

AUG - 8 2016

MICHAEL S. RICHIE
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RICHARD JERREL JACKSON,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F 2015-738

SUMMARY OPINION

LEWIS, JUDGE:

Richard Jerrel Jackson, Appellant, was convicted of, count one, unlawful possession of methamphetamine in violation of 63 O.S.Supp.2012, § 2-402, count two, unlawful possession of marijuana in violation of 63 O.S.Supp.2012, § 2-402, count three, unlawful possession of alprazolam 63 O.S.Supp.2012, § 2-402, count four, unlawful possession of drug paraphernalia in violation of 63 O.S.Supp.2012, § 2-405, and, count five, driving with a suspended license in violation of 47 O.S.2011, § 6-303, in Comanche County district court case number CF-2014-310, before the Honorable Keith B. Aycock, District Judge. Counts one, two, and three were enhanced with two or more prior felony convictions. The jury set punishment at life imprisonment on count one, six (6) years on counts two and three, and one (1) year each on counts four and five, and the trial court sentenced accordingly ordering that the sentences be served consecutively. Jackson perfected an appeal to this Court, raising the following propositions of error.

1. Double Jeopardy should have prohibited carving three crimes from a single possession.
2. Defense counsel was ineffective for failing to object on the basis of double jeopardy, for commenting on Mr. Jackson's right to remain silent, and for failing to object to the way former felonies were used against Appellant.
3. The former felony charge of uttering a forged instrument clearly and improperly showed that the sentence had been suspended in part; accordingly relief must be granted.
4. The trial judge erred by allowing the prosecutor to impeach Mr. Jackson with a charge not filed as a former felony.
5. The evidence was insufficient to support the count 4 charge of unlawful possession of drug paraphernalia.
6. The trial judge erred by allowing the submission into evidence of items that were more prejudicial than probative but were not charged as a crime.
7. Prior felonies which were all part of one transaction were used against Mr. Jackson.
8. The life sentence for the possession of Methamphetamine was excessive.
9. The trial judge erred by failing to halt the sentencing hearing and order that Mr. Jackson be examine for competency.
10. Cumulative error deprived Appellant of a fair trial.

After thorough consideration of Jackson's propositions of error and the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we have determined that the convictions and sentences for counts two and three of the district court shall be reversed and remanded with instructions to dismiss; the remaining counts of the Judgment and Sentence shall be affirmed. Appellant's application for an evidentiary hearing is denied.

In reaching our decision, we find in proposition one, that Appellant's claim is that possession of three different drugs in the same "cache" violates prohibitions against double jeopardy and double punishment pursuant to both Federal and Oklahoma Constitutional law and Oklahoma Title 21 O.S.2011, § 11. The State concedes, under the facts of this case, it was error for Jackson to be convicted of possession of three separate substances, when the substances were possessed in one container.

This issue was squarely addressed in *Watkins v. State*, 1991 OK CR 119, 829 P.2d 42, *opinion on rehearing*, 1992 OK CR 34, 855 P.2d 141, where this court held that possession of cocaine and possession of phencyclidine was one act of possession of controlled dangerous substance and one offense, when both substances were contained on one package. Further, in *Lewis v. State*, 2006 OK CR 48, ¶¶ 5-6, 150 P.3d 1060, 1062, this Court held that possession of a trafficking amount of two separate drugs in one container constituted one count of trafficking in illegal drugs.

The same conclusion must be reached in this case; possession of three separate drugs in one container constitutes one crime of possession of a controlled dangerous substance under the clear language of 63 O.S.Supp.2012, § 2-402. *See Watkins*, 1992 OK CR 34, ¶ 6, 855 P.2d at 142. Consequently conviction on counts two and three must be reversed and remanded with instructions to dismiss.

In proposition two, we find that Appellant has not shown that counsel's conduct fell below the wide range of reasonable professional conduct, or that the

result of the proceeding would have been different had counsel performed as he now, in hindsight, would have preferred. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984).¹

In proposition three, we find that there was no objection to this evidence, thus this Court is limited to review for plain error only. 12 O.S.2011, § 2104; (Rulings on evidence); *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d. 907, 923. To be entitled to relief under the plain error doctrine, an appellant must prove, first, that actual error occurred, second, which is obvious in the record, and third, the error affected his substantial rights; meaning the error affected the outcome of the proceeding; moreover, this Court will not grant relief unless the error seriously affected the fairness, integrity or public reputation of the judicial proceeding or otherwise represents a “miscarriage of justice.” *Id.*

Here the information regarding the suspended sentence on one of many Judgment and Sentence documents did not prejudice Appellant in any manner. Appellant’s sentences were enhanced by six separate prior felony convictions. Appellant cannot show that the outcome would have been affected by the reference to a suspended sentence.

In proposition four, we find that the trial court did not abuse its discretion in allowing the State, over Appellant’s objection, to impeach Appellant by a felony

¹ Appellant has filed an application for evidentiary hearing pursuant to Rule 3.11, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App. (2016), in order to set forth a basis for his claim of ineffective assistance of counsel due to counsel’s failure to identify and object to the transactional felonies used to enhance his sentence. This issue is resolved in our discussion of proposition seven holding that Appellant was not prejudiced by the alleged error. The failure to show prejudice prevents him from showing that counsel was ineffective under our rules and the prejudice prong of *Strickland*. Appellant’s application for an evidentiary hearing is denied.

conviction which could not be used to enhance his sentence. Evidence that an accused has been convicted of a prior felony is admissible for impeachment purposes if the court determines that the probative value outweighs its prejudicial effect to the accused. 12 O.S.2011, § 2609. The evidence was properly used to impeach Appellant's testimony that he had "cleaned up" his life after getting out of prison.

We find, in proposition five, that in reviewing sufficiency claims, this Court examines the evidence in a light most favorable to the State and determines whether there was sufficient evidence for any rational trier of fact to find the essential elements of the offense beyond a reasonable doubt. *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04. This Court reviews "the direct and circumstantial evidence, crediting all inferences that could have been drawn in the State's favor, to determine if any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt." *Davis v. State*, 2004 OK CR 36, ¶ 22, 103 P.3d 70, 78. In a light most favorable to the State, we find that any rational trier of fact could have found the essential elements of possession of drug paraphernalia as charged.

In proposition six, we find that the trial court did not abuse its discretion in allowing the introduction of items found in the search of his vehicle over Appellant's objection. The finding of these items was central to the chain of events, thus the evidence is considered *res gestae*. See *Eizember v. State*, 2007 OK CR 29, ¶ 77, 164 P.3d 208, 230. Moreover, the relevant probative value of

these items was not substantially outweighed by any potential for improper prejudice. There was no abuse of discretion.

In proposition seven, we find that there were no objections to the information charging Appellant with prior felony crimes for sentence enhancement, thus we review for plain error only. The trial court clearly instructed the jury that Appellant was convicted of only six prior felony convictions, even though the information showed ten felony convictions and two misdemeanor convictions in State's exhibit 15. The jurors are presumed to follow the instructions given them. *Sanders v. State*, 2015 OK CR 11, ¶ 15, 358 P.3d 280, 285. In light of the fact that there are admittedly at least six different transactions or occurrences, notwithstanding his allegations concerning the others, there were still six convictions remaining which were properly used as enhancement. *See Cooper v. State*, 1991 OK CR 26, ¶ 14, 806 P.2d 1136, 1139 (five total convictions out of two separate transactions meant two convictions properly used for enhancement). Appellant has not shown that any prejudicial error occurred.

We find, in proposition eight, that Appellant's life sentence for possession of methamphetamine, after former conviction of six felony offenses many of which were drug offenses, falls within the statutory limits and the sentence does not shock this Court's conscience. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 152.

In proposition nine, we find that Appellant has not met his burden of showing that there was a doubt about his competency at the sentencing hearing.

See *Gilbert v. State*, 1997 OK CR 71, ¶ 4, 951 P.2d 98, 103-04. Appellant, in fact, competently raised issues, although baseless, concerning the jurisdiction of the trial court based on his alleged standing as a descendant of indigenous Moors. The trial court had no duty to have Appellant's competency tested. See 22 O.S.2011, § 1175.1, *et seq.*

Finally, in proposition ten, we find that there are no individual errors requiring relief. As we find no error that was harmful, there is no accumulation of error to consider. *Barnett v. State*, 2011 OK CR 28, ¶ 34, 263 P.3d 959, 970.

DECISION

The judgments and sentences for counts two and three shall be **REVERSED** and **REMANDED** with instructions to **DISMISS**; the remaining counts shall be **AFFIRMED**. Appellant's application for an evidentiary hearing is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY
HONORABLE KEITH B. AYCOCK, DISTRICT JUDGE

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OPINION BY: LEWIS, J.

SMITH, P.J.: Concurs
LUMPKIN, V.P.J.: Concurs
JOHNSON, J.: Concurs in Results
HUDSON, J.: Concurs