

counts for which Appellant was neither tried nor convicted.

5. Prosecutorial misconduct denied Appellant a fair trial.
6. The cumulative effect of all errors deprived Appellant of a fair trial.
7. Appellant's case should be remanded for correction of the Judgment and Sentence *nunc pro tunc*.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm, but remand for correction of the Judgment and Sentence. As to Proposition 1, considering the totality of evidence presented at trial in a light most favorable to the State, a rational juror could conclude, beyond a reasonable doubt, that Appellant enjoyed joint dominion and control with his co-defendant, Marcus Hooks, over both the drugs and the firearms seized, and that the firearms were being used in conjunction with drug trafficking. *Watts v. State*, 2008 OK CR 27, ¶ 12, 194 P.3d 133, 137-38; *Pebworth v. State*, 1993 OK CR 28, ¶ 12, 855 P.2d 605, 607. Proposition 1 is denied.¹

¹ The evidence showed that the drugs and guns were discarded along the highway during a high-speed attempt to elude police; Appellant was the front-seat passenger in the vehicle, and co-defendant Hooks was the driver. Two other men were in the back seat. The officer who stopped the vehicle at a safety checkpoint (before Hooks decided to speed away) saw a revolver on the front seat; he also noticed that Appellant was sitting with his back against the passenger seat, with one leg folded on the seat, and a coat draped over his lap. The firearms recovered after the chase included the revolver observed at the checkpoint, as well as a 9mm automatic weapon. Incriminating conversations between the two men, after their arrest, were captured on the patrol car's recording equipment. Those conversations showed that the two men were involved in a drug transaction, and reasonably suggested that the firearms were directly related to that activity.

We reject Appellant's additional claim that a prior ruling from the Tenth Circuit Court of Appeals dictates the result here. Both Hooks and Appellant were convicted in federal court for firearm possession arising from this same episode. On appeal, the Tenth Circuit found that the trial evidence left reasonable doubt as to whether Appellant had dominion and control over a firearm. *United States v. Hooks*, 551 F.3d 1205 (10th Cir. 2009). (Hooks's conviction was affirmed.) However, two important pieces of evidence in the state-court trial were not presented in the federal trial. In the federal prosecution, the government neglected to elicit testimony

In Proposition 2, Appellant claims his trial counsel was ineffective for failing to impeach a witness with his prior inconsistent statement, and failing to seek redaction of certain information regarding Appellant's criminal history. We find the inconsistency about what Appellant told police was not material, given the clearly incriminating statements he made to his confederate, in the officer's absence, which were recorded by equipment in the patrol car. The fact that the jurors could use simple math to deduce that a defendant was granted early release on a prior sentence does not result in error. *Boyd v. State*, 1987 OK CR 197, 743 P.2d 658, 662. Neither omission could reasonably have affected the outcome of the trial. *Grant v. State*, 2009 OK CR 11, ¶ 55, 205 P.3d 1, 22-23. Proposition 2 is denied.

As to Proposition 3, considering all the facts and circumstances, including Appellant's violent criminal history, the fact that the instant offenses were committed just months after his release from prison, and the large amount of drugs involved, we cannot say that the punishments imposed are shocking to the conscience. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149. Proposition 3 is denied.

In Propositions 4 and 7, Appellant contends his case should be remanded for correction of the Judgment and Sentence. The State concedes,

that the officer at the safety checkpoint had seen Appellant sitting in an awkward position with a coat draped over his lap. *Hooks*, 551 F.3d at 1208 & n.1. Furthermore, in the federal trial, the government apparently presented no evidence about the large cache of drugs found with the firearms. *Hooks*, 551 F.3d at 1211. We believe both of these important facts – coupled with the incriminating conversations between the two men – were sufficient for a reasonable juror to conclude that Appellant was attempting to hide the 9mm weapon at the checkpoint, and that he discarded both firearms, and the drugs, on the passenger side of the highway during the chase.

and we agree, that fees and costs assessed for “Count 3” and “Count 4” should be vacated, because Appellant was not convicted of those charges.² 28 O.S.2001, § 101. The State also concedes, and we agree, that the statutory reference for Count 1 found in the Judgment and Sentence is incorrect.³ We therefore **REMAND** the case to the district court for correction of the Judgment and Sentence *nunc pro tunc*. *Demry v. State*, 1999 OK CR 31, ¶ 22, 986 P.2d 1145, 1148-49.

As to Proposition 5, the prosecutor’s misstatement of the evidence in closing argument was minor (and not objected to), and cannot reasonably be said to have affected the outcome of the trial. *Bland v. State*, 2000 OK CR 11, ¶ 101, 4 P.3d 702, 728. Nor did the prosecutor improperly “vouch” for a police witness by referring (without objection) to facts in evidence which bore on his credibility. *Warner v. State*, 2006 OK CR 40, ¶ 184, 144 P.3d 838, 889. There was no plain error in the comments Appellant complains of. Proposition 5 is denied.

As to Proposition 6, because the only errors we have identified are remedied by our remand for correction of the Judgment and Sentence, there is no cumulative error. *Bell v. State*, 2007 OK CR 43, ¶ 14, 172 P.3d 622, 627. Proposition 6 is denied.

² Attachment A to the Judgment and Sentence assesses fees and costs for Counts 3 and 4 totaling \$419.30. These counts were dismissed prior to trial.

³ The statutory reference for trafficking in methylenedioxyamphetamine is 63 O.S.Supp.2004, § 2-415(C)(8).

DECISION

The Judgment and Sentence of the district court is **AFFIRMED**, but the case is **REMANDED** for correction of the Judgment and Sentence *nunc pro tunc*. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2009), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF McINTOSH COUNTY
THE HONORABLE JAMES R. PRATT, ASSOCIATE DISTRICT JUDGE

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OPINION BY C. JOHNSON, P.J.

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LUMPKIN, J.: CONCUR
CHAPEL, J.: CONCUR
LEWIS, J.: CONCUR

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