

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOHNNY L. PERRY,)
) NOT FOR PUBLICATION
)
 Appellant,)
)
 v.) Case No. F-2003-44
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

DEC 03 2003

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

JOHNSON, PRESIDING JUDGE:

Appellant, Johnny L. Perry, was convicted after jury trial in Oklahoma County District Court, Case No. CF-2002-526, of Count 1: Possession of a Controlled Substance (Cocaine) (63 O.S.2001, § 2-401) and Count 2: Possession of a Firearm in the Commission of a Felony (21 O.S.2001, § 1287), both after conviction of two or more felonies (21 O.S.2001, § 51.1). The jury recommended sentences of twenty years imprisonment on each count. On January 8, 2003, the Honorable Tammy Bass-Jones, District Judge, sentenced Appellant in accordance with the jury's recommendation, ordering the sentences to be served concurrently. Appellant then timely filed this appeal.

Appellant raises the following propositions of error:

1. The evidence was insufficient to prove beyond a reasonable doubt that Appellant knowingly and intentionally possessed cocaine.
2. The evidence was insufficient to prove beyond a reasonable doubt that Appellant possessed a firearm in the commission of a felony.
3. The trial court's failure to instruct the jury on the proper punishment range on Count 2 requires sentence modification or resentencing.
4. Cumulative error denied Appellant a fundamentally fair trial.

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 reverse in part and modify in part. As to Proposition 1, considering all of the evidence in a light most favorable to the State, we conclude that the evidence supported other reasonable hypotheses besides Appellant's joint constructive possession of drugs. *Doyle v. State*, 1988 OK CR 147, ¶ 8, 759 P.2d 223, 225. Consequently, Appellant's conviction on Count 1 is **REVERSED WITH INSTRUCTIONS TO DISMISS**. As to Proposition 2, regarding Count 2, we conclude that the only reasonable hypothesis supported by the evidence was that Appellant possessed a firearm. While it may not have been possessed in the commission of a drug offense, Appellant stipulated to the fact that he had three prior felony convictions. We therefore **MODIFY** the judgment in Count 2 to Possession of a Firearm After Conviction of a Felony, After Conviction of Two or More Felonies (21 O.S.2001, §§ 1283, 1284, 51.1(C)), and **MODIFY** the sentence to five (5) years imprisonment. 22 O.S.2001, § 1066; *McArthur v. State*, 1993 OK CR 48, ¶ 10, 862 P.2d 482, 485; *Snyder v. State*, 1989 OK CR 81, ¶ 4, 806 P.2d 652, 654. Our resolution of Proposition 2 renders Proposition 3 moot. As to Proposition 4, we find no prosecutorial misconduct or other trial error, and therefore no cumulative error regarding the same.¹ *Sanders v. State*, 2002 OK CR 42, ¶ 17, 60 P.3d 1048, 1051.

¹ Specifically, we find (1) the prosecutor's rhetorical questions did not shift the burden of proof to Appellant, and his assessments of the defense theory did not disparage Appellant or defense counsel; all of these were fair comments on the evidence, *see Money v. State*, 1985 OK CR 46, ¶ 13, 700 P.2d 204, 207; (2) the only comment Appellant actually objected to at trial was cured by objection, and could not have affected the outcome as it was made in the punishment stage and the jury assessed the minimum sentence, *see id*; (3) the prosecutor's comment invoking racial issues was merely a response to defense counsel's own invocation of these issues in her preceding argument, *see Depew v. State*, 1981 OK CR 61, ¶ 4, 628 P.2d 1174, 1175; and (4) the trial court properly excluded, as irrelevant to the punishment stage, evidence that one of Appellant's co-defendants had pled guilty and received a five-year sentence, *see Brogie v. State*, 1985 OK CR 2, ¶ 39, 695 P.2d 538, 546-47; 12 O.S.2001, § 2401.

DECISION

Count 1 is **REVERSED WITH INSTRUCTIONS TO DISMISS**. As to Count 2, the judgment is **MODIFIED** to Possession of a Firearm After Conviction of a Felony, After Conviction of Two or More Felonies, and the sentence on Count 2 is **MODIFIED** to five (5) years imprisonment.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE TAMMY BASS-JONES, DISTRICT JUDGE

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OPINION BY JOHNSON, P.J.

LILE, V.P.J.: CONCURS IN RESULTS
LUMPKIN, J.: CONCURS IN RESULTS
CHAPEL, J.: CONCURS
STRUBHAR, J.: CONCURS

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