IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ALPHIE PHILLIP MCKINNEY,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
v.	)	
	)	Case No. F-2013-812
STATE OF OKLAHOMA	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, JUDGE:

Appellant Alphie Phillip McKinney was tried by jury and convicted of Trafficking in Illegal Drugs (Cocaine), After Former Conviction of A Felony (Count I) (63 O.S.2011, § 2-415); Possession of a Controlled Dangerous Substance (Methylone), After Former Conviction of a Felony (Count II) (63 O.S. 2011, § 2-402); Possession of a Controlled Dangerous Substance (Marijuana) (Count III) (63 O.S.2011, § 2-402); Possession of a Controlled Dangerous Substance without a Tax Stamp, After Former Conviction of a Felony (Count IV) (68 O.S.2011, § 450.1); Possession of a Controlled Dangerous Substance (Alprazolam), After Former Conviction of a Felony (Count V)(63 O.S.2011, § 2-402); and Possession of Drug Paraphernalia (Count VI) (63 O.S.2011, § 2-405), Case No. CF-2012-791, in the District Court of Tulsa County. The jury recommended as punishment twenty (20) years imprisonment and a $25,000.00 fine in Count I; five (5) years imprisonment and a $1,000.00 fine in Count II; four (4) years imprisonment and a $1,000.00 fine in Count III; one (1) year imprisonment and a $1,000. fine in Count IV; two (2) years imprisonment

and a $1,000.00 fine in Count V; and a $1,000.00 fine in Count VI. The trial court sentenced accordingly, ordering the sentences to run consecutive except for Count IV which was ordered to run concurrent to Count III.[1] It is from this judgment and sentence that Appellant appeals.

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

I. The prosecutor excused prospective jurors from the final panel in violation of the Equal Protection provisions of the Fourteenth Amendment to the United States Constitution.

II. It was error for the district court to permit the prosecutor to inquire about a prior allegation of possession of controlled drug in a case where Appellant was charged with possession of a controlled drug. The prosecutor's questioning undermined Appellant's right to a fair trial under the Fourteenth Amendment to the United States Constitution.

III. Appellant was convicted of the crime of unlawful possession of controlled drugs. The fact that the jury found him to be in constructive possession of four different drugs at the same time does not support his conviction for four distinct crimes.

IV. Since Appellant is guilty of but a single act of possession of different controlled drugs, Counts II, III, and V must be dismissed as lesser included offenses of the trafficking conviction in Count I.

V. Appellant's convictions for both trafficking and failure to secure a tax stamp as alleged in Count I and Count IV violate statutory and constitutional prohibitions against double punishment in this case.

[1] Appellant will be required to serve eighty-five percent (85%) of his sentence for Trafficking in Cocaine (Count I) before becoming eligible for parole. 21 O.S. 2011, § 13.1.

VI. Appellant's trial counsel was ineffective pursuant to the Sixth and Fourteenth Amendments to the United States 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 relief is warranted as discussed in Proposition III.

In Proposition I, a defendant may raise an equal protection challenge to the use of peremptory challenges by showing that the prosecutor used the challenges for the purpose of excluding members of the defendant's own race from the jury panel. *Batson v. Kentucky,* 476 U.S. 79, 96, 106 S.Ct. 1712, 1723-1724, 90 L.Ed.2d 69 (1986). In *Powers v. Ohio,* 499 U.S. 400, 415, 111 S.Ct. 1364, 1373, 113 L.Ed.2d 411 (1991) *Batson* was extended to include race-based exclusions even when the defendant and the potential juror are not of the same race. Under *Batson,* the defendant must first make a *prima facie* showing that the prosecutor has exercised peremptory challenges on the basis of race. Then, the burden shifts to the prosecutor to articulate a race-neutral explanation related to the case for striking the juror in question. The trial court must then determine whether the defendant has carried his burden of proving purposeful determination. *Batson,* 476 U.S. at 98, 106 S.Ct. at 1724. The trial court's findings are entitled to great deference, and we review the record in the light most favorable to the trial court's ruling. *Id.,* 476 U.S. at 98, n. 21, 106 S.Ct. at 1724, no. 21. *See also Coddington v. State,* 2006 OK CR 34, ¶ 11, 142 P.3d 437, 443.

In the present case, we find the trial court did not abuse its discretion in allowing the challenges as Appellant did not meet his burden of showing a *prima facie* case of purposeful discrimination in the exercise of the State's first and third peremptory challenges. *See Mitchell v. State*, 2011 OK CR 26, ¶¶ 41-48, 270 P.3d 160, 173-175; *Smallwood v. State*, 1995 OK CR 60, ¶¶11-14, 907 P.2d 217, 223-224.

In Proposition II, Appellant raised no objection to the prosecutor's question on cross-examination regarding his 2010 case. Therefore, we review only for plain error. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. To be entitled to relief under the plain error doctrine, Appellant must prove: 1) the existence of an actual error (i.e., deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding. *Id.*, 20 O.S.2001, § 3001.1. If these elements are met, this Court will correct plain error only if the error "seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings" or otherwise represents a "miscarriage of justice." *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

As a general rule, any matter is a proper subject of cross examination which is responsive to testimony given on direct examination or which is material or relevant thereto and which tends to elucidate, modify, explain, contradict or rebut testimony given in chief by the witness or which tests the witnesses' accuracy, memory, veracity or credibility. *Malone v. State*, 2013 OK CR 1, ¶ 45, 293 P.3d 198, 212; *Hooks v. State*, 2005 OK CR 23, ¶ 13, 126 P.3d 636, 642. If a

defendant testifies, his testimony will be subject to impeachment which will provide the jury with an accurate picture of his criminal past. *Turner v. State*, 1990 OK CR 79, ¶ 6, 803 P.2d 1152, 1156. Appellant made the decision to testify. He admitted to his previous conviction, his previous arrest and charging, and he brought up the subject of police corruption and the planting of evidence. When a defendant opens the door on direct examination to his criminal activity, cross-examination by the State about that subject does not constitute an attack on the defendant's character. *Maynard v. State*, 1981 OK CR 17, ¶ 12, 625 P.2d 111, 113. It is merely a line of questioning permitted to challenge the credibility of the defendant's testimony. *Id.* The State's cross-examination merely extended the scope of inquiry begun on direct examination. When a defendant opens up a field of inquiry on direct examination, he may not complain of subsequent cross-examination. *Ashinsky v. State*, 1989 OK CR 59, ¶ 15, 780 P.2d 201, 206. *See also Davis v. State*, 1994 OK CR 72, ¶ 6, 885 P.2d 665, 668. We find no error and thus no plain error in the prosecutor's questioning. [2]

In Proposition III, we review only for plain error Appellant's claim that his three convictions for possession of a controlled dangerous substance under 63 O.S.2011, § 2-402 punished him multiple times for one act of drug possession.

[2] Appellant's attempt to raise a claim of prosecutorial misconduct without argument or citation to authority is not properly before the Court. *See* Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014). *See also Postelle v. State*, 2011 OK CR 30, ¶ 90, 267 P.3d 114, 145-146.

See Barnard v. State, 2012 OK CR 15, ¶ 25, 290 P.3d 759, 767 (plain error review for double jeopardy/multiple punishments not raised before trial court).

Title 21 O.S.2011, § 11(A), governs multiple punishments for a single criminal act. Section 11 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.

Possession of a Controlled Dangerous Substance (Methylone) as charged in Count II, Possession of a Controlled Dangerous Substance (Marijuana) as charged in Count III and Possession of a Controlled Dangerous Substance (Alprazolam) as charged in Count V are all made illegal by the same statutory provision, 63 O.S.2011, § 2-402. This provision makes possession of a controlled dangerous substance illegal without regard to the number or type of drug involved. The type of drug becomes important only in regards to punishment under § 2-402(B). As the statute causes it to be unlawful for any person to possess a controlled dangerous substance, the Legislature has not exercised its power to inflict multiple penalties based on the number or type of controlled drugs embraced in a single possessory act. *See Missouri v. Hunter*, 459 U.S. 359, 365, 103 S.Ct. 673, 677, 74 L.Ed.2d 535 (1983). Thus, we construe § 2-402 consistent with the interpretation that we set forth in *Watkins v. State*, 1992 OK CR 34, ¶ 6, 855 P.2d 141, 142 *opinion on rehearing* and find that Appellant's possession of separate types of controlled dangerous

substances in a single container, his vehicle, constitute but one violation of the statute. While the various drugs were found in separate bags, the bags were all found in the car and in the same area of the car – the open space in the door panel. Appellant was in possession of the car and therefore had constructive possession of the drugs. Appellant committed one act of possession of illegal drugs. Appellant's convictions in Counts II, III, and V subjected him to multiple punishments for the same criminal act.

In the second step of a plain error review, we find the forfeited error was clear or obvious despite the absence of any objection. This Court's interpretation of the plain language of the Uniform Controlled Dangerous Substances Act in light of the prohibition of § 11 is well established. *See Lewis v. State,* 2006 OK CR 48, ¶ 5, 150 P.3d 1060, 1062. The Oklahoma Legislature has not addressed this issue to show an intent to treat each type of drug separately, therefore, our interpretation is confirmed to be correct.

As to the third step, we have previously determined that double prosecution affects an appellant's substantial rights and seriously affects the fairness, integrity and public reputation of the trial. *Barnard,* 2012 OK CR 15, ¶ 32, 290 P.3d at 769. We reach the same conclusion in this case.

Having determined that plain error occurred, we must determine whether said error was harmless. As Appellant was convicted and sentenced three times for one act of possession of controlled dangerous substance, we cannot find this error harmless. Counts III & V are reversed and remanded with instructions to dismiss.

In Proposition IV, we again review only for plain error Appellant's claim that as he is guilty of only one act of possession, his possession convictions should be combined and dismissed as lesser included offenses of Count I, Trafficking in Cocaine. *See Barnard*, 2012 OK CR 15, ¶ 25, 290 P.3d 759, 767. Since two of Appellant's three convictions for simple possession have been reversed and remanded with instructions to dismiss, we are left with one conviction for trafficking in cocaine and one conviction for simple possession of controlled dangerous substance. These two acts are illegal pursuant to two separate statutes, 63 O.S. § 2-415 (trafficking) and 63 O.S. 2-402 (simple possession). That the different drugs were found in 1 container – Appellant's vehicle is not determinative. The language of the two statutes is the determining factor. *See Evans v. State*, 2007 OK CR 13, ¶ 5, 157 P.3d 139, 142 (convictions for trafficking in methamphetamine and distributing marijuana did not violate double jeopardy principles as each offense required proof of a fact the other did not and given the differences between the two statutes involved and this Court found no legislative intention to treat the offenses as parts of a single criminal act for purposes of punishment). Appellant's convictions did not violate the Section 11 prohibition against double punishment.

Because Section 11 does not apply, we now conduct a traditional double jeopardy analysis. *See Head v. State*, 2006 OK CR 44, at ¶ 15, 146 P.3d 1141, 1146; *Jones v. State*, 2006 OK CR 5, ¶ 66, 128 P.3d 521, 543. This Court exclusively applies the "same evidence" test in its analysis of a double jeopardy claim. *Jones*, 2006 OK CR 5, ¶ 63, 128 P.3d at 543 citing *Blockburger v. United*

States, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed.2d 306, 309 (1932). Under this test, we determine whether the crimes were separate and distinct crimes with totally dissimilar elements and whether each crime requires proof of elements not contained in the other. *Id.*

While the crimes of trafficking and simple possession both involve the element of possession, trafficking has a minimum quantity of the controlled substance which must be proven which simple possession does not. *See* 63 O.S. §§ 2-415 and 2-402. Appellant's convictions under two different statutes for a trafficking offense and simple possession based upon two different controlled substances are separate and distinct crimes requiring dissimilar proof. Accordingly, any double jeopardy claim fails. Finding no error, we find no plain error.

In Proposition V we review for plain error only Appellant's claim that his convictions in Count I for Trafficking in Cocaine and Count IV for Failure to Have Tax Stamp for the same cocaine violate the statutory and constitutional prohibitions against double punishment. *See Barnard*, 2012 OK CR 15, ¶ 25, 290 P.3d 759, 767.

These two acts are made illegal by two different statutes, 63 O.S.2011, § 2-415, Trafficking and 68 O.S.2011, § 450.1 *et.seq.* Possession of a Controlled Dangerous Substance without a Tax Stamp. One is an act of commission (the knowing trafficking in cocaine) and an act of omission (failing to obtain a tax stamp) involving the same drug. There is no Section 11 violation here because the legislature has expressed an intent to provide separate punishments for a

violation of the Oklahoma Drug Tax Stamp Act (hereafter Tax Act), 68 O.S.2011, § 450.1-450.9, and any drug offense committed by a drug dealer. *See White v. State,* 1995 OK CR 15, ¶ 4, 900 P.2d 982, 996 ("where a defendant is punished for both failing to pay a drug tax and committing a drug offense, all in the same proceeding, no Double Jeopardy problem exists").

Regarding the multiple punishment claim under the federal and Oklahoma Double Jeopardy Clauses, "[i]f the legislature intended cumulative punishment for both violations and the sentences are imposed in the same proceeding, no double jeopardy violation arises." *Dennis v. Poppel,* 222 F.2d 1255 (10th Cir. 2000). "This is true 'regardless of whether [the] two statutes proscribe the 'same' conduct under [the] *Blockburger* [test]' which we apply when the legislative intent is unclear." *Id. quoting Missouri v. Hunter,* 459 U.S.359, 368-69, 103 S.Ct. 673, 679, 74 L.Ed.2d 535 (1983). Under the language of the two statutes, the legislature clearly intended the punishment for the statutory offense of failure to affix tax stamps to be in addition or cumulative to the punishment for the statutory trafficking offense found in the Oklahoma Uniform Controlled Dangerous Substances Act. Therefore, no double jeopardy violation occurred by Appellant's convictions for failure to have tax stamp and trafficking in cocaine. Finding no error in Appellant's convictions, we find no plain error.

In Proposition VI, having thoroughly reviewed Appellant's claims of ineffective assistance of counsel, we find Appellant has failed to carry his burden to show either deficient performance or prejudice. *Goode v. State,* 2010 OK CR 10, ¶ 81, 236 P.3d 671, 686 *citing Strickland v. Washington,* 466 U.S.

668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). In each instance that Appellant argues counsel failed to raise an objection at trial, this Court reviewed the alleged error for plain error. In only one instance was there any merit to a defense objection. In that situation, Appellant's multiple convictions for violation of the same statute, this Court granted Appellant relief. Appellant was not denied the effective assistance of counsel.

DECISION

The Judgments and Sentences in Counts I, II, IV, and VI are **AFFIRMED.** The Judgments and Sentences in Counts III and V are **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS.** Appellant's ***Motion for Oral Argument* is DENIED.** 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 TULSA COUNTY
THE HONORABLE TOM C. GILLERT, DISTRICT JUDGE

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

RE

SMITH, V.P.J., CONCURRING IN PART/ DISSENTING IN PART:

I concur in the decision to affirm Counts 1, 4, and 6 and in the majority's conclusion that Counts 3 and 5 should be reversed with instructions to dismiss based upon our prior decisions. However, I must dissent to the majority's resolution of Appellant's Proposition 4. McKinney's multiple convictions for Trafficking in Illegal Drugs in Count 1 and Possession of a Controlled Dangerous Substance in Count 2 violate the statutory prohibition against multiple punishments in Section 11 of Title 21, as the two crimes arise out of the same act of possession. *Lewis v. State*, 2006 OK CR 48, ¶¶ 3-9, 150 P.3d 1060, 1061-62. This error was actual error that was plain or obvious and affected McKinney's substantial rights. *Barnard v. State*, 2012 OK CR 15, ¶ 13, 290 P.3d 759, 764. As McKinney has shown plain error occurred, I would reverse Count 2 with instructions to dismiss.

JOHNSON, JUDGE, CONCUR IN RESULTS:

I concur in the decision to affirm Counts 1, 2, 4 and 6. I also agree that Counts 3 and 5 should be reversed with instructions to dismiss based on our case law in *Lewis v. State,* 2006 OK CR 48, 150 P.3d 1060 and *Watkins v. State,* 1991 OK CR 119, 829 P.2d 42, *opinion on rehearing,* 1992 OK CR 34, 855 P.2d 141. I cannot join, however, in the majority's plain error analysis in Proposition 3. We explained our plain error review in *Hogan v. State,* 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. For relief under the plain error doctrine, a defendant must show: (1) error; (2) that is plain; and (3) that affects substantial rights. *Id.* This Court exercises its discretion to correct plain error only if the forfeited error "'seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings' or otherwise represents a 'miscarriage of justice.'" *Id.* (citations omitted) Once a defendant meets his or her burden on the three elements of plain error and this Court determines that the plain error affected the fairness, integrity or public reputation of the proceedings, our plain error review is complete and we may exercise our authority to correct otherwise forfeited error as we did in this case.