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ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR09-1091

CHRISTOPHER CODY ANDERSON APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** MAY 19, 2010 APPEAL FROM THE BOONE COUNTY CIRCUIT COURT [CR-08-166-4] HONORABLE GORDON WEBB, JUDGE AFFIRMED

RITA W. GRUBER, Judge

Christopher Cody Anderson was convicted by a jury of misdemeanor furnishing alcohol to a minor and felony fourth-degree sexual assault, a Class D felony, for acts he committed at age twenty-two on May 10, 2007, when the victim was fifteen. The jury fixed his respective sentences at thirty days with a $100 fine and at two years' imprisonment in the Arkansas Department of Correction, and the circuit court pronounced sentence in accord with the jury's decision. Anderson raises one point on appeal, contending that the trial court erred in instructing the jury that the waiting period for a sex-offender treatment program required during his incarceration "would be factored into the instruction on eligibility for transfer to parole." We affirm.

The circuit court used Arkansas Model Jury Instruction–Criminal 9401 to instruct the jury about sentencing and parole eligibility for Class D felonies. The jury was instructed that

it could consider two things while deliberating Anderson's sentence for sexual assault: first, after serving a third of his sentence, he would be eligible for release from the Arkansas Department of Correction to post-prison supervision by the Department of Community Correction; second, he could receive meritorious good time of one day for each day served, decreasing time spent in prison before eligibility for transfer to community supervision. The trial's sentencing phase then proceeded to closing arguments.

The prosecutor stated to the jury that Anderson would be eligible for release after serving a sixth of any sentence it should decide upon. He suggested that a solution for Anderson's unapologetic mind set and arrogant attitude would be a nine-month sex-offender program at the Arkansas Department of Correction, where people who "just don't get it" learn about boundaries and proper behavior. He asked the jury to consider a three-year sentence because, although Anderson would be eligible for parole after six months, he would not be released until he completed the program.

Defense counsel responded in closing argument that it was improper for the prosecutor to argue that Anderson would get out after a sixth of his time served but then say that he would have to serve nine months because of the mandatory sex-offender program. He complained that the prosecutor had neglected to mention "the lengthy time period on the waiting list" for the prison's program, which was much more than a sixth of any sentence they could assign. Counsel commented that "if the waiting period is eighteen months, then actually you write down [sic] would turn into a twelve-year sentence, because he would be

doing two years down there at the maximum—." The circuit court interjected, "I'm going to interrupt you at this point, because I don't think that's the law," and instructed counsel to refrain from making inappropriate argument of matters outside the instructions of law the court had given, "a correct statement of the law and the waiting period is factored into that."

Counsel's request to approach the bench was granted, and the following colloquy took place:

DEFENSE COUNSEL:	I happen to know that the waiting period is very long. The nine months that [the prosecutor] argues was not in evidence and so I thought he opened the door for me to say something about the waiting period . . . .
THE COURT:	But . . . the waiting period to get into the Department of Correction and any time he spends in jail, he's eligible for the–to be counted against his transfer eligibility time.
DEFENSE COUNSEL:	Yes, that's true but I'm talking about the waiting period for him after he applies for the sexual offender program, that waiting list is very long.

The court observed that counsel's argument was "coming across to the jury" that the court had given the jury an inaccurate representation of transfer eligibility. The court ruled that its jury instructions were in accordance with the law and that the court did not think "it is dependent on whether he gets into the sex offender program." Defense counsel stated his belief that "they have to—it's a condition for parole . . . they have to complete that or deaden their time." The prosecutor agreed that defense counsel's statement was accurate. The court instructed defense counsel to "make clear what you're arguing," and counsel agreed to do so.

Again addressing the jury, defense counsel said that the court's instruction on transfer

eligibility was correctly stated. He clarified to the jury his own argument, and the prosecutor's agreement, that Anderson would have to complete a nine-month program in order to become eligible for parole and a post-prison transfer.

Point on Appeal

Anderson raises one point on appeal, contending that the circuit court erred by instructing the jury that the waiting period for a sex-offender treatment program required during his incarceration "would be factored into the instruction on eligibility for transfer to parole." As part of this point, he asserts that the instruction was given after the prosecutor had told the jury that the program was nine months and had agreed that completion of the program is a condition for parole. Anderson argues that defense counsel was required to give "an incorrect interpretation of the law" when the circuit court ordered him to tell the jury that the law of Arkansas was correctly stated by the court.

We note that the court instructed the jury about sentencing and parole eligibility only under AMI Crim. 9401, with no mention of the time requirements of the sex-offender treatment program or its waiting list. When defense counsel argued to the jury that the waiting period for the program the prosecutor recommended could turn a two-year sentence into twelve years, the court interrupted by stating that this was not the law. The issue was discussed at a bench conference, and closing arguments resumed. Defense counsel informed the jury that the court's instruction on transfer eligibility had correctly stated the law and that his argument concerned a separate rule requiring completion of the nine-month treatment

program before parole eligibility.

Anderson's contention that the circuit court erred by instructing the jury that the waiting period for the treatment program "would be factored into the instruction on eligibility for transfer to parole" is a mischaracterization of the court's action. Anderson did not object to the instruction given by the court, he informed the jury that the instruction was a correct statement of the law, and he clarified to the jury that his own argument concerned the waiting time for the treatment program.

Anderson can show no prejudice from the jury instruction given. He received a two-year sentence, less than the three years requested by the prosecutor and less than the six years allowed by Ark. Code Ann. § 5-4-401 (Repl. 2006) for a Class D felony. Furthermore, the failure to object at the first opportunity waives any right to raise a point on appeal, and arguments not raised below will not be addressed on appeal. *Love v. State*, 324 Ark. 526, 922 S.W.2d 701 (1996).

Affirmed.

ROBBINS and HENRY, JJ., agree.