IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

WALTER DEWITT WATSON,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. F-2007-638
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

A. JOHNSON, VICE PRESIDING JUDGE:

Walter Dewitt Watson, Appellant, was tried by jury in the District Court of Washington County, Case Nos. CF-2006-257 and CM-2006-566. The jury returned guilty verdicts and sentences as follows:

CF-2006-257

Count 1: Trafficking in Illegal Drugs (Methamphetamine), in violation of 63 O.S.Supp.2004, § 2-415
Sentence: Forty years imprisonment

Count 2: Trafficking in Illegal Drugs (Cocaine), in violation of 63 O.S.Supp.2004, § 2-415
Sentence: Fifty years imprisonment

Count 3: Possession of a Firearm during Commission of a Felony, in violation of 21 O.S.Supp.2006, § 1287
Sentence: Ten years imprisonment

Count 4: Possession of a Sawed-off Shotgun/Rifle, in violation of 21 O.S.2001, § 1289.18
Sentence: Two years imprisonment

Count 5: Unlawful Use of Police Radio, in violation of 21 O.S.2001, § 1214
Sentence: Three years imprisonment

Count 6: Knowingly Concealing Stolen Property, in violation of 21 O.S.2001, § 1713
Sentence: Time Served in Jail

CM-2006-566

Count 1: Possession of Drug Paraphernalia, in violation of 63 O.S.Supp.2004, § 2-405
Sentence: Fine and costs

Count 2: Possession of Controlled Dangerous Substance (Marijuana), in violation of 63 O.S.Supp.2004, § 2-402
Sentence: Fine and costs

The Honorable Curtis L. DeLapp, who presided at trial, sentenced Watson accordingly and ordered the sentences be served consecutively. In addition to the terms of imprisonment imposed by the jury, Judge De Lapp imposed fines as follows:

CF-2006-257

Count 1: Trafficking in Illegal Drugs (Methamphetamine), in violation of 63 O.S.Supp.2004, § 2-415
Fine: $25,000

Count 2: Trafficking in Illegal Drugs (Cocaine), in violation of 63 O.S.Supp.2004, § 2-415
Fine: $25,000

Count 3: Possession of a Firearm during Commission of a Felony, in violation of 21 O.S.Supp.2006, § 1287
Fine: $500

Count 4: Possession of a Sawed-off Shotgun/Rifle, in violation of 21 O.S.2001, § 1289.18
Fine: $500

Count 5: Unlawful Use of Police Radio, in violation of 21 O.S.2001, § 1214
Fine: $500

From this judgment and sentence, Watson appeals raising the following issues:

(1) whether the search warrant executed at his home was valid;

(2) whether his separate convictions for trafficking in illegal drugs and firearms possession violated constitutional prohibitions against double jeopardy and statutory prohibitions against multiple punishments for the same offense;

(3) whether the introduction of other crimes evidence deprived him of a fair trial;

(4) whether prosecutorial misconduct deprived him of a fair trial;

(5) whether he was deprived of effective assistance of counsel;

(6) whether the felony information was defective and deprived him of notice of the charges against him and prejudiced his ability to present a defense;

(7) whether the decision of the trial court to impose consecutive sentences was an abuse of discretion resulting in excessive punishment;

(8) whether his conviction for possession of a firearm during commission of a felony should be reversed because the statute, as instructed, was unconstitutionally vague and overbroad;

(9) whether the evidence was sufficient to prove the police scanner was a "mobile" radio as required by statute;

(10) whether it was error for the trial court to impose a fine on those counts for which the jury imposed sentence, but no fine;

(11) whether cumulative error deprived him of a fair trial.

For the reasons set out below, we reverse the convictions on Counts 1 and 4; modify the sentences for Counts 2 and 3; and rescind the fines on Counts 3 and 5.

1.

The facts alleged in the search warrant application affidavit were sufficient for the magistrate to make a practical common sense determination that there was a fair probability that illegal drugs would be found at Watson's

residence. *Griffith v. State*, 1987 OK CR 42, ¶ 4, 734 P.2d 1301, 1302; *Tosh v. State*, 1987 OK CR 73, ¶ 5, n.1, 736 P.2d 527, 529. Furthermore, the information in the search warrant affidavit was not stale. The facts alleged in the affidavit suggested that the illegal drug activity at Watson's home was continuous over a period of months. Consequently, the affidavit provided the magistrate with a substantial basis for concluding that a fair probability existed that illegal controlled substances would be found at the time of the search, even though the search warrant was executed sixteen days after a confidential informant cited in the affidavit reported a drug sale at the residence. *See Gregg v. State*, 1992 OK CR 82, ¶ 15, 844 P.2d 867, 874 ("where the affidavit properly recites facts indicating activity of a protracted and continuous nature . . . the passage of time becomes less significant"); *Tosh v. State*, 1987 OK CR 73, ¶ 10, 736 P.2d 527, 529 (affirming validity of search warrant against staleness challenge where warrant sought evidence of ongoing criminal activity and was based on information that defendant sold marijuana three weeks earlier).

2.

Watson's separate convictions in Counts 1 and 2 for Trafficking in Illegal Drugs by possessing trafficking quantities of methamphetamine and cocaine at the same time constitutes multiple punishment for a single criminal act in violation of 21 O.S.2001, § 11. *Lewis v. State*, 2006 OK CR 48, ¶ 10, 150 P.3d 1060, 1063. The conviction on Count 1 must be reversed as plain error.

Additionally, because Watson's conviction for possession of the sawed-off shotgun (Count 4) was based on the same possessory act as his conviction for possessing the shotgun (and several other firearms) during the commission of a felony (Count 3), the convictions with regard to the shotgun were not based on separate and distinct criminal acts. The convictions for Counts 3 and 4, therefore, constitute impermissible multiple punishment. *Cf. Davis v. State*, 1999 OK CR 48, ¶¶ 12-13, 993 P.2d 124, 126-127 ("[w]here the defendant commits a series of separate and distinct crimes, section 11 is not violated"). The conviction on Count 4 is reversed as plain error.

With regard to Counts 3 and 6, Watson's conviction for concealing stolen property (i.e., a .40 caliber Ruger handgun) (Count 6) is punishment for an unlawful act of concealing, whereas his conviction for possession of that same handgun while committing a felony (Count 3) is punishment for an unlawful act of possession. These are two separate and distinct acts. Because the crimes are separate and distinct, convictions on these two counts do not violate 21 O.S. § 11. *Id.* There is no plain error. *See Hogan v. State*, 2006 OK CR 19, ¶ 39, 139 P.3d 907, 923 (finding of plain error first requires showing of error). Furthermore, because Count 6 required proof that the handgun was stolen, and because Count 3 required proof that the handgun was in Watson's possession while he trafficked in illegal drugs, each offense required proof of an element not contained in the other. Consequently, there is no constitutional double jeopardy violation and thus, no plain error. *Davis v. State*, 1999 OK CR

48, ¶ 4, 993 P.2d 124, 125 (citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed.306, 309 (1932)).

3.

The jury could reasonably infer from the firearms, night vision device, police radio, and quantities and denominations of cash found hidden in his closet, that Watson was a drug dealer. The jury could therefore conclude that he knowingly possessed the charged trafficking quantities of illegal drugs. *Cf. Leech*, 2003 OK CR 4, ¶ 3, 66 P.3d at 989 (finding that evidence of defendant's conversation with informant in which they discussed drug quantity and drug-dealing purpose of possession was relevant and necessary evidence to show knowing possession of trafficking quantity). Because this evidence supported an inference that Watson was knowingly dealing in illegal drugs, it was relevant to the charged trafficking offenses and was not evidence of some uncharged "other crime." The evidence was therefore properly admitted,[1] and admission of the evidence was not error.[2]

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[1] Count 5 charged Watson with unlawful use of a police radio in violation of 21 O.S.2001, § 1214. Thus, the police radio was directly relevant to Count 5, in addition to being relevant to Counts 1 and 2 (the trafficking counts) as evidence of knowing possession of trafficking quantities of illegal drugs.

[2] The State points out that Watson testified at trial and attempted to persuade the jury that he was not trafficking in drugs, but that he kept the drugs for his own personal use. In light of this defense, the evidence of firearms, night vision devices, police radio, and large amounts of cash, and the officers' testimony as to how these items were associated with drug trafficking

4.

a.

Watson testified, and defense counsel argued in closing, that most of the drugs Watson possessed were for his own use and that he only sold small quantities of drugs to pay for his own drug habit. Because the scope of Watson's drug dealing was put at issue by this testimony and by defense counsel's argument, evidence of the scope of those dealings was relevant to the charged offenses. The extent of Watson's drug dealing was, therefore, the proper subject of comment by the prosecutor. *See Van White v. State*, 1999 OK CR 10, ¶ 68, 990 P.2d 253, 271 ("[C]ounsel for both the State and the defense have the right to fully discuss the evidence from their standpoint, and any inferences or deductions arising from that evidence. The prosecution is entitled to make reasonable comments on interpretation of the evidence").

b.

The State concedes, and we agree, that the prosecutor's closing argument misstated Watson's testimony about his reason for keeping a sawed-off shotgun near his bed. With regard to the jury's findings of guilt, however, the error was harmless. Given the overwhelming evidence of guilt it is unlikely the jury's verdicts would have been different had the prosecutor not misstated Watson's testimony. *See Wood v. State*, 2007 OK CR 17, ¶ 10, 158 P.3d 467, 473 (holding that under plain error review, defendant must show, among other things, that result of proceeding would be different).

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enterprises became especially probative as evidence supporting an inference of knowing

Nevertheless, we cannot conclude that the misstatement had no effect on the punishment imposed by the jury. The jury indicated a desire to review Watson's exact words about something when it requested a transcript of his testimony, a request that was denied by the judge. Additionally, the jury imposed the maximum statutory sentences on the firearms counts and its forty and fifty year sentences on the trafficking counts were functionally equivalent to the maximum term of life imprisonment available for each of those counts. Under these circumstances, it is not possible to conclude with any degree of confidence that absent the prosecutor's misstatement of Watson's testimony, the jury would have returned the same sentences on these two counts. Accordingly, Watson's sentences are modified as follows:

Count	Offense	Sentence
2	Trafficking in Illegal Drugs	20 years
3	Possession of Firearm During Commission of Felony	2 years

c.

The prosecutor did not use the improper societal alarm argument. None of the statements cited by Watson as raising this argument mentions crimes committed by other persons. Nor do any of the statements urge the jury to make an example out of him to deter other criminals. *See McElmurry v. State*, 2002 OK CR 40, ¶ 151 60 P.3d 4, 35. Additionally, this Court has never held, as Watson suggests, that it is error for a prosecutor to argue that a defendant

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possession of trafficking quantities of illegal drugs.

should be punished to prevent the defendant from committing future crimes; rather, this Court has held that it is improper for a prosecutor to punish a defendant to prevent future crimes by other persons. *Sier v. State*, 1973, OK CR 452, ¶ 7, 517 P.2d 803, 805. The argument to Watson's jury was not improper.

d.

The prosecutor did not shift the burden of proof to Watson by arguing that Watson could have called his girlfriend as a witness to explain why there was no personal-use drug paraphernalia in the house other than rolling papers. Watson's girlfriend could have provided material defense testimony about Watson's personal use of drugs and the State's comment concerning her missing testimony was fair comment on the evidence. See *Pickens v. State*, 2001 OK CR 3, ¶ 39, 19 P.3d 866, 880 (holding that comments on defendant's access to evidence and witnesses are permissible); *Carol v. State*, 1988 OK CR 114, ¶ 12, 756 P.2d 614, 617 ("It is the general rule that where a person may be a material witness in a defendant's behalf and he is not placed upon the stand by the accused nor his absence accounted for, failure to produce him as a witness is a legitimate comment in the argument of the State").

e.

The prosecutor did not improperly argue that Watson should be punished for exercising his right to a jury trial. While the prosecutor did note in passing that Watson opted for a jury trial, it was not done in such a way as to suggest that Watson was doing something not authorized by law when he

requested a jury trial. *See e.g., Littke v. State*, 1953 OK CR 81, 258 P2d 211, 214 (finding improper argument where prosecutor argued that in another case a bootlegger had entered a guilty plea and was serving his time in jail and suggesting by inference that defendant was a bootlegger and did something not authorized by law when she requested jury trial).

5.

Counsel was not ineffective for failing to object to what Watson characterizes as inadmissible other crimes evidence and improper argument based on that evidence. *See Short v. State*, 1999 OK CR 15, ¶ 85, 980 P.2d 1081, 1106 (holding that counsel is not ineffective for failing to raise objections that would have been properly overruled). Additionally, counsel was not ineffective for not raising and preserving the issue of the inadequacy of the search warrant for staleness and lack of probable cause. The record shows that trial counsel moved to quash the search warrant on these grounds and that counsel renewed his objection to the search warrant and the evidence seized under it at the beginning of trial. Furthermore, because we grant relief on the merits on Watson's multiple punishment claims, we do not address Watson's claim that trial counsel was ineffective for not raising multiple punishment objections in the district court.

6.

Watson claims the original charging information was defective on Counts 1 and 2 (the drug trafficking counts), and that he was prejudiced in his ability to present a defense when the trial court judge struck certain erroneous

language from the information on the first day of trial and permitted the trial to proceed on the basis of an amended information.

The defects Watson complains of are that Counts 1 and 2 in the original information charged him with trafficking methamphetamine and cocaine base within 2000 feet of a park. On the first day of trial, the district court correctly observed that there is no such offense as trafficking within 2000 feet of a park and ordered that the park language be stricken from the information. Noting that the change to the information did not enhance the charges in any way, the district court judge found there was sufficient evidence of the amended charge presented at the original preliminary hearing to put Watson on notice of the charges against him. The district court then denied defense counsel's request for a new preliminary hearing on the amended charges. With the trial court's ruling, the State immediately filed an amended information. That information properly charged Watson with trafficking in methamphetamine and cocaine base, not trafficking in methamphetamine and cocaine base within 2000 feet of a park.

Watson asserts that his defense was prejudiced by the amended information, but does not explain how. On this record, and in the absence of any explanation by Watson, it is difficult to see how he might have been prejudiced. We agree with the district court's conclusion that striking the park language as surplus simply eliminated an erroneously included enhancement element from the charged crimes. As a result, the change did not alter the charges in any way that would require Watson to change his defense strategy.

Watson's defense, therefore, could not have been prejudiced, and his mere assertion that it was is nothing more than a conclusory assertion that by itself cannot require relief.

Moreover, trial counsel's own representations to the district court show that counsel was aware of the error before trial and intentionally chose not to bring the error to the court's attention. The error on the part of the district court, if any, therefore, was invited error and cannot serve as the basis for reversal. *See Ellis v. State*, 1992 OK CR 45, ¶ 28, 867 P.2d 1289, 1299 (holding that invited error cannot serve as basis for reversal).

Nevertheless, while we find that the district court properly struck language from Counts 1 and 2 alleging that the drug trafficking crimes occurred within 2000 feet of a park and that the State filed an amended information incorporating that change, we note that the Judgment and Sentence document still describes the convictions as being for "Trafficking in Illegal Drugs within 2000 feet of Park." On remand, the district court will correct the Judgment and Sentence to reflect that the conviction on the unreversed trafficking count (Count 2) was for "Trafficking in Illegal Drugs," not "Trafficking in Illegal Drugs within 2000 feet of Park."

7.

With reversal of Counts 1 and 4, and with modifications to the sentences for Counts 2 and 3, Watson's remaining consecutively running sentences of twenty years imprisonment on Count 2, two years on Count 3, and three years on Count 5 combine for a total term of imprisonment of twenty-five years.

Under the circumstances of this case, this total sentence does not shock our conscience. *Head v. State*, 2006 OK CR 44, ¶ 27, 146 P.3d 1141, 1148. The district court's decision to run the sentences consecutively, therefore, is not an abuse of discretion. *Riley v. State*, 1997 OK CR 51, ¶ 20, 947 P.2d 530, 534; 22 O.S.2001, § 976.

8.

The jury instruction on Count 3 for possession of a firearm during commission of a felony did not define the crime in such a way as to make the instruction unconstitutionally overbroad and vague. The instruction included language requiring that the firearm possession be "connected" to the underlying charged felony (i.e., trafficking in illegal drugs). When read in its entirety, therefore, the instruction would not allow a jury to convict by finding that the firearm was intended to be used for some contingency or escape, or offensive or defensive purpose unrelated to the enumerated underlying felony. *See Pebworth v. State*, 1993 OK CR 28, 855 P.2d 605 ("[p]roof must be shown of a nexus or connection between the possession of the weapon and the underlying felony").

9.

Regardless of whether or not the police scanner radio could be plugged into a wall socket, the evidence (i.e., the radio itself) showed the radio to be a small hand-sized device that was obviously capable of being moved from place to place within a room if plugged in, and capable of being moved even greater

distances if unplugged. Because the evidence, the radio itself, showed the jury that its size and weight made it small and light enough to be moved, the evidence was sufficient for jurors to reasonably conclude that the radio was mobile.[3] *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204.

10.

The district court judge erred by instructing the jury that fines were optional on the drug trafficking counts (Counts 1 and 2). Nevertheless, the district court cured the error when it imposed the minimum mandatory $25,000 fine on each count at sentencing. *See* 63 O.S.Supp.2004, § 2-415(C)(4) & (C)(7)(stating that violations of the trafficking statute "shall be punishable by a fine of not less than Twenty-five Thousand Dollars"). The district court judge was specifically authorized to impose the jury-omitted fines by 22 O.S.2001, § 927.1, which states that when a jury finds a verdict of guilty, but "fails to agree on the punishment to be inflicted, or does not declare such punishment by their verdict, the court shall assess and declare the punishment and render the judgment accordingly." With regard to Counts 3, 4, and 5, however, the governing statutes do not provide for mandatory fines. Therefore, the judge-imposed fines for those counts constitute additional punishment beyond that prescribed by the jury verdict. Accordingly, as the State concedes, the fines for these counts must be rescinded.[4]

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[3] In its common and ordinary use, the term "mobile" means "capable of moving or being moved." Mirriam-Webster's Online Dictionary, http://www.merriam-webster.com/dictionary/mobile. *See also Webster's Third New International Dictionary* 1450 (1986)("capable of moving or being moved from one place to another").

[4] Rescinding the fine for Count 4 is unnecessary given that we have reversed the conviction on that count.

We have found merit in some of Watson's claims and granted relief to include: (1) reversing Counts 1 and 4; (2) modifying the sentences on Counts 2 and 3; and (3) rescinding the fines on Counts 3 and 5. With regard to the remaining counts, as modified, we have found no merit to any of Watson's other claims. Consequently, there is no accumulation of error on these counts sufficient to warrant a conclusion that Watson was denied a fair trial. *See Bechtel v. State*, 1987 OK CR 126, ¶ 12, 738 P.2d 559, 561 (holding that when there have been prejudicial irregularities during course of trial, reversal is warranted only if cumulative effect of all the errors denied Appellant a fair trial).

DECISION

In **Case No. CF-2006-257**, Counts 1 and 4 of the Judgment and Sentence of the District Court are **REVERSED**. The convictions on Counts 2, 3, 5, and 6 are **AFFIRMED**. The sentence for Count 2 is **MODIFIED** to a term of imprisonment of twenty years. The sentence on Count 3 is **MODIFIED** to a term of imprisonment of two years. The fines on Counts 3 and 5 are **RESCINDED**. The case is **REMANDED** to the District Court to enter Judgment and Sentence reflecting these changes and reflecting further that the conviction for Count 2 is for "Trafficking in Illegal Drugs."

The Judgment and Sentence of the District Court in **Case No. CM-2006-566** is **AFFIRMED**.

Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2009), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

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

APPEARANCES AT TRIAL
MARK KANE
P. O. BOX 2566
BARTLESVILLE, OK 74003
ATTORNEYS FOR DEFENDANT

W. SCOTT JULIAN
ASSISTANT DISTRICT ATTORNEY
NOWATA COUNTY COURTHOUSE
229 N. MAPLE STREET
NOWATA, OK 74048
ATTORNEY FOR STATE

APPEARANCES ON APPEAL
THOMAS PURCELL
P. O. BOX 926
NORMAN, OK 73070
ATTORNEY FOR APPELLANT

W. A. DREW EDMONDSON
OKLAHOMA ATTORNEY GENERAL
JENNIFER L. STRICKLAND
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR APPELLEE

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

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LUMPKIN, JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the judgments and sentences affirmed and agree with the reversal with instructions to dismiss Counts 1 and 4 based on my separate writing in *Lewis v. State*, 2006 OK CR 48, 150 Pl3d 1060, 1062 (Lumpkin, J.: Special Concur). However, I must dissent to the modification of sentences in Counts 2 and 3. The Court's decision to modify is based on nothing but speculation and to modify to less than half of the sentence imposed by the jury based on that speculation is arbitrary, unsupported by any evidence in the record.

The prosecutor misstated a single sentence of testimony by the Appellant. The jury was instructed that statements by counsel are not evidence and each member of the jury is to rely on their own memory as to what evidence was actually admitted during the trial. The jury did request a transcript of Appellant's testimony but did not state their reason for wanting a transcript. Instead of inquiring of the jury as to what portions of the testimony they desired to hear in accordance 22 O.S.2001, § 894, the trial judge merely denied their request for a transcript. No further requests or communications were received from the jury. I cannot see how the Court can speculate this exchange warrants a drastic reduction in the sentence recommended by the jury. To modify the sentences in such a Draconian manner on such a dearth of factual basis is very inappropriate for an appellate court. I would affirm the

judgments and sentences in Counts 2 and 3 as determined by the jury and ordered by the trial judge.