

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RYAN LEE NIXON,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2014-939

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

FEB 26 2016

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

HUDSON, JUDGE:

Appellant Ryan Lee Nixon was tried by a jury in the District Court of Washington County, Case No. CF-2013-407, and convicted of Manufacturing a Controlled Dangerous Substance (Count 1), in violation of 63 O.S.Supp.2012, § 2-401(G); and Possession of a Controlled Dangerous Substance (Count 2), in violation of 63 O.S.Supp.2012, § 2-402.¹ The jury recommended Nixon serve fifteen (15) years imprisonment and pay a fifty thousand dollar (\$50,000.00) fine on Count 1, and two (2) years imprisonment and pay a five thousand dollar (\$5,000.00) fine on Count 2. The Honorable Russell Vaclaw, Associate District Judge, sentenced Nixon in accordance with the jury's verdict, but suspended the fine imposed on Count 2. Judge Vaclaw also ordered Nixon's sentences be run concurrently and directed that Nixon be given credit for time served. Nixon now appeals raising the following issues:

I. THE STATE'S EVIDENCE WAS INSUFFICIENT TO PROVE THAT APPELLANT POSSESSED THE METHAMPHETAMINE FOUND

¹ Appellant was charged jointly with Amos James Wilson and Jennifer Suzanne Wilson.

IN THE BEDROOM. ACCORDINGLY, APPELLANT'S CONVICTION FOR COUNT TWO MUST BE REVERSED; and

II. APPELLANT'S SENTENCE SHOULD BE MODIFIED TO REMEDY IMPROPER COMMENTS MADE BY THE PROSECUTOR DURING CLOSING ARGUMENTS.

After thorough consideration of these propositions, and the entire record before us on appeal, including the original record, transcripts, exhibits and briefs of the parties, we **AFFIRM** the Judgment and Sentence for Manufacturing a Controlled Dangerous Substance. However, finding merit with Appellant's first proposition of error, we **REVERSE AND REMAND WITH INSTRUCTIONS TO DISMISS** Appellant's Count 2 conviction for Possession of a Controlled Dangerous Substance.

I.

"We review sufficiency of the evidence claims in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Davis v. State*, 2011 OK CR 29, ¶ 74, 268 P.3d 86, 111 (citing *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 2787, 61 L. Ed. 2d 560, 571 (1979) and *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04). This analysis requires examination of the entire record. *Young v. State*, 2000 OK CR 17, ¶ 35, 12 P.3d 20, 35. In evaluating the evidence presented at trial, we accept the fact-finder's resolution of conflicting evidence as long as it is within the bounds of reason. *See Day v. State*, 2013 OK CR 8, ¶ 12, 303 P.3d 291, 298; *Gilson v. State*, 2000 OK CR 14, ¶ 77, 8 P.3d 883, 910. This Court also accepts "all

reasonable inferences and credibility choices that tend to support the verdict.” *Davis*, 2011 OK CR 29, ¶ 74, 268 P.3d at 111; *see also Coddington v. State*, 2006 OK CR 34, ¶ 70, 142 P.3d 437, 456. The law makes no distinction between direct and circumstantial evidence and either, or any combination of the two, may be sufficient to support a conviction. *Miller v. State*, 2013 OK CR 11, ¶ 84, 313 P.3d 934, 965.

Appellant’s sufficiency of the evidence claim is limited to his Count 2 conviction for possession of methamphetamine. Count 2 charged Appellant with jointly possessing the small bag of methamphetamine found in the northeast bedroom where Amos and Jennifer Wilson were discovered. The elements of Possession of a Controlled Dangerous Substance are: 1) knowing or intentional; 2) possession; 3) of the controlled dangerous substance—here methamphetamine. 63 O.S.Supp.2012, § 2-402. Appellant specifically contends that the State failed to sufficiently prove the element of possession. We agree. “Possession itself means that the possessor has ‘dominion and control’ over the possessed drug, that is, a right to control its disposition.” *Miller v. State*, 1978 OK CR 54, ¶ 8, 579 P.2d 200, 202. As held by this Court:

[W]hen [drugs are] found not on any person but on premises to which several persons have access, possession cannot be inferred simply from the fact that a person was on the premises when the [controlled dangerous substance] was discovered. Rather, there must be other facts shown from which it can be fairly inferred that the defendant had dominion and control over the seized substance. Proof of these other facts may take the form of direct or circumstantial evidence. . . . Circumstantial proof amounting only to a strong suspicion or to a mere probability is insufficient.

Id., 1978 OK CR 54, ¶ 9, 579 P.2d at 202 (internal citation omitted).

The facts demonstrating Appellant had “possession” of the methamphetamine found in the northeast bedroom were negligible. Even when viewed in the light most favorable to the State, the evidence was not sufficient to prove the essential element of “possession”, i.e., Appellant had the necessary dominion and control over the seized substance. *See Miller*, 1978 OK CR 54, ¶¶ 8-9, 579 P.2d at 202 (circumstantial proof that amounts only to a strong suspicion or to a mere probability that a defendant had “dominion and control” over the seized substance is insufficient); *Cf. Gamble v. State*, 1976 OK CR 54, ¶ 29, 546 P.2d 1336, 1342-43 (sufficient evidence showing dominion and control of heroin where appellant opened the door to the residence with his own key; personal papers, photographs and a driver’s license belonging to appellant were found on the premises; and appellant told officers the drugs in the residence were all in a particular bedroom and the remainder of the house which was owned by his brother-in-law was clean).

Thus, finding merit with Appellant’s first proposition of error, Appellant’s conviction for Possession of a Controlled Dangerous Substance must be **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS.**

II.

We reject Appellant’s claim that comments made by the prosecutor during closing arguments were designed to inflame the passions of the jury. As defense counsel failed to object to the alleged error, Appellant has waived all but plain error review. *See Malone v. State*, 2013 OK CR 1, ¶¶ 40-41, 293 P.3d

198, 211, *cert. denied*, ___U.S.___, 134 S. Ct. 172, 187 L. Ed. 2d 119 (2013).

Upon review, we find the challenged comments fell within the wide latitude the parties possess to argue the evidence. *See Coddington*, 2011 OK CR 17, ¶ 72, 254 P.3d at 712; *Bell v. State*, 2007 OK CR 43, ¶ 6, 172 P.3d 622, 624; *Frederick v. State*, 2001 OK CR 34, ¶ 150, 37 P.3d 908, 946. Thus, finding no error occurred here, plain or otherwise, this proposition of error is denied.

DECISION

The Judgment and Sentence for Manufacturing a Controlled Dangerous Substance is **AFFIRMED**. The Judgment and Sentence for Possession of a Controlled Dangerous Substance is **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF WASHINGTON COUNTY
THE HONORABLE RUSSELL VACLAW, ASSOCIATE DISTRICT JUDGE

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SMITH, P.J.: CONCUR
LUMPKIN, V.P.J.: CONCUR
JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR