IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

EDGAR LEE RUCKER, JR., Appellant, v. STATE OF OKLAHOMA Appellee.	)	**NOT FOR PUBLICATION** Case No. F-2000-1634

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

Appellant Edgar Lee Rucker, Jr., was tried by jury for Unlawful Delivery of Controlled Dangerous Substance (Methamphetamine) (63 O.S. 1991, § 2-401), in Case No. CF-99-179; and Possession of Marijuana with Intent to Distribute (63 O.S. 1991, § 2-401) in Case No. CF-99-180, both offenses After Former Conviction of Two or More Felonies, in the District Court of Murray County. The jury found Appellant guilty of Unlawful Delivery of a Controlled Dangerous Substance, After One Prior Conviction and recommended as punishment twelve (12) years imprisonment and a fine of ten thousand dollars ($10,000.) The trial court sentenced accordingly. The jury found Appellant not guilty of Possession of Marijuana with Intent to Distribute. It is from this judgment and sentence that Appellant appeals.

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

I. Appellant's Fourteenth Amendment rights were violated when his jury was permitted to sentence him under both the drug

offense enhancement statute and the habitual offender statute.

II. The State failed to present sufficient evidence to prove that Appellant was a habitual offender, thus violating his Sixth and Fourteenth Amendment rights.

III. The trial court committed reversible error by permitting the State to introduce evidence of other bad acts that were not part of the transaction for which Appellant was being tried. The introduction of such evidence violated Appellant's rights under the Fourteenth Amendment of the United States Constitution and Article II, § 9 of the Oklahoma Constitution.

IV. The State failed to prove beyond a reasonable doubt that Appellant committed the crime of unlawful delivery of a controlled and dangerous substance as alleged in count I of the information because the proof at trial did not conform to the allegations in the information.

V. Appellant was denied the effective assistance of counsel, in violation of the Sixth Amendment to the United States Constitution and corresponding provisions of the Oklahoma Constitution.

VI. Appellant's Fourteenth Amendment rights to the United States Constitution were violated when the prosecutor engaged in prosecutorial misconduct.

VII. The accumulation of error in this case so infected the trial with unfairness that Appellant was denied due process of law.

After a 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 reversal is not warranted under the law and the evidence.

In Proposition I, we find error in the sentencing instruction combining punishment provisions from the Habitual Offender Act 21 O.S.1991, § 51.1(B) and the drug enhancement statutes under 63 O.S.Supp.2000, § 2-401. *See*

Novey v. State, 709 P.2d 696, 699 (Okl.Cr.1985). This error warrants modification of the fine only as the twelve (12) year prison sentence is within the permissible range of imprisonment for conviction after one prior conviction under the Habitual Offender Act. The $10,000 fine recommended by the jury was one-fourth of the $40,000 maximum incorrectly set forth in the jury instructions. The fine is therefore modified to $2,500 which is one-fourth of the correct maximum fine of $10,000.[1]

In Proposition II, we find the State met its burden of proving a prior conviction by offering evidence of Appellant's birthdate and social security number. *See Cooper v. State*, 810 P.2d 1303, 1306 (Okl.Cr.1991). In Proposition III, we find evidence of Appellant' s prior drug usage the day of the crime, and the existence of outstanding arrest warrants, was properly admitted as part of the *res gestae* of the offense. The evidence was closely connected to the charged offense as to form part of the entire transaction, and its admission was necessary to give the jury a complete understanding of the crime. *Rogers v. State*, 890 P.2d 959, 971 (Okl.Cr.1995).

In Proposition IV, there was not a variance between the felony information and the evidence presented at trial. *Smith v. State*, 573 P.2d 713, 716 (Okl.Cr.1978). 22 O.S.1991, § 410. That a defense witness testified contrary to the felony information does not create a variance. In Proposition V, we find Appellant was not denied the effective assistance of counsel. While counsel should have raised an objection to the sentencing instructions, his failure does

[1] *See* 21 O.S.Supp.2000, § 64

not warrant a finding of ineffectiveness under the standards set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See also Bland v. State*, 4 P.3d 702, 730-731 (Okl.Cr.2000). As we have modified the fine, Appellant has failed to establish any prejudice resulting from counsel's conduct.

In Proposition VI, we find Appellant was not denied a fair trial by prosecutorial misconduct. Any error in the comment from opening statement, which resulted in the sustaining of Appellant's objection and an admonishment to the jury to disregard the statement, was cured. See *Romano v. State*, 909 P.2d 92, 116 (Okl.Cr.1995). The remaining comments challenged on appeal were within the wide range of permissible argument. *See Carol v. State*, 756 P.2d 614, 617 (Okl.Cr.1988); *Croan v. State*, 682 P.2d 236, 238 (Okl.Cr.1984). In Proposition VII, we find Appellant was not denied a fair trial by the accumulation of error. The error in the sentencing instruction was the only error warranting action by this Court, and the sentence has been duly modified. *See Bechtel v. State*, 738 P.2d 559, 561 (Okl.Cr.1987).

DECISION

The Judgment is **AFFIRMED,** the twelve year prison sentence is **AFFIRMED** and the $10,000 Fine is **MODIFIED TO $2,500.**

AN APPEAL FROM THE DISTRICT COURT OF MURRAY COUNTY
THE HONORABLE JOHN H. SCAGGS, DISTRICT JUDGE

APPEARANCES AT TRIAL

ROBERT T. KEEL
1412 SOUTH AGNEW AVE.
OKLAHOMA CITY, OK 73108
COUNSEL FOR APPELLANT

MITCHELL D. SPERRY
DISTRICT ATTORNEY
JOHNNY S. LOARD
MURRAY COUNTY COURTHOUSE
SULPHUR, OK 73086
COUNSEL FOR THE STATE

APPEARANCES ON APPEAL

KATHERINE JANE ALLEN
1623 CROSS CENTER DRIVE
NORMAN, OK 73019
COUNSEL FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
DIANE L. SLAYTON
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL
OKLAHOMA CITY, OK 73105
COUNSEL FOR APPELLANT

OPINION BY: LUMPKIN, P.J.
JOHNSON, J.: CONCUR
CHAPEL, J.: CONCUR IN RESULT
STRUBHAR, J.: CONCUR
LILE, J.: CONCUR

RA