IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DEAREL OGLESBY,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
v.	)	Case No. F-2002-470
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

CHAPEL, JUDGE:

Dearel Oglesby was tried by jury and convicted of Distribution of a Controlled Substance (Methamphetamine) in violation of 63 O.S.2001, § 2-401(A),[1] in the District Court of McCurtain County, Case No. CF-2001-277. In accordance with the jury's recommendation the Honorable Gary Brock sentenced Oglesby to life imprisonment and a $20,000 fine. Oglesby appeals from this conviction and sentence.

Oglesby raises four propositions of error in support of his appeal:

I. The honorable court allowed evidence to be introduced in violation to [sic] the Oklahoma Discovery Code and *Allen v. District Court of Washington Co.*;
II. Oglesby's right to a preliminary hearing was denied;
III. The Court allowed evidence of other crimes and wrongdoings to be admitted in violation of *Burks v. State*; and
IV. The trial court erred by allowing the State to endorse additional witness on the second day of trial.

After thorough consideration of the entire record before us on appeal including the original record, transcripts, briefs and exhibits of the parties, we

[1] Oglesby was not convicted of drug trafficking, as the State's brief says (Appellee's Brief at 1).

find that the law and evidence do not require reversal. Three of Oglesby's propositions concern a mix-up in the State's evidence involving two separate baggies of methamphetamine and two lab reports, with one controlled buy. We find in Proposition I that the trial court did not abuse its discretion in allowing the State to introduce a lab report which was not timely provided to Oglesby under the court's discovery order; there was no suggestion that the State deliberately violated the discovery order or profited from the violation, and Oglesby was not prejudiced by the error.[2] We find in Proposition II that the confidential informant presented sufficient evidence at the preliminary hearing to show a crime had been committed and there was probable cause to believe Oglesby committed it.[3] We find in Proposition IV that the trial court did not abuse its discretion in allowing the State to endorse a witness on the second day of trial, where the State acted in good faith as soon as the witness was known and the witness did not testify on a material issue.[4]

In Proposition III Oglesby complains that he was prejudiced by erroneous evidence of other crimes. Oglesby was charged with selling a confidential informant a .48 gram baggie of methamphetamine on August 3, 2001. Before conducting the controlled buy that day, officers searched the informant's truck and found a .38 gram baggie of methamphetamine. The fact that police found

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[2] *Hooks v. State*, 2001 OK CR 1, 19 P.3d 294, 306, *cert. denied*, __ U.S. __, 122 S.Ct. 371, 151 L.Ed.2d 282 (exclusion of evidence too harsh a remedy where violation is not blatant, willful, or calculated); *Morgan v. District Court of Woodward County*, 1992 OK CR 29, 831 P.2d 1001, 1004-05; *Allen v. District of Washington County*, 1990 OK CR 83, 803 P.2d 1164, 1169, *modified by Richie v. Beasley*, 1992 OK CR 52, 837 P.2d 479.

[3] *See, e.g., Kennedy v. State*, 1992 OK CR 67, 839 P.2d 667, 670.

[4] *Jones v. State*, 1995 OK CR 81, 917 P.2d 976, 978; *McCollough v. State*, 1960 OK CR 105, 360 P.2d 727, 731; 22 O.S.2001, § 303.

the bag during the search was not itself improperly admitted. However, its origin was not relevant to the issue in the case – whether the informant bought the .48 gram baggie from Oglesby in the controlled buy. Evidence of the bag's origin was not part of the *res gestae*. While the bag's discovery was arguably part of the circumstances surrounding the controlled buy, the story of its origin was neither part of the entire transaction, necessary to give jurors a complete picture of events, or central to the chain of events.[5] Any discrepancy between the State's evidence at preliminary hearing and trial was relevant only to the extent that it created an opportunity to impeach a witness, or affected a material fact. While the fact of the .38 gram baggie offered an opportunity for impeaching the police officer, talking about its origin (which the officer only knew through hearsay) was not necessary for impeachment.

Although Oglesby objected,[6] both parties eventually introduced evidence that Oglesby had sold the confidential informant the .38 gram baggie at an earlier time. The State never filed a *Burks*[7] notice on this evidence, and without the evidence mix-up, the trial court would not have admitted the evidence of the .38 gram buy. This evidence of other crimes was prejudicial and irrelevant to any trial issue. The effect of the evidence was to inform the

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[5] *Rogers v. State*, 1995 OK CR 8, 890 P.2d 959, 971, *cert. denied*, 516 U.S. 919, 116 S.Ct. 312, 133 L.Ed.2d 215.

[6] During the informant's direct examination, he said he had been to Oglesby's house before to buy drugs. Oglesby objected on other crimes grounds, and the jury was admonished to disregard the question and answer This cured this particular error. *Miskovsky v. State*, 2001 OK CR 26, 31 P.3d 1054, 1066. This statement was not, as Oglesby argues, an evidentiary harpoon. The statement was not made by a police officer and was in direct response to a question. *Rogers*, 890 P.2d at 972.

[7] *Burks v. State*, 1979 OK CR 10, 594 P.2d 771, *overruled in part on other grounds Jones v. State*, 1989 OK CR 7, 772 P.2d 922.

jury that Oglesby, a middle-aged man with no prior convictions, had supplied the confidential informant with drugs more than one time. Although the prosecutor did not ask for the maximum sentence (or, indeed, any specific term), Oglesby received a sentence of life imprisonment. This sentence is excessive considering the facts and circumstances of the case, particularly the amount of drugs sold (.48 gram). We **MODIFY** Oglesby's sentence to 20 years, with a $20,000 fine.

Decision

The Judgment of the District Court is **AFFIRMED**. The Sentence is **MODIFIED** to twenty (20) years, with a $20,000 fine.

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OPINION BY: CHAPEL, J.
JOHNSON, P.J.: CONCUR
LILE, V.P.J.: CONCUR IN RESULTS
LUMPKIN, J.: DISSENTS
STRUBHAR, J.: CONCUR

LUMPKIN, PRESIDING JUDGE: DISSENTS

I dissent to the modification of the sentence based upon admission of evidence of the .38 gram packet of drugs. The trial court sustained an objection and admonished the prosecutor in opening statement not to discuss where the other packet of drugs came from. However, when the CI testified to the same information, defense counsel raised no objection. Further, defense counsel pursued the same information in his cross-examination of the CI. This Court has repeatedly held that an appellant will not be permitted to profit by an alleged error which he or his counsel in the first instance invited by opening the subject or by their own conduct. *Staggs v. State*, 719 P.2d 1297, 1294 (Okl.Cr. 1986).

Further, the prior purchase by the CI was part of the *res gestae* of the offense as it was logically connected to the crime with which Appellant was charged and it explained how the chain of events transpired and proved a common scheme or plan in identifying Appellant's role as a drug dealer. Accordingly, admission of the other packet of drugs does not provide a reason to modify the sentence.