IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ARTHUR RAY CATLETT,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. F 98-687
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LILE, JUDGE:

Appellant, Arthur Ray Catlett, was convicted of the felony crime of Unlawful Possession of a Controlled Drug (methamphetamine) With the Intent to Distribute, 63 O.S.Supp.1994, § 2-401, in the District Court of Payne County, Case No. CF-95-263.[1] In accordance with the jury's verdict, the Honorable Donald L. Worthington, District Judge, sentenced Catlett to serve two years imprisonment. From this judgment and sentence Catlett has perfected his appeal.

Catlett raises the following propositions of error in support of his appeal:

1. The evidence is insufficient to sustain Mr. Catlett's conviction: Mere possession of drug paraphernalia, without more, is not tantamount to "knowing possession" of a controlled substance.

2. Prosecutorial misconduct resulted in Mr. Catlett's unjust conviction for possession of drug paraphernalia and possession of methamphetamine with intent to possess.

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[1] The jury also convicted Catlett on the misdemeanor crimes of Possession of Drug Paraphernalia and Driving without a License.

3. The prosecutor improperly commented on appellant's failure to call a certain witness at trial.

After thorough consideration of the entire record before us on appeal including the original record, transcripts, briefs and exhibits of the parties, we have determined that Catlett's conviction and sentence for the crime of unlawful possession of a controlled drug (methamphetamine) with the intent to distribute should be **MODIFIED**.

In reaching our decision, we find, in proposition one, that the evidence was insufficient to show that Catlett knowingly possessed methamphetamine with the intent to distribute in violation of 63 O.S.Supp.1994, § 2-401. *Billey v. State*, 1990 OK CR 76, 800 P.2d 741, 743. However, the evidence was sufficient to show that he knowingly possessed methamphetamine in violation of 63 O.S.Supp.1994, § 2-402. Therefore we order that Catlett's judgment for Unlawful Possession of a Controlled Drug With Intent to Distribute be modified to Unlawful Possession of a Controlled Drug, and the sentence is modified to two years in prison and no fine, the minimum for this offense. *McCoy v. State*,1985 OK CR 49, 699 P.2d 663, 664 (where evidence insufficient this Court may modify judgment to lesser included offense).

In propositions two and three, we find that Catlett failed to make a contemporaneous objection to the comments of the prosecutor, therefore, we can review for plain error only. *Romano v. State*, 1995 OK CR 74, 909 P.2d 92, 115. Catlett has not shown, nor have we found, that these comments

"probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." 20 O.S.1991, § 3001.1. Therefore, there is no plain error.

DECISION

The judgment for Unlawful Possession of a Controlled Drug (methamphetamine) With Intent to Distribute is **MODIFIED** to Unlawful Possession of a Controlled Drug (methamphetamine), and the sentence is **MODIFIED** to two years in prison and no fine, and as so **MODIFIED**, the judgment and sentence is **AFFIRMED**.

ATTORNEYS AT TRIAL

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OPINION BY: LILE, J.

STRUBHAR, P.J.: CONCURS
LUMPKIN, V.P.J.: CONCURS IN RESULT
JOHNSON, J.: CONCURS
CHAPEL, J.: CONCURS

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