IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KEVIN MAURICE BROWN,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. F-2011-407
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

A. JOHNSON, JUDGE:

Appellant Kevin Maurice Brown was tried by jury and convicted of five counts of Robbery with a Firearm (Counts 1, 2, 6, 7, and 8), in violation of 21 O.S.2001, § 801; two counts of Possession of a Firearm, after former conviction of a felony (Counts 3 and 9), in violation of 21 O.S.Supp.2009, § 1283; one count of First Degree Robbery (Count 4), in violation of 21 O.S.2001, § 798; and one count of Attempting to Elude a Police Officer (Count 10), in violation of 21 O.S.2001, § 540A, all after former conviction of two or more felonies, in the District Court of Tulsa County, Case No. CF-2010-1191. The jury fixed punishment at life imprisonment and payment of a $10,000.00 fine on Counts 1, 2, 4, 6, 7 and 8, and life imprisonment and payment of a $5,000.00 fine in Counts 3 and 9.[1] In Count 10, the jury set punishment as one year imprisonment and payment of a $2,000.00 fine. The Honorable Bill Musseman, who presided at trial, sentenced Brown according to the jury's

[1] Under 21 O.S.Supp.2011, § 13.1, Brown must serve 85% of the sentence imposed on Counts 1, 2, 4, 6, 7, and 8 before he is eligible for parole.

verdict and directed that all sentences run consecutively. From this Judgment and Sentence Brown appeals, raising the following issues:

(1) whether it was error for the trial court to impose punishment on both Counts 3 and 9 for possessing the same firearm as a prior convicted felon;

(2) whether he was deprived the effective assistance of counsel; and

(3) whether his sentence is excessive.

In addition to these issues, raised by his appellate attorney, Brown has tendered a *pro se* brief in which he attempts to present additional issues. For the reasons set out below, we do not consider the issues presented in the proffered supplemental brief. Otherwise, we affirm the Judgment and Sentence of the District Court on all counts except Count 9, which we reverse.

FACTS

Six businesses were robbed in Tulsa between February 13 and March 17 of 2010. The businesses included a Kum N Go convenience store, a Wal-Mart, a Bank of Oklahoma branch located in a Food Pyramid grocery store, a La Quinta Inn, and two Check N Go payday loan offices. Employees of these different businesses identified Brown in pre-trial photo lineups and at trial. On March 12th, during one of the Check N Go robberies, Brown presented a note demanding money. The note was written on the front of a loan application that was dated and signed "Kevin Brown" on the back. Employees from each of the

different businesses, except the Bank of Oklahoma,[2] testified that Brown had a silver or chrome handgun. One Check N Go employee described the handgun as silver or chrome, possibly with a wood grained butt.

On March 31, Detective Eric Spradlin had an arrest warrant for Brown. At approximately 5:00 p.m. Spradlin saw Brown driving on a highway near Brown's mother's home. Spradlin pursued Brown and was joined in the pursuit by Sergeant Luke Sherman. Both officers activated their vehicles' emergency lights and sirens. Brown eventually stopped his car and was taken into custody around 5:46 p.m.

During the chase, Sergeant Sherman saw Brown throw a chrome object out of the driver's side window of his car. Sherman continued the pursuit without stopping, but reported the object's location on the police radio. Corporal Darin Filak responded to the location and found a silver gun on the sidewalk. Detective Demeta Kinard joined Filak and recovered the gun.

DISCUSSION

1.
Double Punishment

Brown claims that his convictions on Counts 3 and 9 for possessing a firearm as a prior convicted felon violate the double jeopardy provisions of the United States and Oklahoma Constitutions. Brown did not raise this claim at trial. The claim is therefore waived and reviewed only for plain error. *See*

[2] The Bank of Oklahoma employee never saw a weapon, but testified that Brown passed him a note demanding money and that the note said that Brown had "a gun or bomb or something like that" (Tr. Vol. 2 at 293).

Barnard v. State, 2012 OK CR 15, ¶ 25, 290 P.3d 759, 767 ("Claims of violations of double jeopardy protections are waived where they were not raised in the trial court.")(quoting *Head v. State*, 2006 OK CR 44, ¶ 9, 146 P.3d 1141, 1144).

Brown argues that the two separate firearm possession counts are based on his continuous possession of the same firearm, and therefore, the counts are multiplicitous and as such violate double jeopardy principles. The State contends, on the other hand, that because the firearm used in the robberies was never recovered or identified as the gun recovered by police, Brown was properly charged and convicted of two separate counts of being a felon in possession of a firearm. According to the State, the record demonstrates that only one firearm was specifically recovered and identified, and that firearm formed the basis for the charge in Count 9. The State further asserts that the firearm which formed the basis of the charge in Count 3 was never recovered or identified, but the evidence clearly showed that Brown used a gun to accomplish the robberies.

The State's argument is correct as far as it goes. It is true that only one firearm was recovered and identified, and it is true that the evidence clearly showed that Brown used a gun to commit the robberies. The State ignores, however, the fact that witness descriptions of the firearm possessed by Brown during the robberies also described the firearm that was later recovered and identified by police as the one they saw Brown throw out his car window.

Specifically, one employee who was robbed at Check N Go, saw a handgun in Brown's pocket and described what she saw as the "[B]utt end of a pistol. It was chrome. There may have been some wood grain on it" (Tr. Vol. 2 at 242). Another Check N Go employee described the gun as "chrome or silver" (Tr. Vol. 2 at 268). An employee who was robbed at the Kum N Go convenience store, described Brown's gun as "a little silver handgun," and an employee who was robbed at the La Quinta Inn described the weapon as a "small chrome pistol," a "very little handgun" (Tr. Vol. 3 at 390, 413). Finally, the employee who was robbed in the Wal-Mart robbery described the gun as "kind of chrome, a little like silver" (Tr. Vol. 3 at 345). The State introduced as evidence the handgun that Brown threw from his car on March 31st as well as a photograph of the handgun on the sidewalk where it was found. This evidence showed the handgun to be a small chrome-silver pistol with a wood grain grip. When the descriptions of the handgun used in the February 13th - March 17th robberies are compared to the handgun recovered by police on March 31st, it is obvious that the robbery victims were very likely describing the same handgun that police recovered.

In *Hancock v. State*, 2007 OK CR 9, ¶¶ 115-117, 155 P.3d 796, 823, this Court held that being a felon in possession of a firearm is a continuing course of conduct, not a discrete act, and as such, double jeopardy principles prohibit charging such an offense as multiple crimes occurring at discrete moments in time. Therefore, the *Hancock* court reasoned that a felon's possession and

control of a particular firearm over a period of time precludes multiple convictions for felonious possession of that firearm unless the State proves beyond a reasonable doubt that the defendant's possession was not continuous. *See Hancock*, 2007 OK CR 9, ¶ 115, 155 P.3d at 823 ("When defendant is charged 'with multiple counts alleging possession of the same weapon on different occasions, the State must bear the burden of proving the defendant's possession was not continuous beyond a reasonable doubt.'")(quoting *Simmons v. State*, 899 P.2d 931, 936 (Alaska Ct.App. 1995).

Here, the evidence showed that the handgun used in the robberies that formed the basis for the felon-in-possession charge in Count 3, was very likely the same handgun recovered by police that formed the basis for the felon-in-possession charge of Count 9. Under these circumstances then, according to *Hancock*, the State carried the burden of producing evidence showing beyond a reasonable doubt that Brown's possession of that handgun was not continuous. The State produced no such evidence. Indeed, the prosecutor argued just the opposite in closing. That is, the prosecutor argued that the handgun Officer Filak found on March 31, 2010, the handgun alleged in Count 9, was the same gun described by the various robbery victims, the handgun alleged in Count 3.

On this record, it is obvious that Brown was convicted and sentenced in Counts 3 and 9 for possession of the same handgun, and the evidence did not show that the possession was discontinuous. Counts 3 and 9 were therefore

multiplicitous, and multiplicitous convictions and sentences violate double jeopardy. *See Wimberly v. State*, 1985 OK CR 37, ¶10, 698 P.2d 27, 31 ("Protection from double jeopardy as guaranteed by the Fifth Amendment to the United States Constitution extends to subsequent prosecutions for the same offense after conviction or acquittal and from multiple punishments for the same offense."); *Johnson v. State*, 1980 OK CR 45, ¶15, 611 P.2d 1137, 1141("[T]he Double Jeopardy Clauses of our State and Federal Constitutions are intended to protect against two distinct abuses. The first is requiring an accused to endure a series of trials where the same offense is charged; the second of these is the infliction of multiple punishments for a single offense); *cf. United States v. Johnson*, 130 F.3d 1420, 1424 (10th Cir. 1997) ("[m]ultiplicity refers to multiple counts of an indictment which cover the same criminal behavior"); *United States v. Morris*, 247 F.3d 1080, 1083 n.2 (10th Cir. 2001)("multiplicitous sentences violate the Double Jeopardy Clause"). Because the double punishment in this instance was obvious error, and because Brown was obviously prejudiced by the error (i.e., punished twice for the same crime), we find that the error constitutes reversible plain error. *See Hogan v. State*, 2006 OK CR 27, ¶ 38, 139 P.3d 907, 923 ("To be entitled to relief under the plain error doctrine, Hogan must prove: 1) the existence of an actual error (i.e., deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding. If these elements are met, this Court will correct plain error

only if the error seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice.").

With jeopardy plainly having attached with the conviction on Count 3, the first charged count, and the second conviction and sentence being plain error as impermissible double punishment, we reverse the second conviction, Count 9. *See Rutledge v. United States*, 517 U.S. 292, 301-302, 307, 116 S.Ct. 1241, 1247-1248, 1250-1251, 134 L.Ed.2d 419 (1996)(finding that remedy for impermissible double punishment is to vacate one of the convictions and its concomitant sentence); *Hancock*, 2007 OK CR 9, ¶ 117, 155 P.3d at 823-824(finding that jeopardy attached upon defendant's first conviction and sentence for felonious possession of firearm thereby requiring reversal of conviction for possession of same firearm at later date).

2.
Ineffective Assistance of Counsel

Brown claims that he was denied the effective assistance of counsel for trial counsel's failure to move that either Count 3 or Count 9 be stricken as multiplicitous. According to Brown, trial counsel's failure to challenge the multiplicity of Counts 3 and 9 compromised his rights to be free from double jeopardy and allowed him to be punished twice for the same continuing criminal act. Because we find that the convictions and sentences on Counts 3 and 9 are multiplicitous, and reverse the conviction on Count 9, this issue is moot.

3.
Excessive Sentence

Brown claims his sentence is excessive and as such violates the Eighth Amendment to the United States Constitution and Article II, Section 9 of the Oklahoma Constitution, both of which prohibit cruel and unusual punishment.

The jury returned life sentences on each of the six robbery counts and a $10,000 fine for each. The jury returned life sentences on both firearms counts and imposed a $5,000 fine for each. On the misdemeanor count of eluding a police officer, the jury returned a sentence of one year imprisonment and a $2,000 fine. The trial court judge imposed the sentences set by the jury and directed that all the sentences be served consecutively. Thus, Brown was sentenced to eight consecutive life sentences, a one year sentence, and a total fine of $72,000.

According to Brown these sentences are cruel and unusual punishment as disproportionate to the crimes because they are the functional equivalent of life without parole. Brown argues specifically that because no one was physically injured during the six robberies he committed, the maximum statutory sentence he received on each count was not proportional to the offense.

In *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149, this Court expressly rejected proportionality review as the standard for evaluating excessive sentence claims and retained the shocks-the-conscience standard. Under this standard, we will not modify a sentence within the statutory range

"unless, considering all the circumstances, it shocks the conscience" of this Court. *Rea*, 2001 OK CR 28, ¶ 5 n.3, 34 P.3d at 149 n.3 (quoting *Maxwell v. State*, 1989 OK CR 22, ¶ 12, 775 P.2d 818, 820).

Here, there is no dispute that each of Brown's individual sentences are within their applicable statutory ranges. Furthermore, five of the six robberies Brown was convicted of in this case were very serious offenses: i.e., robberies with a firearm. And Brown has eight prior felony convictions, one of which was for injuring a child and another was for robbery with a firearm. Given Brown's extensive criminal history as well as the seriousness of the crimes of conviction in the instant case, we do not find Brown's individual sentences, nor his total sentence, shocking to the conscience of this Court.

4.
***Pro Se* Supplemental Brief**

In addition to the brief submitted by his appellate attorney, Brown has also tendered a *pro se* brief in which he raises the following issues:

(1) the State failed to disclose exculpatory evidence that the Tulsa police investigators involved in his case were the subject of a corruption investigation; and

(2) the trial court erred by sealing the record of the discovery hearing and that trial counsel's failure to object to the sealing constituted ineffective assistance of counsel.

Having reviewed the proffered *pro se* brief, and having again reviewed Appellate Counsel's request to file that brief, we find that our permission for

Brown to file the supplemental *pro se* brief was improvidently granted. *See* Rule 3.4(E), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012)(requiring among other things that appellate counsel certify that arguments and authority in the tendered brief "comply with the Rules of this Court," and that the brief presents "only viable, non-frivolous arguments"); Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012)(requiring that among other things, an appellant's brief "shall" include arguments "[C]ontaining the contentions of the appellant, which sets forth all assignments of error, supported by citations to the authorities, statutes and parts of the record. Each proposition of error shall be set out separately in the brief [and] [m]erely mentioning a possible issue in an argument or citation to authority does not constitute the raising of a proposition of error on appeal"); *Lott v. State*, 2004 OK CR 27, ¶ 169, 98 P.3d 318, 358(applying Rule 3.5(A)(5) and holding that "this Court will not review allegations of error that are neither supported in the record or by legal authority"); *Armstrong v. State*, 1991 OK CR 34, ¶ 24, 811 P.2d 593, 599 ("[w]e will not search the record to find the errors an appellant attempts to raise"). *See also Black's Law Dictionary* 758 (6th ed. 1990)(defining improvidently as "[a] judgment, decree, rule, injunction, etc., when given or rendered without adequate consideration by the court, . . . **based upon** a mistaken assumption or **misleading information or advice** . . ."))(emphasis added).[3] Brown's

[3] We note that Appellate Counsel's "Request to File Pro Se Supplemental Brief," did not certify that the tendered brief contained "only viable, non-frivolous arguments," but stated instead

tendered *pro se* supplemental brief is not accepted for filing. The Clerk will return all copies of the tendered brief to Brown. *See* Rule 3.4(E), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012)("This Court will summarily deny '*pro se*' briefs which are merely forwarded by the appellant's attorney without compliance with the requirements of this Rule [3.4(E)].").

DECISION

The Judgment and Sentence of the district court is **AFFIRMED** on Counts 1, 2, 3, 4, 6, 7, 8, and 10. The Judgment and Sentence on Count 9 is **REVERSED**. This Court's Order of January 18, 2012, granting Brown's "Request to File Pro Se Supplemental Brief" is **VACATED** as improvidently granted, and the request is now **DENIED**. The Clerk shall return all copies of Brown's *pro se* briefs, tendered on January 5, 2012, to him as not accepted for filing. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2013), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

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that "[i]f the undersigned counsel felt the additional arguments offered by Kevin Maurice Brown in his *pro se* brief to be good and convincing ones, he would have raised them in Appellant's initial brief" (Req. to File Pro Se Supp. Br. at 2-3).

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE BILL MUSSEMAN, DISTRICT JUDGE

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C. JOHNSON, J.: Concur

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