IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FREDRICK DEMON CLEVELAND,	)	NOT FOR PUBLICATION
	)	
Appellant,	)	
	)	
v.	)	Case No. F-2007-58
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JAN 11 2008
MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

C. JOHNSON, VICE-PRESIDING JUDGE:

Fredrick D. Cleveland was convicted after a jury trial in Oklahoma County District Court, Case No. CF-2006-4059, of Possession of a Controlled Dangerous Substance (Cocaine Base) with Intent to Distribute (Count I), Possession of Proceeds Derived from a Violation of the Uniform Controlled Dangerous Substance Act (Count II) and Possession of a Controlled Dangerous Substance (Marijuana) (Count III). Appellant was found guilty of Counts I and II, After Two or More Prior Felony Convictions and of Count III, After One Prior Felony Conviction. The jury assessed punishment at twenty years imprisonment on Count I, six years imprisonment on Count II and four years imprisonment on Count III. The trial court sentenced Appellant accordingly, ordering the sentences on Counts I and II to run consecutively with each other and the sentence on Count III to be served concurrently with Counts I and II. Appellant timely filed this appeal.

Appellant raises the following propositions of error:

1. Mr. Cleveland's convictions for both Possession of Cocaine with Intent to

Distribute and Possession of Marijuana violate his constitutional protection against Double Jeopardy, because the drugs were found in one container.

2. The trial court erred by allowing a witness to testify to an ultimate issue of fact, thereby invading the province of the jury.

3. The State presented insufficient evidence to prove that Mr. Cleveland possessed cocaine base with the intent to distribute, possessed marijuana, or that he possessed drug proceeds.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm Mr. Cleveland's Judgment and Sentence as to Counts I and II. Appellant's Judgment and Sentence on Count III must be reversed with instructions to dismiss. As to Proposition I, we find that Appellant's Judgment and Sentence on Count III must be reversed with instructions to dismiss. Appellant's possession of both cocaine base and marijuana within a single container, while violative of separate statutes, constituted a single act of possession. 21 O.S.2001, § 11.

We find in Proposition II that the opinion testimony complained of did not merely suggest inferences based upon the witness' specialized knowledge as is permissible. *See Romano v. State,* 1995 OK CR 74, ¶ 21, 909 P.2d 92, 109. Rather, it told the jury what conclusion to reach and was, to this extent, improper. Accordingly, we find that the trial court abused its discretion in allowing this testimony over defense counsel's objection. However, this error does not require reversal. Based upon the evidence properly presented at trial, including testimony about the inferences that could be fairly drawn from the weight and packaging of the cocaine and the amount and denominations of the

bills possessed by Appellant, this Court finds that the inadmissible statement was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

Finally, we find that we find that the evidence presented at trial was sufficient to support, beyond a reasonable doubt, each element of possession with the intent to distribute cocaine base and possession of drug proceeds. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04 (citing *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 2781, 2787, 61 L.Ed.2d 560, 571(1979)).

DECISION

The Judgment and Sentence is **AFFIRMED** as to Counts I and II. The Judgment and Sentence on Count III is **REVERSED** with instructions to **DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE SUSAN P. CASWELL, DISTRICT JUDGE

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OPINION BY C. JOHNSON, V.PJ.

LUMPKIN, P.J.: CONCURS IN PART/DISSENTS IN PART
CHAPEL, J.: CONCURS
A. JOHNSON, J.: CONCURS
LEWIS, J.: CONCURS

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

I concur in the Court's decision to affirm the judgments and sentences in Count I and II. However, I dissent to the decision to reverse and dismiss Count III.

This case is distinguishable from our decision in *Watkins v. State,* 1991 OK CR 119, 829 P.2d 42, *opinion on rehearing,* 1992 OK CR 34, 855 P.2d 141. In *Watkins*, each of the drugs was prohibited under the statutory language of 63 O.S. 1991, § 2-401, and the statutory language did not make the possession of separate drugs under the statute separate offenses. I discussed this distinction in my specially concurring opinion in *Lewis v.* State, 2006 OK CR 48, ___ P.3d ___ where I explained:

> As we explained in Watkins, the issue lies with the plain language of the statute in question, not with the applicability of double jeopardy or double punishment principles. With the publication of *Watkins* more than a decade ago, this Court put the Oklahoma Legislature on notice of how we would interpret the statute and what simple actions would need to be taken if the Legislature desired for separate charges to arise out of a single possession—that is, to amend each of the statutes to provide that possession of separate types of CDS at the same time constitutes separate offenses. Many years have come and gone since then, and the Legislature has declined to make those amendments, thereby confirming this Court's interpretation. Legislatures, not Courts, prescribe the scope of punishment. *See Missouri v. Hunter*, 459 U.S. 359, 365, 103 S.Ct. 673, 677 74 L.Ed.2d 535 (1983). Until those amendments are made, this Court is bound to apply the plain language of the statutes.

In the present case, we are presented with a distinctly different factual and legal issue. The Oklahoma Legislature has exercised its constitutional

authority and passed two separate statutes, *i.e.*, 63 O.S. 2001, § 2-401 and 63 O.S. 2001, § 2-402, prohibiting different acts and creating separate crimes. The Legislature has clearly stated in this instance that the intent is to prosecute both crimes, even though the drugs were possessed at the same time and place. By the act of the Legislature, we are instructed that the provisions of 21 O.S. 2001, § 11 do not apply in this instance. Although the possession is at the same time and place, it is not the "same act" as defined by the Legislature. I would therefore affirm the judgment and sentence in Count III.