IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FRANK LEROY GIBSON, Appellant, v. THE STATE OF OKLAHOMA, Appellee.	)	No. F-2010-651 Not for Publication

SUMMARY OPINION

SMITH, JUDGE:

Frank Leroy Gibson, Appellant, was tried by jury and convicted of Manufacture of Controlled Dangerous Substance (Methamphetamine), After Former Conviction of Two or More Felonies, under 63 O.S.Supp.2005, § 2-401(G) (Count I); and Unlawful Possession of Drug Paraphernalia, a misdemeanor, under 63 O.S.Supp.2004, 2-405 (Count III), in the District Court of Kay County, Case No. CF-2009-206.[1] In accord with the jury verdict, the Honorable Leslie D. Page, Associate District Judge, sentenced Gibson to imprisonment for Life and a fine of $25,000.00 on Count I, and imprisonment for one (1) year and a fine of $1,000 on Count III, to run concurrently.[2] Gibson is properly before this Court on direct appeal.

In Proposition I, Gibson asserts that the evidence presented at trial was insufficient to convict him of Manufacture of Methamphetamine (Count I). Gibson emphasizes the following facts: (1) no one was manufacturing methamphetamine at 218 S. Palm St. at the time his home was searched; (2) no usable pseudoephedrine

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[1] Gibson was found "not guilty" by the jury at trial of Possession of Controlled Substance (Methamphetamine), which was Count II.

[2] Gibson was ordered to pay costs, fees, and a victim compensation assessment of $250 on both Count I and Count III. Gibson was given credit for time served, and neither of his convictions is subject to the "85% Rule," under 21 O.S. Supp.2007, § 13.1.

was found in the home; and (3) the State could not establish who specifically had manufactured in the home or when it had occurred. This Court evaluates such sufficiency claims by determining "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt."[3]

Gibson was charged with manufacturing methamphetamine, and his jury was instructed, in accord with OUJI-CR(2d) 6-3, that the elements of this crime are: "First, knowingly/intentionally; Second, manufacturing; Third, the controlled dangerous substance of methamphetamine."[4] Gibson's jury was further instructed, in accord with OUJI-CR(2d) 6-16, that "manufacturing" includes: "Production, preparation, propagation, compounding, or processing a controlled dangerous substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis; or a combination of extraction and chemical synthesis." *See* 63 O.S.Supp.2006, 2-101(22). Gibson's jury was also properly instructed on the law of possession, including constructive possession and joint possession, and "aiding and abetting."

In *Brumfield v. State*, 2007 OK CR 10, 155 P.3d 826, this Court affirmed the defendant's conviction for aggravated manufacture of methamphetamine even

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[3] *Jackson v. Virginia*, 443 U.S. 307, 319-20, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (emphasis in original); *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04 (quoting *Jackson*); *see also Easlick v. State*, 2004 OK CR 21, ¶ 5, ¶ 15, 90 P.3d 556, 558, 559.

[4] The statute under which Gibson was convicted of manufacturing states:

> Except as authorized by the Uniform Controlled Dangerous Substances Act, it shall be unlawful for any person to *manufacture or attempt to manufacture* any controlled dangerous substance or possess any substance listed in Section 2-322 of this title or any substance containing any detectable amount of pseudoephedrine . . . with the intent to use that substance to manufacture a controlled dangerous substance.

63 O.S.Supp.2005, § 2-401(G) (emphasis added).

though the search of the defendant's home and property did not reveal any actual pseudoephedrine or any "usable methamphetamine."[5] The Court noted that "Brumfield's home and property were littered with the essential ingredients for methamphetamine manufacture—or evidence that essential ingredients had recently been present, *e.g.*, the blister packs . . . ." *Id.* at ¶ 24, 155 P.3d at 836. In both *Brumfield* and the current case, the search revealed burned pseudoephedrine blister packs. The *Brumfield* Court rejected the defendant's evidence insufficiency claim, noting that the record contained "compelling evidence that [the] manufacturing process had been recently undertaken by someone in [the defendant's] home." *Id.* We reject the current claim as well.

Although this case did not involve manufacturing that was still "in process" at the time of the search, the electric coffee grinder found in the kitchen sink (where it would not be expected to remain for long), with "detectable" pseudoephedrine still on it, the burnt blister packs and lithium battery package in the fireplace (when there was twice-weekly trash pickup), the pseudoephedrine receipts in the trash (for purchases made by other people), along with the "finished product" methamphetamine found in Gibson's bedroom, all support the jury's conclusion that methamphetamine had been quite recently manufactured in the home. Furthermore, the fact that ingredients and items associated with manufacturing were spread throughout his home likewise supported the jury's conclusion that Gibson was guilty of this manufacturing.[6]

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[5] 2007 OK CR 10, ¶ 6, 155 P.3d at 830. The *Brumfield* search did reveal a glass jar of a two-layer liquid solution, which tested positive for methamphetamine. *Id.* at ¶ 5, 155 P.3d at 829.

[6] The fact that Darren Terrell may well have been involved in this enterprise does not affect Gibson's

The Information charged Gibson with manufacturing methamphetamine "on or about" April 3, 2009. Although the evidence suggests that no actual drug production occurred on this day, the State was not required to prove manufacturing occurred on this date. Time is not a material element of this offense, and there was no issue of alibi or fair notice with respect to this date, which was simply the date of the search of Gibson's home. *See Robedeaux v. State*, 1995 OK CR 73, ¶¶ 7-12, 908 P.2d 804, 806-07. The evidence established that methamphetamine was manufactured in Gibson's home not long before April 3, 2009, and Gibson was properly convicted of this manufacturing. Proposition I is rejected accordingly.

In Proposition II, Gibson asserts that the trial court's handling of a sentencing question from his jury was illegal, improper, and prejudicial to his sentence.[7] The handling of such questions is governed by 22 O.S.2001, § 894, which requires that the trial court inform the parties regarding the question from the jury and that the answer to the jury be provided in open court, in the presence of the parties, unless the parties agree that the question be answered in another way. *See* 22 O.S.2001, § 894; *Grayson v. State*, 1984 OK CR 87, ¶ 11, 687 P.2d 747, 749. The record establishes only that the jury was provided the following answer, which was typed on the same paper as the jury's question: "Jurors: It is not proper for you to consider these matters. Resume deliberations. JUDGE PAGE." Hence the record does not establish that § 894 was properly followed.

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accountability. And the fact that additional new materials had already been assembled for future manufacturing only further demonstrates Gibson's knowing and willful decision to allow his home to be used for the preparation, production, and processing of methamphetamine.

[7] The note from Gibson's jury stated: "Would he be eligible for parole? [I]s a 21 yr sentence 21 yrs? [I]s this a new offense since this is Manufacturing? [O]r is it based on felony offenses[?]"

This Court has repeatedly recognized that a presumption of prejudice exists in this situation, but also that this presumption can be overcome if this Court is convinced that the defendant was not prejudiced by the trial court's failure to follow § 894. *See, e.g., Smith v. State*, 2007 OK CR 16, ¶ 52, 157 P.3d 1155, 1172. This Court finds that because the court's answer was "entirely correct, limited in scope, and essentially the same as would have been given had [§ 894] been strictly followed, the presumption of prejudice is overcome in this case." *Grayson*, 1984 OK CR 87, ¶ 12, 687 P.2d at 750. Gibson argues that his jury was looking for reassurance that if it sentenced him to imprisonment for 21 years, he would actually serve 21 years. But any legally *correct* response to Gibson's jury could not possibly have provided such reassurance. Hence Gibson was not prejudiced by any failure of the court to comply with § 894. And Proposition II is rejected accordingly.

In Proposition III, Gibson challenges the State's use of two guilty plea "summary of facts" forms, rather than judgment and sentence documents, to establish his two prior felony convictions on Count I. Gibson had two prior convictions for Unlawful Possession of Marijuana with Intent to Distribute, one in 1994 in Canadian County and one in 1998 in Cotton County. He notes that the plea documents for these convictions list the sentencing ranges at issue (each had a maximum sentence of life) and that the second conviction included a summary of the facts at issue, none of which would have been contained in a simple judgment and sentence document. Gibson also asserts that the plea documents do not establish that his convictions were "final."

Nevertheless, Gibson raised no objection to the use of these documents to establish his prior convictions, and it was his responsibility to do so. *See Cooper v. State*, 1991 OK CR 26, ¶ 16, 806 P.2d 1136, 1139. Nor does Gibson present any evidence (or even argue) that his convictions in these cases were not final; and the time for an appeal is long past. *See Ahhaitty v. State*, 1986 OK CR 28, ¶ 4, 715 P.2d 82, 84. This Court finds that the use of the guilty plea documents to establish Gibson's prior convictions was not plain error and that he was not prejudiced by the use of these documents in this case. Proposition III is rejected accordingly.

In Proposition IV, Gibson asserts that a reference to his "post-arrest silence" during Officer Dana Wilson's testimony violated the Fifth Amendment to the United States Constitution and necessitates a reversal of his conviction. No objection was made to the reference at trial, however, waiving all but plain error.

The remark at issue came up during the re-direct testimony of Wilson, after his direct and cross-examination testimony that when Gibson arrived home, he immediately asserted that anything illegal found in the home had been planted there by officers. The following exchange occurred:

> Q. All right. Now when [Gibson] arrived back that day, you said he made some statements about you planting the evidence in his house, the drugs?
> A. Well, police in general, I guess.
> Q. Did he ever at that time say to you that's all Darren Terrell's stuff?
> A. I don't believe so.
> Q. Did he ever say it was anybody else's stuff, other than you planted it?
> A. No. He wouldn't—he was Mirandized and he wouldn't—he wouldn't talk.

No objection was raised to this testimony, and the prosecutor went on to establish that Gibson had not even entered his home or seen what had been seized at the point he accused the police of planting evidence.

Despite the reference by Wilson, the prosecutor made no argument or comment whatsoever regarding Gibson's post-arrest silence; and it was never mentioned again. This Court finds that although Wilson (a State witness) made a reference to Gibson's "post-arrest silence," it was *not* in the context of suggesting that this silence should be held against him or seen as consciousness of guilt. Rather, the prosecutor's question was intended (reasonably enough) to establish that although Gibson immediately accused the police of planting evidence, he did not assert that anything illegal in the home belonged to Terrell, which was the crux of his defense at trial. And the testimony at issue was not even a true "comment" on Gibson's post-arrest silence. *See, e.g., Romano v. State*, 1995 OK CR 74, ¶¶ 13-15, 909 P.2d 92, 108. In the context of Gibson's entire trial, Wilson's brief reference to Gibson's post-*Miranda* silence did not render the trial unfair, nor does it necessitate the reversal of his convictions. Proposition IV is rejected accordingly.

In Proposition V, Gibson asserts that the prosecutor committed misconduct during his trial, which deprived him of a fair trial and contributed to an excessive sentence. Gibson raises the following claims: (1) the prosecutor improperly invoked societal alarm; (2) the prosecutor misstated facts and argued facts not in evidence; (3) the prosecutor made inappropriate and prejudicial arguments during opening statement; (4) the prosecutor asserted her personal opinion regarding the defendant's guilt and a witness's credibility; and (5) the prosecutor improperly attacked defense counsel. This Court must determine whether the challenged actions rendered Gibson's trial fundamentally unfair, such that the jury's verdict

cannot be relied upon.[8] Almost none of the examples now raised were objected to at trial. Thus we review these challenges only for plain error, separately noting and addressing instances that were met with an objection. *Matthews v. State*, 2002 OK CR 16, ¶ 38, 45 P.3d 907, 920.

Regarding Gibson's "societal alarm" claim, this Court finds that the prosecutor's opening characterization of methamphetamine as "one of the worst poisons ever created by mankind," as well as her closing argument references to methamphetamine as "a horrible, raging beast that is trolling the streets of our nation, our state, our country" and the "war in the streets that we're fighting" against methamphetamine, were all within the wide range of effective advocacy and argument that is permitted at trial. *Id.* In addition, this Court notes that the prosecutor consistently linked her arguments to the specific facts before the jury regarding Gibson, rather than suggesting that the jury should punish him for larger societal problems or that the jury should "send a message" to the broader public about their outrage regarding methamphetamine.[9] *See McElmurry v. State*, 2002 OK CR 40, ¶ 151, 60 P.3d 4, 34 (contrasting "prohibited 'societal alarm' argument" and "'make an example' out of the defendant to deter other potential criminals"

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[8] *See Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872, 40 L.Ed.2d 431 (1974); *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986); *see also Brewer v. State*, 2006 OK CR 16, ¶ 13, 133 P.3d 892, 895 ("Allegations of prosecutorial misconduct do not warrant reversal of a conviction unless the cumulative effect was such as to deprive the defendant of a fair trial.") (citations omitted).

[9] For example, during the State's final second-stage closing, the prosecutor concluded by urging the jury to send a message *to Gibson* regarding his failure to learn from his past:

> Minimum sentence just doesn't fit in this case. It would fit for somebody without priors. . . . But somebody with priors for dealing drugs—I don't think so. This case is not a minimal case. You've got to send a message that you're dealing in drugs, you go to prison, you get out, you deal more drugs, you go to prison, you get out and you start to manufacture meth on a large scale basis in Kay County, the message we send is that's a life sentence. We're done with you. That's a life sentence.

argument with permissible argument based upon the defendant's own actions and appropriate punishment for these actions). The prosecutor's arguments in this context did not constitute plain error or improperly prejudice Gibson.

Regarding Gibson's claim that the prosecutor misstated facts and argued facts not in evidence, this Court finds that the examples cited by Gibson do not amount to assertions of fact about the evidence presented at trial, but rather are examples of arguing that the jury should make certain *inferences* from the evidence presented.[10] *See, e.g., Stouffer v. State*, 2006 OK CR 46, ¶ 169, 147 P.3d 245, 276; *Spears v. State*, 1995 OK CR 36, ¶ 59, 900 P.2d 431, 445. Hence the examples cited herein do not constitute prosecutorial misconduct.

Regarding the claim that the prosecutor made inappropriate, prejudicial arguments during opening statement, the examples cited were not objected to, were not plain error, and did not constitute prejudicial misconduct.

Within his claim that the prosecutor asserted her personal opinion regarding his guilt, Gibson challenges two statements made during the prosecutor's final, first-stage closing argument.[11] Since neither statement was met with an objection, we review only for plain error.

The United States Supreme Court and this Court have repeatedly recognized that it is improper for a prosecutor to express a personal opinion regarding either

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[10] For example, when the prosecutor argued that plastic tubing found in the kitchen trash was "evidence of a very fresh cook," this was a permissible inference/argument from evidence presented, rather than a claim that someone had *testified* that the tubing was evidence of a recent cook.

[11] The prosecutor argued, "Frank Gibson is as guilty as anybody I've ever seen. Frank Gibson is guilty a hundred percent." Shortly before this statement, the prosecutor also remarked, "Officer Wilson answered a lot of questions. He answered a lot of questions in a short period of time and he was a hundred percent honest with you and I know you believe that, I know I believe that, and I actually believe defense counsel believes that."

the defendant's guilt or the credibility of a witness.[12] The prosecutor's statements that Gibson is "as guilty as anybody I've ever seen" and that she personally "believes" that Wilson was 100% honest are clear examples of a prosecutor improperly injecting her own personal opinion into her argument. Hence these two remarks do constitute improper prosecutorial misconduct and also plain error. Nevertheless, this Court finds that these two remarks, even considered cumulatively, were harmless regarding the jury's determination of Gibson's guilt.[13]

In his final assertion of prosecutorial misconduct, Gibson challenges various remarks within the prosecutor's final closing argument as improper attacks on defense counsel.[14] None of these remarks were challenged at trial, and we review only for plain error. This Court finds that the challenged remarks—criticizing defense counsel's closing argument as not based upon evidence presented at trial, calling a defense argument "ridiculous," warning the jury against getting "distracted by the Darren Terrell path," *etc.*—do not constitute plain error, nor do they constitute prejudicial misconduct. Gibson's Proposition V prosecutorial misconduct claim is rejected accordingly.

In Proposition VI, Gibson challenges the fact that the trial court informed the jury, during voir dire, that Gibson's attorney was himself facing criminal charges.

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[12] In *United States v. Young*, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), the Supreme Court summarized the "dangers" of a "prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused," including the fact that "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *Id.* at 18-19, 105 S.Ct. at 1048 (citation omitted). *See also Lewis v. State*, 1977 OK CR 287, ¶ 20, 569 P.2d 486, 490 ("Clearly it is improper for the prosecution to state his opinion concerning the guilt of the defendant[]."); *Stewart v. State*, 1988 OK CR 108, ¶ 21, 757 P.2d 388, 396 (improper to vouch for credibility of State witness).

[13] This Court will address the potential impact of these remarks on Gibson's sentence *infra*.

[14] In his brief, Gibson includes an improper vouching claim within this section (regarding the prosecutor's reference to believing Wilson). This claim has already been addressed herein.

Gibson also argues that the voir dire conducted was inadequate to identify jurors who could not be impartial due to this fact. This Court notes that despite Gibson's summary of this claim, the trial court did *not* inform the jury that defense counsel had pending charges for embezzlement.[15] This Court also notes that no objection was made to the court's remarks at trial and that defense counsel's pending criminal charges were never referenced again. Hence we review only for plain error.

Within this proposition, Gibson asserts that the voir dire following the court's remarks was inadequate to assess potential bias from juror exposure to information regarding defense counsel's pending charges—either in the media or based upon the court's summary. Yet nothing in the record suggests that the trial court imposed any limits on voir dire in this regard, nor did defense counsel request any special or additional voir dire on this issue. Nor does the record contain any other reference to this topic (such as in a motion in limine). This Court will not find that the voir dire on this issue was inadequate when nothing in the record suggests that the trial court did anything to limit or restrict voir dire in this regard.

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[15] Rather, just after introducing defense counsel to the jury and asking if anyone knew him, either personally or professionally, the trial court stated as follows:

> All right. Thank you Mr. Clark. Now I need to mention at this time that Mr. Clark is, himself, facing charges. He is accused of certain crimes, himself, and there's—there has been some publicity about that. There's been some—I think maybe some air time over it and some articles in the paper about it, and my only question to you, is, that you understand he is presumed innocent of those offenses and they are pending. It's not anything we're dealing with here in this—the charges are filed here, but none of us are dealing with it as Judges or prosecuting attorneys or defense attorneys.
>
> Are there any of you, having that in mind, that feel like that that might affect your service as a juror? You understand that has nothing, absolutely nothing to do with any charge against Mr. Gibson today and that they—that depends entirely upon the facts that you'll hear from the witness stand and under your instructions of the law.
>
> Does anyone feel uncomfortable sitting as a juror in this case, knowing of Mr. Clark's situation, in any way at all?

The transcript records that there was "[n]o verbal response by the jury panel."

Nevertheless, this Court finds that the remarks of the trial court, standing alone, were ill-advised and created the potential for unfair prejudice. While it was reasonable and appropriate to attempt to determine if any potential jurors had been exposed to information regarding defense counsel's pending charges, the trial court could (and should) have addressed this issue by questioning the panel regarding exposure to *any* recent publicity or information regarding defense counsel, and then individually questioning any potential juror who indicated such exposure. It was not necessary—and carried the potential for unfair prejudice to the defendant—to inform the entire panel that Gibson was being represented by someone who, himself, had been recently charged with multiple crimes. This Court also notes that the trial court's ultimate question to the panel, whether any potential juror would "feel uncomfortable sitting as a juror in this case, knowing of Mr. Clark's situation" was not well-suited to determining the real issue at stake: whether any potential juror could potentially be biased against Gibson, or whether any potential juror might view his case or counsel's advocacy differently, based upon the fact that defense counsel was also facing criminal charges. This Court finds plain error in this regard.[16]

In Proposition VII, Gibson asserts that in light of all the facts and circumstances of his case, his sentence of imprisonment for Life on Count I is excessive. *See Luna v. State*, 1992 OK CR 26, ¶ 14, 829 P.2d 69, 73-74 ("The excessiveness of punishment must be determined by a study of all the facts and circumstances of each case."). In Proposition VIII, Gibson asserts that the

[16] Whether or not this error could be viewed as "harmless" or not, is addressed *infra*.

cumulative effect of the errors made during the trial of his case cannot be considered harmless beyond a reasonable doubt. *See Dodd v. State*, 2004 OK CR 31, ¶¶ 115-16, 100 P.3d 1017, 1051. This Court does not find that a life sentence, in general, is excessive for a conviction of manufacturing methamphetamine after two prior felony convictions. In addition, this Court finds, beyond a reasonable doubt, that the misconduct and error noted herein, even considered cumulatively, did not impact or affect the jury's determination of Gibson's guilt. Hence the misconduct and error addressed herein are harmless in regard to his convictions.

Nevertheless, this Court cannot conclude, beyond a reasonable doubt, that the cumulative effect of the misconduct and error noted herein did not impact the jury's determination of Gibson's sentence on Count I. This Court is troubled by both the prosecutor's personal assurances to the jury (regarding her own certainty of Gibson's guilt and her belief in Officer Wilson's credibility), and by the trial court's unnecessary and potentially prejudicial decision to inform the jury that Gibson's counsel was himself facing criminal charges. Although this Court has found that the State's evidence was sufficient to convict Gibson on Count I—though no actual pseudoephedrine was found in his home—and even though this Court finds that the noted misconduct and error did not impact the jury's determination of Gibson's guilt, this Court finds that the cumulative effect of the misconduct and error likely impacted the jury's determination of his sentence on Count I. This Court simply cannot confidently conclude that the cumulative effect of this misconduct and error was harmless regarding Gibson's sentence.

Consequently, this Court concludes that Gibson's sentence on Count I should be modified to imprisonment for 25 years. 22 O.S.2001, § 1066.

DECISION

Frank Leroy Gibson's **CONVICTIONS** for Manufacture of Controlled Dangerous Substance (Methamphetamine), AFCF (Count I) and Unlawful Possession of Drug Paraphernalia (Count II) are hereby **AFFIRMED**. His **SENTENCE ON COUNT I**, however, is hereby **MODIFIED TO IMPRISONMENT FOR 25 YEARS**. His **SENTENCE ON COUNT II** is **AFFIRMED**, and the sentences will remain concurrent. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF KAY COUNTY
THE HONORABLE LESLIE D. PAGE, ASSOCIATE DISTRICT JUDGE

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OPINION BY: SMITH, J.

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LEWIS, V.P.J.:	CONCUR IN RESULTS
LUMPKIN, J.:	CONCUR IN PART/DISSENT IN PART
C. JOHNSON, J.:	CONCUR

LUMPKIN, JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in affirming the convictions in this case. However, I must dissent to the modification of the sentence in Count I.

Although the opinion professes to apply a plain error analysis to Gibson's claims in Proposition V, the opinion omits crucial aspects of plain error review. The opinion reviews the comments challenged as improper statements of personal belief and expressions of personal opinion and determines that "these two remarks do constitute improper prosecutorial misconduct and also plain error." That is not the review adopted by this Court. Instead,

> To be entitled to relief under the plain error doctrine, [an appellant] must prove: 1) the existence of an actual error (i.e., deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding. *See Simpson v. State*, 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d 690, 694, 695, 698; 20 O.S.2001, § 3001.1 . If these elements are met, this Court will correct plain error only if the error "seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings" or otherwise represents a "miscarriage of justice." *Simpson*, 1994 OK CR 40, ¶ 30, 876 P.2d at 701 (*citing United States v. Olano*, 507 U.S. 725, 736, 113 S.Ct. 1770, 1779, 123 L.Ed.2d 508 (1993); 20 O.S.2001, § 3001.1 .

Hogan v. State, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. This Court reviews the "entire record to determine whether the cumulative effect of improper comments by the prosecutor prejudiced Appellant, constituting plain error." *Romano v. State*, 1995 OK CR 74, ¶ 54, 909 P.2d 92, 115. Thus, the opinion omits to determine whether the cumulative effect of the prosecutor's improper

comments, taken in context of the entire record, prejudiced Gibson, meaning affected the outcome of the proceeding.

Applying this analysis to the present case, the comments did not deprive Gibson of a fundamentally fair trial or have any prejudicial impact on the judgment and sentence. *Warner v. State*, 2006 OK CR 40, ¶ 197, 144 P.3d 838, 891. The instance of vouching was very limited as was the expression of personal belief in Gibson's guilt. There was strong evidence of Appellant's guilt as to both Counts I and III. As noted by the State, the prosecutor's comments did not significantly impact the jury as they acquitted Appellant of Count II. Further, the jury's sentence determination was supported by strong evidence. Gibson had two prior felony drug convictions. I simply cannot agree with the determination in the opinion that the prosecutor's comments in the first stage of the trial affected the outcome of the second stage sentencing proceeding. Plain error did not occur.

As to Proposition VI, I find that the trial judge did the right thing. In a town the size of Ponca City, the defense attorney's case was the elephant in the room. If the trial judge had not asked the jury about counsel's case, then we would be seeing a proposition of error alleging the jury should have been asked.

In determining this issue the opinion, again, fails to properly apply plain error review. Instead of applying the review set forth in *Simpson* and *Hogan*, the opinion determines that the trial court's remarks were "ill advised and

created the potential for unfair prejudice." This analysis is made out of whole cloth, and it is applied without citation to any authority.

As set forth above, this Court has set forth a clear standard of review for plain error. The analysis begins with the determination whether actual error occurred. *Hogan*, 2006 OK CR 19, ¶¶ 38-39, 139 P.2d at 923; *Simpson*, 1994 OK CR 40, ¶¶ 11-13, 876 P.2d at 695. Plain error is error which affects the appellant's substantial rights or affected the outcome of the proceeding. *Id.*

Applying this standard to the present case, Gibson has not shown that the trial court's remarks during *voir dire* constituted actual error. The record shows that *voir dire* was conducted in a manner sufficient to afford Gibson a jury free of outside influence, bias or personal interest. *Sanchez v. State*, 2009 OK CR 31, ¶ 44, 223 P.3d 980, 997; *Young v. State*, 2000 OK CR 17, ¶¶ 19-20, 12 P.3d 20, 31–32. Thus, Gibson has not shown that the *voir dire* was inadequate.

Turning to Gibson's Due Process claim, the key question is: "was the jury as finally composed fair and impartial and no member removable for cause." *See Rivera v. Illinois*, 556 U.S. 148, 129 S.Ct. at 1453, 173 L.Ed.2d 320 (2009). As Gibson has not shown that any juror that sat on his jury was less than fair and impartial, I find that he was not denied his right to a fair trial before an impartial jury. *Grant v. State*, 2009 OK CR 11, ¶ 22, 205 P.3d 1, 12; *Rojem v. State*, 2006 OK CR 7, ¶¶ 36-37, 130 P.3d 287, 295; *Harris v. State*, 2004 OK CR 1, ¶¶ 13-14, 84 P.3d 731, 741; *Ross v. State*, 1986 OK CR 49, ¶ 11, 717 P.2d 117, 120. As Gibson has not shown an actual error, plain error did not occur.

The misapplication of law within the opinion compounds within Proposition VIII. As plain error did not occur in Propositions V and VI, there is not any error to accumulate. "We have held that an accumulation of error argument will be rejected where all of the alleged errors are meritless." *Ashinsky v. State*, 1989 OK CR 59, ¶ 31, 780 P.2d 201, 209.

Even if there had been numerous irregularities during the course of the trial, relief is not required because Gibson was not denied a fair sentencing proceeding. *Bechtel v. State*, 1987 OK CR 126, ¶ 12, 738 P.2d 559, 561. The trial court's questions in *voir dire* and the prosecutor's comments in first stage closing argument did not influence the jury's verdict in the second stage of the proceedings. 20 O.S.2001, § 3001.1. Instead, the jury's determination of punishment was properly based upon Gibson's two prior felony convictions for controlled dangerous substances offenses. As such, Gibson's sentence in Count I should be affirmed.

Finally, I continue to adhere to the rule that matters contained in footnotes are dicta. *See Cannon v. State*, 1995 OK CR 45, 904 P.2d 89, 108 (Lumpkin, concur in results) *citing Wainwright v. Witt*, 469 U.S. 412, 422, 105 S.Ct. 844, 851, 83 L.Ed.2d 841 (1985). As opposed to law review articles, citations within court opinions are set forth in the text. *Taylor v. State*, 2011 OK CR 8, ¶ 3, 248 P.3d 362, 380 (Lumpkin, J., concurring) (*citing The Bluebook*: A Uniform System of Citation 3, 45 (Columbia Law Review Ass'n, et al. eds., 18th ed. 2005). The stylistic practice of using footnotes to state the law or attempt to set out the law has led to confusion in the past. *Id.*; *See*

Jackson v. State, 2006 OK CR 45, ¶ 14, 146 P.3d 1149, 1156 (addressing request to consider claim anew because the claim was disposed of in a footnote rather than in the body of the opinion). This confusion can be avoided by properly placing the holding of the Court and supporting authority in the body of the opinion. *Id.*; *Jackson*, 2006 OK CR 45, ¶ 1, 146 P.3d at 1168 (Lumpkin, V.P.J., concurring in results).