IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DAVID LYNN FLEMING,	)	
	)	**NOT FOR PUBLICATION**
Appellant,	)	
	)	
vs.	)	**No. F-2012-1014**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

SMITH, VICE PRESIDING JUDGE:

David Lynn Fleming was tried by a jury and convicted of one count of Breaking and Entering in violation of 21 O.S.2011, § 1438(B) (Count I), one count of Possession of a Controlled Dangerous Substance (Methamphetamine and Marijuana), AFCF (2 or More) in violation of 63 O.S.2011, § 2-402 (Count III), and one count of Possession of Drug Paraphernalia in violation of 63 O.S.2011, § 2-405(B) (Count V) in the District Court of Payne County, Case No. CF-2011-714.[1] In accordance with the recommendation of the jury, the Honorable Stephen Kistler sentenced Fleming to one year imprisonment on Count I, fifty years imprisonment on Count III, and one year imprisonment on Count V. The trial court ordered that the sentences be served concurrently.

Fleming appeals from these convictions and sentences and raises seven propositions of error in support of his appeal.

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[1] Fleming was charged with the crime of Burglary in the First Degree in Count I, Burglary in the Second Degree in Count II, and Unauthorized Use of a Motor Vehicle in Count IV. However, the jury returned a verdict of guilty to the lesser-included offense on Count I and verdicts of not guilty on Counts II and IV.

I. Because Possession of a Controlled Dangerous Substance in a Container is not two separate offenses, Appellant has been punished twice for a single act.

II. Prosecutorial misconduct deprived Appellant of a fair trial.

III. The trial court improperly bifurcated the proceedings by submitting the misdemeanor offenses to the jury as part of the second stage of trial.

IV. The State improperly amended the Information by combining Counts 3 and 5, thereby merging two separate and distinct crimes.

V. Sending unredacted judgments and sentences to the jury was error.

VI. Fifty years of incarceration for simple Possession of Controlled Dangerous Substance is shockingly excessive.

VII. The cumulative effect of the trial errors warrants relief.

After thorough consideration of the entire record before us, including the original record, transcripts, and briefs, we find merit in Appellant's fifth proposition of error and modify the sentence imposed in Count III.

James Clements was the airport manager at the Cushing Municipal Airport. As part of his compensation package, Mr. Clements was given the use of a home on the grounds of the airport; he lived there with his wife Alicia. On November 20, 2011, Mrs. Clements was in her kitchen when she heard her dog barking. She walked to her dining room and found Fleming standing in her home dressed only in a t-shirt, jeans, and socks. Mrs. Clements asked him who he was and why he was in her house. Fleming responded that "some girls" told him to enter and wait inside the house. Mrs. Clements backed Fleming out of the house. Once outside, Fleming drew her attention to Mr. Clements' pickup parked nearby and stated that the girls

told him to put his boxes in the truck and wait for them. The boxes were actually the Clements' property which had been stored in an outbuilding. Mrs. Clements returned to her house, locked the door and called police and her husband. By the time Mr. Clements and police arrived, Fleming was gone.

Inside the outbuilding, a pair of boots, a belt, and items of identification in Fleming's name were found. As he was preparing to leave the property, Sgt. Claxton heard a mumbled voice coming from a wooded area behind the Clements' home; he followed the sound and found Fleming. Sgt. Claxton approached Fleming from behind with his weapon drawn and ordered Fleming to show his hands. Fleming did not respond and did not move. After approximately a minute and a half, Fleming put his hands in the air and turned around to face the officer. Officers found a prescription pill bottle, one baggie containing a white substance, and a cellophane cigarette wrapper containing marijuana in Fleming's pocket. Testing showed that the illegal substances found in Fleming's possession were 0.21 grams of methamphetamine and 0.59 grams of marijuana.

In his first proposition of error, Fleming argues that his convictions for Possession of a Controlled Dangerous Substance and Possession of Drug Paraphernalia violate the prohibition against multiple punishments for a single act in 22 O.S.2011, § 11. This issue was not raised in the trial court and is waived on appeal. We review for plain error. Plain error is an actual error, that was plain or obvious, that affects a defendant's substantial rights and the outcome of the trial. *Barnard v. State*, 2012 OK CR 15, ¶ 13, 290 P.3d 759, 764. No plain error occurred.

Analysis of a Section 11 claim focuses on the relationship between the crimes. *Logsdon v. State*, 2010 OK CR 7, ¶ 17, 231 P.3d 1156, 1165. Where the crimes arise out of one act, Section 11 prohibits prosecution for more than one crime, absent specific legislative intent to allow multiple punishments. *Lewis v. State*, 2006 OK CR 48, ¶¶ 3-9, 150 P.3d 1060, 1061-62. Even where the legislature does not intend cumulative punishments, Section 11 is not violated if the criminal acts are separate and distinct. *Logsdon*, 2010 OK CR 7, ¶ 17, 231 P.3d at 1165. Our resolution of Fleming's claim is controlled by *Head v. State*, 2006 OK CR 44, 146 P.3d 1141 where we held that Section 11 is not violated by convictions for Possession of a Controlled Dangerous Substance and Possession of Drug Paraphernalia, even where the paraphernalia is the storage container for the illegal drugs. We decline Fleming's request to deviate from our decision in *Head* to make exception for those cases in which the container is considered paraphernalia only because it is used to store the illegal drugs. Proposition I is denied.

In Proposition II, Fleming argues that he was denied a fair trial by prosecutorial misconduct. He asserts that the prosecutor made repeated appeals to sympathy from the jury during voir dire, direct examination of the Clements, and closing arguments by reference to the fear and insecurity that results from a residential burglary. In addition, he argues that during the second stage the prosecutor improperly urged the jury to determine sentencing based solely on Fleming's prior convictions. Allegations of prosecutorial misconduct must be evaluated within the context of the trial as a whole and will not warrant relief unless the misconduct deprived Appellant of a fair trial. *Coddington v. State*, 2011 OK CR

17, ¶ 72, 254 P.3d 684, 712. Where the comments or questions are not met with contemporaneous objection we review only for plain error. *Id.* On the other hand, where an objection is made and sustained by the trial court, any error on the part of the prosecutor is cured. *Hanson v. State*, 2009 OK CR 13, ¶ 19, 206 P.3d 1020, 1028.

Several of the prosecutor's questions on direct examination were met with timely objections which were sustained by the trial court. Any error with regard to these questions was cured. No objection was made to the remaining questions and arguments now challenged on appeal, thus our review is only for plain error. While some of the prosecutor's questions to the venire could be considered improper appeals to sympathy, the rest were directed at anticipated trial issues and determining whether the potential jurors could be fair and impartial. Although one question directed to Mr. Clements' practice of locking his doors after the break-in was a subtle appeal to sympathy, the prosecutor's questioning of the Clements regarding their actions and emotions during and immediately following the break-in were proper as part of the *res gestae* of the crime. *McElmurry v. State*, 2002 OK CR 40, ¶ 63, 60 P.3d 4, 21-22. The prosecutor's closing arguments were not an appeal to sympathy but were fair comment on the evidence and made in response to the cross-examination of Mrs. Clements. Nor was it improper for the prosecutor to emphasize Fleming's five prior convictions in recommending the sentence to be imposed.

While we find slight excess on the part of the prosecutor in some of his questions in voir dire and on direct examination, his actions did not amount to

"flagrant" misconduct. *Davis v. State*, 2011 OK CR 29, ¶ 174, 268 P.3d 86, 128. Considered in the context of the entire three-day trial, the cumulative effect of these few questions did not affect the outcome of the trial as evidenced by Fleming's acquittal on the charge of Burglary in the First Degree. Proposition II is denied.

In his third proposition of error, Fleming argues that the trial court improperly submitted the question of punishment on the misdemeanor offenses to the jury during the second stage of trial as opposed to the first stage. No objection to this procedure was raised in the trial court and, thus, he has waived all but plain error. *Grissom v. State*, 2011 OK CR 3, ¶ 46, 253 P.3d 969, 986. Fleming is correct that the trial court erred in bifurcating the questions of guilt or innocence and punishment on the misdemeanor crimes where these were not offenses subject to enhancement. 22 O.S.2011, § 860.1. By allowing punishment to be determined on these misdemeanor offenses during the second stage of trial, the jury was effectively allowed to consider Fleming's prior convictions in determining punishment where enhancement would not otherwise be allowed. *See Marshall v. State*, 2010 OK CR 8, ¶ 57, 232 P.3d 467, 480-81; *Perryman v. State*, 1999 OK CR 39, ¶ 14, 990 P.2d 900, 905. Although this was error, it does not rise to the level of plain error. It is clear beyond a reasonable doubt that it did not affect the outcome of the jury's sentencing determination where defense counsel specifically requested that the jury sentence Fleming to one year imprisonment on each of the misdemeanor offenses. Proposition III is denied.

In Proposition IV Fleming argues that the prosecutor improperly merged two separate and distinct crimes by charging him with the unlawful possession of

methamphetamine and marijuana in the same count of Possession of a Controlled Dangerous Substance. Because the jury was instructed that they had to find Fleming possessed both substances in order to find him guilty, he also contends the jury should have been instructed that they had to find the existence of a prior drug-related conviction as an element of the crime before they could find him guilty of felonious drug possession based in part on his possession of marijuana. Fleming also argues the trial court erred in failing to require the jury to specify whether they found him guilty of possession of one of the drugs – and if so which one – or both. At no point in the proceedings did Fleming raise any objection to the manner in which the crime of Possession of a Controlled Dangerous Substance was charged nor the instructions given to the jury. He has waived all but plain error on these claims. *Barnard*, 2012 OK CR 15, ¶ 13, 290 P.3d at 764 (failure to object to jury instructions waives all but plain error); *Nealy v. State*, 1981 OK CR 142, ¶ 4, 636 P.2d 378, 380 (failure to file a demurrer or motion to quash waives any defect in the Information except as goes to jurisdiction).

It is well established that the decision of whether to bring charges and, if so, what charge to bring, lies within the discretion of the prosecutor. *Woodward v. Morrissey*, 1999 OK CR 43, ¶ 9, 991 P.2d 1042, 1045. Contrary to his underlying assumption, Fleming's singular act of possessing methamphetamine and marijuana was not two separate and distinct crimes. The Legislature did not create separate criminal offenses for the possession of multiple illegal drugs in a single act. *See Watkins v. State*, 1992 OK CR 34, ¶ 5-6, 855 P.2d 141, 142; *Lewis v. State*, 2006 OK CR 48, ¶¶ 5-10, 150 P.3d 1060, 1062-63. Because Fleming committed a single

criminal act of Possession of a Controlled Dangerous Substance, it was within the discretion of the prosecutor to either name both drugs or opt for one of them as the basis for the charge. There was no plain error in the prosecutor's election to name both.

"The determination of which instructions shall be given to the jury is a matter within the discretion of the trial court. Absent an abuse of that discretion, this Court will not interfere with the trial court's judgment if the instructions as a whole, accurately state the applicable law." *Harney v. State*, 2011 OK CR 10, ¶ 10, 256 P.3d 1002, 1005. The trial court did not err in failing to instruct the jury that they had to find the existence of a prior drug-related conviction before they could return a verdict of guilty of Possession of a Controlled Dangerous Substance predicated in part on Fleming's possession of marijuana. A prior drug-related conviction is not an element of the crime of possession of marijuana; rather, it is relevant only to the enhancement of punishment. *Gamble v. State*, 1988 OK CR 41, ¶ 6, 751 P.2d 751, 753. Nor was there error on the part of the trial court in failing to require the jury to specify which one or both of the drugs they found him to possess beyond a reasonable doubt. In this case, Fleming's possession of marijuana essentially merged into the more seriously punished possession of methamphetamine. *Lewis*, 2006 OK CR 48, ¶¶ 6-7, 150 P.3d at 1062. There was no plain error in the trial court's instructions to the jury. Proposition IV is denied.

We do find merit in Fleming's fifth assignment of error. During the second stage of trial, the State entered into evidence five Judgments and Sentences as proof of Fleming's prior felony convictions, three of which reflected that Fleming was given

partially suspended sentences. For the first time on appeal, he argues it was error to admit the Judgments and Sentences without redacting the sentences imposed on the grounds that they allowed the jury to speculate on probation and parole policies. This issue was not preserved for appeal by objection in the trial court and is reviewed for plain error. *Andrew v. State*, 2007 OK CR 23, ¶ 24, 164 P.3d 176, 188.

The admission of Fleming's Judgments and Sentences in Case Nos. CF-95-359 and CF-2001-98 for which he received terms of five years and twelve years imprisonment in the Department of Corrections respectively did not, without more, allow the jury to speculate on parole. The mere reference to the sentence imposed on a prior conviction within a Judgment and Sentence does not invoke the concept of parole before a jury. *Mathis v. State*, 2012 OK CR 1, ¶ 31, 271 P.3d 67, 78. This same is not true of the remaining three Judgments and Sentences which reflected that Fleming was given partially suspended sentences. The explicit reference to probation on the face of these documents would allow the jury to speculate on probation policies and their admission into evidence without redaction was an actual error that was plain or obvious. *Hunter v. State*, 2009 OK CR 17, ¶ 9, 208 P.3d 931, 933.

To determine if this error affected Appellant's substantial rights, we must ask whether it affected the outcome of the proceedings. If it is clear, beyond a reasonable doubt, that the error did not affect the outcome of the proceedings, then it cannot be said that Fleming has been denied a substantial right. *Barnard*, 2012

OK CR 15, ¶ 15, 290 P.3d at 764. Although this is an exacting standard, we cannot say that the error was harmless beyond a reasonable doubt under these facts.

Based upon his prior convictions, Fleming's range of punishment for the crime of Possession of a Controlled Dangerous Substance was a minimum of six years imprisonment up to life. 63 O.S.2011, § 2-402(B)(1); 21 O.S.2011, § 51.1(C). The evidence showed that Fleming was in possession of 0.21 grams of methamphetamine and 0.59 grams of marijuana. As a matter of comparison, the chemist testified that a Sweet 'N Low packet weighs 1 gram, thus Fleming's combined amount of drugs was just under this amount. While the prosecutor did not expressly reference the fact that Fleming had previously been given probationary sentences, he did ask the jury to pay close attention to each of the Judgments and Sentences that were admitted into evidence. Given the extremely small amount of drugs, it is difficult to conclude that the fifty year sentence imposed by the jury was not influenced by the clear reference to probation policies in these exhibits. Admission of the unredacted Judgments and Sentences was plain error and, therefore, the sentence imposed on Count III should be modified to thirty years imprisonment.

In Proposition VI, Fleming argues that the fifty year sentence imposed for Possession of a Controlled Dangerous Substance is excessive. With our modification of the sentence imposed based upon error in Proposition V, this issue is moot.

In his final proposition of error, Fleming argues that the cumulative effect of the errors raised on appeal deprived him of a fair trial. Where this Court has

reviewed each of the individual allegations of errors raised on direct appeal and found none to warrant relief, a cumulative error argument has no merit. *Mathis*, 2012 OK CR 1, ¶ 33, 271 P.3d at 78-79. However, when multiple errors occur which, when considered in combination, deprive Appellant of a fair trial, relief may be warranted. *Black v. State*, 2001 OK CR 5, ¶ 98, 21 P.3d 1047, 1078. Upon review of the record, the errors committed at trial when considered cumulatively do not require reversal or further modification of the sentences imposed. Proposition VII is denied.

DECISION

The Judgment and Sentence of the District Court of Payne County is **AFFIRMED IN PART AND MODIFIED IN PART**. Fleming's convictions on Counts I, III, and V are **AFFIRMED**, the sentences on Counts I and V are **AFFIRMED**, and the sentence on Count III is **MODIFIED** to thirty (30) years imprisonment. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2014), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF PAYNE COUNTY
THE HONORABLE STEPHEN R. KISTLER, DISTRICT JUDGE

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OPINION BY: SMITH, V.P.J.
LEWIS, P.J.: CONCUR IN RESULT
LUMPKIN, J.: CONCUR IN PART/DISSENT IN PART
C. JOHNSON, J.: CONCUR
A. JOHNSON, J.: CONCUR

LUMPKIN, JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the Court's decision except for the modification of the sentence in Count III. Appellant did not object to the introduction of the unredacted Judgments and Sentences at trial, and in fact stipulated to them. Appellant may not now complain that he was prejudiced by the unredacted Judgments and Sentences. *See Lott v. State,* 2004 OK CR 27, ¶ 103, 98 P.3d 318, 345 (a party may not complain of error which he himself invited).

Further, Appellant had five prior convictions. With this many priors, the fact that the Judgments and Sentences showed Appellant received probation in three of those prior cases had no effect on the sentence. The minimum sentence in Count III with the prior convictions was 20 years. Fifty years for Possession of Controlled Dangerous Substance, After Former Conviction of Two or More Felonies is not excessive. I would affirm the sentence in Count III.