

JAN - 8 2003

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

ROBERT WESLEY CHOATE,)
)
 Appellant,)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION
Case No. F-2001-1488

SUMMARY OPINION

CHAPEL, JUDGE:

Robert Wesley Choate was tried by jury and convicted of Count I: Manufacturing a Controlled Dangerous Substance in violation of 63 O.S. Supp.2000, §§ 2-401 and 2-408; Count II: Possession of a Precursor in violation of 63 O.S.Supp.2000, § 2-328(E); and Count III: Possession of a Controlled Dangerous Substance in violation of 63 O.S.Supp.2000, § 2-402, After Former Conviction of Two or More Felonies, in the District Court of Oklahoma County, Case No. CF-99-4877.¹ In accordance with the jury's recommendation, the Honorable Jerry D. Bass sentenced Choate to thirty (30) years' imprisonment and a \$50,000.00 fine on Count I and twenty (20) years' imprisonment on Count II. Choate appeals from these convictions and sentences.

Choate raises the following propositions of errors:²

¹ The State dismissed the "After Former Conviction of Two or More Felonies" charge for Count I. The State's motion to dismiss Count III was granted at sentencing.

² Choate also filed a *pro se* supplemental brief asserting that his speedy trial rights were violated. Choate's claim fails on the merits. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) (test for a speedy trial violation balances length of delay, reason for delay, defendant's assertion of the right to a speedy trial during the delay, and prejudice resulting

- I. The trial court committed reversible error in admitting statements of Mr. Choate in violation of his Fifth Amendment right to remain silent and his fourteenth amendment right to due process and fundamental fairness.
- II. The violations of double jeopardy and the Oklahoma statutory prohibition against multiple punishments resulting from Mr. Choate's simultaneous convictions for Count I, Manufacture of Methamphetamine, Count 2, Possession of a Precursor Substance (Red Phosphorous), and Count 3, Possession of a Controlled Dangerous Substance (Methamphetamine), were not cured by the dismissal of Count 3 at formal sentencing. Count I, or alternatively, Count 2, must also be dismissed.
- III. The State presented insufficient evidence on Count 2 to prove beyond a reasonable doubt that Mr. Choate was in possession of the precursor substance of red phosphorous.
- IV. The trial court's failure to instruct the jury on the proper ranges of punishment on Counts 1 and 2 was plain reversible error that violated Mr. Choate's right to due process and a fundamentally fair trial.
- V. Mr. Choate's due process right to a fundamentally fair trial was violated by inadmissible evidence invoking societal alarm and improper opinion testimony.
- VI. Mr. Choate's conviction on Count 2 violated due process and must be dismissed because the information charged a violation of Okla. Stat. Tit. 63, § 2-328(E)(1) (2001), but the jury was instructed on and convicted Mr. Choate under Okla. Stat. Tit. 63, § 2-328(E)(2) (2001), a crime not charged in the information.
- VII. Trial errors and prosecutorial misconduct, cumulatively, denied Mr. Choate due process and require reversal or modification/
- VIII. Under the facts of this case, the \$50,000 minimum nondiscretionary fine mandated under the manufacturing statute is unconstitutional because it does not bear a sufficient, if any, quantitative relationship to the offense.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, briefs and exhibits of the parties, we find that Choate's conviction under Count II must be reversed and remanded

from delay. Choate's trial delay of twenty-six (26) months was partly due to his requested continuance. Additionally, Choate asserts but never establishes that he was prejudiced by the

with instructions to dismiss. We find in Proposition I that Choate never unequivocally invoked his right to silence.³ We find in Proposition II that Choate's convictions for manufacturing a controlled dangerous substance and possession of a precursor violates 21 O.S.2001, § 11.⁴ Proposition III is moot due to the relief granted in Proposition II. We find in Proposition IV that the jury was properly instructed on the range of punishment for manufacturing a controlled dangerous substance.⁵ We find in Proposition V that the evidence about which Choate complains was properly admitted at trial.⁶ Proposition VI is moot based upon the relief granted in Proposition II. We find in Proposition VII that there was no cumulative error. The relief recommended in Proposition II adequately resolved Propositions II, III and VI; there was no other individual error.⁷ We find in Proposition VIII that the fine provision in 63 O.S.Supp.2000, § 2-401 bears a direct relationship to the offense and was not excessive.

delay.

³ *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350, 2355, 129 L.Ed.2d 362 (1994)(invocation of *Miranda* rights must be unequivocal) and *Long v. State*, 883 P.2d 167, 171-72 (Okla.Cr.1994)(adopting right to counsel analysis for right to silence claims). Choate merely stated that he did not want to talk "right now," not that he did not want to talk.

⁴ See unpublished opinion *Smith v. State*, F-2001-213 (Okla.Cr. June 12, 2002). These crimes are not separate and distinct. Choate committed but one act of attempting to manufacture.

⁵ *William v. State*, 2002 OK CR 39, 59 P.3d 518. I disagree with that result and maintain the opinion I stated in the *Williams* dissent.

⁶ *Littlejohn v. State*, 989 P.2d 901, 907-08 (Okla.Cr.1998)(failure to object to evidence waives all but plain error). There was no error, plain or otherwise. The officers' opinions relating to the dangers of methamphetamine production, use and investigation were relevant and admissible, as were their opinions identifying certain substances used in the manufacturing process. Trial counsel is not ineffective for failing to object to admissible evidence.

⁷ *Humphreys v. State*, 947 P.2d 565, 578 (Okla.Cr.1997), *cert. denied*, 524 U.S. 930, 118 S.Ct. 2329, 141 L.Ed.2d 702 (1998)(no cumulative error possible where no individual error found). There was no error in admitting the syringe found in the car. The prosecutor's reference to Choate as a "meth cook" was based upon the evidence and Choate's own admission.

Decision

The Judgment and Sentence for Count I is **AFFIRMED**. The Judgment and Sentence for Count II is **REVERSED AND REMANDED** with instructions to dismiss.

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OPINION BY: CHAPEL, J.

JOHNSON, P.J.: CONCUR IN RESULTS
LILE, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR IN RESULTS
STRUBHAR, J.: CONCUR