

Appellant now appeals his convictions and sentences. He raises the following propositions of error:

- I. There was insufficient evidence presented that Appellant committed an offense;
- II. Appellant's convictions for manufacturing methamphetamine, possession of methamphetamine, and possession of a precursor substance violate the state and federal prohibitions against double jeopardy and double punishment;
- III. Appellant's Fourteenth Amendment Due Process rights were violated when the jury was erroneously instructed as to the range of punishment in the second stage, regarding Count IV; and
- IV. The accumulation of errors in this case deprived Appellant of due process of law pursuant to the state and federal constitutions.

After thoroughly considering these propositions and the entire record before us, including the original record, transcripts, and briefs of the parties, we find the issues Appellant raises in propositions two and three have merit and require relief, as set forth below.

With respect to proposition one, we find, after viewing the evidence in the light most favorable to the State and accepting all reasonable inferences and credibility choices that tend to support the jury's verdict, any rational trier of fact could have found the essential elements of the crime of manufacturing and possession of a firearm while committing a felony beyond a reasonable doubt. *Spuehler v. State*, 709 P.2d 202, 203-204 (Okl.Cr.1985); *Ott v. State*, 967 P.2d 472, 476 (Okl.Cr.1998).

With respect to proposition two, we find, under the facts of this case, Appellant's simultaneous convictions for manufacturing methamphetamine,

possession of precursor substances, and possession of methamphetamine were not based upon a series of separate and distinct crimes here, but rather one act of manufacturing, which encompassed both possession of precursor substances and methamphetamine. *Davis v. State*, 993 P.2d 124, 126 (Okl.Cr.1999); *Hale v. State*, 888 P.2d 1027, 1029 (Okl.Cr.1995). Although no objection was filed at trial, the multiples punishments amount to plain error.

With respect to proposition three, we find plain error occurred when the jury was erroneously instructed that the range of punishment on Count IV, possession of a firearm while in the commission of a felony, in violation of 21 O.S.Supp.1999, § 1287, was not less than twenty (20) years imprisonment. Here, the punishment range was not less than two (2) years nor more than ten years, as a first violation of 21 O.S.Supp.1999, § 1287, which is itself a form of enhancement statute.² As such, we find Appellant's sentence under Count IV must be modified, as set forth below.

With respect to proposition four, we find, under this record, no plain error or ineffective assistance of counsel concerning defense counsel's introduction of prior convictions in the first stage, the jury instructions, enhancement of the convictions, or the impeachment procedure used. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Simpson v. State*, 876 P.2d 690, 693 (Okl.Cr.1994).

² The Court was recently called upon to decide this very issue in the unpublished decision of *Stratmoen v. State*, F-2000-292. Three members of the Court took the position that an enhancement statute may not be enhanced by another enhancement statute. I dissented on that issue on the basis that Section 1287 is not an enhancement statute, but a substantive felony statute, which may be enhanced like another felony under 21 O.S.Supp.1999, § 51.1. I continue to take that position, but defer to my colleagues here as a matter of stare decisis.

DECISION

Appellant's conviction and sentences on Count I is hereby **AFFIRMED**. His convictions and sentences on Counts II and III, i.e., Possession of a Precursor Substance and Possession of Methamphetamine, are hereby **REVERSED** and the matter is **REMANDED** to the District Court of Logan County with instructions to **DISMISS** both of those counts. Appellant's conviction on Count IV is hereby **AFFIRMED**, but his sentence thereon is hereby **MODIFIED** to five (5) years. All sentences shall be served concurrently.

AN APPEAL FROM THE DISTRICT COURT OF LOGAN COUNTY
THE HONORABLE DONALD L. WORTHINGTON, DISTRICT JUDGE

APPEARANCES AT TRIAL

DANIEL E. JAMES
2601 NW EXPRESSWAY, SUITE 201W
OKLAHOMA CITY, OK 73112
COUNSEL FOR APPELLANT

EDDIE VALDEZ
ASSISTANT DISTRICT ATTORNEY
LOGAN COUNTY
LOGAN COUNTY COURTHOUSE
GUTHRIE, OK 73044
COUNSEL FOR THE STATE

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

APPEARANCES ON APPEAL

STUART W. SOUTHERLAND
P.O. BOX 4441
TULSA, OK 74159-0441
COUNSEL FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
BRANT M. ELMORE
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OK 73104-4894
COUNSEL FOR THE STATE

RE