

concurrently. From this Judgment and Sentence James appeals, raising the following issues:

- (1) whether the district court erred in separating his single charge of unlawful possession of drugs into two counts and imposing sentences for each;
- (2) whether his felony conviction for unlawful possession of cocaine should be reversed;
- (3) whether he is entitled to relief under the plain error doctrine because the Judgment and Sentence admitted for sentence enhancement included that James received a suspended sentence on an amended charge;
- (4) whether his sentence is excessive and should be modified; and
- (5) whether he should be afforded relief based on cumulative error.

We find reversal of James' conviction for unlawful possession of marijuana is required for the reasons discussed below, but otherwise affirm the judgment and sentence of the district court.

1. & 2.

The State charged James with a single course of illegal conduct by charging him in the information with a single count of unlawful possession of drugs based on his possession of cocaine and marijuana. The single count alleged two theories of culpability, namely unlawful cocaine possession (a felony) and unlawful marijuana possession (a misdemeanor). The district court, without objection, separated the charge for the jury's consideration and submitted jury instructions for a charge of unlawful possession of cocaine and another for unlawful possession of marijuana. The district court also

submitted separate verdict forms. The court reasoned, “the jury can find him guilty of one or both, or not guilty of one or both.” The jury returned a verdict of guilty on both theories and set punishment on each. The district court sentenced James on both charges, but ran the sentences on the unlawful possession charges concurrently because “[t]he marijuana conviction merges into the conviction for the cocaine.”¹ The prosecutor stated, “State is in complete agreement with Your Honor’s findings that Count 1 and 2 do merge.”

James claims he had no notice he was subject to two convictions and sentences based on the single count of unlawful possession of drugs alleged by the State.² We agree.

We first note that the State was free to charge James in a single count as it did here. Furthermore, the district court did not err in submitting separate instructions to the jury on the two theories alleged by the State in the single count. Once the jury found both theories of unlawful possession based on the single count supported by sufficient evidence, however, it was error not to merge both convictions into one conviction with a single sentence because the information evinced the State’s intent to treat James’ conduct of possessing both marijuana and cocaine in this case as a single act.

Where a defendant has committed multiple acts, each capable of sustaining a separate conviction, the State may charge the defendant either for

¹ Generally, merging of offenses refers to combining two charges or convictions into one with the lesser crime ceasing to have an independent existence rather than merely running separate offenses concurrently.

² He also claims that his two convictions violate the prohibition against multiple punishment.

each separate act or for the cumulative effect of the acts under multiple theories of the offense. But in order to sustain multiple convictions—one for each separate act—and to avoid constitutional implications, the State must provide notice to the defendant in the form of an information showing the State's intent to treat the defendant's conduct as multiple acts. It necessarily follows that where a defendant commits multiple criminal acts but the information charges the defendant only for a single course of conduct, even if multiple theories of culpability are presented, the trial court cannot convict the defendant of separate criminal acts without offending due process. See *Patterson v. State*, 2002 OK Cr 18, ¶ 23, 45 P.3d 925, 931 (defendant is entitled to fair notice of the charges against him). Our decision today merely holds that in cases such as this one the information must indicate that the State intends to treat the conduct of the defendant as multiple acts if multiple convictions are to be sustained.

James was not apprised by the information that he was subject to more than one conviction for his criminal acts. The prejudice is obvious: James suffered two convictions instead of one and, although he will not serve additional time because his sentences on each conviction run concurrently, he was assessed a separate fine and costs for each conviction. We find plain error and dismiss James' misdemeanor conviction for unlawful possession of

marijuana.³ See *Bray v. Page*, 1972 OK CR 53, ¶ 11, 494 P.2d 339, 340 (when error requires dismissal of related charges, court dismisses offense carrying lesser penalty).

3.

We reject James' claim that he was prejudiced by the admission of information within the exhibit admitted for sentence enhancement that he received a suspended sentence on an amended charge and had another charge dismissed. Reviewing for plain error only, we find none. James' case is readily distinguishable from *Hunter v. State*, and he cannot show any error from the admission of the exhibit affected the outcome of his case. See *Hunter v. State*, 2009 OK CR 17, ¶¶ 8-10, 208 P.3d 931, 933-934 (plain error is error that counsel failed to preserve through a timely trial objection, but upon appellate review, is clear from the record and affected the defendant's substantial rights). This claim is denied.

4.

James' sentence for unlawful possession of cocaine, after former conviction of a felony is supported by the facts of the case and is within the range of punishment provided by law.⁴ This Court will not disturb a sentence within statutory limits unless, under the facts and circumstances of the case, it is so excessive as to shock the conscience of the Court. *Gomez v. State*, 2007

³ James argument in his second proposition of error is without merit, namely that it is his conviction for the felony offense that should be reversed because of the error discussed in proposition 1.

⁴ James does not challenge his sentence for unlawful possession of drug paraphernalia.

OK CR 33, ¶ 18, 168 P.3d 1139, 1146; *Rea v. State*, 2001 OK CR 28, ¶ 5 n.3, 34 P.3d 148, 149 n.3. James' sentence does not meet that test and no relief is warranted.

5.

No other relief is warranted in this case based on a cumulative error analysis. The cumulative error doctrine applies when several errors occurred at the trial court level, but none alone warrants reversal. *DeRosa v. State*, 2004 OK CR 19, ¶ 100, 89 P.3d 1124, 1157. Although each error standing alone may be of insufficient gravity to warrant reversal, the combined effect of an accumulation of errors may require a new trial. *Id.* Dismissal of James' misdemeanor marijuana conviction corrects the only error found in this case. This claim is denied.

DECISION

James' Judgment and Sentence for Unlawful Possession of Cocaine, After Former Conviction of a Felony and Unlawful Possession of Drug Paraphernalia is **AFFIRMED**. His conviction for Unlawful Possession of Marijuana is **REVERSED** with instructions to **DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE KURT G. GLASSCO, DISTRICT JUDGE

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

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