

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

EDUARDO RIVERA FAJARDO,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2007-690

FILED
IN COURT OF CRIMINAL APP
STATE OF OKLAHOM

JUL 24 2008

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

A. JOHNSON, JUDGE:

Appellant Eduardo Rivera Fajardo was tried by jury and convicted in the District Court of Tulsa County, Case No.CF-2006-5482, of Trafficking in Illegal Drugs (Count 1) in violation of 63 O.S.Supp.2004, § 2-415(B), Failure to Obtain Drug Tax Stamp (Count 2) in violation of 68 O.S.2001, § 450.8, and Possession of Paraphernalia (Count 3) in violation of 63 O.S.Supp.2004, § 2-405.¹ The jury fixed punishment at forty-four years imprisonment and a \$297,000.00 fine on Count 1, three years imprisonment and a \$3,000.00 fine on Count 2, and one year imprisonment on Count 3. The Honorable Jefferson D. Sellers, who presided at trial, sentenced Fajardo accordingly, and ordered the sentences to be served concurrently. From this judgment and sentence Fajardo appeals, raising the following issues:

¹ Fajardo was originally charged with five counts: Count One: Trafficking in Illegal Drugs (Marijuana); Count Two: Trafficking in Illegal Drugs (Cocaine); Count Three: Failure to Obtain a Tax Stamp (Marijuana); Count Four: Failure to Obtain a Tax Stamp (Cocaine); Count Five: Possession of Drug Paraphernalia. The State merged Counts One and Two and merged Counts Three and Four in an Amended Information. The remaining counts were then renumbered.

- (1) whether the evidence was sufficient to sustain his convictions;
- (2) whether the cumulative effect of prosecutorial misconduct deprived him of a fair trial and contributed to an excessive sentence;
- (3) whether the jury's verdict for drug trafficking is infirm because of the use of a single verdict form and a range of punishment instruction that included the range of punishment for trafficking in marijuana and trafficking in cocaine; and
- (4) whether cumulative error deprived him of a fair trial and reliable verdict.

We affirm the Judgment and Sentence of the District Court on Counts 2 and 3. We also affirm the Judgment of the District Court on Count 1, but find Fajardo's sentence on this Count should be modified for the reasons discussed below.

1.

The trial evidence was sufficient for any rational trier of fact to find that Fajardo constructively possessed the cocaine and marijuana discovered during the execution of the search warrant beyond a reasonable doubt. *Coddington v. State*, 2006 OK CR 34, ¶ 66, 142 P.3d 437, 455, *cert. denied*, ___U.S.___, 127 S.Ct. 2032, 167 L.Ed.2d 804 (2007); *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204.

2.

The parties agree that the prosecutor exceeded the bounds of proper argument in this case. "Allegations of prosecutorial misconduct do not warrant reversal of a conviction unless the cumulative effect was such as to deprive the defendant of a fair trial." *Brewer v. State*, 2006 OK CR 16, ¶ 13, 133 P.3d 892, 895. Relief is not warranted unless in light of the entire record, the defendant

has suffered prejudice. *Id.* We are convinced that the overwhelming weight of the evidence, and not the improper arguments made by the prosecutor, was the basis for the jury's guilty verdict and that Fajardo received a fair trial in that regard. *See Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). We are not satisfied, however, that the remarks had no impact on the sentence imposed for trafficking. The trial court, hearing the argument first hand and having the opportunity to observe the jury's reaction, found that the improper remarks affected the sentence. The trial court suggested sentence modification for Count 1 was appropriate in this matter. We agree and modify Fajardo's sentence for trafficking in illegal drugs to remedy the error.

3.

In *Lewis v. State*, we held that when an individual is found in possession of two different types of drugs both over the threshold amount under 63 O.S.Supp.2004 § 2-415(C), the two drugs form one chargeable offense of Trafficking in Illegal Drugs with a minimum penalty determined by the drug with the highest minimum penalty. *See Lewis v. State*, 2006 OK CR 48, ¶ 6-7, 150 P.3d 1060, 1062.² *See also Watkins v. State*, 1992 OK CR 34, ¶ 5, 855 P.2d 141, 142 (possession of PCP with intent to distribute merged into possession of cocaine with intent to distribute because cocaine had the higher

² While *Lewis* was in effect at the time Fajardo was charged and tried; merger, in cases like this one, is no longer required. Effective November 1, 2007, separate types of controlled substances described in subsection A of this section when possessed at the same time in violation of any provision of this section shall constitute a separate offense for each substance. 63 O.S.Supp.2007 §2-415(B)(3).

minimum penalty). Based on our decision in *Lewis*, Fajardo's two counts of trafficking were merged for trial. Unfortunately, the part of the *Lewis* decision dealing with the appropriate range of punishment in a case like this was not brought to the attention of the court below. It was left to struggle with appropriate instructions to the jury on the range of punishment for drug trafficking in this case because the minimum punishment for trafficking in marijuana is less than the minimum punishment provided for trafficking in cocaine.³ The trial court ultimately submitted an instruction that provided ranges of punishment for both trafficking in marijuana and trafficking in cocaine. The instruction failed, however, to provide any explanation of how to utilize those two ranges of punishment in relation to the single charge of trafficking in illegal drugs. The instruction was confusing and constituted error under *Lewis*.

If it is possible to arrive at the intent and purpose of the jury, the verdict should be upheld. See *Johnson v. State*, 1988 OK CR 54, ¶ 11, 751 P.2d 1094, 1097. The jury was instructed that Fajardo was charged with committing trafficking by knowingly possessing 28 grams or more of cocaine and/or 25 lbs. of marijuana. The submission of a single verdict form for trafficking in illegal drugs and the court's range of punishment instruction did not affect the jury's

³ The range of punishment for Trafficking in Illegal Drugs (Cocaine) is 10 years to life imprisonment in the State Penitentiary and a fine of not less than \$25,000 nor more than \$100,000 for cocaine weighing between 28 grams and 300 grams and a fine of not less than \$100,000 nor more than \$500,000 for cocaine weighing more than 300 grams. 63 O.S.Supp.2004 §2-415 (C)(2). The range of punishment for Trafficking in Illegal Drugs (Marijuana) is four years to life imprisonment and a fine of not less than \$25,000 nor more than \$100,000. 63 O.S.Supp.2004, § 2-415 (C)(1).

finding of guilt because Fajardo never contested the quantity of the marijuana and cocaine seized, and the amounts involved satisfied the drug weight requirements of section 2415 for a finding of trafficking in each drug.

Under the holding of this Court in *Lewis*, the range of punishment for trafficking in cocaine (ten to life) was the only range that should have been instructed upon in this case. Because the court's instruction provided two ranges of punishment for the single charge of trafficking, we cannot find that the instruction did not confuse the jury and affect its sentence on Fajardo's conviction for trafficking in illegal drugs. Modifying Fajardo's sentence in Count 1 not only cures the error from the improper argument of the prosecutor but also cures any error stemming from the court's range of punishment instruction for drug trafficking.

4.

Sentence modification remedies the two errors in this case and no further relief is required under Fajardo's cumulative error claim.

DECISION

The Judgment and Sentence of the District Court on Counts 2 and 3 is **AFFIRMED**. The Judgment of the District Court on Count 1 is **AFFIRMED** as **MODIFIED**. This matter is remanded to the District Court with instructions to **MODIFY** Fajardo's sentence in Count 1 from forty-four years in prison to twenty-five years in prison and a \$100,000 fine. Under Rule 3.15, *Rules of the*

Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App. (2008), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE JEFFERSON D. SELLERS, DISTRICT JUDGE

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OPINION BY: A. JOHNSON, J.
LUMPKIN, P.J.: Concur
C. JOHNSON, V.P.J.: Concur
CHAPEL, J.: Concur
LEWIS, J.: Concur

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