

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

BEVERLY MICHELLE MOORE,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. F-2006-63

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUN 11 2007

MICHAEL S. RICHIE
CLERK

OPINION

A. JOHNSON, J.:

Appellant Beverly Michelle Moore was tried by jury and convicted of First Degree Murder¹ in the District Court of Oklahoma County, Case No. CF-2004-351. The jury fixed punishment at life imprisonment without the possibility of parole and the Honorable Susan P. Caswell, who presided at trial, sentenced her accordingly. Moore does not challenge the validity of her first degree murder conviction on appeal and we affirm the judgment. Jury instruction error, however, requires modification of Moore's sentence.

FACTS

On January 13, 2004, two-year-old Avery Snyder was rushed to the hospital suffering from severe closed head trauma. His condition was grave and he was put on life support. The next day life support was discontinued after he was declared brain dead and he died as a result of his injuries. There was no dispute that someone physically injured Avery and that his head and

¹ 21 O.S.2001, § 701.7(C).

brain injuries were consistent with the violent shaking known within the medical community as shaken baby syndrome. The only issue at Moore's trial was whether Todd Snyder, who was Avery's father, or Moore, who was Snyder's live-in girlfriend, caused Avery's injuries.

At trial, Moore recanted her confession to police and insisted that she did not shake Avery. She described Avery's actions in the minutes before his collapse and maintained that Todd must have shaken him before he left to go to a nearby pawn shop. Her account included a description of Avery's ability to walk for several minutes before his collapse. The possibility of the child walking after sustaining the injury to his brain was refuted by Dr. Griggs, Avery's attending physician in the pediatric intensive care unit. The detailed account Moore had provided in her confession, however, was consistent with the medical testimony and physical evidence. While the evidence proved that Moore caused Avery's injuries that day, there was no evidence that Moore had abused Avery or any other child in the past or had any sort of criminal record.

I.
Omission of an Instruction Setting
Forth the 85% Rule

Moore argues that the trial court erred in not instructing her jury that if sentenced to life with the possibility of parole, she would serve 85% of a life sentence or 38.3 years before becoming eligible for parole.² Moore's attorneys

² Oklahoma's 85% Rule limits parole eligibility for enumerated offenses, including first degree murder. 21 O.S.Supp.2002, §§§ 12.1-13.1.

failed to offer an instruction on the 85% Rule or to object to the lack of such instruction given to the jury. That failure forfeits any error unless Moore can show plain error. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. To be entitled to relief under the plain error doctrine, Moore must prove: 1) the existence of an actual error (i.e., deviation from a legal rule); 2) that is plain or obvious; and 3) that affected her substantial rights, meaning the error affected the outcome of the proceeding. *Id.*

Moore relies on *Anderson v. State*, in which this Court held that the 85% Rule is a “specific and readily understood concept of which the jury should be informed” when sentencing defendants for qualifying offenses. 2006 OK CR 6, ¶ 25 130 P.3d 273, 283; *see also Carter v. State*, 2006 OK CR 42, ¶ 3, 147 P.3d 243, 244. Moore receives the benefit of that decision because her appeal is heard post *Anderson*. *Lacy v. State*, 2007 OK CR 20, ¶ 6, ___P.3d___(May 23, 2007).

This Court requires trial courts to give juries accurate information about punishment so the jury may carry out its sentencing function. *See Littlejohn v. State*, 2004 OK CR 6, ¶ 10, 85 P.3d 287, 293. In *Anderson*, we held that it was error not to give the defendant’s requested instruction on the 85% Rule because the jury should be informed that the offender before them would be required by law to serve 85% of any sentence imposed before he is parole eligible. *Anderson*, 2006 OK CR 6, ¶¶11-13, 130 P.3d at 278. We explained:

Since jurors are likely to assume that defendants would become parole eligible at a much earlier point in time, explaining the 85% Rule will avoid unnecessary and unfair prejudice to the defendant-

due to juries “rounding up” their sentences, in an attempt to account for their uninformed guesses about the impact of parole. Thus instructing upon the 85% Rule will actually discourage jury speculation, while still respecting the separation between the judicial and executive branches.

Id. at ¶ 23, 130 P.3d at 282.

In *Roy v. State*, 2006 OK CR 47, ¶ 26, 152 P.3d 217, 226, we found the trial court erred in failing to give an instruction on the 85% Rule, despite no request, and that the instruction error coupled with improper argument by the prosecutor necessitated relief. In *Lacy v. State*, 2007 OK CR 20, ¶ 6, ___P.3d___ (May 23, 2007), we found the lack of instruction was plain error and modified the defendant’s sentence.

Not only was Moore’s jury not informed of the 85% Rule in the court’s instructions, the court did not inform the jury of the rule when the jury sent out a note during deliberations specifically asking about any “guidelines that determine the minimum time a prisoner will serve with [a] Life Sentence.” (Court’s Exhibit 6) The jury’s question indicates that, had the jury been properly instructed, it may well have considered a life sentence with the possibility of parole appropriate in this case given Moore’s lack of criminal record and the evidence showing Moore’s conduct in hurting the child was an isolated event. The failure to instruct the jury regarding the 85% Rule, after the question from Moore’s jury, constitutes plain error in this case and leaves us “in grave doubt that the lack of an instruction clarifying the meaning of life imprisonment and the effect of the 85% Rule prejudicially impacted the sentencing deliberations” of Moore’s jury. *Roy*, 2006 OK CR 47, ¶ 26, 152 P.3d

at 226 *quoting Carter*, 2006 OK CR 42, ¶ 7, 147 P.3d at 245. This record supports a finding that the lack of instruction resulted in the jury's decision to impose the higher sentence and so affected the outcome of the proceeding. Under these circumstances the appropriate remedy is to modify Moore's sentence to life imprisonment with the possibility of parole.³

DECISION

The Judgment of the district court is **AFFIRMED**. The case is **REMANDED** to the district court with instructions to **MODIFY** Moore's sentence to Life with the Possibility of Parole. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2007), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE SUSAN P. CASWELL, DISTRICT JUDGE

APPEARANCES AT TRIAL

DAVID R. SLANE
ISAAC S. FUNDERBURK
ERIC REYNOLDS
1327 LINWOOD BLVD.
OKLAHOMA CITY, OK 73106
ATTORNEYS FOR DEFENDANT

SARAH McAMIS
GAYLAND GEIGER
ASST. DISTRICT ATTORNEYS
OKLA. COUNTY OFFICE BLDG.
320 ROBERT S. KERR, STE 505
OKLAHOMA CITY, OK 73102
ATTORNEYS FOR STATE

APPEARANCES AT APPEAL

STEVEN M. PRESSON
ROBERT W. JACKSON
P. O. BOX 5392
NORMAN, OK 73070-5392
ATTORNEYS FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL
OF OKLAHOMA
CHRISTY A. BAKER
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR APPELLEE

³ The resolution of this issue renders Moore's other claim moot and it will not be addressed.

OPINION BY: A. JOHNSON, J.

LUMPKIN, P.J.: Concur in Part, Dissent in Part

C. JOHNSON, V.P.J.: Concur

CHAPEL, J.: Concur

LEWIS, J.: Concur in Part, Dissent in Part

RA

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 modification of the sentence.

As the Court notes, this case was tried five months prior to our decision in *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273, no objections were made to the instructions and no requested instructions regarding the 85% rule were presented to the trial court. In fact, the trial court correctly followed the law applicable at the time of trial in this case. Now, this Court seeks to find error and modify the sentence solely because the trial judge was not clairvoyant in seeing what future decisions this Court would reach. As I have stated before, this Court is failing to follow the decision in *Anderson* that the 85% requirement would not apply to cases tried before that decision.

The trial court did not commit any error in this case based on the law at the time of trial and the decision of the jury should be affirmed.

LEWIS, JUDGE, CONCURS IN PART/DISSENTS IN PART:

I agree to affirming the conviction, however I dissent to modifying the sentence to life with the possibility of parole. I would remand this matter for resentencing to address Anderson error.