

Lawrence Edward BENSON v. STATE of Arkansas

CA CR 86-126

720 S.W.2d 340

Court of Appeals of Arkansas
Division II

Opinion delivered December 17, 1986
[Rehearing denied January 21, 1987.]

1. CRIMINAL LAW — FIRST DEGREE BATTERY IS LESSER INCLUDED OFFENSE OF AGGRAVATED ROBBERY. — First degree battery is a lesser included offense of aggravated robbery.
2. APPEAL & ERROR — APPELLATE COURT OPTIONS WHEN CASE MODIFIED TO LESSER INCLUDED OFFENSE. — When an appellate court modifies the offense to a lesser included offense the court may, depending upon the facts, reduce the punishment to the maximum for the lesser offense, reduce it to the minimum for the lesser offense, fix it themselves at some intermediate point, remand the case to the trial court for the assessment of the penalty, or grant a new trial

either absolutely or conditionally.

Appeal from Hempstead Circuit Court; *John W. Goodson*, Judge; affirmed as modified.

Pilkinton, Pilkinton & Yocum, by: *Tony Yocum*, for appellant.

Steve Clark, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

TOM GLAZE, Judge. Appellant appeals from a jury verdict convicting him of aggravated robbery. He was sentenced to twenty years in the Department of Correction. We affirm, as modified, and issue this memorandum opinion pursuant to section (d) of the per curiam *In re Memorandum Opinions*, 16 Ark. App. 301, 700 S.W.2d 63 (1985).

[1] This case is clearly controlled by the supreme court's recent decision in a companion case. See *Trotter v. State*, 290 Ark. 269, 719 S.W.2d 268 (1986). *Trotter* was decided on the same facts and evidence presented in the instant case. The court held that the proof did not support the jury's finding of aggravated robbery. Further, the court held that first degree battery was a lesser included offense of aggravated robbery. We are bound by that decision.

[2] In *Trotter*, the court, quoting *Dixon v. State*, 260 Ark. 857, 545 S.W.2d 606 (1977), held:

[i]n this situation we may, depending upon the facts, "reduce the punishment to the maximum for the lesser offense, reduce it to the minimum for the lesser offense, fix it ourselves at some intermediate point, remand the case to the trial court for the assessment of the penalty, or grant a new trial either absolutely or conditionally."

290 Ark. at 277.

First degree battery is a class B felony punishable by five to twenty years imprisonment. The jury sentenced appellant to twenty years in prison, and we see no reason, based upon the record and evidence presented, to change the length of the sentence under the lesser offense—the same as imposed by the supreme court in *Trotter*. Therefore, we fix appellant's sentence

at twenty years for the lesser included offense of first degree battery.

Affirmed as modified.

CRACRAFT, C.J., and CORBIN, J., agree.
