IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RICCO DANTE WALTERS,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**No. F-2014-870**
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

HUDSON, JUDGE:

Appellant Ricco Dante Walters was tried by jury and convicted in Cherokee County District Court, Case No. CF-2013-392, of the following crimes:

Count 1: Possession of a Sawed-Off Shotgun, in violation of 21 O.S.2011, § 1289.18;
Count 3:[1] Possession of Drug Paraphernalia, in violation of 63 O.S.2011, § 2-405;
Count 4: Possession of Firearm After Former Felony Conviction, in violation of 21 O.S.Supp.2012, § 1283(A);

The jury recommended the following sentences:

Count 1: Twenty (20) years imprisonment;
Count 3: One (1) year in the county jail;
Count 4: Ten (10) years imprisonment;

The jury's sentencing determination on Count 1 was made after finding the existence of two prior felony convictions for purposes of sentence enhancement. The jury's sentence on Count 4 was made after finding the existence of one prior felony conviction for purposes of sentence enhancement.

[1]The jury acquitted Appellant on Count 2: Possession of Controlled Dangerous Substance.

The Honorable Darrell G. Shepherd, District Judge, sentenced Walters in accordance with the jury's verdicts and ordered the sentences on all three counts to run concurrently. Walters now appeals.

Appellant alleges three propositions of error on appeal:

I. APPELLANT WAS DEPRIVED OF A FAIR TRIAL BY THE INTRODUCTION OF OTHER CRIMES EVIDENCE;

II. THE INTRODUCTION OF EVIDENCE THAT APPELLANT'S DEFERRED SENTENCE HAD BEEN ACCELERATED DEPRIVED APPELLANT OF A FAIR TRIAL AND CONSTITUTED FUNDAMENTAL ERROR; and

III. APPELLANT'S CONVICTION FOR BOTH POSSESSION OF A SAWED-OFF SHOTGUN AND POSSESSION OF THE SAME SHOTGUN AFTER FORMER CONVICTION OF A FELONY VIOLATED THE PROTECTIONS AGAINST DOUBLE JEOPARDY AND DOUBLE PUNISHMENT.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we find that Appellant's convictions and sentences in both Count 1 for Possession of a Sawed-Off Shotgun and Count 3 for Possession of Drug Paraphernalia are **AFFIRMED**. However, the conviction and sentence in Count 4 for Possession of Firearm After Former Felony Conviction must be **REVERSED WITH INSTRUCTIONS TO DISMISS**. Further, the Judgment and Sentence must be corrected as discussed herein.

1.

Appellant argues that he was denied a fair trial through the introduction of alleged other crimes evidence. Appellant specifically attacks the prosecutor's elicitation of testimony at trial concerning the various social security numbers

reflected on Appellant's county jail booking sheet and on judgment and sentence documents and other proof introduced to prove up his prior felony convictions.

Appellant either did not object to the testimony he now challenges in Proposition I or objected on grounds different than that now offered, thus waiving all but plain error review. *Barnard v. State*, 2012 OK CR 15, ¶ 13, 290 P.3d 759, 764; *Al-Mosawi v. State*, 1996 OK CR 59, ¶ 22, 929 P.2d 270, 278. To be entitled to relief for plain error, a defendant must show: (1) the existence of an actual error; (2) that the error is plain or obvious; and (3) that the error affected his substantial rights, meaning that the error affected the outcome of the proceeding. *Barnard*, 2012 OK CR 15, ¶ 13, 290 P.3d at 764.

"This Court reviews the decision of the trial court regarding the admissibility of evidence for an abuse of discretion." *Owens v. State*, 2010 OK CR 1, ¶ 12, 229 P.3d 1261, 1266. The prosecutor's cross-examination of both jailer Terrell Girder and Appellant concerning the two social security numbers listed on Appellant's booking sheet does not amount to error, let alone plain error. The prosecutor elicited this testimony to corroborate the account by Investigators Justin Hackworth and James Brown of why they searched the blue bag in the absence of Appellant producing photo identification.

This testimony was probative and not unfairly prejudicial and was elicited in response to defense counsel's attack on the investigators' credibility concerning the reason they were insistent on finding a photo ID. "It is a well established rule of law in this State that a defendant may not 'open the door' to

certain collateral matters and complain on appeal that the State has committed error by entering into such matters." *Battles v. State*, 1973 OK CR 370, ¶ 14, 513 P.2d 1314, 1317. There was no abuse of discretion from this testimony and thus no error, plain or otherwise. *Cf. Luker v. State*, 1972 OK CR 360, ¶ 12, 504 P.2d 1238, 1240-41 (defense attorney first opened the door to possible link between himself and another crime on cross-examination of State's witnesses about the circumstances which led to securing a search warrant for defendant's office; thus, no error from this invited reference to evidence indicating defendant may have been involved in another crime).

Additionally, the challenged testimony during Stages 2 and 3 of the trial from Jason Adams, Investigator James Brown and Anita Hendrix was relevant to prove Appellant's prior felony convictions and was properly admitted. *See Battenfield v. State*, 1991 OK CR 99, ¶ 9, 826 P.2d 612, 614; *Cooper v. State*, 1991 OK CR 54, ¶ 8, 810 P.2d 1303, 1306. Thus, the trial court did not abuse its discretion in admitting this testimony and there is no error, let alone plain error, warranting relief. Proposition I is denied.

2.

Appellant alleges that the admission of State's Exhibit 12—the Cherokee County judgment and sentence offered during Stage 3 for sentence enhancement—deprived him of a fair trial because it contained information that Appellant's original conviction in the case was a deferred sentence that had been accelerated to become a suspended sentence in July 2008. Appellant concedes that he did not object to State's Exhibit 12 on this ground at trial. He

has therefore waived review of all but plain error on appeal. *Barnard*, 2012 OK CR 15, ¶ 13, 290 P.3d at 764.

Assuming without deciding that error occurred from the failure to redact this information in State's Exhibit 12, Appellant fails to show the error affected his substantial rights, meaning that the error affected the outcome of the proceeding. *Barnard*, 2012 OK CR 15, ¶ 13, 290 P.3d at 764. The State aptly notes that even if the jury assumed Appellant had committed some crime warranting acceleration of his deferred sentence in the summer of 2008, the jury would likely assume it was based on Appellant's prior felony conviction in Tulsa County Case No. CF-2007-4758 which was introduced as State's Exhibit 10 and shows that conviction was entered on February 19, 2008. Hence, there is no prejudice to Appellant's substantial rights as he was not deprived of a fundamentally fair trial considering the total circumstances. Appellant therefore fails to show plain error and relief is denied for Proposition II.

3.

Appellant alleges that his Count 1 conviction for Possession of a Sawed-Off Shotgun and his Count 4 conviction for Possession of Firearm After Former Felony Conviction violate the Oklahoma prohibition against double punishment set forth in 21 O.S.2011, § 11. We agree. Title 21, O.S.2011, § 11 provides in pertinent part:

> [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.

In *Sanders v. State*, 2015 OK CR 11, 358 P.3d 280, we held:

> The proper analysis of a Section 11 claim focuses on the relationship between the crimes. *Barnard v. State*, 2012 OK CR 15, ¶ 27, 290 P.3d 759, 767; *Davis v. State*, 1999 OK CR 48, ¶ 13, 993 P.3d 124, 126. If 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. If the offenses at issue are separate and distinct, requiring dissimilar proof, Oklahoma's statutory ban on "double punishment" is not violated. *Littlejohn v. State*, 2008 OK CR 12, ¶ 16, 181 P.3d 736, 742. Thus, it is first necessary to examine the relationship between the two crimes to determine whether they constitute a single act. *Barnard*, 2012 OK CR 15, ¶ 27, 290 P.3d at 767.

Sanders, 2015 OK CR 11, ¶ 6, 358 P.3d at 283. "Where there is a series of separate and distinct crimes, . . . Section 11 is not violated." *Logsdon v. State*, 2010 OK CR 7, ¶ 17, 231 P.3d 1156, 1165 (citing *Davis*, 1999 OK CR 48, ¶ 12, 993 P.2d at 126).

The factors to be considered in a double-punishment analysis under § 11 are: 1) the particular facts of each case; 2) whether those facts set out separate and distinct crimes; and 3) the intent of the Legislature. *Sanders*, 2015 OK CR 11, ¶ 8, 358 P.3d at 284. "While the crime of felon in possession is complete upon a convicted felon being in possession, either personally or constructively, of a weapon the individual's further actions dictate whether additional criminal charges may arise from those acts." *Id.* (internal citation omitted).

In explaining its decision to run Appellant's sentences for Counts 1 and 4 concurrently, the trial court stated at formal sentencing that "the two weapons charges are essentially one act." (S. Tr. 8). On appeal, the State concedes that the factual basis for Appellant's convictions on Counts 1 and 4 were based on the same act, i.e., possession by Appellant, a convicted felon, of a single sawed-off shotgun found by Investigators Hackworth and Brown in the blue bag on September 19, 2013. The State argues, however, that 21 O.S.Supp.2012, § 1283 embodies a clear legislative intent that the crime of felonious possession of a firearm may be punished along with other crimes arising from the same act of firearms possession such as possession of a sawed-off shotgun under § 1289.18.

There is no doubt that the Oklahoma Legislature intended for a violation of § 1283(A) to serve as a stand-alone crime regardless of whether a felon in possession of a firearm actually used it to facilitate a new crime. However, that does not represent express legislative intent that a defendant may be convicted of felonious possession of a firearm under § 1283(A) along with another offense arising incidentally from a single act of firearms possession. Here, review of §§ 1283 and 1289.18 reveals no such express legislative intent authorizing Appellant's convictions on Counts 1 and 4.

In *Sanders*, we found a § 11 violation based on the defendant's convictions for both felonious possession of a firearm and knowingly concealing stolen property. These two convictions were based on the single act of Sanders, a convicted felon, possessing a Glock 17C found by sheriff's deputies

on the kitchen table of a house he occupied. *Sanders*, 2015 OK CR 11, ¶¶ 9-11, 358 P.3d at 284.

As in *Sanders*, the record evidence in the present case shows that the same weapon was used to support Appellant's convictions on Counts 1 and 4. There was no temporal break between the two offenses. Appellant's single act of possessing the sawed-off shotgun in the blue bag improperly resulted in two charges and resulting convictions. Appellant's Proposition III double punishment claim is therefore meritorious; the trial court abused its discretion in denying relief for this claim and we reverse and remand Appellant's Count 4 conviction with instructions to dismiss. *Sanders*, 2015 OK CR 11, ¶ 12, 358 P.3d at 284. Based upon this conclusion, we need not address Appellant's related double jeopardy claim. *Id.*

4.

Finally, the written judgment and sentence filed in this case erroneously shows Appellant was convicted of Count 1: Possession of a Firearm After Former Felony Conviction; Count 2: Possession of Sawed-Off Shotgun; and Count 3: Possession of Controlled Dangerous Substance. The trial court is therefore ordered to correct the judgment and sentence *nunc pro tunc* to reflect the jury's actual verdicts and the trial court's pronouncement of sentence. This includes Appellant's conviction in Count 1 for Possession of a Sawed-Off Shotgun, his acquittal in Count 2 for Possession of a Controlled Dangerous Substance and his conviction in Count 3 for Possession of Drug Paraphernalia.

DECISION

The Judgment and Sentence in both Count 1 for Possession of a Sawed-Off Shotgun and Count 3 for Possession of Drug Paraphernalia are **AFFIRMED**. The Judgment and Sentence in Count 4 for Possession of Firearm After Former Felony Conviction is **REVERSED WITH INSTRUCTIONS TO DISMISS**. The trial court is **FURTHER ORDERED** to correct the Judgment and Sentence *nunc pro tunc* to reflect the jury's actual verdicts and the trial court's pronouncement of sentence as discussed in Section 4 of this summary opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CHEROKEE COUNTY
THE HONORABLE DARRELL G. SHEPHERD, DISTRICT JUDGE

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SMITH, P.J.: CONCUR
LUMPKIN, V.P.J.: CONCUR
JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR