



- I. Defense counsel's failure to present a defense at both stages of trial and at sentencing was so ineffective that it denied Crews his Sixth Amendment right to counsel;
- II. The trial court erred when it overruled defense counsel's objection to the admission of Crews's sentence for a previous felony conviction;
- III. Because the trial court mis-instructed the jury on Count 8, possession of a firearm after conviction or on probation, this Court must reverse the conviction and remand it or a new trial;
- IV. Numerous instances of improper arguments by the prosecution so inflamed the jurors against Crews that the verdicts they returned cannot be considered the product of a fair trial; and
- V. The cumulative effect of the errors denied Crews a fair trial.

After thorough consideration of the entire record before us on appeal including the original record, transcripts, exhibits and briefs, we find the law and evidence require reversal of Count VIII. No other relief is required. We find in Proposition I that defense counsel made reasonable strategic decisions to present a defense of consent to the sex crimes and waive second stage closing argument, conducted zealous adversarial testing of the State's case, and was not ineffective.<sup>1</sup> We find in Proposition II that the trial court's failure to redact the term of years from Crews's Judgment and Sentence for his prior conviction does not require relief.<sup>2</sup> We find in Proposition IV that the majority of evidence and argument were within appropriate limits, and any impropriety did not affect Crews's rights.<sup>3</sup> We find in Proposition V that no accumulated error in these propositions warrants relief.<sup>4</sup>

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<sup>1</sup> *Hooks v. State*, 2001 OK CR 1, 19 P.3d 294, 317 cert. denied, 534 U.S. 963, 122 S.Ct. 371, 151 L.Ed.2d 282; *Lewis v. State*, 1998 OK CR 24, 970 P.2d 1158, 1173-74, cert. denied, 528 U.S. 892, 120 S.Ct. 218, 145 L.Ed.2d 183 (1999); *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1512-14, 146 L.Ed.2d 389 (2000); *Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052, 2069-70, 80 L.Ed.2d 674, 693 (1984).

<sup>2</sup> *Cooper v. State*, 1991 OK CR 26, 806 P.2d 1136, 1139.

<sup>3</sup> *Hooks*, 19 P.3d at 314; 20 O.S.2001, § 3001.1.

<sup>4</sup> See, e.g., *Hanson v. State*, 2003 OK CR 12, 72 P.3d 40, 55 (numerous, serious errors required remand for capital resentencing); *Fitzgerald v. State*, 1998 OK CR 68, 972 P.2d 1157, 1175

We find error in Proposition III. Crews did not testify, and this trial was conducted in two stages. Count VIII charged Crews with possession of a firearm after former conviction or while on probation. This Court has explicitly set out the proper procedure for handling these cases – crimes containing as an element a prior conviction shall be tried to guilt and punishment in the second stage.<sup>5</sup> The trial court did not follow this procedure. During first stage the trial court, without objection, gave partial instructions on Count VIII, directing jurors to find whether Crews knowingly possessed a firearm. This does not state a crime. The elements of the crime with which Crews was charged are: (a) knowingly and willfully (b) possessing or having at his residence (c) any pistol or dangerous or deadly firearm which could be easily concealed, (d) and the defendant was convicted of a particular felony in a particular court on a particular date.<sup>6</sup> As the committee comments to the uniform jury instruction note, under most circumstances it is legal to own or possess a firearm in Oklahoma; the element of a prior conviction creates the crime and thus must be specifically pled, proved and instructed on. The State admits the trial court failed to instruct on the elements of the crime, but argues there was no plain error. Whether or not the defendant agrees to the instructions, it is plain error to fail to instruct on the elements of a crime.<sup>7</sup> The

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(numerous, serious errors required remand for capital resentencing); *Bechtel v. State*, 187 OK CR 1126, 138 P.2d 559, 561 (serious errors required reversal and remand).

<sup>5</sup> *Chapple v. State*, 1993 OK CR 38, 1866 P.2d 1213, 1217.

<sup>6</sup> OUJI-CR (2<sup>nd</sup>) 6-39.

<sup>7</sup> *Cabana v. Bullock*, 474 U.S. 376, 384, 106 S.Ct. 689, 696, 88 L.Ed.2d 704 (1986) (jury verdict cannot stand where instructions do not find it to require each element of the crime under proper standard of proof); U.S. Constitution, Amend. 14.

question is whether, beyond a reasonable doubt, the jury's verdict was not affected by the erroneous instruction.<sup>8</sup>

The State argues any error in first stage instruction makes no difference since the jury found Crews guilty of a prior conviction in second stage, shielding him from the potential prejudicial effect of his conviction during the first stage.<sup>9</sup> This misses the point. Crews's jury was never instructed on the elements of possession of a firearm after conviction or while on probation. In fact, the jury was never told during the first stage of trial that Crews was charged in Count VIII with possession of a firearm after conviction or while on probation. When the prosecutor read the Information before opening argument, she said, "Possession of a Firearm, by knowingly having in his possession and within his immediate control, a handgun." The jury was initially instructed that Crews was charged with "Count 8: Possession of a Firearm." At the close of evidence, the jury was instructed Crews was charged in Count VIII with possessing a firearm, and told the elements of "possessing a firearm" were (a) knowingly and willfully (b) possessing or having at his residence (c) any pistol or dangerous or deadly firearm which could be easily concealed. This instruction correctly cited the first three elements of the charged crime, but not the fourth, without which there is no crime. The jury's

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<sup>8</sup> See, e.g., *Pope v. Illinois*, 481 U.S. 497, 502, 107 S.Ct. 1918, 1922, 95 L.Ed.2d 439 (1987) (unconstitutional added element in instruction subject to harmless error analysis; harmless where improper instruction added to but did not change essential elements); *Rose v. Clark*, 478 U.S. 570, 579, 106 S.Ct. 3101, 3107, 92 L.Ed.2d 460 (1986) (improper burden-shifting instruction on elements subject to harmless error analysis; harmless where jury was instructed on essential elements of the crime).

<sup>9</sup> The State relies on *Chapple*, 1866 P.2d at 1217, which came to that conclusion. There is no indication that the jury in *Chapple* was not informed of the elements of the crime charged.

first stage verdict found that Crews “possessed a firearm.” During the second stage, jurors were instructed they had found Crews “guilty of the crime [sic] of possession of a firearm”, and told to “determine the proper punishment for the crime of Possession of a Firearm after a former conviction of a felony.” The instruction then stated that the punishment for possession of a firearm after one previous conviction was imprisonment for two to ten years and a fine of not more than \$10,000.

Nowhere in these instructions, or at any time during the trial, were jurors instructed on the crucial fourth element of Count VIII. Jurors found Crews had been convicted of a felony. However, the jury was never told that Crews’s prior conviction had any bearing on his guilt for the crime charged in Count VIII. In fact, in the second stage jurors were told they had already found Crews guilty of the crime – possession of a firearm – and were now merely determining the punishment which would be available after a felony conviction. Contrary to the State’s argument, Crews was certainly prejudiced by this instruction: thanks to the omission of the fourth element, he was improperly convicted of an act that is not a crime. As Crews notes, this is similar to *Allen v. State*.<sup>10</sup> There, the defendant was charged with carrying a loaded firearm in a vehicle, but the jury was instructed in the first stage on simple possession of a firearm. We held that an instruction on simple possession of a firearm “does not apprise the jury of a crime in the state of Oklahoma”,<sup>11</sup> and reversed and

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<sup>10</sup> 1994 OK CR 13, 871 P.2d 79, *cert. denied*, 513 U.S. 952, 115 S.Ct. 370, 130 L.Ed.2d 322.

<sup>11</sup> *Id.*, 871 P.2d at 103.

remanded that conviction. We do the same here. This proposition is granted.  
Count VIII is reversed and remanded for a new trial.

### **Decision**

The Judgments and Sentences in Counts I, II, III, IV, V, VI, VII and IX are **AFFIRMED**. The Judgment and Sentence in Count VIII is **REVERSED** and **REMANDED** for a new trial.

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#### **OPINION BY: CHAPEL, J.**

JOHNSON, P.J.: SPECIALLY CONCURS  
LILE, V.P.J.: CONCUR IN PART/DISSENT IN PART  
LUMPKIN, J.: CONCUR IN RESULTS  
STRUBHAR, J.: CONCUR

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**JOHNSON, PRESIDING JUDGE:      Specially Concurring**

I agree that all Counts should be affirmed, and would grant relief on Count VIII. However, I would not remand for a new trial. Retrial is not necessary and neither is the expense and trouble it causes to all concerned. As a practical matter, on remand the procedure followed often results in either dismissal of the charge or a plea agreement. I would reverse Count VIII and remand with instructions to dismiss. Therefore, I specially concur herein.