

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KAYLA D. ROBERTSON,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

Case No. F-2008-255

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

APR - 3 2009

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

LEWIS, JUDGE:

MICHAEL S. RICHIE
CLERK

Kayla D. Robertson, Appellant, was tried by jury and convicted of Count 1, manufacturing a controlled dangerous substance, in violation of 63 O.S.Supp.2005, § 2-401; Count 2, possession of a firearm in the commission of a felony, in violation of 21 O.S.Supp.2006, § 1287; Count 3, possession of a controlled drug within 1,000 feet of a school, in violation of 63 O.S.Supp.2004, § 2-402; and Count 4, destroying evidence, a misdemeanor, in violation of 21 O.S.2001, § 454, in Tulsa County District Court, Case No. CF-2006-4971. The jury found that Appellant committed Counts 1 through 3 after a prior felony conviction, and sentenced Appellant to twenty (20) years imprisonment and a \$50,000 fine in Count 1; four (4) years imprisonment and a \$1,000 fine in Count 2; nine (9) years imprisonment and a \$2,500 fine in Count 3; and one (1) year imprisonment and a \$500 fine in Count 4. The District Court, Hon. William C. Kellough, District Judge, sentenced Appellant to serve Counts 1, 2, and 4 consecutively, totaling twenty five (25) years imprisonment, and Count 3

to be served concurrently with Count 1. Ms. Robertson appeals in the following propositions of error:

1. The Evidence Was Insufficient To Prove Beyond A Reasonable Doubt That Appellant Possessed A Firearm While In The Commission Of A Felony, In Violation Of Appellant's Rights To A Fair Trial Under The 5th And 14th Amendments To The United States Constitution And Under Art. II, § 7 Of The Oklahoma Constitution.
2. The Trial Court Erred In Admitting Evidence Of Other Crimes And Then Failing To Issue Any Limiting Instructions To Appellant's Jury Regarding Its Use Of This Evidence. Because Other Evidence Of Appellant's Guilt Was Sufficient To Support The Jury's Verdicts Of Guilty On Counts I, III, And IV, The Instruction Error Resulted In A Violation Of Appellant's Right To A Fair Sentencing Determination On Count I In Violation Of The 5th And 14th Amendments To The United States Constitution And Under Art. II, § 7 Of The Oklahoma Constitution.
3. Sentencing Errors Combined To Deprive Appellant Of Her Rights To Fair Sentencing Determinations Under The 5th And 14th Amendments To The United States Constitution And Art. II, § 7 Of The Oklahoma Constitution.
4. Cumulative Error Denied Appellant Fair Sentencing Determinations, And This Court Should Modify Her Sentences.

We review Appellant's Proposition One to determine whether the evidence at trial, viewed in the light most favorable to the State, would permit any rational trier of fact to find the essential elements of the offense beyond a reasonable doubt. *Speuhler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204. Considering the factors set forth in *Pebworth v. State*, 1993 OK CR 28, ¶ 12, 855 P.2d 605, 607, the issue of Appellant's guilt was a question for the jury under proper instructions. Proposition One is denied.

In Proposition Two, Appellant argues the District Court committed error by failing to give a limiting instruction on evidence of other crimes. The evidence of other crimes was properly admitted on cross-examination when Appellant opened the door to evidence establishing her involvement and prior knowledge of manufacturing methamphetamine. The District Court's failure to give a limiting instruction *sua sponte* "does not automatically constitute reversible error unless it arises to the level of plain error," which we have defined as "error which goes to the foundation of the case, or which takes from a defendant a right essential to his defense." *Jones v. State*, 1989 OK CR 7, ¶¶ 8-9, 772 P.2d 922, 925, *overruled on other grounds*, *Omalza v. State*, 1995 OK CR 80, 911 P.2d 286. The evidence here was properly admitted and the lack of a limiting instruction did not result in plain error. Proposition Two requires no relief.

Proposition Three establishes that, in Count 1, Appellant was subjected to enhanced punishment for her drug convictions under 21 O.S.Supp.2002, § 51.1(A)(2), as well as a \$50,000 fine provided by 63 O.S.Supp.2004, § 2-401, in violation of *Gaines v. State*, 1977 OK CR 259, 568 P.2d 1290. The fine in Count 1 is therefore vacated. *Coates v. State*, 2006 OK CR 24, ¶ 6, 137 P.3d 682, 684-685. Appellant's remaining challenges to the instructions on fines in Counts 2, 3, and 4 are unpersuasive. Appellant also challenges the 50% instruction informing the jury that she "must serve 50% of the sentence before being eligible for parole." Absent an objection, we review this instruction only

for plain error, and find none. *Anderson v. State*, 2006 OK CR 6, 130 P.2d 273.

Appellant also finds error in the admission of “extraneous and prejudicial” information indicating she had received suspended sentences on her two prior felony convictions. Appellant did not object or seek redaction of information from the evidence submitted. We find the State presented evidence of two valid judgments and sentences showing her prior convictions. This was not error. *Massingale v. State*, 1986 OK CR 6, ¶ 9, 713 P.2d 15, 16.

Appellant next argues that prejudicial error occurred when the District Court had “undocumented jury communications” about sentencing, in violation of 22 O.S.2001, § 894. The evidence of these communications is the prosecutor’s uncontradicted statement at sentencing describing a question from the jury (asking whether sentences would be consecutive or concurrent) and the District Court’s response to that question. While the record does not reflect compliance with section 894, the Court’s answer to the jury’s question “would not appear to have amounted to error had the proper formalities been observed.” *Boyd v. State*, 1977 OK CR 322, ¶ 10, 572 P.2d 276, 279. “[T]he purpose of this statute is to prevent certain communications from being made outside of open court which might influence the jury when both parties of the adversary proceeding have not at least had a chance to be present to protect their interests.” *Id.* at ¶ 13, 572 P.2d at 280. There is no evidence of prejudice here. The Court’s failure to convey the jury into court for its response to the question was harmless. *Id.* at ¶ 13, 572 P.2d at 280. Appellant’s final claim in

Proposition Three, that her sentence is excessive, is without merit. *Rea v. State*, 2001 OK CR 28, 34 P.3d 148.

Proposition Four seeks relief from cumulative errors. We have addressed the individual errors and remedied the errors where appropriate. There is no accumulation of error amounting to prejudicial error.

DECISION

The Judgment and Sentence of the District Court of Tulsa County imposing a fine of \$50,000 in Count 1 is **VACATED**, but the Judgments and Sentences are, in all other respects, **AFFIRMED**. Pursuant to Rule 3.15, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2007), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE WILLIAM C. KELLOUGH, DISTRICT JUDGE**

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OPINION BY LEWIS, J.
C. JOHNSON, P.J.: Concur
A. JOHNSON, V.P.J.: Concur
LUMPKIN, J.: Concur
CHAPEL, J.: Concur

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