IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BRYAN MATTHEW CARROLL,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	Case No. F 2004-1182
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LEWIS, JUDGE:

Appellant, Bryan Matthew Carroll, was tried by jury and convicted of, count one, Assault and/or Battery with a Dangerous Weapon, 21 O.S.2001, § 645, count three,[1] Attempting to Elude a Police Officer, 21 O.S.2001, § 540A(A), count four, Unlawful Possession of Drug Paraphernalia, 63 O.S.2001, § 2-405, count five, Driving while License is Cancelled/Suspended/Revoked, 47 O.S.2001, § 6-303, count six, Speeding, 47 O.S.2001, § 11-801, and count seven, Failure to Stop at a Stop Sign, 47 O.S.2001, § 11-201, in the District Court of Creek County, Drumright Division, Case No. CF-2004-119, before the Honorable Joe Sam Vassar, District Judge. The jury set punishment at, count one, one (1) year imprisonment and a $1,500 fine, count three, one year in jail and a $2,000 fine, count four, $200 fine, count five, nine months in jail and a

[1] Carroll was also charged with, count two, Unauthorized us of a Motor Vehicle – but the charge was dismissed prior to trial, upon motion of the State.

$500 fine, count six, thirty days in jail and a $500 fine, and count seven, ten days in jail and a $500 fine. Judge Vassar sentenced Carroll in accordance with the jury verdict, ordering that the sentences be served consecutively.

From the Judgments and Sentences, Carroll has perfected his appeal to this Court. Carroll raises the following propositions of error in support of his appeal:

I. Appellant's right to be free from double jeopardy was violated.

II. The evidence was insufficient to support the charge of Assault and Battery with a Dangerous Weapon.

III. The evidence was insufficient to support the charge of Unlawful Possession of Drug Paraphernalia.

IV. Prosecutorial misconduct deprived Appellant of a fair trial.

V. Evidentiary harpoons deprived Appellant of a fair trial.

VI. Appellant was deprived of effective assistance of counsel.

VII. The search was unlawful; therefore, the paraphernalia charge must be dismissed.

VIII. The fine in count six [speeding] was unlawful.

IX. All the sentences and fines were excessive.

X. Cumulative error deprived Appellant of a fair trial.

After thorough consideration of Carroll's propositions of error and the entire record before us on appeal, including the original record, transcripts, and briefs, we have determined that counts one, four and seven should be reversed with instructions to dismiss, the sentence in count six shall be

modified, and the judgments and sentences in the remaining counts shall be affirmed.

The facts reveal that an Oklahoma Highway Patrol Trooper attempted to stop Appellant for traveling 97 mph in a 65 mph zone. Appellant attempted to elude by increasing his speed and driving past several stop signs in Creek County. The twenty-minute pursuit was recorded by the trooper's dash mounted camera. The trooper ended the pursuit by initiating contact between the two vehicles causing Appellant to lose control. Another collision occurred when the front of the trooper's vehicle collided with the left side of Appellant's vehicle, while Appellant was still trying to drive away. The vehicles became entangled and Appellant fled on foot. He was driving under suspension and a glass vial with glass tubing was found in the vehicle from which he fled.

In reaching our decision, we find, in Proposition I, that the charge of failure to stop for a stop sign occurred because of Appellant's attempting to elude, for which he was also charged. This crime formed part of the proof the State used to show that Appellant was attempting to elude. One of the elements of attempting to elude is using "any other manner" to elude. *See* 21 O.S.2001, § 540A(A). Therefore, the failure to stop at a stop sign became necessarily included in the charge of attempting to elude, thus Appellant was subject to a violation 21 O.S.2001, § 11[2] by being convicted of both offenses.

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[2] "In no case can a criminal act or omission be punished under more than one section of law . . ."

In considering Propositions II and III, we review the evidence in a light most favorable to the State to determine whether any rational trier of fact could have found the existence of the elements beyond a reasonable doubt. *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559. In this case, we find that no rational finder of fact could have found Appellant guilty of Assault and Battery with a Dangerous Weapon because there was no evidence that Appellant had the required intent to do bodily harm. The best evidence, which consisted of a videotape of the pursuit does not show that Appellant intentionally drove into the Trooper's vehicle with the intent to do bodily harm.

With regard to the conviction for Possession of Drug Paraphernalia, we find that the State's evidence failed to show that Appellant either used or intended to use the item found for the ingestion of a controlled dangerous substance or that the item found was specifically designed for use in ingesting illegal drugs.[3] We find that the mere possession of this glass device with only the trooper's opinion that it could be used for smoking marijuana or cocaine is insufficient under the drug paraphernalia statute, definitions and factors found in Title 63. *See* 63 O.S.2001, § 2-101(32), § 2-101.1, & § 2-405.

In Propositions V and IV, we find that where potential error occurred, an objection was sustained, and the jury was admonished, any error was cured. *Welsh v. State*, 2000 OK CR 8, ¶ 26, 2 P.3d 256, 369-70. Where objections

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[3] In fact, the State failed to show that this was nothing more than one of a kind of "water pipes designed for ornamentation in which no detectable amount of an illegal substance is found." See 63 O.S.2001, § 2-101.

were sustained and no admonition was requested or given, any potential error is either cured or waived. *Brown v. State,* 1998 OK CR 77, ¶ 88, 989 P.2d 913, 933; *Shepard v. State,* 1988 OK CR 97, ¶ 7, 756 P.2d 597, 599-600. Other alleged prosecutorial misconduct amounted to proper comments on the evidence or proper rebuttal to defense counsel's argument, thus there was no error. *Bland v. State,* 2000 OK CR 11, ¶ 117, 4 P.3d 702, 731; *Bernay v. State,* 1999 OK CR 46, ¶ 62, 989 P.2d 998, 1014; *Charm v. State,* 1996 OK CR 40, ¶ 62, 924 P.2d 754, 770.

In Proposition VI, we find that Appellant has not shown that counsel's conduct fell below reasonable standards of conduct, thus he was not deprived of effective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984). Counsel's plea to give the maximum on traffic offenses while asking the jury to acquit him of felony offenses was reasonable in this case. We find that the argument raised in Proposition VII is moot as we are ordering that the conviction for Illegal Possession of Drug Paraphernalia be dismissed.

In Proposition VIII, we find that the jury was not properly instructed on the range of punishment for speeding in excess of the posted maximum (97 mph in a 65 mph zone), thus we order that the sentence for this offense be modified to ten (10) days in jail and a $200 fine (with credit for time served per the Judgment and Sentence). In Proposition IX, we find that the sentences in the remaining convictions are within the range of punishment, and, based on

the facts and circumstances of this case, the sentences do not shock this Court's conscience. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149 n. 3.

Finally, we find, with regard to Proposition X, that we have granted relief based on individual errors in this case. A review of this case under a cumulative error review warrants no further relief. *See Williams v. State*, 2001 OK CR 9, ¶ 127, 22 P.3d 702, 732.

DECISION

The Judgments and Sentences in counts one, four and seven shall be **REVERSED** and **REMANDED** with instructions to **DISMISS**. The Sentence for count six shall be **MODIFIED** to a Sentence of ten (10) days (with credit for time already served) and a $200 fine. The Judgments and Sentences in the remaining counts shall be **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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OPINION BY: LEWIS, J.

CHAPEL, P.J.: Concurs
LUMPKIN, V.P.J.: Concurs in Part/Dissents in Part
C. JOHNSON, J.: Concurs
A. JOHNSON, J.: Concurs

LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

In Proposition I, the facts show the running of the stop sign was a part of Appellant's attempt to elude the police. Therefore, I agree that his conviction for both attempting to elude and running a stop sign was a violation of double jeopardy principles.

In Proposition III, I find the evidence sufficient to support the conviction for possession of paraphernalia. The opinion of the experienced trooper, with a history of drug arrests, combined with Appellant's desperate attempt to elude the officers supports a conclusion that the "glass smoking device" visible in the cup holder of the dash was drug paraphernalia and not merely an ornamental type of pipe. *See* 63 O.S. 2001, § 2-101. Further, I agree the sentence for speeding conviction should be modified as the jury was not properly instructed on the range of punishment.