

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BRANDON GERALD THOMAS,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

Case No. F-2015-201

FILED  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

MAR 23 2016

SUMMARY OPINION

MICHAEL S. RICHIE  
CLERK

LUMPKIN, VICE-PRESIDING JUDGE:

Appellant, Brandon Gerald Thomas, was tried by jury trial and convicted of Trafficking in Illegal Drugs (Methamphetamine) (Count 1) (63 O.S.2011, § 2-415) and Possession of Controlled Drugs Without Tax Stamp Affixed (Count 2) (68 O.S.2011, § 450.3) in the District Court of Tulsa County, Case Number CF-2012-925.<sup>1</sup> The jury recommend as punishment imprisonment for eight (8) years and a \$25,000.00 fine in Count 1 and imprisonment for two (2) years in Count 2. The trial court sentenced accordingly, ordered the sentences to run consecutively but granted Appellant credit for time served. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in this appeal:

- I. The evidence was insufficient to corroborate Ms. Gilliam's testimony at trial.

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<sup>1</sup> As to Count 3, the District Court sustained Appellant's demurrer to the offense of Possession of a Firearm While in the Commission of a Felony (21 O.S.2011, § 1287). Noting that the gun was not loaded and was stored in a drawer in a back bedroom, the District Court determined that the gun was not used to actually facilitate the commission of an offense or strategically located for use during the commission of an offense.

- II. Evidence seized pursuant to a search warrant was improperly admitted in violation of the Fourth Amendment of the United States Constitution and Article II, § 30 of the Oklahoma Constitution.
- III. Mr. Thomas' Fourteenth Amendment Due Process Rights pursuant to the United States Constitution were violated when the trial court failed to properly instruct the jury.
- IV. The trial court abused its discretion when it ordered Mr. Thomas' sentences to be served consecutively.
- V. Cumulative errors deprived Mr. Thomas of a fair proceeding and 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 neither reversal nor modification of sentence is warranted under the law and the evidence.

In Proposition One, Appellant challenges the sufficiency of the evidence. He argues that the accomplice testimony of his girlfriend, Brittany Gilliam, was not corroborated and, thus, the evidence was insufficient to support his convictions. As there was at least one material fact of independent evidence that tended to connect Appellant with the commission of the crime, we find that Gilliam's testimony was sufficiently corroborated. *Glossip v. State*, 2007 OK CR 12, ¶ 41, 157 P.3d 143, 152. Circumstantial evidence established that Appellant had constructive possession of the 112.41 grams of methamphetamine found within the freezer of the home in which he stayed with Gilliam several nights a week. *Cummings v. State*, 1998 OK CR 45, ¶ 20, 968 P.2d 821, 830 ("[C]ircumstantial evidence can be adequate to corroborate the accomplice's testimony."); *Staples v. State*, 1974 OK CR 208, ¶¶ 8-10, 528

P.2d 1131, 1133-34 (holding that circumstantial evidence may establish proof of possession of contraband).

As Gilliam's testimony was sufficiently corroborated, the jury was free to consider all of the testimony presented at trial. *Glossip*, 2007 OK CR 12, ¶ 42, 157 P.3d at 152. Taking the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the charged offenses 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 One is denied.

In Proposition Two, Appellant challenges the trial court's denial of his motion to suppress. Appellant contends that the information within the Affidavit for Search Warrant was insufficient to establish probable cause that methamphetamine would be found inside the home.<sup>2</sup>

Reviewing the Affidavit for Search Warrant, we cannot say that the District Court abused its discretion when it denied Appellant's motion. *Nilsen v. State*, 2009 OK CR 6, ¶ 5, 203 P.3d 189, 191; *Lee v. State*, 1983 OK CR 41, ¶ 6, 661 P.2d 1345, 1349-50. Giving great deference to the issuing magistrate's determination of probable cause, we find there was a substantial basis for concluding that probable cause existed. *United States v. Leon*, 468 U.S. 897, 914, 104 S.Ct. 3405, 3416, 82 L.Ed.2d 677 (1984); *Wackerly v. State*, 2000 OK CR 15, ¶ 15, 12 P.3d 1, 9. Given all the circumstances set forth in the Affidavit there was a fair probability that methamphetamine would be found in the

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<sup>2</sup> Appellant was the named subject in the Affidavit.

home. *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983); *Bland v. State*, 2000 OK CR 11, ¶ 44, 4 P.3d 702, 717 (adopting totality of circumstances test for determination of probable cause). Proposition Two is denied.

In Proposition Three, Appellant raises three separate challenges to the jury instructions. We note that Appellant did not object to the instructions at trial, thus, we find that he has waived appellate review of the instant challenges for all but plain error. *Burgess v. State*, 2010 OK CR 25, ¶ 21, 243 P.3d 461, 465; *Romano v. State*, 1995 OK CR 74, ¶ 80, 909 P.2d 92, 120; Therefore, we review Appellant's claims pursuant to the test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, and determine whether Appellant has shown an actual error, which is plain or obvious, and which affects his substantial rights. *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. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*

Appellant, first, claims that the District Court's omission of Instruction No. 9-32, OUJI-CR(2d) (Supp.2000), prevented the jury from knowing how to find corroboration of the accomplice's testimony. Reviewing Appellant's claim pursuant to the test set forth in *Simpson*, we find that he has not shown an

error that is plain or obvious. *Malone*, 2013 OK CR 1, ¶ 41, 293 P.3d at 211-212.

Taking the instructions as a whole, we find that the instructions fairly and accurately stated the law. *Eizember v. State*, 2007 OK CR 29, ¶ 111, 164 P.3d 208, 236; *Norton v. State*, 2002 OK CR 10, ¶ 17, 43 P.3d 404, 409. Although the District Court omitted the instruction which guides jurors through the mental process of setting aside the accomplice's testimony, the jury instructions sufficiently apprised the jury as to the requirement of corroboration of the accomplice's testimony. Because the District Court instructed the jurors concerning the use of accomplice testimony, the necessity of corroboration, the definition of corroboration, and the requisite standard for corroboration we find that the instructions properly guided the jury's determination. See Instruction Nos. 9-25 through 9-28, 9-30, and 9-31, OUJI-CR(2d) (Supp.2000).

As the State adequately corroborated the accomplice's testimony, we find that *Pink v. State*, 2004 OK CR 37, 104 P.3d 584, is distinguishable from the present case. *Id.*, 2004 OK CR 37, ¶¶ 18, 24, 104 P.3d at 591, 593. We further note that the prosecutor in the present case did not argue that the jurors were not required to eliminate the accomplice's testimony when determining whether there was sufficient corroboration as the prosecutor argued in *Pink*. *Id.*, 2004 OK CR 37, ¶¶ 21-22, 104 P.3d at 592-93. Instead, the prosecutor explicitly informed the jurors that they would have to determine if the State's case was based solely on the accomplice's testimony, or if there was other evidence that

corroborated Gilliam's account. Accordingly, we find that Appellant has not shown that error, plain or otherwise, occurred.

Second, Appellant claims that the District Court erred when it instructed the jury concerning the offense of Trafficking in Illegal Drugs. He argues that the instruction's reference to the charged offense as "an attempt to commit the crime" was incorrect and confusing. Reviewing Appellant's claim pursuant to the test set forth in *Simpson*, we find that he has shown an error that is plain or obvious. *Malone*, 2013 OK CR 1, ¶ 41, 293 P.3d at 211-212. The State charged Appellant with the offense of Trafficking in Illegal Drugs. The jury instruction incorrectly referenced the offense as "an attempt to commit the crime of Trafficking in Illegal Drugs."

However, we find that Appellant has not shown that this error affected his substantial rights, the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Simpson*, 1994 OK CR 40, ¶¶ 23, 30, 876 P.2d at 698, 700-01. Appellant concedes that the instruction's accurately set forth the elements of the crime of Trafficking in Illegal Drugs. At the outset of the trial, the District Court informed the jury that Appellant was charged with the crime of Trafficking in Illegal Drugs in the Statement of The Case. The State further informed the jurors of this fact when it read the Information to them. The District Court informed the jurors that Appellant was charged with Trafficking in Illegal Drugs in all of the other

closing instructions. The jury's verdict read "Trafficking in Illegal Drugs."<sup>3</sup> Accordingly, we find that no relief is required.

Third, Appellant claims that the District Court erred when it instructed the jury concerning the offense of Possession of Controlled Drugs Without a Tax Stamp Affixed. Reviewing Appellant's claim pursuant to the test set forth in *Simpson*, we find that he has not shown an error that is plain or obvious. *Malone*, 2013 OK CR 1, ¶ 41, 293 P.3d at 211-212.

Oklahoma does not have a Uniform Jury Instruction for the offense of No Tax Stamp. The District Court's instructions were consistent with the plain language of the Controlled Dangerous Substances Act (68 O.S.2011, § 450.1 - § 450.8). See *State v. Young*, 1999 OK CR 14, ¶ 27, 989 P.2d 949, 955 ("[S]tatutes are to be construed according to the plain and ordinary meaning of their language."). Therefore, we find that the District Court's instructions fairly and accurately stated the applicable law. *Eizember*, 2007 OK CR 29, ¶ 111, 164 P.3d at 236

Even if we were to determine that the offense of No Tax Stamp required proof of the element "knowingly or intentionally," we would find the error harmless in the present case. See *White v. State*, 1995 OK CR 15, ¶ 19, 900 P.2d 982, 991 (Citing to trial court's instructions listing "knowing and intentional" as element of No Tax Stamp offense in determining the sufficiency of the evidence). It is clear beyond a reasonable doubt that a rational jury would have found Appellant guilty absent the error. *Neder v. United States*, 527

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<sup>3</sup> We note that an Attempt to Traffick in Illegal Drugs is subject to the same penalty as the charged offense. See 63 O.S.2011, § 2-408.

U.S. 1, 7-9, 119 S.Ct. 1827, 1833, 144 L.Ed.2d 35 (1999); *Primeaux v. State*, 2004 OK CR 16, ¶¶ 77, 81, 82, 88 P.3d 893, 907-08. As in *White*, when the jury found Appellant guilty of Trafficking, they necessarily found that Appellant knowingly and intentionally possessed seven grams or more of methamphetamine. See *White*, 1995 OK CR 15, ¶ 19, 900 P.2d at 991. Proposition Three is denied.

As to Proposition Four, we find that, under all the facts and circumstances of the case, Appellant's overall sentence is not so excessive as to shock the conscience of the Court. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149; *Freeman v. State*, 1994 OK CR 37, ¶ 38, 876 P.2d 283, 291. In light of the large quantity of methamphetamine Appellant possessed, we do not find that the trial court abused its discretion when it ran Appellant's sentences consecutive. *Riley v. State*, 1997 OK CR 51, ¶ 21, 947 P.2d 530, 535; *Kamees v. State*, 1991 OK CR 91, ¶ 21, 815 P.2d 1204, 1208-09. Proposition Four is denied.

As to Proposition Five, we find 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. Proposition Five is denied.

### DECISION

The judgment and sentence is hereby **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.



AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY  
THE HONORABLE JAMES M. CAPUTO, DISTRICT JUDGE

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**OPINION BY: LUMPKIN, V.P.J.**

SMITH, P.J.: Concur in Results  
JOHNSON, J.: Concur  
LEWIS, J.: Concur  
HUDSON, J.: Concur