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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JUAN JOSE NAVA-GUERRA,	)	**NOT FOR PUBLICATION**
	)	
Appellant,	)	
	)	
v.	)	**Case No. F-2018-313**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, JUDGE:

Appellant, Juan Jose Nava-Guerra, was tried by jury and convicted of Count 1, Aggravated Trafficking in Illegal Drugs, in violation of 63 O.S.2011, § 2-415,[1] and Count 2, Conspiracy to Commit Aggravated Trafficking in Illegal Drugs, in violation of 63 O.S.2011, § 2-408, in the District Court of Canadian County Case Number CF-2014-587. The jury recommended as punishment 105 years imprisonment on each count. The trial court sentenced Appellant accordingly and ordered the sentences to run concurrently

[1] Appellant must serve 85% of his sentence before becoming eligible for consideration for parole. 21 O.S.2011, § 13.1.

to one another. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in this appeal:

I. The trial court violated Mr. Nava-Guerra's due process protections by erroneously allowing hearsay statements to be introduced at trial.

II. The evidence seized as a result of the search of the vehicle in which Appellant was a passenger should have been suppressed as the search was unlawful.

III. The transcript of the in-car audio was improperly admitted over defense counsel's numerous objections.

IV. The trial court erred when it assessed an indigent defense fee greater than that allowed by statute.

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 no relief is warranted other than modification of the Judgment and Sentence to reflect the correct fee amounts as set forth in Proposition IV.

Appellant contends in his first proposition that his co-conspirators' statements were improperly admitted through the in-car video (State's Exhibit 13) and the transcription of the video

(State's Exhibit 14). He argues the statements were hearsay because they were made after the conspiracy ended and they were not made in furtherance of the conspiracy. Although Appellant objected to the admission of the State's exhibits (Tr. I 124-25, Tr. II 44-45), he admitted virtually the same evidence in Defendant's Exhibit 1 (Tr. II 137).

Appellant relied heavily upon this evidence as support for his theory of defense, *i.e.*, that he was merely a passenger in the Buick and knew nothing of the presence of the cocaine. He utilized State's Exhibit 14 and Defendant's Exhibit 1 extensively during his cross-examination of Maria Lopez, the Oklahoma Bureau of Narcotics and Dangerous Drugs employee who translated and transcribed the audio of the in-car conversation and he specifically urged the jury to pay close attention to State's Exhibit 13, State's Exhibit 14 and Defendant's Exhibit 1 during his closing argument. Thus, having admitted and relied upon the same evidence as the State, Appellant cannot claim error in the admission of the State's evidence as grounds for relief. "When a defendant objects to the introduction of evidence, but then introduces the same evidence himself, there are no grounds for reversal, even if the evidence was incompetent."

McHam v. State, 2005 OK CR 28, ¶ 26, 126 P.3d 662, 671. Proposition I is denied.

In his second proposition, Appellant maintains the trial court erred in denying his motion to suppress because the search of the Buick was unlawful and violated the Fourth Amendment. He argues Agent Wells had no reasonable suspicion that the Buick or its driver were violating the law. We review this claim for an abuse of discretion. *Bramlett v. State*, 2018 OK CR 19, ¶ 10, 422 P.3d 788, 793. "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." *Runnels v. State*, 2018 OK CR 27, ¶ 41, 426 P.3d 614, 624.

Appellant contends the stop of the Buick for following too closely pursuant to the "three second rule" was unreasonable based upon the traffic, road and weather conditions existing at the time. We disagree and find our decision in *State v. Zungali*, 2015 OK CR 8, 348 P.3d 704, dispositive of this issue.

> To stop a vehicle, police must have reasonable, articulable suspicion that the car or its driver is in violation of the law. *McGaughey v. State*,

> 2001 OK CR 33, ¶ 24, 37 P.3d 130, 136. "[T]he determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." *Illinois v. Wardlow,* 528 U.S. 119, 125, 120 S. Ct. 673, 676, 145 L. Ed. 2d 570 (2000). To determine if a traffic stop violates the Fourth Amendment, we consider whether the officer's action was justified at its inception and whether the officer's subsequent actions were reasonably related in scope to the circumstances which justified the interference in the first place. *McGaughey,* 2001 OK CR 33, ¶ 24, 37 P.3d at 136.

Zungali, 2015 OK CR 8, ¶ 5, 348 P.3d at 705-06. In *Zungali,* an OBNDD agent stopped a vehicle on I-40 eastbound for following another with a space of less than one-second between them, in violation of 47 O.S.2011, § 11-310(a). Section 11-310(a) provides, "[t]he driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway." A search of the vehicle revealed forty-nine pounds of marijuana hidden inside. The appellees challenged the traffic stop. Evidence was adduced at the hearing on the motion to suppress that the Oklahoma Driver's Manual recommends a following distance of at least three seconds and that following too closely is one of the top

three causes of accidents on Oklahoma roads. *Id.*, 2015 OK CR 8, ¶¶ 2-6, 348 P.3d at 705-06. This Court determined the traffic stop, based upon violation of the three-second rule together with the agent's calculation and observation of a less than one-second gap, provided the "objective justification required for reasonable suspicion justifying a traffic stop." *Id.*, 2015 OK CR 8, ¶ 8, 348 P.3d at 706-07.

In the present case, as in *Zungali*, evidence was presented that the Buick had approximately a one-second space between it and the vehicle in front of it, that the Oklahoma Driver's Manual[2] recommends a three-second gap between vehicles and that the agent's observation of the one-second gap between the Buick and the vehicle in front of it formed the basis of the traffic stop. The agent's traffic stop was justified. The trial court did not abuse its discretion in denying Appellant's motion to suppress. Proposition II is denied.

In Proposition III, Appellant claims State's Exhibit 14 was improperly admitted for numerous reasons. However, as fully set forth above, although Appellant objected to the admission of State's

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[2] Appellant cites an internet source for the Oklahoma Driver's Manual. We do not consider this as it is not part of the record on appeal. Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019).

Exhibit 14, Appellant admitted Defendant's Exhibit 1, an almost identical exhibit to State's Exhibit 14. He used the defense exhibit extensively to cross-examine Ms. Lopez and urged the jury to pay close attention to it and to State's Exhibits 13 and 14 during closing argument. Again, having admitted the same evidence as the State and relied upon that evidence in his defense, Appellant cannot claim error in the admission of the State's evidence as grounds for relief. *McHam*, 2005 OK CR 28, ¶ 26, 126 P.3d at 671. Proposition III is denied.

In his last proposition, Appellant contests the Oklahoma Indigent Defense System fee of $500.00 and administrative fee of ten percent of that amount included in his Judgment and Sentence. As no objection was lodged to these fees, we review this claim for plain error pursuant to *Simpson v. State*, 1994 OK CR 40, ¶¶ 3, 11, 23 30, 876 P.2d 690, 693-95, 698-701. Under the *Simpson* test, we determine whether Appellant has shown an actual error, which is plain or obvious, and which affects his or her substantial rights. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise

represents a miscarriage of justice. *Id.*, 1994 OK CR 40, ¶ 30, 876 P.2d at 701.

As set forth in 22 O.S.2011, § 1355.14(E), where the Oklahoma Indigent Defense System's representation does not involve a proceeding resulting in a final order, such as in a plea, a trial, or a revocation hearing, the proper fee amount is $250.00. The associated administrative fee is ten percent of that amount or $25.00. The Oklahoma Indigent Defense System ceased representing Appellant prior to trial. Therefore, we find plain error occurred in the trial court's assessment of a fee greater than the statutory amount. The State concedes the $500.00 OIDS fee and $50.00 administrative fee are incorrect.

The OIDS fee imposed in this case should be modified from $500.00 to $250.00 with the corresponding Revolving Fund fee, representing ten percent of the Indigent Defense fee, modified from $50.00 to $25.00. The trial court is directed to enter an order *nunc pro tunc* correcting the Judgment and Sentence consistent with this opinion.

DECISION

The **JUDGMENT and SENTENCE is AFFIRMED** as modified. The case is remanded to the District Court for entry of an order *Nunc Pro Tunc* modifying the assessment to be paid for representation by an attorney employed by the Oklahoma Indigent Defense System to $250.00, with the corresponding administrative fee modified to $25.00. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CANADIAN COUNTY
THE HONORABLE PAUL HESSE, DISTRICT JUDGE

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OPINION BY: LUMPKIN, J.
LEWIS, P.J.: Concur
KUEHN, V.P.J.: Concur in Results
HUDSON, J.: Concur
ROWLAND, J.: Concur