IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ANDREW LEE HARRIS,	)	
	)	**NOT FOR PUBLICATION**
Appellant,	)	
v.	)	Case No. F-2012-916
	)	
STATE OF OKLAHOMA	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, JUDGE:

Appellant Andrew Lee Harris was tried by jury and convicted of Possession of a Controlled Substance (Cocaine) (63 O.S.Supp.2009, § 2-402), After Former Conviction of Two or More Felonies, in the District Court of McCurtain County, Case No. CF-2010-204. The jury recommended as punishment imprisonment for thirty (30) years and the trial court sentenced accordingly. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of his appeal:

I. The trial court's refusal to instruct the jury on possession of paraphernalia violated Appellant's due process rights under the 14th Amendment to the United States Constitution and Art. II, § 7, of the Oklahoma Constitution.

II. Improper prosecutorial evidence and argument concerning probation deprived Appellant of his due process rights to a fair jury sentencing trial under the 14th Amendment to the United States Constitution and Art. II, § 7, of the Oklahoma Constitution.

III. The trial court committed plain error in failing to follow the mandatory procedure set out in 22 O.S.§ 894, thereby

violating Appellant's due process rights to a fair jury sentencing trial under the 14th Amendment to the United States Constitution and Art. II, § 7 of the Oklahoma Constitution.

After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that under the law and the evidence, reversal is not warranted but the sentence should be modified to twenty (20) years in prison.

In Proposition I, determining whether any particular offense is a lesser included or a necessarily included offense is a two part analysis which first requires courts to make a legal determination about whether a crime constitutes a lesser included offense of the charged crime or whether it is legally possible for the charged crime to include a lesser included offense. *Davis v. State,* 2011 OK CR 29, ¶ 101, 268 P.3d 86, 115, *citing Shrum v. State,* 1999 OK CR 41, ¶ 7, 991 P.2d 1032, 1035. To determine what constitutes a lesser included offense of any charged crime, this Court looks not only at the elements but also to the crimes the trial evidence tends to prove. *Id. Prima facie* evidence of the lesser included offense must be presented at trial in order to warrant giving the lesser included instruction. *Id. Prima facie* evidence of a lesser included offense is that evidence which would allow a jury rationally to find the accused guilty of the lesser offense and acquit him of the greater. *Id.*

Misdemeanor possession of paraphernalia is not a lesser included offense of possession of CDS as it is not a legally recognizable lesser included offense,

but a separately chargeable offense. *See Head v. State,* 2006 OK CR 44, ¶ 14, 146 P.3d 1141, 1144 (possession of CDS and possession of paraphernalia are separately chargeable offenses even where the CDS is possessed in a container that is itself an object of contraband drug paraphernalia). The two statutory provisions require evidence of a different type of contraband. *Id.,* at ¶ 16, 146 P.3d at 1144. The elements of the two provisions are so distinctive that the only way a juror could acquit a defendant of possession of CDS in favor of a conviction for misdemeanor possession of paraphernalia would be to ignore any evidence of the CDS. For, "the quantity of the drug possessed is not material in a prosecution for controlled dangerous substance possession because the relevant statute does not prescribe any minimum amount that must be possessed". *Head,* 2006 OK CR 44, ¶ 7, 146 P.3d at 1144 *citing Spriggs v. State,* 1973 OK CR 275, ¶12, 511 P.2d 1139. Therefore, as possession of CDS does not require a minimum amount, a rational juror would not ignore evidence of the CDS regardless of the quantity. The trial court in this case did not abuse its discretion in refusing Appellant's instruction. *See Ciprano v. State,* 2001 OK CR 25, ¶ 14, 32 P.3d 869, 873 (the determination of which instructions shall be given to the jury is a matter within the trial court's discretion).

In Proposition II, we review only for plain error. *Hogan v. State,* 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. Through the testimony of a deputy court clerk, certified copies of Appellant's prior Judgments and Sentences were introduced and admitted as final felony convictions (State's Exhibits 3, 4, & 5). Admission of certified copies of the Judgments and Sentences listing

Appellant's previous sentences is not error as that does not improperly invoke the concept of parole before the jury. *Mathis v. State,* 2012 OK CR 1, ¶ 31, 271 P.3d 67, 78. However, the State also introduced the testimony of Appellant's former probation and parole officer who testified that she had supervised Appellant approximately two to three years earlier as a result of the convictions in State's Exhibits 3, 4, & 5. We find this testimony error, as it was an impermissible unmistakable reference to the pardon and parole system. *See Richardson v. State,* 1979 OK CR 100, ¶ 19, 600 P.2d 361, 367 *citing Webb v. State,* 1976 OK CR 46, ¶ 7, 546 P.2d 642, 644 (sentence modification warranted if prosecutor's remark was 'unmistakable reference to pardon and parole system'). *See also Williams v. State,* 1988 OK CR 75, ¶ 7, 754 P.2d 555, 556-557. "Jurors should not hear about, and thus be encouraged to speculate on, probation and parole policies . . . We have long held that parties should not refer to probation and parole policies in order to influence a sentence." *Hunter v. State,* 2009 OK CR 17, ¶¶ 9-10, 208 P.3d 931, 933-934.

When combined with the prosecutor's comment during closing argument to look at Appellant's history as reflected on the Judgments and Sentences, this error prejudiced a substantial right and affected the outcome of the sentencing proceeding as it urged the jury to sentence Appellant on the basis of improper concerns. The impact of this improper evidence can be seen in the jury's questions during deliberations asking how many "years of parole" Appellant would receive and how much time he would serve in a prison facility. This plain

error warrants modification of Appellant's sentence to twenty (20) years imprisonment.

In Proposition III, we find Appellant's challenge to the trial court's adherence to 22 O.S. 2001, § 894 moot based upon our resolution of Proposition II and the modification of Appellant's sentence.

DECISION

The Judgment is **AFFIRMED.** The Sentence is **MODIFIED TO TWENTY (20) YEARS** imprisonment. 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 the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF McCURTAIN COUNTY
THE HONORABLE MICHAEL DeBERRY, ASSOCIATE DISTRICT JUDGE

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SMITH, V.P.J.: CONCUR
C. JOHNSON, J.: CONCUR IN RESULTS
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