

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOHNNY LEE WHITWORTH,)
)
 Appellant,) NOT FOR PUBLICATION
)
 v.) Case No. F-2006-408
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

OCT 17 2007

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

A. JOHNSON, JUDGE:

Johnny Lee Whitworth, Appellant, was tried by jury in the District Court of Oklahoma County, Case No. CF-2004-3224, and was found guilty of First Degree Manslaughter in violation of 21 O.S.2001, § 711.¹ The jury fixed punishment at 100 years imprisonment. The Honorable Virgil C. Black, who presided at trial, sentenced Whitworth accordingly. From this judgment and sentence Whitworth appeals, raising the following issues:

1. Whether the instructions to the jury failed to adequately state the law because the instructions did not include a statement that self-defense is a defense to manslaughter.
2. Whether the evidence was sufficient to prove he was not acting in self-defense.
3. Whether his sentence should be modified or remanded for resentencing because the jury was not instructed on the 85% Rule.
4. Whether his sentence is excessive.

¹ Whitworth was charged with Murder in the First Degree, but the jury convicted him of the lesser included offense of manslaughter on the theory that Whitworth was too intoxicated to form an intent to kill.

We find reversal is not required and affirm the Judgment. Error in response to the jury's question about sentencing and the court's failure to instruct on the 85% Rule, however, requires modification of Whitworth's sentence for the reasons discussed below.

1.

The instructions, as a whole, fairly and accurately stated the applicable law and informed the jury of the crime charged and Whitworth's defenses of self defense and voluntary intoxication. *See Dill v. State*, 2005 OK CR 20, ¶ 11, 122 P.3d 866, 869 ("Jury instructions are a matter committed to the sound discretion of the trial court whose judgment will not be disturbed as long as the instructions, taken as a whole, fairly and accurately state the applicable law."). No relief is required.

2.

The evidence was sufficient for a rational jury to find that the State disproved Whitworth's defense of self-defense beyond a reasonable doubt. *Coddington v. State*, 2006 OK CR 34, ¶ 66, 142 P.3d 437, 455, *cert. denied*, ___U.S.___, 127 S.Ct. 2032, 167 L.Ed.2d 804 (2007). The jury was free to disbelieve Whitworth's account and find that Whitworth's inconsistent statements during his interview and at trial coupled with his efforts to conceal the shooting disproved his claim of self-defense.

3.

The court below refused to inform the jury of the 85% Rule when Whitworth's jury sent out a note during deliberations specifically asking how

much time Whitworth would actually serve. The trial court's failure to give Whitworth's requested instruction on the 85% Rule in response to the question is error under *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273 and its progeny. Relief for *Anderson* error is not automatic and this Court reviews the record to determine if the lack of instruction affected the sentence. *Carter v. State*, 2006 OK CR 42, ¶ 5, 147 P.3d 243, 244. Whitworth's jury accepted his voluntary intoxication defense, but imposed a 100-year sentence for first-degree manslaughter when Whitworth had no prior record. The jury's question indicates it was struggling with the number of years to impose and may well have considered a sentence substantially less than 100 years had it been properly instructed. The failure to tell the jury about the 85% Rule leaves us in grave doubt whether the lack of an instruction about the 85% Rule prejudicially impacted the sentencing deliberations. This record supports a finding that the lack of instruction resulted in the jury's decision to impose such a lengthy sentence and so affected the outcome of the proceeding. Under these circumstances, the appropriate remedy is to modify Whitworth's sentence to fifty years imprisonment. 22 O.S.2001, § 1066.

4.

The resolution of Proposition 3 renders this claim moot and it will not be addressed.

DECISION

The Judgment of the District Court is **AFFIRMED**. The case is remanded to the district court with instructions to **MODIFY** Whitworth's sentence to fifty

years imprisonment. Under 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 VIRGIL C. BLACK, DISTRICT JUDGE

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

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