

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

JIMMY DON MYRICK,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

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NOT FOR PUBLICATION

Case No. F-2015-36

FILED  
IN COURT OF CRIMINAL APPEALS,  
STATE OF OKLAHOMA

MAY 13 2016

**SUMMARY OPINION**

MICHAEL S. RICHIE  
CLERK

**JOHNSON, JUDGE:**

Appellant Jimmy Don Myrick was tried in a non-jury trial and convicted of Possession of a Controlled Dangerous Substance (Count 1) in violation of 63 O.S.2011, § 2-402(B)(2) in the District Court of McCurtain County, Case No. CF-2012-74. The Honorable Gary Brock, Special Judge, who presided at trial, sentenced Myrick to thirty months imprisonment. Myrick appeals, raising the following issues:

- (1) whether the State's evidence was sufficient to prove the offense of felony possession of marijuana when there was no evidence that he was represented by counsel or waived counsel when he was convicted of the predicate misdemeanor possession of marijuana;
- (2) whether his conviction should be reversed with instructions to dismiss based on an inadequate chain of custody; and
- (3) whether his sentence is excessive.

We find reversal is not required and affirm the Judgment and Sentence of the district court.

Myrick was charged with possession of marijuana. To enhance this charge from a misdemeanor to a felony, the State introduced a Judgment and Sentence proving that Myrick entered an earlier guilty or nolo contendere plea to a misdemeanor charge of unlawful possession of marijuana. The State's evidence, however, failed to prove either that he was represented by counsel or that he made an informed waiver of his right to representation at the earlier proceeding. Myrick argues that because prior uncounseled misdemeanor convictions cannot be used to enhance a sentence in a subsequent prosecution, the evidence presented at trial was insufficient to support his conviction for felony possession of marijuana. This Court reviews challenges to the sufficiency of the evidence in the light most favorable to the State and will not disturb the verdict if any rational trier of fact could have found the essential elements of the crime charged to exist beyond a reasonable doubt. *Head v. State*, 2006 OK CR 44, ¶ 6, 146 P.3d 1141, 1144. *See also Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04.

The State acknowledges that a prior conviction cannot be used for enhancement purposes if the defendant was unrepresented and did not knowingly and voluntarily waive his right to counsel. *See Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967); *Holmes v. State*, 1983 OK CR 78, ¶ 5, 664 P.2d 1063, 1064. The State has, however, filed a motion to supplement the record with a certified copy of the waiver of attorney form

which shows that Myrick's waiver of counsel in the underlying misdemeanor case was knowing and intelligent. See Rule 3.11(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011). The State's motion is granted upon a finding that the waiver of attorney form is necessary to assist in the determination of the issue raised in this proposition. Upon consideration of the whole record, including the waiver of attorney form, we find that Myrick made an informed decision to waive his right to counsel at the plea proceeding. The evidence, when viewed in the light most favorable to the State, supports Myrick's conviction for felony possession of marijuana beyond a reasonable doubt. Relief is not required.

2.

The State presented evidence at trial that the hand rolled cigarette Trooper Owens retrieved from Myrick's jacket was sent to a lab where it was analyzed and determined to be marijuana. Myrick complains on appeal that it was error for the trial court to admit this evidence. The admission of evidence lies within the sound discretion of the trial court and when the issue is properly preserved for appellate review we will not disturb the trial court's decision absent an abuse of discretion. See *Coddington v. State*, 2011 OK CR 17, ¶ 65, 254 P.3d 684, 710. Because no objection was made to the introduction of this evidence, we review for plain error on appeal. See *Hancock v. State*, 2007 OK CR 9, ¶ 72, 155 P.3d 796, 813.

Myrick argues that the trial court erred in considering the marijuana tested by the lab because there were unexplained gaps in the chain of custody and there are “grave concerns” that the evidence seized was not the same evidence tested by the lab. The chain of custody rule is intended to guard against substitution or tampering with evidence between the time it is collected and the time it is analyzed. *See Alverson v. State*, 1999 OK CR 21, ¶ 22, 983 P.2d 498, 509. For admissibility, the State need not disprove all possibility of alteration. *See Mitchell v. State*, 2010 OK CR 14, ¶ 74, 235 P.3d 640, 657-58. Any speculation that an impropriety may have occurred in an otherwise sufficient chain of custody goes to the weight of the evidence, not its admissibility. *See Anderson v. State*, 2010 OK CR 26, ¶ 4, 252 P.3d 211, 212. A trial court considers, and we review, “(1) the nature of the article; (2) the circumstances surrounding its preservation; and, (3) the likelihood of contamination, alteration or tampering.” *Driskell v. State*, 1983 OK CR 22, ¶ 60, 659 P.2d 343, 354.

Myrick offers only speculation regarding the possibility that the marijuana cigarette tested was tampered with or substituted between the time it was seized and the time it was tested. We find no plain error in the trial court’s admission and consideration of this evidence. Relief is not required.

3.

Myrick’s sentence is supported by the facts of the case and is within the range of punishment provided by law. This Court will not disturb a sentence

within statutory limits unless, under the facts and circumstances of the case, it is so excessive as to shock the conscience of the Court. *Gomez v. State*, 2007 OK CR 33, ¶ 18, 168 P.3d 1139, 1146; *Rea v. State*, 2001 OK CR 28, ¶ 5 n.3, 34 P.3d 148, 149 n.3. Myrick's sentence does not meet that test, and no relief is warranted.

### **DECISION**

The Judgment and Sentence of the district court is **AFFIRMED**. The State's Motion to Supplement is **GRANTED**. 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 delivery and filing of this decision.

### **AN APPEAL FROM THE DISTRICT COURT OF McCURTAIN COUNTY THE HONORABLE GARY BROCK, SPECIAL JUDGE**

#### **APPEARANCES AT TRIAL**

JAMES P. LONGACRE  
117 N. CENTRAL AVE.  
IDABEL, OK 74745-3816  
ATTORNEY FOR DEFENDANT

SCOTT DOERING  
ASSISTANT DISTRICT ATTORNEY  
108 N. CENTRAL AVE., STE 1  
IDABEL, OK 74745  
ATTORNEY FOR STATE

#### **APPEARANCES ON APPEAL**

NANCY WALKER-JOHNSON  
P. O. BOX 926  
NORMAN, OK 73070  
ATTORNEY FOR APPELLANT

E. SCOTT PRUITT  
OKLAHOMA ATTORNEY GENERAL  
JENNIFER L. CRABB  
ASSISTANT ATTORNEY GENERAL  
313 N.E. 21<sup>ST</sup> STREET  
OKLAHOMA CITY, OK 73105  
ATTORNEYS FOR APPELLEE

**OPINION BY: JOHNSON, J.**  
**SMITH, P.J.: Concur**  
**LUMPKIN, V.P.J.: Concur in Part and Dissent in Part**  
**LEWIS, J.: Concur**  
**HUDSON, J.: Concur in Results**  
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**LUMPKIN, VICE PRESIDING JUDGE: CONCURRING IN PART/DISSENTING IN PART**

I concur in the Court's decision to affirm the judgment and sentence but must respectfully dissent to granting the State's motion to supplement.

In reaching its decision in Proposition One, the majority considers the extra-record evidence attached to the State's Motion to Supplement the record. In its motion, the State seeks to supplement the record with a purported "Waiver of Attorney" document. However, this document has neither been properly identified nor subjected to cross examination. As such the Court cannot use the attachment as substantive evidence regarding the issue raised. *Warner v. State*, 2006 OK CR 40, ¶ 14, 144 P.3d 838, 858. Instead, the attachment only goes to the determination whether an evidentiary hearing is required. *Id.*, 2006 OK CR 40, ¶ 14 n.3, 144 P.3d at 858 n. 3.

Supplementation of the record is only appropriate under Rule 3.11(A) *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015), when the extra-record material is necessary for the determination of an issue. *Coddington v. State*, 2011 OK CR 17, ¶ 21, 254 P.3d 684, 698. Rule 3.11(B) places restrictions on application of Rule 3.11(A). *McElmurry v. State*, 2002 OK CR 40, ¶ 167, 60 P.3d 4, 36. Rule 3.11(B)(2) limits supplementation to either the circumstance where a transcript or item which was admitted by the trial court has not been included in the record on appeal or in conjunction with a claim of ineffective assistance of counsel. Stated simply, Rule 3.11(A) is not

intended to allow parties to bolster a trial record. *Day v. State*, 2013 OK CR 8, ¶ 10, 303 P.3d 291, 297.

If a party meets the requisite showing under Rule 3.11, the proper remedy is to remand the case to the District Court for an evidentiary hearing on the issue. *Warner*, 2006 OK CR 40, ¶ 92, 144 P.3d at 873. At a minimum, this Court must direct the District Court Clerk to file an amended record.

In the present case, the State's request to supplement the record is improper under Rule 3.11(B)(2) because the Waiver of Attorney document was not admitted in the trial court proceedings. Further, in evaluating claims of insufficient evidence, this Court "determines whether, after reviewing 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." *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. This Court only reviews the evidence within the record on appeal. See *Clayton v. State*, 1984 OK CR 88, ¶ 6, 695 P.2d 3, 6.

I further find that the State has not shown that supplementation of the record is necessary. Instead, the State merely seeks to bolster the trial record. The prosecution introduced the Judgment and Sentence document concerning Appellant's prior conviction for the misdemeanor of Unlawful Possession of Marijuana. Contrary to *Burgett v. State*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967), the Judgment and Sentence document did not show that Appellant

was represented by counsel at the time that he entered his plea. However, the prosecution also introduced a docket sheet which reflected that the court had received a Waiver of Attorney in the case. This made out a prima facie case for the predicate conviction, which, in the absence of rebutting or contradictory evidence was sufficient to support a rational juror's finding that Appellant had the predicate conviction. *Thomas v. State*, 1986 OK CR 161, ¶ 7, 727 P.2d 1380, 1383; *Tucker v. State*, 1980 OK CR 93, ¶ 14, 620 P.2d 1314, 1317.

Although supplementation is not appropriate in this case, the prosecution presented sufficient evidence to support Appellant's conviction. Reviewing the evidence in the present case in the light most favorable to the prosecution, any rational juror could have found the fact of Appellant's prior conviction for misdemeanor possession of marijuana beyond a reasonable doubt. No relief is required.