

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

EMBRY JAY LOFTIS,)
) NOT FOR PUBLICATION
 Appellant,)
)
 v.) Case No. F-2009-1067
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

FEB 23 2011

SUMMARY OPINION

C. JOHNSON, JUDGE:

MICHAEL S. RICHIE
CLERK

Appellant, Embry Jay Loftis, was convicted after jury trial in Carter County District Court, Case No. CF-2009-112, of Unlawful Possession of a Controlled Dangerous Substance, After Former Conviction of Two or More Felonies. The jury assessed punishment at forty years imprisonment and a \$10,000 fine. The trial court sentenced Appellant accordingly. It is from this Judgment and Sentence that Appellant appeals to this Court.

Appellant raises the following propositions of error:

1. Absolute exclusion of the defense witnesses was unwarranted and denied Mr. Loftis a meaningful opportunity to present a complete defense.
2. Mr. Loftis represented himself at trial without the trial court determining if he was competent to do so, or that his decision to represent himself was voluntary.
3. The trial court erred by permitting the jury to enhance punishment with the prior convictions which were part of the same transaction.
4. Because the written second stage jury instructions are missing from the district court file, and are not part of the record on appeal, Mr. Loftis has been deprived of his right to fully appeal the second stage of his trial, therefore his sentences must be modified.

5. Prosecutorial misconduct during closing arguments deprived Appellant of a fair trial.
6. The evidence presented at trial was insufficient to support the conviction for possession of cocaine, as there was insufficient proof of possession.
7. Mr. Loftis should be granted relief based upon cumulative error.
8. The trial court erred when it ordered Mr. Loftis' convictions to be run consecutively.

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 Mr. Loftis's Judgment and modify his Sentence. As to Proposition I, we find that any error in the trial court's ruling denying Appellant the right to present witnesses on his behalf can be found in this case to have been harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967); *Jones v. State*, 2009 OK CR 1, ¶ 46-48, 201 P.3d 869, 883; *White v. State*, 1998 OK CR 69, ¶ 12, 973 P.2d 306, 311.

With regard to Proposition II, we find that Appellant was not forced to represent himself but rather chose to do so and this choice was made knowingly, intelligently and voluntarily. *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975). Further, Appellant was competent to waive his right to counsel. *Godinez v. Moran*, 509 U.S. 389, 396, 113 S.Ct. 2680, 2685, 125 L.Ed.2d 321 (1993).

In Proposition III, we find that 21 O.S.2001, § 51.1(B) prohibits the introduction of transactional priors for purpose of enhancement. It is true that

a showing that the prior convictions had sequential case numbers and occurred on the same day is not sufficient to support an inference they are transactional. See *Ott v. State*, 1998 OK CR 51, ¶ 16, 967 P.2d 472, 478. In the present case, however, that these convictions occurred on the same day and actually arose out of the same case number was not the only evidence supporting Appellant's assertion that they were transactional. The testimony of the witness who sponsored the Judgments and Sentences indicated her belief that the 1998 convictions were transactional. Accordingly, we find that the trial court abused its discretion in allowing both 1998 convictions to be considered by the jury for purposes of enhancement. *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 29, __ P.3d __.

We find in Proposition IV that despite the failure to include written second stage jury instructions within the record, as is required by 22 O.S.2001, § 831(6), the certified transcript of the trial court's reading of the same rendered this error harmless beyond a reasonable doubt as Appellant had an adequate record from which to base his appeal of the second stage of trial.

As to Proposition V, we find that the prosecutor's closing argument improperly and unmistakably called to the jury's attention that Appellant did not serve his full sentence on his prior conviction. *Darks v. State*, 1998 OK CR 15, ¶ 59, 954 P.2d 152, 167. Such a conclusion is supported by the two notes sent out to the judge by the jury during second stage deliberations asking how much time Appellant served on his prior conviction for distribution and about

the percentage of time he would serve on the present conviction. Under the circumstances of this case, we find the prosecutor's comment was plain error which affected the jury's decision in sentencing. *Williams v. State*, 2008 OK CR 19, ¶ 124, 188 P.3d 208, 230.

In Proposition VI we find that the evidence was sufficient to support Appellant's conviction for possession of controlled dangerous substance beyond a reasonable doubt. *Head v. State*, 2006 OK CR 44, ¶ 6, 146 P.3d 1141, 1144. *See also Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04.

In his seventh proposition Appellant claims that the trial errors, when considered cumulatively, warrant a new trial or sentence modification. Upon review of Appellant's claims for relief and the record in this case we conclude that although his trial was not error free, any errors and irregularities, even when considered in the aggregate, do not require reversal of Appellant's judgment. *DeRosa v. State*, 2004 OK CR 19, ¶ 100, 89 P.3d 1124, 1157. However, we find that the cumulative effect of the sentencing errors raised in Propositions III and V require that Appellant's sentence be modified to thirty years imprisonment.

Finally, we find that the trial court did not abuse its discretion in ordering the sentence imposed on his felony possession conviction to run concurrently with the sentences imposed on his misdemeanor convictions. *Coates v. State*, 2006 OK CR 24, ¶ 8, 137 P.3d 682, 685.

DECISION

The Judgment of the district court is **AFFIRMED**. Appellant's Sentence is **MODIFIED** to thirty years imprisonment. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2010), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF CARTER COUNTY
THE HONORABLE THOMAS S. WALKER, DISTRICT JUDGE**

APPEARANCES AT TRIAL

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OPINION BY C. JOHNSON, P.J.
A. JOHNSON, P.J.: CONCUR
LEWIS, V.P.J.: CONCUR IN RESULTS
LUMPKIN, J.: CONCUR IN RESULTS
SMITH, J.: SPECIALLY CONCUR

SMITH, J., SPECIALLY CONCURS:

I concur with the Court's decision. I write separately to emphasize to trial courts the importance of allowing a defendant to present witnesses. Where, as here, the defendant provided notice before trial and appeared *pro se*, prohibiting him from calling any witnesses was too harsh a sanction.