IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ROBERT DEWAYNE COX,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
v.	)	
	)	Case No. F-2014-524
STATE OF OKLAHOMA	)	
	)	
Appellee.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JUL - 9 2015
MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

LUMPKIN, VICE-PRESIDING JUDGE:

Appellant, Robert Dewayne Cox, was tried by Jury and convicted of Possession of Methamphetamine (Count 1) (63 O.S.2011, § 2-402), After Former Conviction of a Felony; Possession of Marijuana (misdemeanor) (Count 2) (63 O.S.2011, § 2-402); and Public Intoxication (Count III) (37 O.S.2011, § 8) in the District Court of Bryan County Case No. CF-2012-522. The jury recommended as punishment imprisonment for ten (10) years in Count 1; incarceration for one (1) day in the county jail in Count 2; and incarceration for five (5) days in the county jail in Count 3. The trial court sentenced in accordance with the jury's recommendation and ordered the sentences to run concurrently. It is from this judgment and sentence that Appellant appeals.

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

I. Convictions for possession of a controlled dangerous substance in both counts 1 and 2 offends the protections against double punishment and double jeopardy.

II. Law enforcement provided an insufficient chain of custody to show the substances allegedly seized from Mr. Cox were the

same substances that were tested by the OSBI and formed the basis of counts 1 and 2, possession of methamphetamine and marijuana.

III. Admission of other crimes evidence prejudiced the jury, deprived Appellant of a fundamentally fair trial and warrants modification of the sentence.

IV. Alternatively, reversal is required because any failure to adequately and completely preserve issues for review in this Court was the result of the ineffective assistance of counsel.

V. Cumulative errors deprived Mr. Cox of a fair trial and a reliable outcome.

After a thorough consideration of these propositions and the entire record before us on appeal including the original records, transcripts, and briefs of the parties, we have determined that Appellant is entitled to relief in Proposition One.

In his first proposition of error, Appellant claims that his convictions for possession of a controlled dangerous substance in Counts 1 and 2 violated 21 O.S.2011, § 11 and the constitutional prohibitions against double jeopardy. Appellant concedes that he failed to raise this challenge before the District Court. As such, we find that he has waived appellate review of the issue for all but plain error. *Logsdon v. State*, 2010 OK CR 7, ¶ 15, 231 P.3d 156, 1164. We review the claim pursuant to the test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690; *Head v. State*, 2006 OK CR 44, ¶ 9, 146 P.3d 1141, 1144.

Under *Simpson*, an appellant must show an actual error, that is plain or obvious, affecting his substantial rights, and which seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise

represents a miscarriage of justice. *Id.*, 1994 OK CR 40, ¶¶ 10, 26, 30, 876 P.2d at 694, 699, 701; *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395; *Malone v. State*, 2013 OK CR 1, ¶ 41, 293 P.3d 198, 211-212. "[P]lain error is subject to harmless error analysis." *Id.*, 1994 OK CR 40, ¶ 20, 876 P.2d at 698.

We find that Appellant has shown the existence of an actual error in the present case. His possession of the separately packaged methamphetamine and marijuana in the same container, namely, his right front coin pocket, constituted but one violation of 63 O.S.2011, § 2-402, punishable only once according to § 11. *Lewis v. State*, 2006 OK CR 48, ¶¶ 2, 9-10, 150 P.3d 1060, 1061-63 (finding § 11 violated where separately packaged drugs possessed in single container), *citing Watkins v. State*, 1991 OK CR 119, 829 P.2d 42, *opinion on rehearing*, 1992 OK CR 34, ¶ 6, 855 P.2d 141, 142. We further find that this error was quite clear or obvious despite the absence of any objection. *Simpson*, 1994 OK CR 40, ¶ 26, 876 P.2d at 699. This Court's interpretation of the plain language of the Uniform Controlled Dangerous Substances Act in light of the prohibition within § 11 is well established. *See Lewis*, 2006 OK CR 48, ¶ 5, 150 P.3d at 1062. The error affected Appellant's substantial rights and seriously affected the fairness, integrity or public reputation of the trial. *Barnard v. State*, 2012 OK CR 15, ¶ 32, 290 P.3d 759, 769; *Simpson*, 1994 OK CR 40, ¶¶ 24-25, 30, 876 P.2d at 699, 701. As Appellant was twice convicted and sentenced for one act of possession of a controlled dangerous substance, we cannot find that this error was harmless.

Simpson, 1994 OK CR 40, ¶¶ 19-20, 876 P.2d at 698 (reversal is not warranted for plain error if the error was harmless.). Therefore, we find that Appellant is entitled to relief.

In his second proposition of error, Appellant challenges the sufficiency of the evidence supporting his convictions in Counts 1 and 2. He asserts that the State failed to prove a sufficient chain of custody as to the controlled dangerous substances. Appellant failed to raise this challenge before the District Court. As such, we find that he has waived appellate review of this issue for all but plain error as analyzed above. *Simpson*, 1994 OK CR 40, ¶¶ 2, 23, 11, 876 P.2d at 692-93, 694-95, 698-99.

Applying the test set forth in *Simpson*, we find that Appellant has not shown that error, plain or otherwise, occurred. *Id.*, 1994 OK CR 40, ¶¶ 10, 26, 30, 876 P.2d at 694, 699, 701. As the State established a sufficient chain of custody to rule out substitution or tampering between the time that the evidence was found and the time that it was analyzed, the jury was properly permitted to consider the drug evidence. *Brown v. State*, 1998 OK CR 77, ¶ 58, 989 P.2d 913, 929. Taking the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense of possession of a controlled dangerous substance beyond a reasonable doubt. *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204. Proposition Two is denied.

In his third proposition of error, Appellant contends that the State improperly elicited evidence of other crimes or bad acts during its cross-examination of him. Appellant concedes that he failed to properly challenge the State's introduction of this evidence at trial and, thus, waived appellate review of this issue for all but plain error. *Simpson*, 1994 OK CR 40, ¶¶ 2, 23, 11, 876 P.2d at 692-93, 694-95, 698-99; *Short v. State*, 1999 OK CR 15, ¶ 27, 980 P.2d 1081, 1094 ("When a specific objection is raised at trial, this Court will not entertain a different objection on appeal."). Applying the test set forth in *Simpson*, we find that Appellant has not shown the existence of an actual error. *Id.*, 1994 OK CR 40, ¶¶ 10, 26, 30, 876 P.2d at 694, 699, 701.

The prosecutor's inquiries as to whether Appellant purchased or consumed methamphetamine and marijuana on the day in question were not improper because such evidence, if any, was part of the *res gestae* of the offense. *Warner v. State*, 2006 OK CR 40, ¶ 68, 144 P.3d 838, 868; *Rogers v. State*, 1995 OK CR 8, ¶ 20, 890 P.2d 959, 971. In light of Appellant's testimony on direct-examination, we find that the prosecutor's inquiries as to whether Appellant had purchased or consumed methamphetamine or marijuana in the past were not improper because the evidence was material to the issue of Appellant's truthfulness as a witness and met the other crimes exception set forth in 12 O.S.2011, § 2404(A)(3). *Mitchell v. State*, 2011 OK CR 26, ¶ 64 270 P.3d 160, 177; *Hawkins v. State*, 1986 OK CR 58, ¶¶ 7-8, 717 P.2d 1156, 1158-59; 12 O.S.2011, § 2608(B). As we find that no error, plain or otherwise, occurred, Proposition Three is denied.

In his fourth proposition of error, Appellant claims that trial counsel's failure to preserve appellate review as to his claims of error in Propositions One, Two and Three constituted ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). In Propositions Two and Three, we found that plain error had not occurred. As such, we find that Appellant has not shown a reasonable probability that the outcome of the trial would have been different but for counsel's failure to preserve appellate review of these issues. *Andrew v. State*, 2007 OK CR 23, ¶ 99, 164 P.3d 176, 198; *Glossip v. State*, 2007 OK CR 12, ¶¶ 110-12, 157 P.3d 143, 161.

Because we determined in Proposition One that Appellant had shown plain error and was entitled to relief, we find that his claim of ineffective assistance concerning that claim is moot. Proposition Four is denied.

As to Proposition Five, we find that Appellant was not denied a fair trial by cumulative error. *Ashinsky v. State*, 1989 OK CR 59, ¶ 31, 780 P.2d 201, 209; *Bechtel v. State*, 1987 OK CR 126, 738 P.2d 559, 561. We determined in Proposition One that Appellant's convictions for possession of a controlled dangerous substance in Counts 1 and 2 constituted plain reversible error because Appellant possessed the substances in his right coin pocket and thus Appellant had been punished twice for one act. However, this sole error cannot support an accumulation of error claim. *Hope v. State*, 1987 OK CR 24, ¶ 12, 732 P.2d 905, 908. Therefore, no new trial or modification of sentence is warranted and this assignment of error is denied.

DECISION

The Judgment and Sentences of the District Court as to Counts 1 and 3 are affirmed. Appellant's Conviction for misdemeanor Possession of Marijuana in Count 2 is **REVERSED** with instructions to dismiss. This matter is remanded to the District Court for entry of Judgment and Sentence consistent with this Opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF BRYAN COUNTY
THE HONORABLE ROCKEY L. POWERS, ASSOCIATE DISTRICT JUDGE

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JOHNSON, J.: CONCUR IN RESULT
LEWIS, J.: CONCUR
HUDSON, J.: CONCUR

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