

JUL 12 2002

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES W. PATTERSON
CLERK

JEROME WADE HENNESY,) NOT FOR PUBLICATION
)
Appellant,)
v.) Case No. F 2001-873
)
THE STATE OF OKLAHOMA,)
)
Appellee.)

SUMMARY OPINION

JOHNSON, VICE-PRESIDING JUDGE:

Appellant, Jerome Wade Hennesy, was convicted by a jury in Carter County District Court, Case No. CF 2000-442, of Trafficking in a Controlled Dangerous Substance (Cocaine Base), in violation of 63 O.S.2001, § 2-415.¹ Jury trial was held June 5th and 6th, 2001, before the Honorable Lee Card, Associate District Judge. The jury set punishment at ten (10) years imprisonment and imposed a Twenty-Five Thousand Dollar (\$25,000.00) fine. Judge Card formally sentenced Appellant on July 20, 2001 in accordance with the jury's verdict. From the Judgment and Sentence imposed, Appellant filed this appeal.

Appellant raises two propositions of error:

1. The circumstantial evidence presented at trial failed to exclude every reasonable hypothesis except that Appellant was guilty of trafficking in cocaine base, and
2. Appellant was prejudiced by the improper admission of extensive other crimes evidence.

¹ Appellant also was convicted of misdemeanor Unlawful Possession of Marijuana, CM 2000-735, but is not appealing that conviction.

After thorough consideration of the propositions raised, the record before us, the transcripts, the briefs and arguments of the parties, we have determined that relief is required for the reasons set forth below.

In Proposition Two, Appellant contends he was prejudiced by the improper admission of other crimes evidence and we agree. Although defense counsel did not object to the admission of this evidence, we find it was prejudicial, and its admission rose to the level of plain error in this case. Because the evidence in this case was not great and was entirely circumstantial, we cannot say the error was harmless. *Simpson v. State*, 1994 OK CR 40, ¶ 18, 876 P.2d 690, 698. Accordingly, we find the case should be **REVERSED AND REMANDED FOR A NEW TRIAL.**

Our decision on Proposition Two renders the sufficiency of evidence claim in Proposition One moot. We trust the State to strengthen its evidence showing knowledge and control over the contraband so that a similar claim will not be raised should Appellant be convicted on retrial.

DECISION

The Judgment and Sentence of the trial court is hereby **REVERSED AND REMANDED FOR A NEW TRIAL**

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OPINION BY: JOHNSON, V.P.J.

LUMPKIN, P.J: DISSENTS
CHAPEL, J.: CONCURS
STRUBHAR, J.: CONCURS
LILE, J.: DISSENTS

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LUMPKIN, PRESIDING JUDGE: DISSENTS

Appellant was not prejudiced by the admission of evidence of other crimes. Evidence that Appellant was conducting drug transactions just prior to the execution of the search warrant was a part of the *res gestae* of the trafficking charge. See *Rogers v. State*, 890 P.2d 959, 971 (Okl.Cr.1995). The record shows that Appellant sold a controlled dangerous substance during the surveillance of the property in which a search warrant was soon to be executed. There is a visible connection between the selling of the drugs and the discovery of the crack cocaine in the trunk of the Mercedes. *Smith v. State*, 727 P.2d 1366 (Okl.Cr.1986). The evidence was part of the sequence of events and necessary to give the jury a complete understanding of the crime. *Fontenot v. State*, 881 P.2d 69, 83 (Okl.Cr.1994). Further, evidence of the drug sales was so closely connected to the trafficking charge so as to eliminate the element of surprise *Burks v. State*, 594 P.2d 771, 772 (Okl.Cr.1979)¹ seeks to prevent. See *Welborn v. State*, 481 P.2d 783, 784 (Okl.Cr.1971). Therefore, no pre-trial notice was required. The probative value of the evidence was not outweighed by the danger of unfair prejudice. Omitting the evidence would have left the jury without a clear picture of the events surrounding the execution of the search warrant. Therefore, reversal is not warranted based upon admission of evidence of other drug sales.

¹ overruled in part on other grounds, *Jones v. State*, 772 P.2d 922 (Okl.Cr.1989).

Further, the evidence in this case was both direct and circumstantial. The drugs found in Appellant's presence and in the Mercedes were direct evidence of guilt. Circumstantial evidence of guilt included Appellant's possession of the car keys, and the large sums of money found on both Appellant and sister. Reviewing this evidence under the standard set forth in *Spuehler v. State*, 709 P.2d 202, 203-04 (Okl.Cr.1985), a rational trier of fact could find the elements of the crime charged beyond a reasonable doubt. As I have stated previously, there is no legal foundation supporting a separate standard of review depending on the evidence presented. See *White v. State*, 900 P.2d 982 (Okl.Cr.1995) (Lumpkin, J: specially concurring). This Court should recognize that fact and adopt a unified *Spuehler*-type approach to evaluating the sufficiency of the evidence in all cases.

LILE, JUDGE: DISSENTS

The evidence of drug transactions was evidence of possession of the "trafficking" quantity. The evidence was properly admitted into evidence.