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JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DEBRA GORRELL)

Appellant,)

v.)

Case No. F-2000-483

THE STATE OF OKLAHOMA)

Appellee.)

SUMMARY OPINION

CHAPEL, JUDGE:

Debra Gorrell was tried by jury and convicted of Unlawful Possession of Methamphetamine with Intent to Distribute in the Presence of a Child in violation of 63 O.S.Supp.1999, § 2-402; Conspiracy to Possess and Distribute Methamphetamine in violation of 63 O.S.1991, § 2-408; Maintaining a Dwelling House for the Use or Sale of Drugs in violation of 63 O.S.Supp.1999, § 2-404; Endeavoring to Manufacture Methamphetamine in violation of 63 O.S.1991, § 2-408; and Possession of Marijuana in violation of 63 O.S.Supp. 1999, § 2-402 in Murray County Case Nos. CF-99-193, 194, 195, 196, and 197, respectively.¹ The Honorable John H. Scaggs sentenced Gorrell to fifteen (15) years imprisonment in Case No. CF-99-193, fifteen (15) years imprisonment in Case No. CF-99-194; ten (10) years imprisonment in Case No. CF-99-195; twenty (20) years imprisonment in Case No. CF-99-196; and six (6) months imprisonment in Case No. CF-99-197. The trial court ordered the

sentences in CF-99-193, 194 and 195 to be served concurrently and the sentences in CF-99-196 and 197 to be served concurrently but consecutively to the sentences in CF-99-193, 194 and 195.² Gorrell has perfected her appeal of these convictions.³

Gorrell raises the following Propositions of Error:

- I. Court erred in admitting evidence of other crimes going back to 1997, despite the fact that the defendant was on trial for offense allegedly committed in 1999 and failed to explain the meaning of the terms or which exception of the five (5) the court ruled on for admission.
- II. Trial court violated 21 Okla. Stat. § 11 statutory prohibition against multiple punishment for one criminal course of conduct.
- III. Title 63 Okla. Stat. § 2-408 Endeavoring to Manufacture is unconstitutional and subjected Appellant to Double Jeopardy.
- IV. The State failed to prove the elements of unlawful possession of methamphetamine in the presence of a child under the age of 12.⁴
- V. The testimony of Charles Dion Roller and Wade Allen Edwards was not corroborated and should be disregarded; the State failed to prove the crime of endeavoring to manufacture methamphetamine.
- VI. Failure to instruct jury correctly on essential and material elements of crime charged in the guilty stage and required to be proven by competent evidence is “fundamental error” if omission is necessary to what jury had to consider in order to convict.

¹ Gorrell was found guilty on all charges except Possession of Marijuana, After Former Conviction of a Felony. Gorrell was also acquitted of Child Abuse in Case No. CF-99-199.

² The jury recommended that all sentences be served concurrently.

³ On July 16, 2001, this Court remanded this case for an Evidentiary Hearing to determine “under what authority law enforcement officers entered Gorrell’s home.” On July 31, 2001, the hearing was held and the trial court concluded that the officers entered Gorrell’s home without a warrant but with an occupant’s consent. We find this conclusion is supported by the record and that the officers entry was lawful. See *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980).

⁴ Propositions IV and V are inverted in text of the brief and are addressed in the order that they appear in the list of propositions.

VII. The State did not prove Appellant had possession of marijuana on November 9, 1999.

VIII. The Court erred in the punishment phase by instructing under the general habitual offenders statute rather than under uniform controlled dangerous substance act.

IX. The trial court abused its discretion by selecting the enhancement rather than the district attorney and refusal to run the sentences concurrently as suggested by the jury.

After thorough consideration of the entire record before us on appeal, including the original records, transcripts, briefs, and exhibits of the parties, we determine that reversal is required for Gorrell's conviction for Maintaining a Dwelling House for the Use or Sale of Drugs in Murray County Case No. CF-99-195. We affirm the remaining convictions.

We find in Proposition I that any error in the admission of other crimes evidence was harmless beyond a reasonable doubt.⁵ We find in Proposition II that neither 21 O.S.1991, § 11 nor double jeopardy were violated for any of Gorrell's convictions because both the requisite elements for and evidence to prove each of these crimes was separate and distinct.⁶ We find in Proposition III that the Endeavoring to Manufacture Controlled Substances statute is

⁵ 12 O.S.1991, 2404. We find there was no error in the admission of Henry Ritchie's testimony regarding prior drug transaction as it established the necessary elements of Maintaining a Dwelling for the Purpose of Selling Controlled Substances. To convict Gorrell of this offense, the State had to prove both that a "substantial purpose" in keeping the dwelling was to sell or use drugs and that there was more than a single incidence of drug activity. *Meeks v. State*, 872 P.2d 936, 938 (Okl.Cr.1994). Moreover, any error in the admission Wade Smith's testimony was harmless beyond a reasonable doubt as the jury was instructed by the trial court not to consider Smith's testimony as substantive evidence of guilt for the charged crimes and because other evidence of Gorrell's guilt was overwhelming

⁶ *Watkins v. State*, 829 P.2d 42 (Okl.Cr.1991) and *Watkins v. State*, 855 P.2d 141 (Okl.Cr.1992). The double jeopardy argument raised in Proposition III is resolved by this Proposition.

constitutional.⁷ We find in Proposition IV that there was sufficient evidence for a rational trier of fact to find that the methamphetamine sale occurred in the presence of a child under 12.⁸ We find in Proposition V that the accomplices' testimony was sufficiently corroborated and the evidence sufficient to support Gorrell's conviction for Endeavoring to Manufacture Methamphetamine.⁹ We find in Proposition VI that the jury was improperly instructed on Maintaining a Dwelling for the Use or Sale of Drugs.¹⁰ We find in Proposition VII that the evidence was sufficient to support Gorrell's conviction for Possession of Marijuana.¹¹ We find in Proposition VIII that Gorrell's sentence was properly enhanced pursuant to 21 O.S.1991, § 51.¹² We find in Proposition IX that the trial court did not abuse its discretion in ordering Gorrell's sentences in Case Nos. CF-99-196 and 197 to be served consecutively to her sentences in Case Nos. CF-99-193, 194 and 195.¹³

Decision

The Judgments and Sentences of the trial court in Murray County District Court Case Nos. CF-99-193, 194, 196 and 197 are **AFFIRMED**. The Judgment and Sentence in Murray County District Court Case No. CF-99-195 is **REVERSED AND REMANDED** for a new trial.

⁷ *Childers v. City of Tulsa*, 658 P.2d 497 (Okla.Cr.1983). The offense is clearly defined and a person of ordinary intelligence would know what is prohibited. The double jeopardy argument raised in this Proposition is resolved in Proposition II.

⁸ *Spuehler v. State*, 709 P.2d 202, 203-04 (Okla.Cr.1985).

⁹ *Id.*

¹⁰ *Meeks v. State*, 872 P.2d 936, 939 (1994). Here, the instruction given to the jury omitted three necessary paragraphs included within Oklahoma Uniform Jury Instruction 6-12 (Supp. 2000), to the detriment of Gorrell.

¹¹ *Spuehler*, 709 P.2d at 203-04.

¹² *Novey v. State*, 709 P.2d 696, 699 (Okla.Cr.1985)(State can elect to proceed under either enhancement statute when prior felonies are both drug and non-drug offenses).

¹³ *Riley v. State*, 947 P.2d 530, 534 (Okla.Cr.1997).

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LUMPKIN, P.J.:	CONCUR
JOHNSON, V.P.J.:	CONCUR
STRUBHAR, J.:	CONCUR
LILE, J.:	CONCUR IN PART/DISSENT IN PART

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