IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LONNIE WAYNE TATE,	)	
	)	**NOT FOR PUBLICATION**
Appellant,	)	
vs.	)	**Case No. F-2011-460**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

SMITH, JUDGE:

Lonnie Wayne Tate was tried by jury and convicted of Attempting to Elude a Police Officer, in violation of 21 O.S.2001, § 540(A) (Count I); Running a Roadblock, in violation of 21 O.S.2001, § 540(B) (Counts II, IV, and V); and Assault and Battery Upon Police Officer, in violation of 21 O.S.2001, § 649 (Count VI), in the District Court of Washington County, Case No. CF-2010-71. Tate was acquitted of Count III, Running a Roadblock, in violation of 21 O.S.2001, § 540(B). On the same day, the jury also heard and convicted Tate of Obstructing an Officer in violation of 21 O.S.2001, § 540 (Count I); Speeding in Excess of Lawful Maximum Limit in violation of 47 O.S.Supp.2008, § 11-801 (B) (Count II); and Resisting an Officer in violation of 21 O.S.2001, § 268 (Count III), in Washington County District Court Case No. CM-2010-128. In accord with the jury's recommendation in Case No. CF-2010-71, the Honorable Curtis L. DeLapp sentenced Tate to two (2) years imprisonment on Count I; a $1,000 fine on Count II; a $5,000 fine on Count IV; one (1) year imprisonment and a $1,000 fine on Count V; and two (2) years imprisonment on Count VI. Counts I, V, and VI were ordered to run consecutively. Also in accord with the

jury's recommendation in Case No. CM-2010-128, Judge Delapp sentenced Tate to a $250 fine on Count I; a $200 fine on Count II, and a $250 fine on Count III. Tate appeals from these convictions and sentences and raises four propositions of error in support of his appeal.

> I. Because Mr. Tate engaged in a single act of fleeing from police, his conviction for eight separate offenses violated the prohibitions against double jeopardy and double punishment.
> II. The evidence was insufficient to sustain the convictions for Running a Roadblock, as police never established roadblocks in this case.
> III. The State's evidence was insufficient to support Mr. Tate's conviction for Aggravated Attempt to Elude a Police Officer.
> IV. Mr. Tate's conviction for Driving Too Fast for Conditions must be vacated because he was not charged with this offense.

After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we find that in CM-2010-128, Count I and III must be reversed with instructions to dismiss. The sentence on Count II should be modified to conform to the fine set by statute, $35.00. 47 O.S.Supp.2008, § 11-801(G). No other relief is required.

For the first time on appeal, Tate argues that his eight convictions are actually separate punishments for one single act, fleeing the police, in violation of 21 O.S.2011, §11 and the double jeopardy prohibitions. Okla. Const. art. II, § 21; U.S. Const. amend. V, XIV. We review this claim for plain error only. *Logsdon v. State,* 2010 OK CR 7, ¶ 15, 231 P.3d 1156, 1164; 20 O.S.2011, § 3001.1.

Section 11 prohibits prosecution for multiple crimes arising out of one act unless the Legislature clearly intended otherwise. In analyzing claims under Section 11, we focus on the relationship between the crimes. *Davis v. State,* 1999 OK CR 48, ¶¶12-13, 993 P.2d 124, 126-27 (citation omitted). There is no

prohibition against punishing a series of separate and distinct crimes committed during a course of conduct. *Ziegler v. State,* 1980 OK CR 23, ¶¶ 9-10, 610 P.2d 251, 253-54. In analyzing double jeopardy claims, we apply the *Blockburger* test, examining whether each offense requires proof of an additional fact not required by the other. *Watts v. State,* 2008 OK CR 27, ¶ 16, 194 P.3d 133, 138 -139 (*citing Blockburger v. United States,* 248 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932)).

We find, in CM-2010-128, punishment for Count I, Obstructing an Officer, and Count III, Resisting an Officer, violates Section 11. The remaining counts in both cases do not offend Section 11 or principles of double jeopardy. First we conclude that the Obstructing an Officer and Attempting to Elude a Police Officer charges are duplicative, arising from one act: eluding. Once Tate failed to yield to Police Officer Bullen's lights and sirens, Tate was engaging in the act of eluding police. The State attempts to isolate Tate's actions during the course of his flight, when he was forced to stop at the intersection of Frank Phillips Boulevard and Cherokee. Tate's refusal to heed the orders of police to exit his car at that intersection, and then his resumed flight, was a continuation of his act of eluding. Tate did *obstruct* the officers in their attempt to halt his flight, but this act was part and parcel of his ongoing flight. This error was plain and obvious and affected Tate's substantial rights. *Simpson v. State,* 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d 690, 694, 695, 698; 20 O.S.2011, § 3001.1. Because the error resulted in double punishment for one act, we find relief warranted.

Section 11 also bars the punishment of Tate for both the crimes of Resisting an Officer and Felony Assault and Battery Upon Police Officer.[1] When Tate's car was finally disabled, several officers, including Bullen and Shelts, struggled to remove Tate from his car. Tate resisted forcefully. As Bullen tried to gain control of Tate through the driver's side window, Tate grabbed Bullen's arm and tried to pull Bullen toward the car. Shortly thereafter, Tate was pulled out of the passenger side of the car and placed on the ground. Officer Shelts testified that Tate continued to resist arrest as he lay on the ground; kicking and flailing his arms. Shelts moved to restrain Tate's legs and was kicked in the groin area. Through the cooperation of several officers, Tate was soon handcuffed. The kicking of Shelts was part and parcel of the conduct that supported the Resisting an Officer charge. Punishing Tate for both crimes violates Section 11. *See Ajeani v. State,* 1980 OK CR 29, ¶¶ 5-7, 610 P.2d 820, 823 (dismissing assault charge where the same conduct supported both resisting and assault charges). We further find that this error was plain and obvious and affected Tate's substantial rights. *Simpson v. State,* 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d at 694, 695, 698; 20 O.S.2011, § 3001.1.

We reject Tate's claim that Section 11 is violated by the punishment of both Assault and Battery Upon Police Officer and Attempting to Elude a Police Officer. At most, they are "separate crimes which [are] only tangentially relate[d] to one or more crimes committed during a continuing course of conduct." *Davis,* 1999 OK

[1] Resistance to Executive Officer's Performance of Duty, 21 O.S.2001, § 268, provides: "Every person who knowingly resists, by the use of force or violence, any executive officer in the performance of his duty, is guilty of a misdemeanor." Assault and Battery Upon Police Officer, 21 O.S.2001, § 649, provides, in pertinent part: "Every person who, without justifiable or excusable cause knowingly commits battery or assault and battery upon the person of a police officer . . . in the performance of his duties, upon conviction, shall be guilty of a felony . . . ."

CR 48, ¶13, 993 P.2d at 127. When Tate's car was disabled, the flight was over. The exercise of force against officers to resist the arrest was a separate act. There is no plain error. Nor is punishing Tate for both Attempting to Elude a Police Officer and Assault and Battery Upon Police Officer a violation of double jeopardy. Assault and battery requires a battery. Eluding requires that defendant receive a visual or audible warning to stop. *Watts,* 2008 OK CR 27, ¶ 16, 194 P.3d at 138 -139; *Blockburger,* 248 U.S. at 304, 52 S.Ct. at 182, 76 L.Ed. 306. There is no plain error.

Finally, Tate argues that the acts of speeding and running roadblocks were not distinct from the act of eluding, and therefore punishment for each offense violates Section 11. Because Tate was speeding prior to his attempt to elude the police, Speeding is rightfully charged and punished separately. There is no plain error. The Legislature clearly intended Running a Roadblock to be a separate crime. *See* 21 O.S.2001, § 540B - Roadblocks (emphasis added) ("Any operator of a motor vehicle approaching such roadblock has a duty to stop at the roadblock . . . . *and the willful violation hereof shall constitute a separate offense from any other offense committed.").* It is within the province of the Legislature to ensure that this offense is punished as a separate crime. *Davis,* 1999 OK CR 48, ¶13, 993 P.2d at 126-27. There is no plain error.

Nor is there a double jeopardy violation as a result of Tate's conviction for Attempting to Elude a Police Officer, Running a Roadblock and Speeding. Felony eluding requires that Tate put others in danger by his actions. Running a Roadblock requires the establishment of a roadblock. Speeding requires

acceleration above the posted speed limit. *Watts*, 2008 OK CR 27, ¶ 16, 194 P.3d at 138 -139; *Blockburger*, 248 U.S. at 304, 52 S.Ct. at 182, 76 L.Ed. 306. There is no plain error.

Thus, Proposition I is denied in part and granted in part. Count I, Obstructing an Officer, and Count III, Resisting an Officer, in Case No. CM-2010-128, must be dismissed because punishment for these acts violates Section 11. 21 O.S.2011, §11. The errors were plain and affected Tate's substantial rights. *Simpson v. State*, 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d at 694, 695, 698; 20 O.S.2011, § 3001.1. The remaining counts in both cases do not violate Section 11 or principles of double jeopardy. 21 O.S.2011, §11; Okla. Const. art. II, § 21; U.S. Const. amend. V, XIV.

In Proposition II, Tate challenges the sufficiency of the evidence supporting the three counts of Running a Roadblock. The elements of Running a Roadblock are: 1) A driver of a motor vehicle; 2) While attempting to elude the officer; 3) Willfully fails to stop at a roadblock or passes by or through such roadblock without receiving permission from a peace officer in attendance thereto. 21 O.S.2001, § 540B. A roadblock is "a barricade, sign, standing motor vehicle, or similar obstacle temporarily placed upon or adjacent to a public street . . . with one or more peace officers in attendance thereof directing each operator of approaching motor vehicles to stop or proceed." *Id.*

Tate argues that the roadblock was legally insufficient because no officer stood on the road directing traffic. We disagree. In each roadblock, a manned patrol car was in the road, partially obstructing the traffic flow, with lights and

sirens activated. To require police to stand on the road, directing traffic, during the course of a high speed chase would be to place police in grave and unnecessary danger. Viewing the evidence in the light most favorable to the State and accepting all inferences that support the verdict, we find sufficient evidence for a rational jury to convict Tate of three counts of Running a Roadblock. *Warner v. State,* 2006 OK CR 40, ¶ 35, 144 P.3d 838, 863; *Spuehler v. State,* 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04. This Proposition is denied.

In Proposition III, Tate argues that there was insufficient evidence to support his felony conviction for Attempting to Elude a Police Officer.[2] Specifically, Tate claims that there was no evidence that anyone was actually endangered by his actions. Tate's claim, however, minimizes the evidence supporting the verdict and fails to recognize the seriousness of his actions. Viewing the evidence in the light most favorable to the State, we find that there is ample, competent evidence to support the conclusion of the jury that officers and/or other drivers were endangered by Tate's actions. *Warner,* 2006 OK CR 40, ¶ 35, 144 P.3d at 863 *Spuehler,* 1985 OK CR 132, ¶ 7, 709 P.2d at 203-04. This Proposition is denied.

Finally, in Proposition IV, Tate argues that he was not properly charged and the jury was not properly instructed on Count II of CM-2010-128, Speeding in Excess of Lawful Maximum Limit, 47 O.S.Supp.2008, § 11-801(B). Tate argues two infirmities in his conviction. First, the State never alleged how fast Tate was traveling, as it is required to do pursuant to 47 O.S.2001, § 11-807. Tate did not object to this failure at trial, so we review for plain error. 20 O.S.2001, § 3001.1.

[2] Tate refers to the offense of Aggravated Attempt to Elude a Police Officer.

Tate does raise an actual, obvious error. He cannot, however, demonstrate that the error affected his substantial rights because Tate had notice of the alleged speeding violation in discovery, specifically the affidavit of arrest. There is no plain error.[3] *Simpson v. State*, 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d at 694, 695, 698; 20 O.S.2011, § 3001.1.

Second, Tate argues that the trial court erroneously instructed the jury that Speeding in Excess of Lawful Maximum Limit carried a fine of not less than $10 or more than $200. The State concedes that 47 O.S.Supp.2008, § 11-801(G) dictates the fine for any person convicted of speeding up to 20 miles over the speed limit is $35.00. *Id.* Tate was fined $200.00. We modify that fine, to $35.00.[4]

DECISION

The Judgment and Sentence of the District Court of Washington County is **AFFIRMED** in part and **REVERSED** in part. Tate's **CONVICTIONS** and **SENTENCES** in Case No. CF-2010-71 are hereby **AFFIRMED**. In Case No. CM-2010-128, Tate's convictions for Obstructing an Officer (Count I) and Resisting an Officer (Count III) are **REVERSED AND REMANDED** to the trial court with instructions to **DISMISS**. Tate's conviction for Speeding in Excess of Lawful Maximum Limit (Count II) is **AFFIRMED**, but the fine is **MODIFIED** to $35.00.

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[3] The State's argument that it is not obligated to specify the actual speed driven because 47 O.S.2001, § 11-807 only applies to civil actions, is not correct. The title of Section 11-807 is "Charging Violations and Rule in Civil Actions." The substance of the statute deals with: 1) charging civil and criminal violations; 2) clarifying that the maximum speed limitations established in Chapter 11, Article 8 do not impact the burden of plaintiffs in civil actions; and 3) establishing that unless otherwise provided, the penalty for violating provisions of Sections 11-801 to 11-806 is a misdemeanor.

[4] Tate contends we should modify the fine to ten dollars because the complaint failed to allege how fast Tate drove. We reject this argument because Tate had notice of the details of the alleged speeding infraction through discovery.

Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF WASHINGTON COUNTY
THE HONORABLE CURTIS L. DELAPP, DISTRICT JUDGE

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OPINION BY: SMITH, J.
A. JOHNSON, P.J.: Concur
LEWIS, V.P.J.: Concur
LUMPKIN, J.: Concur in Part and Dissent in Part
C. JOHNSON, J.: Concur

LUMPKIN, JUDGE: CONCURING IN PART/DISSENTING IN PART

I concur in the Court's decision to affirm the judgment and sentence in Case No. CF-2010-71, and modify the sentence in Count II in Case No. 2010-128. However I dissent to the reversal of Counts I and III in Case No. CM-2010-128.

First, I note that the Opinion fails to properly apply plain error review in Propositions I and IV. The review of a claim for plain error does not consist of announcing plain error review and then examining the merits of a claim or the associated prejudice. Instead, this Court reviews for plain error under the analysis set forth in *Hogan v. State*, 2006 OK CR 19, 139 P.3d 907.

> 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., 2006 OK CR 19, ¶ 38, 139 P.3d at 923 (*citing Simpson v. State*, 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d 690, 694, 695, 698; 20 O.S.2001, § 3001.1.). Only if the appellant shows all three elements will the Court review the error on appeal. *Id.*; *Simpson*, 1994 OK CR 40, ¶¶ 12, 30, 876 P.2d at 695, 701.

As to Proposition I, the Court must first determine whether Appellant has shown the existence of an actual error. *Id.*, 2006 OK CR 19, ¶ 39, 139 P.3d at 923. Because plain error is not a separate basis of appellate review, the Court turns to the rule of law applicable to the particular claim to make this determination. *See Hogan*, 2006 OK CR 19, ¶ 39, 139 P.3d at 923 (reviewing

settled law regarding jury instructions in assessing whether an actual error occurred); *Simpson*, 1994 OK CR 40, ¶ 30, 876 P.2d at 701 (finding that plain error is not a separate basis for appellate relief).

The Opinion determines that Appellant's acts constituted "resumed flight." However, this Court has not recognized the doctrine of "resumed flight." Instead,

> The proper analysis of a claim raised under Section 11 is then to focus on the relationship between the crimes. If the crimes truly arise out of one act. . . then Section 11 prohibits prosecution for more than one crime. One act that violates two criminal provisions cannot be punished twice, absent specific legislative intent. This analysis does not bar the charging and conviction of separate crimes which may only tangentially relate to one or more crimes committed during a continuing course of conduct.

Davis v. State, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126-27. "[W]here there are a series of separate and distinct crimes, Section 11 is not violated." *Id.*, 1999 OK CR 48, ¶ 12, 993 P.2d at 126; *citing Ziegler v. State*, 1980 OK CR 23, ¶ 10, 610 P.2d 251, 254.

Appellant has not shown existence of an actual error. The offense of Attempting to Elude a Police Officer was complete when Appellant was forced to stop at the intersection of Frank Phillips Boulevard and Cherokee. As such, Appellant's act of obstructing the officers at the intersection was a separate and distinct crime.

The offenses of Resisting an Officer and Battery Upon a Police Officer were separate and distinct in the present case. The misdemeanor Information charged Appellant with Resisting an Officer "by obstructing Bartlesville Police

Officers by knowingly resisting and struggling with officers, including Officer Chris Bullen, who were making a lawful arrest." (O.R. II, 1). In contrast, the felony Information charged Appellant with Assault and Battery Upon Police Officer, "by willfully and unlawfully kicking Bartlesville Police Department Officer Michael Shelts in the groin with his foot...." (O.R. I, 2). Although the evidence at trial reveals that Officer Shelts was assisting Office Bullen when Appellant resisted Bullen's attempt to make the lawful arrest, the two offenses were separate and distinct acts. Each offense involved a separate officer. *See Logsdon v. State*, 2010 OK CR 7, ¶ 18, 231 P.3d 1156, 1165 (finding that the crimes of forgery and fraudulently selling securities were separate and distinct acts each involving separate victims); *Kinchion v. State*, 2003 OK CR 28, ¶ 11, 81 P.3d 681, 685 (finding that offenses were separate and distinct acts, in part, because each involved different victims). Officer Bullen was the subject of the offense of Resisting an Officer, whereas, Officer Shelts was the victim of the offense of Assault and Battery Upon a Police Officer.

As Appellant has not proven the existence of an actual error in Proposition I, then plain error did not occur. *See Hogan*, 2006 OK CR 19, ¶ 44, 139 P.3d at 925.

As to Proposition IV, the Opinion erroneously determines there was an actual and obvious error in the charging of the offense of Speeding in Excess of Lawful Maximum Limit. The Court must first determine whether Appellant has shown the existence of an actual error. The standard to determine whether an appellate received constitutionally sufficient notice of the charge is not whether

the State failed to allege an element that it is required to allege. To the contrary, this Court has explicitly rejected the bright-line elements pleading rule. *Parker v. State*, 1996 OK CR 19, ¶¶ 23-24, 917 P.2d 980, 986. Instead, the test is:

> whether the Information gives the defendant notice of the charges against him and apprises him of what he must defend against at trial. This determination will be made on a case-by-case basis in each appeal where the issue is raised. This Court will look to the "four corners" of the Information together with all material that was made available to a defendant at preliminary hearing or through discovery to determine whether the defendant received notice to satisfy due process requirements.

Id. As noted in the Opinion, Appellant had notice of the alleged speeding violation in discovery. Thus, Appellant has not proven the existence of an actual error and plain error did not occur. *See Hogan,* 2006 OK CR 19, ¶ 44, 139 P.3d at 925.