

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE  
CLERK

DESIRAY JAIBAI ALLEN, )  
 )  
 Appellant, )  
 v. )  
 THE STATE OF OKLAHOMA, )  
 )  
 Appellee. )

Not for Publication

Case No. F-2005-471

**SUMMARY OPINION**

**CHAPEL, PRESIDING JUDGE:**

Desiray Jaibai Allen was tried by jury and convicted of Counts I, and III Distribution of Controlled Substance in violation of 63 O.S.Supp.2003, § 2-401, after former conviction of a felony, in the District Court of Custer County, Case No. CF-04-118.<sup>1</sup> In accordance with the jury’s recommendation the Honorable Jacqueline P. Duncan sentenced Allen to two terms of twenty (20) years imprisonment, one on each count. Allen appeals from this conviction and sentence.

Allen raises six propositions of error in support of his appeal:

- I. Irrelevant, Improper and misleading evidence during the penalty phase resulted in an inflated and excessive sentence;
- II. Prosecutorial misconduct throughout the trial so infected the proceedings with unfairness that Allen’s rights to due process and a fair trial were violated;
- III. Irrelevant and inflammatory evidence was erroneously admitted, resulting in an unfair trial and denial of due process;
- IV. The erroneous admission of hearsay evidence in Allen’s case deprived him of his Sixth Amendment right to confrontation;
- V. Allen was deprived of effective assistance of counsel; and
- VI. The cumulative effect of all errors was to deprive Allen of a fair trial.

<sup>1</sup> Allen was acquitted of Count II, Distribution of Controlled Substance Within 2000 Feet of a Public Park.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find that reversal is not required by the law and evidence. However, error in Proposition I requires that Allen's sentence be modified. We find in Proposition I that, while the Judgment and Sentence for Allen's previous conviction was admissible to prove his alleged prior offense,<sup>2</sup> it was plain error to admit the other documents included in that exhibit. These included (a) Form 13.8(A), the trial court's additional findings at time of sentencing, which clearly states on its face that it is not to be admitted into evidence in any future prosecution; (b) Allen's driver's license master record and traffic record, showing thirty offenses and six Department of Motor Vehicles actions, plus fees and documents received and reinstatements; and (c) Allen's OSBI record, showing seventeen offenses (not including the charged offenses) which include two charges of stalking, assault on an officer, and escape. None of these documents were appropriate for the jury's consideration of either guilt or an appropriate sentence.<sup>3</sup> In combination with irrelevant evidence and argument, these

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<sup>2</sup> *Camp v. State*, 1983 OK CR 74, 664 P.2d 1052, 1053; *Lawson v. State*, 1971 OK CR 242, 486 P.2d 759, 762. Allen claims jurors should not have seen the portion of the Judgment and Sentence which reflected the terms and conditions of his probation. He argues that this is analogous to informing jurors about pardon and parole, or allowing argument about possible reduction of sentence. The Judgment and Sentence itself shows that all of Allen's sentence is suspended, and including the conditions of probation did not improperly inform jurors about parole issues.

<sup>3</sup> *Tucker v. State*, 1972 OK CR 170, 499 P.2d 458, 461 (rap sheet inadmissible); *Cook v. State*, 1972 OK CR 169, 499 P.2d 456, 457 (rap sheet inadmissible); *Lawson*, 486 P.2d at 762 (rap sheet inadmissible); *Bean v. State*, 1964 OK CR 59, 392 P.2d 753, 755 (prison record with details of escapes, holds, etc., not admissible).

documents may have contributed to the jury's determination of sentence. Accordingly, we modify Allen's sentences to fifteen (15) years on each count.

We find in Proposition II that, reviewing Allen's claims of prosecutorial misconduct, any errors either do not rise to the level of plain error,<sup>4</sup> or are resolved by our modification of Allen's sentences.<sup>5</sup> We find in Proposition III that some irrelevant evidence was not prejudicial,<sup>6</sup> and any effect other irrelevant evidence may have had on Allen's sentence is resolved by our

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<sup>4</sup> 20 O.S.2001, § 3001.1. These errors include: (a) arguing during opening statement, *Malicoat v. State*, 2000 OK CR 1, 992 P.2d 383, 394-95; *Hammon v. State*, 1995 OK CR 33, 898 P.2d 1287, 1306.; (b) elicited evidence of other crimes, *Burks v. State*, 1979 OK CR 10, 594 P.2d 771, *overruled in part on other grounds Jones v. State*, 1989 OK CR 7, 772 P.2d 922 (defendant to be convicted only on evidence of crimes charged), (c) vouched for a witness's credibility, *Hanson v. State*, 2003 OK CR 12, 72 P.3d 40, 50 n. 28; *Nickell v. State*, 1994 OK CR 63, 885 P.2d 670, 673; and (d) elicited irrelevant evidence, 12 O.S.2001, § 2401.

<sup>5</sup> These errors include: (a) suggesting Allen preyed on society, *Hanson* 72 P.3d at 50, (argument suggesting society paid the price when defendant preyed on the weak appealed improperly to jurors' sympathy, sentiment or prejudice); (b) encouraging jurors to infer that Allen had sold drugs to persons other than the witness, *Hager v. State*, 1980 OK CR 51, 612 P.2d 1369, 1373-74; *see also Wing v. State*, 1978 OK CR 53, 579 P.2d 196, 200 (error to argue that defendant was collecting for previous drug deals where no evidence of previous deals admitted); *Brewer v. State*, 1982 OK CR 128, 650 P.2d 54, 58 (error to argue that defendant will commit future crimes); (c) eliciting irrelevant evidence of the general drug problem, 12 O.S.2001, § 2401, *Burks*, 594 P.2d at 772; (d) appealing to racial prejudice, *White v. State*, 1954 OK CR 30, 268 P.2d 310, 315; *Morehead v. State*, 12 Okl.Cr. 62, 151 P. 1183, 1190 (appeal to racial prejudice in argument created reversible error); *Hamilton v. State*, 38 Okl.Cr. 62, 259 P. 168, 172 (appeal to racial prejudice in argument created reversible error). *See also Golden v. State*, 23 Okl.Cr. 243, 214 P. 946, 947-48 (appeal to religious prejudice, combined with other error, required reversal). Jurors were correctly instructed on the burden of proof and the prohibition against considering race in their deliberations. Due to those instructions and the non-explicit nature of the argument, this error does not require reversal. *Ryder v. State*, 2004 OK CR 2, 83 P.3d 856, 875.

<sup>6</sup> This includes evidence that the informant visited police after he finished working for them, and an officer's description of a bystander as a white female. The informant's testimony that he initially set up a drug buy with a defense witness before completing the transaction which forms the basis for Count I was part of the *res gestae*. Contrary to the State's argument, this is the only alleged error which is *res gestae*. Evidence is considered *res gestae* a) when it is so closely connected to the charged offense as to form part of the entire transaction, b) when it is necessary to give the jury a complete understanding of the crime, or c) when it is central to the chain of events. *Rogers v. State*, 1995 OK CR 8, 890 P.2d 959, 971. *See also Lalli v. State*, 1994 OK CR 15, 870 P.2d 175, 177. Evidence that Allen previously sold the informant drugs, that the informant bought drugs from others in the Weatherford area, or that the informant was tired of seeing the drugs in the area, was not *res gestae*.

modification of his sentences.<sup>7</sup> We find in Proposition IV that any error in hearsay evidence of identification does not rise to the level of plain error, as both the informant and a defense witness identified him during their testimony. We find in Proposition V that counsel was not ineffective for failing to object to evidence and argument.<sup>8</sup> We find in Proposition VI that the errors in accumulation do not warrant relief beyond modification of Allen's sentence.<sup>9</sup>

### Decision

The Judgments of the District Court are **AFFIRMED**. The Sentences on Counts I and III are **MODIFIED** to fifteen (15) years on each count. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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<sup>7</sup> This includes evidence that the informant agreed to help police because he was tired of seeing the drug activity in the Weatherford area.

<sup>8</sup> *Hooks v. State*, 2001 OK CR 1, 19 P.3d 294, 317; *Williams v. Taylor*, 529 U.S. 362, 393, 120 S.Ct. 1495, 1513, 146 L.Ed.2d 389 (2000) (defendant prejudiced where counsel's actions deny him a substantive or procedural right to which he is entitled by law); *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003); *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 693 (1984).

<sup>9</sup> *Fitzgerald v. State*, 1998 OK CR 68, 972 P.2d 1157, 1175 (five separate serious errors required reversal and remand for resentencing); *Peninger v. State*, 1991 OK CR 60, 811 P.2d 609, 613 (serious, prejudicial errors in admission of evidence and argument required reversal).

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