IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

GLEN DARRELL HAMPTON, JR.,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	Case No. F 2000-1062
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LILE, JUDGE:

Appellant Glen Darrell Hampton, Jr. was convicted, after a jury trial, of, count one, First Degree Rape, 21 O.S.1991, §§ 1111, 1114; count two, Pointing a Firearm at Another, 21 O.S.Supp.1998, § 1289.16, count three, Forcible Oral Sodomy, 21 O.S.Supp.1998, §§ 886, 888; count four, Possession of a Controlled Dangerous Substance (Methamphetamine), 63 O.S.Supp.1998, § 2-402; count 5, Felonious Possession of a Firearm, 21 O.S.1991, § 1283; count 6, Possession of a Firearm while Committing a Felony, 21 O.S.Supp.1998, § 1287; count 8,[1] Possession of a Controlled Dangerous Substance (Percocet); 63 O.S.Supp.1998, § 2-401; count 9, Possession of a Controlled Dangerous Substance (Marijuana), 63 O.S.Supp.1998, § 2-401; and count ten, Possession of Drug Paraphernalia, 63 O.S.1991, § 2-405, in the District Court of Oklahoma County, Case Number CF-

[1] Count 7, Using Radio Equipment While In The Commission Of A Felony, was dismissed at preliminary hearing.

98-7131, before the Honorable Susan W. Bragg, District Judge.[2] In accordance with the jury verdict, Judge Bragg sentenced Hampton to two hundred fifty (250) years; one hundred fifty (150) years; two hundred (200) years; forty seven (47) years; one hundred fifty (150) years; ten (10) years; twenty (20) years; one (1) year, and one (1) year and a $1000 fine, respectively. From these judgments and sentences Hampton has perfected his appeal.

Hampton raises the following propositions in support of his appeal.

1. The state presented insufficient evidence on counts 4 and 10 to prove beyond a reasonable doubt that Mr. Hampton knowingly and intentionally possessed methamphetamine and drug paraphernalia respectively.

2. The State presented insufficient evidence on count 2 to prove beyond a reasonable doubt that Appellant pointed a firearm at the complaining party.

3. The State presented insufficient evidence on count 8 to prove beyond a reasonable doubt that the contents in the single pharmaceutical capsule was in fact the controlled dangerous substance of Percocet.

4. Admission of other crime evidence violated Mr. Hampton's right to a fair and impartial trial under the Sixth and Fourteenth Amendments of the United States Constitution, article II, sections 7 and 20 of the Oklahoma Constitution, and Okla. Stat. Tit. 12, §§ 2403, 2404(b)(1991).

5. Count 10, possession of drug paraphernalia, must be dismissed because the jury was improperly instructed upon a theory not charged in the information.

6. Count 5, felonious possession of a firearm, must be reversed and remanded for a new trial.

[2] The State alleged three prior convictions. The jury indicated that the convictions were had after former conviction of two or more felonies.

7. Mr. Hampton's sentences on counts 1-5 and 8 must be modified or, alternatively, remanded for resentencing. Plain error occurred when the trial court's instructions improperly allowed the jury to use Appellant's prior 1977 rape conviction both as a predicate felony for count 5, felonious possession of a firearm, and for enhancement purposes for counts 1-4 and 8. Plain error also occurred when the trial court's instructions improperly used Appellant's prior 1986 rape and pointing a firearm convictions as two separate convictions where the two counts arose out of the same transaction or occurrence.

8. Mr. Hampton was subjected to multiple punishments for the same offense in violation of Okla. Stat. Tit. 21, §§ 11(a) and/or double jeopardy.

9. Trial errors, individually or cumulatively, and prosecutorial misconduct denied appellant his constitutional right to a fair trial or, in the alternative, resulted in Appellant receiving grossly disproportionate and excessive sentences.

After thorough consideration of Appellant's propositions of error and the entire record before us on appeal, including the original record, transcripts, and briefs, we have determined that the judgment and sentence for count six shall be reversed and remanded with instructions to dismiss; the remaining judgments and sentences shall be affirmed.

We find in proposition one that there was sufficient evidence from which a jury could determine that Appellant knowingly possessed methamphetamine and drug paraphernalia. *Johnson v. State*, 1988 OK CR 246, ¶8, 764 P.2d 530, 532. In proposition two, we find that sufficient evidence, regardless of the victim's loss of memory, was presented to show that Appellant pointed his pistol at the victim. *See Short v. State*, 1999 OK CR 15, ¶ 32, 980 P.2d 1081, 1096. In proposition three, we find that the expert's testimony regarding the identification and

contents of the pharmaceutical capsule, absent challenge, presented sufficient facts for the jury to determine that the pill contained the Schedule II substance oxycodone. *Id.*

In proposition four, we find that the introduction of "other crimes evidence" was proper in this case. *Myers v. State*, 2000 OK CR 25, ¶ 24, 17 P.3d 1021. We find, in proposition five, that the instructions regarding the possession of paraphernalia, when read as a whole, properly informed the jury regarding the elements of the offense that the State was required to prove. *Selsor v. State*, 2000 OK CR 9, ¶ 18, 2 P.3d 344, 350.

In proposition six, we find that the trial court's procedure, while not in accordance with our mandate in *Chapple v. State*, 1993 OK CR 38, ¶ 18, 866 P.2d 1213, 1216, granted the same safeguards as the *Chapple* procedure, thus the procedure was harmless (there was no objection from Appellant at trial). In proposition seven, we find that Appellant has cited no authority which requires a prior conviction to be used either as an element of one offense or as enhancement to a separate offense. We further find that Appellant failed to object to the use of the prior rape and prior pointing a firearm offenses as two separate offenses when they arose out of the same transaction. Although this error deprived Appellant the right to have the jury instructed on the proper range of punishment on count five and may constitute plain error, we find that Appellant suffered no prejudice from this procedure as he was sentenced to a term well beyond the minimum sentence, thus it was harmless. *Simpson v.*

State, 1994 OK CR 40, ¶ 19, 876 P.2d 690, 698. Regarding the effect on the other crimes charged, we find that there was no plain error.

In proposition eight we find that, due to the State's failure to specifically show, at trial, that the pointing the firearm offense and the possession of the firearm in the commission of the rape arose out of separate acts, the charge of possession of a firearm in the commission of a felony (count six) must be reversed and remanded with instructions to dismiss. *O'Campo v. State*, 1989 OK CR 38, ¶ 14, 778 P.2d 920, 924. We further find that convictions on the other offenses do not violate either double jeopardy, double punishment or 21 O.S.1991, § 11. *Davis v. State*, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126-27.

Finally, in proposition nine, we find that Appellant's six claims of prosecutorial misconduct in this proposition do not constitute misconduct as they were in direct response to Appellant's argument, were proper comments on the evidence, or did not constitute misconduct on their face. *Bland v. State*, 2000 OK CR 11, ¶ 117, 4 P.3d 702, 731; *Van White v. State*, 1999 OK CR 10, ¶ 67, 990 P.2d 253, 271; *Charm v. State*, 1996 OK CR 40, ¶ 62, 924 P.2d 754, 770; *Cooper v. State*, 1991 OK CR 26 ¶¶ 15-16, 806 P.2d 1136, 1139; *Hollan v. State*, 1984 OK CR 42, ¶ 20, 676 P.2d 861, 865. We further find that, in regard to the other alleged trial errors raised in this proposition, the use of the prior 1977 rape was proper during the punishment phase of trial. 21 O.S.1991, § 51A. The hearsay testimony of the nurse did not elicit an objection, thus no trial ruling could be made and the testimony did not constitute plain error.

Short v. State, 1999 OK CR 15, ¶ 32, 980 P.2d at 1096. Evidence regarding a police scanner and police codes found in Appellant's van did not constitute improper other crimes evidence and Appellant has shown no prejudice in the introduction of this evidence. *Bear v. State*, 1988 OK CR 181, ¶ 22, 762 P.2d 950, 956.

Appellant urges us to find that, where trial counsel failed to object to any of the errors alleged in his propositions, the failure to object constituted ineffective assistance of counsel. Appellant has failed to show that counsel's conduct fell below the wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). We further find that when taken together, the errors complained of by Appellant in his propositions do not require relief other than that already granted. *Bland v. State*, 2000 OK CR 11, ¶ 105, 4 P.3d at 734 Lastly, we find that Appellant's sentences do not shock the conscience of this Court, thus are not excessive. *Perryman v. State*, 1999 OK CR 39, ¶ 16, 990 P.2d 900, 905

DECISION

The judgment and sentence of the trial court in count six is **REVERSED** and **REMANDED** with instructions to **DISMISS**; the remaining judgments and sentences are **AFFIRMED**.

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OPINION BY: LILE, J.

LUMPKIN, P.J.:	**CONCURS IN RESULTS**
JOHNSON, V.P.J.:	**CONCURS**
CHAPEL, J.:	**CONCURS IN PART/DISSENTS IN PART**
STRUBHAR, .J.:	**CONCURS**

RE

CHAPEL, J., CONCURRING IN PART AND DISSENTING IN PART:

I would affirm the Rape (Count I) and Sodomy (Count III) convictions and would modify the sentences imposed for each these crimes to life. I would reverse all other convictions and sentences.