

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

OMAR SHARROD POLLARD,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2012-732

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
FEB 26 2014

SUMMARY OPINION

A. JOHNSON, JUDGE:

MICHAEL S. RICHIE
CLERK

Appellant Omar Sharrod Pollard was tried by jury and convicted in the District Court of Jackson County, Case No. CF-2011-165, of Unlawful Distribution of a Controlled Dangerous Substance (crack cocaine), After Former Conviction of Two Felonies in violation of 63 O.S.2011, § 2-401. The jury fixed punishment at forty years imprisonment. The Honorable Clark Huey, who presided at trial, sentenced Pollard accordingly. From this Judgment and Sentence Pollard appeals, raising the following issues:

- (1) whether he was deprived of a fair trial by the admission of multiple felonies from the same transaction for sentence enhancement;
- (2) whether prosecutorial misconduct deprived him of a fair trial;
- (3) whether ineffective assistance of counsel deprived him of a fair sentencing proceeding;
- (4) whether information about suspended sentences and pardon and parole deprived him of a fair sentence and must result in modification;
- (5) whether the evidence is sufficient to support his conviction;

- (6) whether his sentence is excessive; and
- (7) whether cumulative error deprived him of a fair trial.

We find reversal is not required and affirm the Judgment of the District Court. Modification of Pollard's sentence, however, is required for the reasons discussed below.

This case involves three major issues, two dealing with sentencing and one challenging the sufficiency of the evidence. The combination of two plain errors related to the sentencing stage of trial warrants brief discussion and relief.¹ *See Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923 (plain error is error that counsel failed to preserve through a timely trial objection, but upon appellate review, is clear from the record, affected the defendant's substantial rights and requires correction to avoid a miscarriage of justice).

The State sought to enhance Pollard's sentence based on two prior felony convictions. The second page of the information alleged one prior conviction for second degree burglary and another prior conviction consisting of nine counts of various sex offenses that arose out of a single transaction.² The prosecutor read the supplemental information at the beginning of second stage

¹ Pollard's claim that the trial evidence was insufficient to sustain his conviction is without merit. The evidence, viewed in the light most favorable to the State, was sufficient for any rational trier of fact to find beyond a reasonable doubt that Pollard knowingly and intentionally sold crack cocaine. *See Logsdon v. State*, 2010 OK CR 7, ¶ 5, 231 P.3d 1156, 1161; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204.

² Pollard was convicted of five counts of rape by instrumentation, three counts of forcible sodomy and one count of first degree rape in the District Court of Jackson County, Case No. CF-2008-256.

and listed all nine counts of the second conviction alleged for sentence enhancement. Defense counsel stipulated to the convictions as read and did not object to the introduction of the Judgment and Sentence (State's Exhibit 11) reflecting the nine counts arising out of the same transaction. During closing argument, the prosecutor asked the jury to assess punishment considering that "the Defendant has two prior felony convictions, one of those being convicted of nine counts." Defense counsel asked the jury to consider in its sentencing deliberations the light sentence received by the informant in this case for selling cocaine. The prosecutor responded that it was the informant's first offense. He went on to say concerning Pollard's record, "[s]o you can either look at it as, like strike three or like strike eleven if you want to count each count."

It was error to admit State's Exhibit 11 showing more than one conviction arising out of a single transaction and to include that information in opening statement and closing argument. *See Miller v. State*, 1984 OK CR 33, ¶ 9, 675 P.2d 453, 455 (holding when felony offenses arise out of the same transaction the State is limited to informing the jury of only "one" of the "convictions arising from the single event.>").

The supplemental information also stated that the five year sentence imposed for Pollard's conviction for second degree burglary was "all suspended" and that the twenty year sentence imposed on each of the nine felonies arising out of the same transaction was suspended except for the first two and one half

years. The prosecutor read the supplemental information, including the information about the suspended sentences, to the jury at the beginning of second stage. The information that these sentences were entirely or partially suspended was included on the Judgment and Sentence exhibits admitted as State's Exhibits 10 and 11. It was error to tell the jury about the suspension of Pollard's sentences in opening statement of the punishment phase of trial and to include that information on the Judgment and Sentence exhibits. See *Hunter v. State*, 2009 OK CR 17, ¶¶ 9-10, 208 P.3d 931, 933-34.

We reject the State's contention that Pollard suffered no prejudice from these errors. The felonies arising from the same transaction were for nine serious and violent sex offenses of which Pollard was required to serve only a fraction of the sentence imposed. The prosecutor twice highlighted the number of counts during closing argument. And the jury imposed punishment well beyond the prosecutor's request of "at least 20 years." It flies in the face of common sense to conclude the jury's sentence was not adversely influenced by the admission of the number of counts arising from the same transaction or the suspended nature of the sentences received by Pollard for those convictions. Modification of Pollard's sentence is appropriate.

DECISION

The Judgment of the district court is **AFFIRMED**. Pollard's sentence is **MODIFIED** to 25 years imprisonment. 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 JACKSON COUNTY
THE HONORABLE CLARK HUEY, ASSOCIATE DISTRICT JUDGE
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LUMPKIN, J.: Concur in Results
C. JOHNSON, J.: Concur

RB