

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CURTIS DALE GIBSON,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2006-905

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

APR 10 2008

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

A. JOHNSON, JUDGE:

Curtis Dale Gibson, Appellant, was tried by jury in the District Court of Jackson County, Case No. CF-2005-111, and found guilty of Rape, First Degree, After Former Conviction of Two Felonies, in violation of 21 O.S.2001, § 1114(A)(1). The jury fixed punishment at thirty years imprisonment. The Honorable Clark E. Huey, who presided at trial, sentenced Gibson accordingly. From this judgment and sentence Gibson appeals, raising the following issues:

- (1) whether he was denied a fair trial by the admission of hearsay statements of an alleged victim who was not called to testify and, therefore, he had no opportunity to confront and examine;
 - (2) whether he was denied a fair trial through prosecutorial misconduct;
 - (3) whether the jury should have received an instruction on the statutory 85% limit on parole eligibility;
 - (4) whether the introduction of evidence that he had previously received a suspended sentence for another rape deprived him of a fair sentence; and
 - (5) whether cumulative error deprived him of a fair trial.
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For the reasons set forth below, we affirm the judgment of conviction, but vacate the sentence and remand for resentencing.

1.

The statements made by the victim's sister that were disclosed in the testimony of the D.H.S. Child Protective Services investigator and the Altus Police Department detective alleging she (the sister) had also been raped by Gibson were not hearsay. Their admission as evidence was neither error nor plain error. *Bland v. State*, 2000 OK CR 11, ¶ 65, 4 P.3d 702, 721.

2.

None of the prosecutor's closing comments rises to the level of reversible plain error. *Hogan v. State*, 2006 OK CR 19, ¶¶ 38, 87-88, 139 P.3d 907, 923, 935; *Young v. State*, 2000 OK CR 17, ¶ 49, 12 P.3d 20, 37; *Fitchen v. State*, 1987 OK CR 109, ¶ 3, 738 P.2d 177, 179.

3.

The trial court's failure to instruct the jury on the statutory 85% limit on parole eligibility was plain error. *Anderson v. State*, 2006 OK CR 6, ¶ 25, 130 P.3d 273, 283; *Carter v. State*, 2006 OK CR 42, ¶ 5, 47 P.3d 243, 244; *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. The sentence must be vacated and the case remanded for resentencing.

4.

Gibson's claim of sentencing error, based on complaints that the State improperly introduced evidence and argument concerning a prior suspended

sentence, is a claim that is rendered moot by our disposition of his 85% claim above.

5.

Because we find no accumulation of error with regard to the guilt phase of Gibson's trial, and because we remand for resentencing on other grounds, Gibson's cumulative error argument is denied. *Smith v. State*, 2007 OK CR 16, ¶ 81, 157 P.3d 1155, 1179.

DECISION

The Judgment of Conviction of the District Court is **AFFIRMED**. The Sentence is **VACATED** and the case is **REMANDED** to the District Court for resentencing. Under Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2008), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF JACKSON COUNTY
THE HONORABLE CLARK E. HUEY, ASSOCIATE DISTRICT JUDGE

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OPINION BY: A. JOHNSON, J.
LUMPKIN, P.J.: Concur in Part, Dissent in Part
C. JOHNSON, V.P.J.: Concur
CHAPEL, J.: Concur in Results
LEWIS, J.: Concur

RB

LUMPKIN, PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the Court's decision to affirm the conviction in this case. However, I must dissent to the remand for resentencing. The Appellant was convicted after two prior felony convictions and the minimum sentence he could receive was twenty (20) years. I find the fact the Appellant did not request an instruction on the 85% rule, did not object to the instructions given and only received a sentence ten (10) years above the minimum to be harmless beyond a reasonable doubt. 20 O.S.2001, § 3001.1. I would affirm the judgment and sentence. *See Carter v. State*, 2006 OK CR 42, 147 P.3d 243.