**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

| | | |
|---|---|---|
| ERIC CASEY ZEISET, | ) | |
| | ) | **NOT FOR PUBLICATION** |
| | ) | |
| Appellant, | ) | Case No. F-2021-636 |
| v. | ) | |
| | ) | |
| THE STATE OF OKLAHOMA | ) | |
| | ) | |
| Appellee. | | |



**SUMMARY OPINION**

**LUMPKIN, JUDGE:**

Appellant Eric Casey Zeiset was tried by jury and found guilty of Possession of Explosives (21 O.S.2011, § 1767.1(A)(4)) (Counts 1-4); Possession of Stolen Vehicle ( 21 O.S.Supp.2018, § 4-103) (Count 5); Using a Security Camera or System While in Commission of a Felony (21 O.S.2011, § 1993) (Count 6); and Possession of a Firearm After Former Conviction of a Felony (21 O.S.2011, § 1283 (A)) (Counts 7-20), All After Former Conviction of a Felony, in the District Court of Grady County, Case No. CF-2019-39. As punishment, the jury returned sentences of sixty (60) years imprisonment and a $5,000.00 fine in Counts 1 and 2; thirty (30) years imprisonment and a $5,000.00 fine in Counts 3 and 4; ten (10) years imprisonment and

a $5,000.00 fine in Count 5; ten (10) years imprisonment and a $10,000.00 fine in Count 6; and thirty (30) years imprisonment in each of Counts 7-20. The trial court sentenced accordingly and ordered the sentences to run consecutively. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of his appeal:

I. The evidence was insufficient to support a conviction for Possession of Explosives because there was no proof of the requisite intent to unlawfully use the explosive devices.

II. The State failed to prove beyond a reasonable doubt that Appellant actually or constructively possessed an explosive device.

III. The trial court erred when it failed to properly instruct the jury as to the elements of Using a Security Camera or System While in Commission of a Felony in violation of Sixth and Fourteenth Amendments to the United States Constitution and Article Two, Sections Seven and Twenty of the Oklahoma Constitution.

IV. Appellant's 620 year sentence ordered to be served consecutively is excessive and should shock the conscience of this Court.

V. The Judgment and Sentence must be corrected by an Order *Nunc Pro Tunc* to reflect the crimes Appellant was sentenced to.

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, relief is warranted only in Proposition III.

In Propositions I and II, Appellant challenges the sufficiency of the evidence supporting his convictions in Counts 1-4 for Possession of Explosives. Appellant was charged and convicted under 21 O.S.2011, § 1767.1(A)(4). This section provides in pertinent part:

> A. Any person who shall willfully or maliciously commit any of the following acts shall be deemed guilty of a felony:
> 4. Manufacture, sell, transport, or possess any explosive, the component parts of an explosive, an incendiary device, or simulated bomb with knowledge or intent that it or they will be used to unlawfully kill, injure or intimidate any person, or unlawfully damage any real or personal property;

The jury was instructed on these elements in Instruction No. 24.

In Proposition I, Appellant argues the State failed to prove that he intended to unlawfully use the devices found in his home. Appellant asserts there was no proof that he had any intent to do anything with the explosives. In Proposition II, Appellant argues the State failed to prove that he had possession of the explosive devices.

We review Appellant's challenge to the sufficiency of the evidence supporting his conviction in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *Fuston v. State,* 2020 OK CR 4, ¶ 92, 470 P.3d 306, 328. In reviewing sufficiency of the evidence claims, this Court does not reweigh conflicting evidence or second-guess the decision of the fact-finder; we accept all reasonable inferences and credibility choices that tend to support the verdict. *Id.* The credibility of witnesses and the weight and consideration to be given to their testimony are within the exclusive province of the trier of facts. *Id.*

"Intent is a state of mind that will be proven, if at all, by circumstantial evidence. Circumstantial evidence by its nature requires the jury to use it to draw reasonable inferences. On appellate review this Court accepts all reasonable inferences which tend to support the jury's verdict." *Scott v. State,* 1991 OK CR 31, ¶ 4, 808 P.2d 73, 75-76 (internal citations omitted).

Evidence showed that four (4) improvised explosive devices ("IEDs") were found in a bag on the kitchen counter of Appellant's home. Two of the IEDs were grenades similar to those used by the

military and police for riot control. One grenade had OC spray taped to it. Both could be detonated simply by pulling out the pin. The other two IEDs were blasting caps tapped together with birdshot/buckshot added and needed only the addition of a battery to detonate. Testimony from the investigating trooper and the D.A. Investigator showed that the only purpose for adding birdshot/buckshot would be to harm others. They explained that the only legitimate reason to have such explosives would be if a person worked in construction or the oilfield. Even then, a license would be required to have the explosives. Further, even if a person had a license or legitimate reason for having the explosives, they would not be wrapped and taped together with duct tape, nor would there be buckshot inside. Based upon their experience and training, neither witness knew of any legitimate, non-harmful reason to have homemade explosive devices.

"Pieces of evidence must be viewed not in isolation but in conjunction, and we must affirm the conviction so long as, from the inferences reasonably drawn from the record as a whole, the jury might fairly have concluded the defendant was guilty beyond a reasonable doubt." *Matthews v. State*, 2002 OK CR 16, ¶ 35, 45 P.3d 907, 919-920. Considering the above testimony in light of the other evidence, a

jury could reasonably infer Appellant had the explosive devices with the intent to use them. This other evidence included two (2) years of law enforcement surveillance showing Appellant armed at all times; the discovery of numerous firearms in his house set out ready to be used; an AR-15 rifle which had previously been seen in his possession, found in a truck parked near the house and which Appellant was working on when law enforcement arrived; and the presence of surveillance cameras around the house. Further, Appellant initially fled the scene when law enforcement arrived but later returned. Upon his return, he carried a rifle, acted "tactically" and "aggressively" at the sight of a police car, and appeared to be setting up an ambush. He again fled from police only to resist and struggle when apprehended.

In light of this evidence, and the absence of any statements or evidence from Appellant regarding his intent or reasons for having the devices, a jury could reasonably infer that Appellant had the intent to unlawfully use the explosive devices found in his home.

Regarding Appellant's challenge to evidence of his possession of the IEDs, the law of possession, as applied in illegal drug cases, *Wall v. State*, 2020 OK CR 9, ¶ 23, 465 P.3d 227, 234; and firearms cases,

*Watts v. State*, 2008 OK CR 27,¶ 12, 194 P.3d 133, 137 applies in cases involving explosive devices.

This body of law provides that possession can be actual or constructive, joint or single. *Wall*, 2020 OK CR 9, ¶ 23, 465 P.3d at 234. This is a case of constructive possession as the illegal explosives were not found on Appellant's person. Constructive possession can be established through circumstantial evidence proving a defendant knows of the presence of the contraband and has the power and intent to control its disposition or use. *Id.* A defendant's knowledge and intent can be proved by circumstantial evidence. *Id.* Mere proximity to the contraband is not sufficient to sustain the State's burden of proof. *Id.* Proof of knowing possession of contraband is often solely circumstantial, and thus requires that guilt be determined through a series of inferences. *Id.* Even in the absence of proof of possession and exclusive control, constructive possession may still be proven if "there are additional independent factors showing [the accused's] knowledge and control." *Id.* Such independent factors may consist of "incriminating conduct by the accused ... or any other circumstance from which possession may be fairly inferred." *Id.*

Two (2) years of surveillance showed that the house where the explosives were found belonged to Appellant, where he was seen numerous times coming and going freely, and that he was the sole resident. Other people had been seen to come and go to the house but none stayed any length of time. Appellant was the sole constant person seen at the home. When officers arrived to serve the warrants, Appellant was not only seen on the property but to freely come and go from the house. While Appellant initially fled the scene, he returned to his home the next night. The D.A. Investigator testified that in his training and experience, people did not often travel with explosive devices because of the danger they could detonate. He agreed that "people make them and set them somewhere and don't touch them until they're ready to use them[.]" Additionally, evidence that Appellant possessed numerous other weapons easily visible and ready to be used supports an inference that Appellant possessed the explosives contained in the bag visible on a kitchen counter.

This evidence, of additional independent factors, show Appellant's knowledge and control of the explosive devices found on the kitchen cabinet of his home. Reviewing the evidence in the light most favorable to the State, a rational trier of fact could have found

beyond a reasonable doubt that Appellant was in possession of the explosive devices. Propositions I and II are denied.

In Proposition III, Appellant contends the trial court failed to properly instruct the jury on the elements of Count 6, Using a Security Camera or System While in the Commission of a Felony; and therefore Count 6 should be reversed and remanded for a new trial. The State concedes the argument has merit and agrees Count 6 should be reversed and re-tried.

The present case was tried in three (3) stages. During the first stage, instructions were given on the elements of Possession of Explosive Devices (Counts 1-4), and Possession of Stolen Vehicle (Count 5). However, no instruction on the elements of Using a Security Camera (Count 6) were given. During the second stage, instructions on the elements of Possession of a Firearm, After Former Conviction of a Felony (Counts 7-20) were given. Regarding Count 6, an instruction was given on return of the verdict. However, no instructions were given at any stage of this trial setting out the elements of § 1993(C), Using a Security Camera or System While in the Commission of a Felony.

The record reflects no objection to the absence of such an instruction or a request that such instruction be given. Therefore, our

review on appeal is for plain error. *Chadwell v. State*, 2019 OK CR 14, ¶ 4, 446 P.3d 1244, 1245. Under the plain error test set forth in *Simpson v. State*, 1994 OK CR 40, ¶¶ 10, 26, 30, 876 P.2d 690, 694, 699, 701 this Court determines whether the 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.*, 2019 OK CR 14, ¶ 4, 446 P.3d at 1245.

"Whether or not the defendant agrees to the instructions, it is plain error to fail to instruct on the elements of a crime." *Harmon v. State*, 2005 OK CR 19, ¶ 7, 122 P.3d 861, 864. *See also Pinkley v. State*, 2002 OK CR 26, ¶ 7, 49 P.3d 756, 758-759; *Sherburn v. State*, 1990 OK CR 10, ¶ 9, 787 P.2d 1282, 1285. "The failure of the trial court to instruct on an essential element of the offense charged is fundamental reversible error, as it constitutes a substantial violation of an accused's constitutional and statutory rights." *Pierce v. State*, 1988 OK CR 294, ¶ 3, 766 P.2d 365, 366. "The trial judge, whether requested or not, has an obligation to instruct the jury on the essential

elements of the offense charged." *Id.* *See also Atterberry v. State*, 1986 OK CR 186, ¶ 8, 731 P.2d 420, 425.

The failure to instruct the jury on the elements of Using a Security Camera While Committing a Felony was error. This error affected Appellant's substantial rights as it deprived him of his constitutional right to make the government prove every element of the charged offense.

That the evidence of the presence of the security cameras was not contested does not render this error harmless. *Contra Chadwell*, 2019 OK CR 14, ¶ 7, 446 P.3d at 1247. Here, Appellant challenged the sufficiency of the State's evidence simply by going to trial. The failure to instruct on the elements of the offense needed for a conviction allowed the State to obtain a conviction without proving each element of the offense. This Court cannot be sure that the jury verdict would have been the same absent the error.

Under the circumstances of the present case, the failure to instruct the jury on the elements of Count 6, Using a Security Camera While Committing a Felony is reversed and remanded for a new trial as Appellant was denied his right to a fair trial. *See Harmon*, 2005 OK CR 19, ¶ 10, 122 P.3d at 855.

In Proposition IV, Appellant contends his sentences, considered individually and in the aggregate, are excessive and should be favorably modified. Specifically, he argues that the trial court abused its discretion in ordering the sentences to run consecutively. He asserts the total 620 years he would serve does not bear a direct relationship to the nature and circumstances of his offenses. He argues there was no evidence that he meant to harm anyone or that anyone was actually harmed with the explosives and firearms at his residence, and the State failed to prove any motive or produce a "manifesto" showing he was dangerous in any way.

The question of excessiveness of punishment must be determined by a study of all the facts and circumstances of each case. *Bivens v. State*, 2018 OK CR 33, ¶ 3, 431 P.3d 985, 996. Where the punishment is within the statutory limits, the sentence will not be disturbed unless under all the facts and circumstances of the case it is so excessive as to shock the conscience of the Court. *Id.* Regarding consecutive versus concurrent sentences, there is no absolute constitutional or statutory right to receive concurrent sentences. 22 O.S.2011, § 976. In fact, sentences are to run consecutively unless the trial judge, in his or her discretion, rules otherwise. *Id. See also Neloms*

*v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. 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. *Id.*

A review of the record and applicable statutes show the sentences imposed were well within statutory range, and in many cases on the lower end of the range. As discussed in Propositions I and II, the evidence was sufficient to prove beyond a reasonable doubt that Appellant committed the crime of Possession of Explosives. A review of the record shows the evidence proved beyond a reasonable doubt Appellant committed the crimes of Possession of Stolen Vehicle, and Possession of a Firearm, After Former Conviction of a Felony.[1] Contrary to Appellant's argument, the State did not need to produce a "manifesto" showing he was dangerous. His actions proved his dangerousness.

The judge's comments at sentencing show careful consideration was given in sentencing Appellant, particularly as it pertained to running the sentences consecutively. We find no abuse of discretion in the court's decision.

---

[1] In light of our resolution in Proposition III, reversing the conviction in Count 6, Using a Security Camera While in Commission of a Felony, the sentence imposed in that offense is not considered here.

Based upon our review of all the facts and circumstances of the case, the facts of the offenses justified the sentences imposed. We find Appellant's sentence is not excessive and the trial court did not abuse its discretion in running the sentences consecutively. This proposition is denied.

In Proposition V, Appellant argues that his Judgment and Sentence must be corrected by an Order *Nunc Pro Tunc* to accurately reflect the crimes for which he was convicted and sentenced, specifically in Counts 4, 6, 7, and 8. The State agrees and, with an exhibit to a *Motion to Supplement the Record on Appeal,* shows that the necessary corrections have been made. Therefore, according to the State, Appellant's claim is moot.

Appellant was charged, convicted, and sentenced in Count 4 for Possession of Explosives (21 O.S.2011, § 1767.1(A)(4)); in Count 6 for Using a Security Camera or System While in Commission of a Felony (21 O.S.2011, § 1993); and in Counts 7-8 for Possession of a Firearm After Former Conviction of a Felony (21 O.S.2011, § 1283(A)). However, the written Judgment and Sentence filed in July 2021 states that Appellant was convicted in Counts 4, 6, and 7 of

Possession of a Stolen Vehicle and in Count 8 of Tampering with a Security Camera.

In a *Motion to Supplement the Record on Appeal* tendered for filing in this case, the State seeks supplementation with a certified copy of an Amended Judgment and Sentence filed in the District Court of Grady County, April 21, 2022. This amended Judgment and Sentence lists the counts and convictions consistent with the felony information and verdicts returned by the jury. The amended Judgment and Sentence correctly shows convictions in Count 4 for Possession of Explosives, Count 6 for Using a Security Camera While Committing a Felony, and Counts 7 and 8 for Possession of Firearm, After Former Conviction of a Felony.

Pursuant Rule 3.11(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2022) we find supplementation of the record with the amended Judgment and Sentence necessary for a determination of the claim raised in Proposition V. The *Motion to Supplement* is Granted. Supplementing the record with the corrected, amended Judgment and Sentence renders Appellant's request for a correction order moot. This proposition is denied.

## DECISION

The **JUDGMENT and SENTENCE** in **Count 6 is REVERSED AND REMANDED FOR A NEW TRIAL. THE JUDGMENT AND SENTENCE IN ALL OTHER COUNTS** is **AFFIRMED.** The State's ***Motion to Supplement the Record on Appeal*** is **GRANTED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2022), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF GRADY COUNTY
THE HONORABLE KORY KIRKLAND, DISTRICT JUDGE

**APPEARANCES AT TRIAL**

DONALD McCARTHY
P.O. BOX 644
OKLAHOMA CITY, OK 73101
COUNSEL FOR THE DEFENSE

JASON M. HICKS
DISTRICT ATTORNEY
REBECCA BRINK
ABIGAIL WILBURN
ASST. DISTRICT ATTORNEYS
217 N. THIRD ST.
CHICKASHA, OK 73018
COUNSEL FOR THE STATE

**APPEARANCES ON APPEAL**

NICOLLETTE BRANDT
OKLAHOMA INDIGENT DEFENSE
P.O. BOX 926
NORMAN, OK 73070
COUNSEL FOR APPELLANT

JOHN M. O'CONNOR
OKLAHOMA ATTORNEY GENERAL
KEELEY L. MILLER
ASST. ATTORNEY GENERAL
313 N.E. 21ST ST.
OKLAHOMA CITY, OK 73105
COUNSEL FOR THE STATE

**OPINION BY: LUMPKIN, J.**
ROWLAND, P.J.: Concur
HUDSON, V.P.J.: Concur
LEWIS, J.: Concur in Result
MUSSEMAN, J.: Concur