

**FILED**  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA  
**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**  
AUG - 7 2003

CARLOS GOMEZ MODESTO,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

MICHAEL S. RICHIE

) CLERK FOR PUBLICATION

) Case No. F 2002-1041

**S U M M A R Y O P I N I O N**

**JOHNSON, PRESIDING JUDGE:**

Appellant, Carlos Gomez Modesto, was convicted in Oklahoma County District Court, Case No. CF 1997-7770, of Trafficking in Illegal Drugs (Methamphetamine), in violation of 63 O.S.Supp.1995, § 2-415 (Count 1), and Trafficking in Illegal Drugs (Cocaine), in violation of 63 O.S.Supp.1995, § 2-415 (Count 2). Jury trial was held on March 5-7, 2001, before the Honorable Ray Elliott, District Judge. The jury found Appellant guilty on both Counts and set punishment at ten (10) years on each Count and imposed a Fifty Thousand Dollar (\$50,000.00) fine on Count 1 and a Twenty-Five Thousand Dollar (\$25,000.00) fine on Count 2. Formal sentencing was held on July 31, 2002. Judge Elliott found the jury was misinstructed as to the range of punishment on Count 1 and "amended" the punishment imposed on Count 1 to four (4) years imprisonment. Judge Elliott then sentenced Appellant to four (4) years on Count 1 and to (10) years on Count 2 and ordered the sentences to run concurrently. Thereafter, Appellant perfected this appeal.

Appellant raises five (5) propositions of error:

1. The trial court erred in overruling Mr. Modesto's motion to quash and dismiss the information on grounds of former jeopardy;
2. The trial court erred in overruling Mr. Modesto's motion to dismiss one of the Counts at the sentencing hearing because his conviction on both Counts 1 and 2 constitutes a double jeopardy violation;
3. The State presented insufficient evidence at trial to support Mr. Modesto's convictions for trafficking in methamphetamine and cocaine;
4. Mr. Modesto's convictions must be reversed with instructions to dismiss due to the prosecutor's grossly prejudicial comment during rebuttal closing argument comparing Mr. Modesto to Charles Manson; and,
5. Evidentiary rulings by the trial court deprived Mr. Modesto of his right to a fundamentally fair trial.

After thorough consideration of the propositions raised and the entire record before us on appeal, including the original record, transcripts, briefs and exhibits of the parties, we have determined that Count 1 should be reversed and remanded to the district court with instructions to dismiss and Count 2 should be affirmed for the reasons set forth below.

Using the standard set forth in *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982), the trial judge determined Appellant's retrial was not barred as Appellant had not shown the prosecutor intentionally goaded him into requesting a mistrial. *See also McCarty v. State*, 1995 OK CR 48, ¶¶ 59-60, 904 P.2d 110, 126-127. Accordingly, we find the trial court did not abuse its discretion by overruling his motion to quash and dismiss the information, and Proposition One is denied.

In Proposition Three, we find the evidence was sufficient to sustain Appellant's convictions for both trafficking in methamphetamine and trafficking

in cocaine. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204. However, Proposition Two has merit and we find Appellant's two convictions for trafficking violate the double punishment provision of the Oklahoma Constitution. Therefore, Count 1 should be, and hereby is, reversed and remanded with instructions to dismiss. *Watkins v. State*, 1991 OK CR 119, 829 P.2d 42, *reh'g denied*, 1992 OK CR 34, 855 P.2d 141.

The prosecutor's comment invoking the name of Charles Manson was error, but we find it does not warrant relief in this case. See *e.g.*, *Black v. State*, 2001 OK CR 5, ¶¶ 96-97, 21 P.3d 1047, 1078; *Alverson v. State*, 1999 OK CR 21, ¶ 43, 983 P.2d 498, 514, *cert. denied*, 528 U.S. 1089, 120 S.Ct. 820, 145 L.Ed.2d 690 (2000).

Lastly, while we find the trial court committed some error in its evidentiary rulings, particularly with regard to drug dealer profile type evidence, we find admission of this evidence was harmless beyond a reasonable doubt. See *Wilson v. State*, 1994 OK CR 5, ¶¶ 5-6, 871 P.2d 46, 48-49.

### **DECISION**

The Judgment and Sentence imposed on Count 2 in Oklahoma County District Court, Case No. CF 97-7770, is hereby **AFFIRMED** and the Judgment and Sentence imposed on Count 1 is hereby **REVERSED AND REMANDED TO THE DISTRICT COURT WITH INSTRUCTIONS TO DISMISS.**

#### **APPEARANCES AT TRIAL**

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**OPINION BY: JOHNSON, P.J.**

LILE, V.P.J. : SPECIALLY CONCURS  
LUMPKIN, J.: CONCUR  
CHAPEL, J.: CONCURS IN  
PART/DISSENTS IN PART  
STRUBHAR, J.: CONCUR

**CHAPEL, JUDGE, CONCURS IN PART/DISSENTS IN PART:**

I concur in the decision to reverse Count I. I dissent to the decision to affirm Count II. I am of the opinion that this entire trial was barred by the double jeopardy provisions of our state and federal constitutions. This was a retrial of a case which had previously been mistried due to prosecutorial error. In my judgment when a mistrial is granted due to error, which the prosecutor knows, or should know that the error may result in a mistrial then retrial is prohibited by double jeopardy provisions.