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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

OLUBANJI MILTON MACAULAY,	)	**NOT FOR PUBLICATION**
Appellant,	)	**Case No. F-2018-894**
v.	)	
STATE OF OKLAHOMA,	)	
Appellee.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JUL - 2 2020
JOHN D. HADDEN
CLERK

SUMMARY OPINION

HUDSON, JUDGE:

Appellant, Olubanji Milton Macaulay, was tried and convicted by a jury in Oklahoma County District Court, Case No. CF-2017-1887, of Counts 1-7: Possession of a Counterfeit Driver License, After Former Conviction of Two or More Felonies, in violation of 47 O.S.2011, § 6-301(2)(b).[1] The Honorable Glenn Jones, District Judge, presided at trial and sentenced Macaulay to ten years

[1] Appellant was additionally charged with seven counts of Possessing a Signed or Unsigned Credit Card (Counts 9-15), a misdemeanor, in violation of 21 O.S.2011, § 1550.28(b). The trial court granted a defense demurrer to these counts at the conclusion of the State's case-in-chief. Notably, the Third Amended Information inexplicably omitted a Count 8 charge.

imprisonment on each count to run concurrently each to the other.[2] The court granted Macaulay credit for time served and further imposed various costs and fees. Macaulay now appeals and raises the following propositions of error before this Court:

I. THE TRIAL COURT ERRED IN ADMITTING ITEMS SEIZED FROM A CAR FOR WHICH [APPELLANT] HAD THE KEY FOB IN HIS POSSESSION AS THE SEARCH OF THE VEHICLE WAS THE RESULT OF AN UNLAWFUL AND UNREASONABLE SEARCH AND SEIZURE IN VIOLATION OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 2, § 30 OF THE OKLAHOMA CONSTITUTION;

II. [APPELLANT'S] CONVICTION[S] FOR MULTIPLE COUNTS OF COUNTERFEIT IDENTIFICATIONS VIOLATED OKLA. STAT. TIT. 21, SECTION 11 AND THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY; and

III. THE TRIAL COURT ERRED IN FAILING TO GIVE A SPOLIATION INSTRUCTION REGARDING THE FAILURE OF LAW ENFORCEMENT TO COLLECT AND/OR PRESERVE THE SECURITY FOOTAGE FROM THE BANK.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we find relief is warranted under the law and evidence.

[2] The sentencing phase of trial resulted in a mistrial. Macaulay subsequently agreed to allow the trial court to sentence him.

We **AFFIRM** Counts 1 and 4 of the Judgment and Sentence, but **REVERSE and REMAND** with instructions to **DISMISS** Counts 2, 3, 5, 6 and 7.

Proposition I. Appellant filed a pretrial motion to suppress the evidence discovered in his rental vehicle. A hearing on Appellant's motion to suppress was held on May 17, 2018 and focused solely on the issue of standing. The trial court reviewed the preliminary hearing transcript in advance of the hearing to ascertain the relevant facts underlying Appellant's motion. No witnesses were called. After hearing argument from counsel for both parties, the trial court denied the motion to suppress. Based on the evidence presented at preliminary hearing, the trial court found Appellant voluntarily abandoned any expectation of privacy he may have had in the vehicle and its contents when he told police that he walked to the bank. Thus, the trial court found Appellant lacked standing to challenge the search and resultant seizure of items from that vehicle. The defense renewed its objection to the search at trial thus preserving this issue for appellate review.

On appeal, Appellant complains the trial court erred in admitting evidence of the items found in his car. He argues law

enforcement discovered the items through an illegal search in violation of the Fourth Amendment, and thus the trial court erred in denying his motion to suppress. "We review a trial court's decision to grant or deny a motion to suppress for abuse of discretion; 'we accept the district court's factual findings supported by evidence, and review the legal conclusions *de novo.*'" *State v. Hodges*, 2020 OK CR 2, ¶ 3, 457 P.3d 1093, 1095 (quoting *State v. Hovet*, 2016 OK CR 26, ¶ 4, 387 P.3d 951, 953). "An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *Fuston v. State*, 2020 OK CR 4, ¶ 42, __P.3d__.

The Fourth Amendment, made applicable to the states through the Fourteenth Amendment, prohibits unreasonable searches and seizures. *State v. Sittingdown*, 2010 OK CR 22, ¶ 9, 240 P.3d 714, 716. "Fourth Amendment rights are personal, may not be asserted on behalf of another, and will be enforced only where a search and seizure infringes on a defendant's own rights." *Fuston*, 2020 OK CR 4, ¶ 41. Thus, "[t]o properly raise an objection under the Fourth

Amendment, Appellant must [first] prove he exhibited an actual, subjective expectation of privacy, which society is prepared to recognize as reasonable, in the area searched." *Id.*; *see also Marshall v. State*, 2010 OK CR 8, ¶ 48, 232 P.3d 467, 478 ("[W]e must first determine whether [the defendant] has standing to contest the search."); *Champeau v. State*, 1984 OK CR 54, ¶ 11, 678 P.2d 1192, 1195 (same).

In denying Appellant's motion to suppress, the trial court found Appellant had in effect voluntarily abandoned any expectation of privacy he may have had in the vehicle and its contents when he told police that he walked to the bank. We have generally held that "one [who] voluntarily abandons property [ ] has no standing to complain of its search and seizure." *Menefee v. State*, 1982 OK CR 24, ¶ 22, 640 P.2d 1381, 1385 (citing *Abel v. United States*, 362 U.S. 217 (1960)). "Abandonment is primarily a question of intent, and such intent may be inferred from words, acts and other objective facts." *Id.*

Upon review, we find Appellant voluntarily abandoned any possessory or property interest he may have had in the rental vehicle along with its contents. Asked if he "had a car or if he had driven" to the bank, Appellant told the officers at the scene "he had walked."

When Oklahoma City Police Detective Michael Anderson subsequently searched Appellant incident to arrest and found a car key fob in Appellant's pocket, Appellant remained silent, saying nothing to police about having a rental car or ownership over the items contained therein. This despite the fact the key ring holding the fob had a tag indicating the car was a rental and listing the vehicle's make, model and tag number. Moreover, Oklahoma City Police Officer Paul Galyon testified at trial that Appellant denied "multiple times" that the vehicle was his. Appellant's words prior to the discovery of the key fob coupled with his failure to assert a possessory right to the vehicle and its contents after the key fob was discovered show Appellant's purposeful decision to abandon any reasonable expectation of privacy he may have had in the vehicle and its contents. *Menefee*, 1982 OK CR 24, ¶ 22, 640 P.2d at 1385.

Appellant fails to demonstrate the district court abused its discretion in denying his motion to suppress. Proposition I is denied.

Proposition II. Appellant complains his convictions for seven counts of possession of counterfeit identifications violate the statutory prohibition against double punishment, 21 O.S.2011, § 11(A), and the state and federal constitutional prohibition against

double jeopardy. He argues he possessed all seven counterfeit identifications in a single act, and thus can only be guilty of one count. He alternatively asserts if the identifications he possessed in the bank and the identifications discovered in his rental vehicle are deemed two separate acts of possession, at most he can be guilty of only two counts.

Appellant raised a Section 11 claim. This issue is thus preserved for appellate review. However, Appellant did not raise a constitutional double jeopardy claim below. We review this claim for plain error only. *Logsdon v. State*, 2010 OK CR 7, ¶ 15, 231 P.3d 1156, 1164.

Title 21 O.S.2011, § 11 governs multiple punishments for a single criminal act and provides in relevant part that:

> [A]n act or omission which is made punishable in different ways by different provisions of this title may be punished under any of such provisions, . . . but in no case can a criminal act or omission be punished under more than one section of law; and an acquittal or conviction and sentence under one section of law, bars the prosecution for the same act or omission under any other section of law.

Id., § 11(A).

Section 11 complements the double jeopardy protections of the state and federal constitutions. *Barnard v. State*, 2012 OK CR 15, ¶

26, 290 P.3d 759, 767. Thus, "a traditional double jeopardy analysis is conducted only if Section 11 does not apply." *Id.*; *Irwin v. State*, 2018 OK CR 21, ¶ 5, 424 P.3d 675, 676. A Section 11 analysis "focuses on the relationship between the crimes." *Barnard*, 2012 OK CR 15, ¶ 27, 290 P.3d at 767. "If the offenses at issue are separate and distinct, requiring dissimilar proof, Oklahoma's statutory ban on 'double punishment' is not violated." *Sanders v. State*, 2015 OK CR 11, ¶ 6, 358 P.3d 280, 283. However, "[i]f the crimes truly arise out of one act, Section 11 prohibits prosecution for more than one crime, absent express legislative intent." *Barnard*, 2012 OK CR 15, ¶ 27, 290 P.3d at 767.

Title 47, Section 6-301(2)(b) provides in pertinent part: "It is a felony for any person . . . to knowingly possess *any* state counterfeit or fictitious license or identification card[.]" 47 O.S.2011, § 6-301(2)(b) (emphasis added). Both parties focus on the Legislature's use of the pronoun "any" in Section 6-301(2)(b). The indefinite pronoun "any" can be singular or plural depending on its usage. As used in Section 6-301(2)(b), the Legislature's intent is not plainly expressed. If "any" is construed as the State asserts, each state counterfeit license possessed is a separate offense regardless of the

number. Thus, if 100 counterfeit licenses had been discovered in Appellant's rental vehicle, he could have been charged with 100 counts. Nothing in Section 6-301(2)(b) indicates the Legislature intended such a result. *See Rousch v. State*, 2017 OK CR 7, ¶ 5, 394 P.3d 1281, 1283 ("In interpreting a statute, we look to its purpose, the evil to be remedied, and the consequences of any particular interpretation.").

Notably, within Section 6-301 the Legislature meticulously carved out multiple and distinct offenses relating to the unlawful use of state licenses or identification cards—including displaying, possessing, and manufacturing counterfeit licenses. Yet despite the Legislature's preciseness, the statute does not clearly sanction multiple penalties based on the number or type of counterfeit licenses embraced in a single possessory event. Barring such express legislative authorization, Section 6-301(2)(b) cannot be interpreted in such a manner.[3]

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[3] *Compare Brown v. State*, 2008 OK CR 3, ¶ 6, 177 P.3d 577, 579 (because the Legislature at that time had not expressly made each individual image of child pornography contained on a "CD–ROM" or in a "magnetic disk memory" a separate offense under Title 21 O.S.2001, § 1024.1, cumulative images on a "CD–ROM" or in a "magnetic disk memory" were found to constitute a single offense); *Watkins v. State*, 1991 OK CR 119, 829 P.2d 42, *opinion on rehearing*, 1992 OK CR 34, 855 P.2d 141 (no legislative authorization for inflicting multiple penalties

Having determined multiple convictions pursuant to Section 6-301(2)(b) for a single possession of counterfeit driver licenses is violative of Section 11, we must next factually resolve whether Appellant singularly possessed all seven counterfeit licenses or whether he committed two separate possessory acts. Appellant carried four of the counterfeit licenses into the bank in his portfolio. The remaining three were discovered inside his rental vehicle stashed inside a bag. The State thus independently proved two separate acts of possession. *Cf. Davis v. State*, 1996 OK CR 15, ¶ 38, 916 P.2d 251, 261 (State independently proved possession of two of the four CD-ROM discs containing obscene pictures as the discs were discovered in a separate room from other obscene CD-ROM discs). We therefore affirm Counts 1 and 4,[4] but reverse Counts 2, 3, 5, 6 and 7 as impermissible multiple punishment in violation of 21 O.S.2011, § 11.

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based on the number or type of controlled drugs embraced in a single possessory event); *Hunnitcutt v. State*, 1988 OK CR 91, ¶ 14, 755 P.2d 105, 110 (nothing in the statutes indicate the legislature intended a defendant could be punished twice for attempting to conceal stolen property simply because the defendant paid money to an undercover officer and was given one sack containing two pistols).

[4] Count 1 relates to the counterfeit Texas Driver License, bearing the name Michael C. Kappas, Appellant provided the Branch Manager at First Fidelity Bank. Count 4 involves the counterfeit Ohio Driver License, bearing the name Floyd Dunbar, that was discovered in Appellant's rental car.

Finding no Section 11 violation as to the remaining two counts—Counts 1 and 4—we conduct a traditional double jeopardy analysis. Because these convictions are for two separate and distinct possessory acts, Appellant was not punished twice for the same offense in violation of double jeopardy. *See Rousch*, 2017 OK CR 7, ¶ 3, 394 P.3d at 1282 ("Two distinct acts of the same offense . . . will not violate double jeopardy where the acts are interrupted and separate in time."); *Davis*, 1996 OK CR 15, ¶¶ 38, 40, 916 P.2d at 261 (independent possession of discs containing obscene materials indicates separate crimes of possession). As there was no double jeopardy violation, there is no error, thus no plain error.

For the foregoing reasons, Appellant's convictions on Counts 1 and 4 are affirmed, but his Counts 2, 3, 5, 6 and 7 convictions are reversed and remanded with instructions to dismiss.

Proposition III. Appellant complains the trial court erred when it failed to instruct the jury on spoliation due to the State's failure to collect and preserve a digital video from the bank's security camera located in Branch Manager's office. Appellant preserved this issue by requesting a spoliation instruction.

"We review a trial court's rulings on jury instructions for an

abuse of discretion." *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 59, 241 P.3d 214, 234. An instruction allowing the jury to draw a negative inference from the failure to preserve evidence is not appropriate in the absence of a showing of bad faith by police. *Id.*, 2010 OK CR 23, ¶ 61, 241 P.3d at 234. The record on appeal in this case does not reveal bad faith on the part of the officers. Moreover, whether the video would have had any exculpatory value is rank speculation on Appellant's part. *See id.*, 2010 OK CR 23, ¶ 20, 241 P.3d at 225 (unpreserved evidence "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (quoting *California v. Trombetta*, 467 U.S. 479, 488–89 (1984))); *Hogan v. State*, 1994 OK CR 41, ¶ 18, 877 P.2d 1157, 1161 (relief will not be granted based upon speculation that there would be exculpatory evidence). Thus, in the absence of a showing of bad faith by law enforcement when they failed to secure the bank video, the loss of the evidence does not constitute a denial of due process and a spoliation instruction was not appropriate. *Cuesta-Rodriguez*, 2010 OK CR 23, ¶ 61, 241 P.3d at 234; *Torres v. State*, 1998 OK CR

40, ¶ 23, 962 P.2d 3, 13.

The trial court did not abuse its discretion by denying Appellant's request for a spoliation instruction. Proposition III is denied.

DECISION

Counts 1 and 4 of the Judgment and Sentence are **AFFIRMED.** Counts 2, 3, 5, 6 and 7 are **REVERSED and REMANDED** with instructions to **DISMISS.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE GLENN JONES, DISTRICT JUDGE

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OPINION BY: HUDSON, J.
LEWIS, P.J.: CONCUR IN RESULT
KUEHN, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR
ROWLAND, J.: CONCUR

LEWIS, PRESIDING JUDGE, CONCURRING IN RESULT:

I concur with the result reached in this matter, but do not join the majority's discussion on abandonment in Proposition I. I don't agree that Appellant abandoned any expectation of privacy in the vehicle in question.