

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JIMMY DOUGLAS LETTERMAN,)
)
 Appellant,)
 v.)
 STATE OF OKLAHOMA)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2005-987

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

DEC 04 2006

MICHAEL S. BISHOP
CLERK

SUMMARY OPINION

LUMPKIN, VICE-PRESIDING JUDGE:

Appellant Jimmy Douglas Letterman was tried by jury and convicted of Unlawful Possession of Controlled Drug (Methamphetamine) (Count II) (63 O.S.Supp.2004, § 2-402(B)(1)); Unlawful Possession of Marijuana (Count III) (63 O.S.Supp.2004, § 2-402(B)(2); Possession of a Firearm while in Commission of a Felony (Count IV) (21 O.S. 2001, § 1287); and Unlawful Possession of Paraphernalia (Count V) (63 O.S. Supp.2004, § 2-405(B)), Case No. CF-2004-345 in the District Court of Mayes County.¹ The jury recommended as punishment six (6) years in prison and a ten thousand dollar (\$10,000.00) fine in each of Counts II and IV; and one year in prison and a one thousand dollar (\$1,000.00) fine in each of Counts III and V. The trial court sentenced accordingly, ordering the sentences in Counts II and IV to run consecutively, the one-year sentences in Count III and V to run concurrently with Count II. It is from this judgment and sentence that Appellant appeals.

¹ Appellant was acquitted in Count I, Manufacture of Controlled Dangerous Substance (Methamphetamine) (63 O.S.Supp. 2004, § 2-401(F)).

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

- I. The trial court erred in failing to dismiss the charge of possession of a firearm in commission of a felony when the jury found Appellant not guilty of the underlying felony. Accordingly, Appellant's conviction for possession of a firearm in commission of a felony must be reversed with instructions to dismiss.
- II. Appellant's constitutional protection to be free from double jeopardy was violated when the jury convicted him of possessing both methamphetamine and marijuana and the trial court erred in overruling defense counsel's demurrer.
- III. The State failed to establish, beyond a reasonable doubt, that Appellant knowingly possessed drug paraphernalia or controlled substance when the drug paraphernalia and controlled substance were not in Appellant's possession, but discovered on property not belonging to Appellant, now where Appellant resided.

After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that under the law and the evidence, reversal is warranted only in Count III.

In Proposition I, any inconsistency in the verdicts in Counts I and IV is not grounds for the reversal of the conviction in Count IV. As we stated in *Gray v. State*, 1982 OK CR 137, ¶ 20, 650 P.2d 880, 884:

Consistency of multiple verdicts is not the test for assessing the validity of a particular verdict in a criminal case. Rather, a verdict is proper if it is supported by sufficient evidence. See, *Dunn v. United States*, 284 U.S. 390, 52 S.Ct. 1889, 76 L.Ed. 356 (1932); *Woodard v. State*, 567 P.2d 512 (Okl.Cr.1977).

See also U.S. v. Powell, 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461 (1997).

The conviction in Count IV for possession of a firearm during the commission of the felony of manufacturing methamphetamine was supported by evidence that Appellant possessed the firearm in the same tent where evidence of the manufacture of the methamphetamine was located, and the loaded gun was strategically located on a table near a cot subject to quick and easy access if necessary. Under this evidence, it is logical to conclude Appellant intended to actually use the gun if necessary to defend himself or his drug operation. The evidence supports a conviction under 21 O.S. 2001, § 1287. *See Ott v. State*, 1998 OK CR 51, ¶ 10, 967 P.2d 472, 476; *Pebworth v. State*, 1993 OK CR 28, ¶ 12, 855 P.2d 605, 607. Therefore, applying the analysis of the U.S. Supreme Court in *U.S. v. Powell*, *supra*, despite the jury's finding in Count I, the conviction in Count IV is affirmed as the State proved beyond a reasonable doubt that Appellant committed the offense of possession of a weapon while committing the felony of manufacturing methamphetamine.

We review for plain error only the trial court's failure to give the uniform jury instruction regarding the elements of the offense of possession of a weapon while committing a felony. *See Williams v. State*, 2001 OK CR 9, ¶ 27, 22 P.3d 702, 712. The record shows defense counsel did not request the uniform instruction nor was an objection raised to its absence. The instruction given to the jury did not specifically set forth the underlying felony. Any error in this omission is harmless as the jury was fully informed through other instructions and argument as to the underlying felony and its elements, as well as the State's

burden of proof. See *Ellis v. Ward*, 2000 OK CR 18, ¶ 4, 13 P.3d 985, 986 (instructional error subject to harmless error analysis). When read in their entirety, the instructions as a whole sufficiently stated the applicable law, including the elements of the offenses and the State's burden of proof.

We also find error in the trial court's failure to instruct the jury on the seventh element, that "the possession of the weapon was connected to the commission of or attempt to commit the felony." See OUJI-CR (2d) 6-38. This particular element was not addressed in any other instruction. While this omission might warrant relief in another case, here it does not as the uncontroverted evidence clearly established a connection between the weapon and the underlying felony. Therefore, the trial court's failure to instruct the jury on this "nexus" element did not have a substantial influence on the outcome of the case because even if the jury had received the entire uniform instruction, their verdict in this count would not have been any different. See *Simpson v. State*, 1994 OK CR 40, ¶ 37, 876 P.2d 690, 702. Therefore, the error was harmless and no relief is required. See *Smallwood v. State*, 1995 OK CR 60, ¶ 36, 907 P.2d 217, 228-229.

In Proposition II, Appellant's convictions for possession of methamphetamine and possession of marijuana violate the constitutional prohibition against multiple punishments for the same offense. *Watkins v. State*, 1992 OK CR 34, ¶¶ 5-6, 855 P.2d 141. Possession of methamphetamine and possession of marijuana are both made illegal by the same statutory provision - 63 O.S.Supp.2004, § 2-402. This section makes possession of controlled

dangerous substances illegal. The type of controlled dangerous substance possessed only becomes important when punishment is imposed under § 2-402(B)). Even though the illegal substances in this case were found in separate caches, the statutory language does not provide for separate charges of possession for each illegal substance. Accordingly, Appellant's conviction for possession of marijuana (Count III) is reversed with instructions to dismiss.

In Proposition III, we find reasonable inferences can be made from the State's evidence that, at the very least, Appellant shared in the possession of the methamphetamine and drug paraphernalia found inside and around the outside of the tent. *See Scott v. State*, 1991 OK CR 31, ¶ 4, 808 P.2d 73, 76 (on appellate review this Court accepts all reasonable inferences which tend to support the jury's verdict). *See also Hammonds v. State*, 1987 OK CR 132, ¶ 6, 739 P.2d 525, 527 (possession may be actual or constructive, exclusive or joint). Reviewing this evidence in the light most favorable to the prosecution, any rational trier of fact could have found Appellant guilty of possession of methamphetamine and possession of drug paraphernalia beyond a reasonable doubt. *See Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559.

DECISION

The Judgments and Sentences in **COUNTS II, IV AND V are AFFIRMED.** The Judgement and Sentence in **Count III is REVERSED WITH INSTRUCTIONS TO DISMISS.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005), the MANDATE is ORDERED issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF MAYES COUNTY
THE HONORABLE JAMES D. GOODPASTER, DISTRICT JUDGE

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CHAPEL, P.J.: CONCUR
C. JOHNSON, J.: CONCUR
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