IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DENNIS RAY RUNNELS,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2015-53**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, VICE PRESIDING JUDGE:

Appellant, Dennis Ray Runnels, was tried by jury and convicted of Unlawful Distribution of Controlled Dangerous Substance (Methamphetamine) (63 O.S.Supp.2012, § 2-401(A)(1)), After Former Conviction of Two or More Felonies in the District Court of Hughes County, Case Number CF-2013-40. The jury recommended as punishment imprisonment for nineteen (19) years and the trial court sentenced Appellant accordingly, imposed one (1) year of post imprisonment supervision, and ordered that Appellant pay a $1,000.00 court appointed attorney assessment and all court costs. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in this appeal:

I. Failure to introduce and provide a complete chain of custody to show the substance seized from the informant came from Appellant and was the same substance tested and reported by the OSBI chemist to be Methamphetamine requires dismissal.

II. The State's evidence was insufficient to support Appellant's conviction for possession of a controlled substance-Methamphetamine.

III. Mr. Runnels was denied due process and a fundamentally fair trial by the prosecutor's failure to disclose exculpatory impeachment evidence for an indispensable identification witness and correct the informant's false testimony.

IV. The jury was incorrectly instructed on the range of punishment for distribution of the Schedule II, controlled dangerous substance-Methamphetamine.

V. Mr. Runnels' sentence was inflated by instruction, comments and evidence advising of the possibility that suspension, probation, earned credits or parole would reduce any sentence of imprisonment the jury imposed.

VI. Mr. Runnels' sentence is excessive and must be favorably modified in the interest of justice.

VII. Reversal is required because Mr. Runnels was denied his constitutional right to the effective assistance of counsel.

VIII. Cumulative errors deprived Mr. Runnels of a fair trial and a reliable sentencing determination.

After 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 Four.

In his first two propositions of error, Appellant challenges the sufficiency of the evidence supporting his conviction. He, first, argues that the State failed to provide a complete chain of custody for the Methamphetamine and asserts that the test results should have been suppressed.

We note that Appellant failed to challenge the admission of the test results at trial, thus he has waived appellate review of the instant challenge for all but plain error. *Anderson v. State*, 2010 OK CR 27, ¶ 4, 252 P.3d 211, 212. This Court reviews for plain error pursuant to the test set forth in *Simpson v. State*,

1994 OK CR 40, 876 P.2d 690. *Jackson v. State, 2016 OK CR 5, ¶ 4, 371 P.3d 1120, 1121*; *Malone v. State*, 2013 OK CR 1, ¶ 41, 293 P.3d 198, 211-212. We determine whether the appellant has shown an actual error, which is plain or obvious, and which affects his or her substantial rights. *Id.*, *Malone*, 2013 OK CR 1, ¶ 41, 293 P.3d at 211-212; *Simpson*, 1994 OK CR 40, ¶¶ 10, 26, 30, 876 P.2d at 694, 699, 701. 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.*

Reviewing the record in the present case we find that Appellant has not shown the existence of an actual error. The testimony at trial established a sufficient chain of custody to properly admit the test results. *Mitchell v. State*, 2010 OK CR 14, ¶ 74, 235 P.3d 640, 657; *Stouffer v. State*, 2006 OK CR 46, ¶ 193, 147 P.3d 245, 279; *Trantham v. State*, 1973 OK CR 181, ¶ 10, 508 P.2d 1104, 1107.

Second, Appellant contends that the evidence failed to establish that he distributed the Methamphetamine beyond a reasonable doubt. After viewing the evidence in the light most favorable to the prosecution, we find that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *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.

Investigator Heath Miller's testimony and the audio portion of the recording of the controlled-buy both corroborated the informant, Lisa Knighton's, testimony. Thus, we find that the jury rationally weighed the evidence and resolved any conflicts. *Plantz v. State*, 1994 OK CR 33, ¶ 43, 876 P.2d 268, 281. Taking the evidence in the present case in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of Unlawful Distribution of Methamphetamine beyond a reasonable doubt. Propositions One and Two are denied.

In Proposition Three, Appellant contends the State failed to disclose impeachment evidence relating to State's witness, Lisa Knighton. He asserts that Knighton had more than the four felony convictions which she admitted at trial. He further asserts that the prosecutor failed to correct the record, when Knighton testified untruthfully about the number of prior felony convictions she had suffered and the nature of those offenses.

The record does not support Appellant's claim. Nothing within the record establishes either that the prosecution suppressed evidence that was exculpatory or favorable to Appellant or that the prosecution knowingly presented false evidence. *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), *United States v. Agurs*, 427 U.S. 97, 103, 110, 96 S. Ct. 2392, 2397, 2401, 49 L.Ed.2d 342 (1976); *Giglio v. United States*, 405 U.S. 150, 153-54, 92 S.Ct. 763, 766. 31 L.Ed.2d [104] (1972), *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Appellant has attached to his brief as Exhibits "B" through "G," copies of Judgment and Sentence documents and a screen shot from the Oklahoma Department of Correction's website which he attributes to Lisa Knighton. These exhibits were not introduced into evidence or filed within the case and, as such, are not part of the record on appeal. *See* Rule 3.11(B)(3), *Rules of the Oklahoma Court of Criminal Appeals*, 22 O.S., Ch. 18, App. (2015) ("The Record on appeal is formulated only by matters which have been admitted during proceedings in the trial court."). Attaching exhibits to the party's brief is not the proper method to seek to supplement the record on appeal. *See Id.* Because they are improperly filed, the exhibits are **ORDERED** stricken from Appellant's brief.[1]

In conjunction with his Brief, Appellant filed his Motion For New Trial, Or, In The Alternative, Motion To Supplement Appeal Record And Request For Consideration Or Evidentiary Hearing On Claim Of Ineffective Assistance Of Trial Counsel.[2] He requests a new trial and seeks to supplement the record with the Judgment and Sentence documents and a screen shot from the Oklahoma Department of Correction's website which he has attached to the motion. *See Underwood v. State*, 2011 OK CR 12, ¶ 91, 252 P.3d 221, 254.

Appellant has neither argued nor shown that he could not have discovered the documents attached to his motion with reasonable diligence before trial. In footnote 4 of his brief, Appellant relates that the evidence is

[1] The Appellate Court Clerk is directed to retain a copy of Appellant's brief with the stricken exhibits for record keeping purposes.

[2] We address Appellant's allegation of ineffective assistance within Proposition Seven.

available at both the Oklahoma Department of Correction's website and the Oklahoma State Court Network's website. (Brief, pg. 22). Therefore, we find that Appellant's motion should be denied. *Underwood*, 2011 OK CR 12, ¶ 93, 252 P.3d at 254.

Even if we were to erroneously consider the exhibits attached to Appellant's motion, we would conclude that Appellant is not entitled to relief. As Appellant has failed to establish that there is a reasonable probability that, had the documents been disclosed to the defense, the result of the proceeding would have been different, we find that the documents are not material. *Id.*; *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490 (1995); *Bagley*, 473 U.S. at 682, 105 S.Ct. at 3382; *Giglio*, 405 U.S. at 154, 92 S.Ct. at 766.

We note that Knighton accurately described her felony convictions as uttering a forged instrument. The act of uttering a forged instrument is explicitly delineated as forgery in the second degree. 21 O.S.2011, § 1577; Inst. No. 5-69, OUJI-CR(2d) (Supp.1997).

We further note that the majority of the Judgment and Sentence documents could not be used to impeach Knighton's testimony because the felony convictions were stale. 12 O.S.2011, § 2609(B). The fact that Knighton may have been subject to impeachment for five felony convictions instead of four could not reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. *Kyles*, 514 U.S. at 435, 115 S.Ct. at 1566. Based on the record, we find that it is not reasonable to find his

substantial rights have been violated or that the result of the proceedings would have been different had counsel impeached Knighton with a fifth felony conviction. Appellant's motion for a new trial and request to supplement the record is **DENIED.** Proposition Three is denied.

In Proposition Four, Appellant contends that the trial court incorrectly instructed the jury as to the minimum punishment for the charged offense. Appellant failed to challenge the trial court's instruction at trial, thus, he has waived appellate review of this claim for all but plain error. *Grissom v. State*, 2011 OK CR 3, ¶ 28, 253 P.3d 969, 980; *Romano v. State*, 1995 OK CR 74, ¶ 80, 909 P.2d 92, 120. Therefore, we review Appellant's claim pursuant to the test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690. *Jackson*, 2016 OK CR 5, ¶ 4, 371 P.3d at 1121; *Malone*, 2013 OK CR 1, ¶ 41, 293 P.3d at 211-212.

The State concedes that plain error occurred and that under the circumstances relief is required. We agree.

The District Court instructed the jury that the minimum punishment was imprisonment for fifteen (15) years. However, the statutory range of punishment for the offense of Distribution of Methamphetamine After Two or More Felony Convictions is imprisonment for not less than six (6) years nor more than life. 63 O.S.Supp.2012, § 2-401(A)(1); 21 O.S.2011, § 51.1(C). This error was plain or obvious and affected Appellant's substantial rights. *McIntosh v. State*, 2010 OK CR 17, ¶ 9, 237 P.3d 800, 803.

Reviewing the entire record, we cannot say that this error was harmless. *Id.*, 2010 OK CR 17, ¶ 10, 237 P.3d at 803; *Simpson*, 1994 OK CR 40, at ¶ 37, 876 P.2d at 702. To the contrary, the error seriously affected the fairness, integrity or public reputation of the trial. *Id.*; *Simpson*, 1994 OK CR 40, at ¶ 30, 876 P.2d at 701. As the jury's reasoning behind its assessment of punishment is readily apparent, modification of the sentence is the appropriate relief.[3] *McIntosh*, 2010 OK CR 17, ¶¶ 10-11, 237 P.3d at 803; *Scott v. State*, 1991 OK CR 31, ¶ 14, 808 P.3d 73, 77. Appellant's sentence is modified to imprisonment for ten (10) years, with one (1) year of post imprisonment supervision, and he shall also be ordered to pay a $1,000.00 court appointed attorney assessment and all court costs.

In Proposition Five, Appellant contends that evidence, argument, and the instructions led the jury to speculate about probation and parole during the second stage of his trial. He concedes that he waived appellate review of this issue for all but plain error when he failed to object to this information at trial. *See Harney v. State*, 2011 OK CR 10, ¶ 23, 256 P.3d 1002, 1007; *Hunter v. State*, 2009 OK CR 17, ¶ 8, 208 P.3d 931, 933. Therefore, we review Appellant's claim pursuant to the test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690. *Jackson, 2016 OK CR 5, ¶ 4, 371 P.3d at 1121; Malone*, 2013 OK CR 1, ¶ 41, 293 P.3d at 211-212.

Appellant has shown the existence of an actual error that is plain or obvious from the record in the present case. Reviewing the totality of the

[3] We note that Appellant does not request resentencing but specifically requests modification of his sentence as relief for this error. (Brief, pgs. 37-38).

circumstances, we find that there was an unmistakable reference to probation, parole, and the details of Appellant's former convictions. *Harney*, 2011 OK CR 10, ¶ 24, 256 P.3d at 1007. The State explicitly informed the jury that Appellant had received a suspended sentence when the prosecutor read this fact off of the Information during the State's opening statement in the second stage of the trial. *Stewart v. State*, 2016 OK CR 9, ¶ 17, 372 P.3d 508, 512 ("[I]t is error for the prosecutor to explicitly inform the jury that the defendant has received a suspended sentence through reading this fact off of the Information during the State's opening statement and calling the jury's attention to this fact during closing argument."). The trial court similarly read off this allegation to the jury in the second stage instructions. *Johnson v. State*, 2004 OK CR 25, ¶ 9, 95 P.3d 1099, 1102 (finding instruction regarding commutation or parole improper). The State introduced Appellant's Pen Pack to prove his former convictions but failed to redact the numerous references to probation, parole and the details of Appellant's former convictions within the enclosed Informations. *Mornes v. State*, 1988 OK CR 78, ¶ 12, 755 P.2d 91, 94 (finding that failure to excise from an otherwise relevant "pen pack" the details of the former convictions, a defendant's prison record, and any references to parole constitutes error). Thus, we find that plain error occurred.

As this error occurred during the second stage of the trial, the jury's determination of Appellant's guilt was not affected. *See McIntosh*, 2010 OK CR 17, ¶ 10, 237 P.3d at 803 ("[U]nder plain error review, we reverse only if we conclude that the error was not 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.). We determined in Proposition Four that instructional error required modification of Appellant's sentence. This determination renders moot any determination as to whether the instant error was harmless as to the jury's recommendation of punishment.

In Proposition Six, Appellant contends that his sentence is excessive. Our determination in Proposition Four that instructional error requires modification of Appellant's sentence renders this claim moot.

In Proposition Seven, Appellant challenges the effectiveness of defense counsel. This Court reviews ineffective assistance of counsel claims under the two-part test mandated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *Mitchell v. State*, 2011 OK CR 26, ¶ 139, 20 P.3d 160, 190.

Appellant asserts that defense counsel was ineffective for failing to preserve appellate review of the challenge that he raised in Proposition One. We determined in Proposition One that Appellant had not shown that error, plain or otherwise, had 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 raise the challenges that he now raises on appeal. *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.

Appellant similarly asserts that defense counsel was ineffective for failing to preserve appellate review of the challenges that he raises in Propositions

Four and Five. Our determination that Appellant's sentence must be modified due to instructional error renders Appellant's ineffective assistance of counsel claims moot.

Appellant further asserts that defense counsel was ineffective for failing to investigate, discover and present Lisa Knighton's additional felony convictions as set forth in Proposition Three. Nothing in the record supports Appellant's contention.

Simultaneous with the filing of his Brief, Appellant filed her Motion For New Trial, Or, In The Alternative, Motion To Supplement Appeal Record And Request For Consideration Or Evidentiary Hearing On Claim Of Ineffective Assistance Of Trial Counsel. Appellant seeks to supplement the record on appeal pursuant to Rule 3.11(B)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015) and requests an evidentiary hearing based upon her claims of ineffective assistance of counsel. We review this motion pursuant to the analysis set forth in *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905–906.

Turning to the non-record materials attached to Petitioner's application, we find that Appellant has not provided sufficient information to show this Court by clear and convincing evidence that there was a strong possibility that defense counsel was ineffective. *Id.* We determined in Proposition Three that Appellant had not shown a reasonable probability that the result of the proceeding would have been different had defense counsel known of the documents attached to Appellant's motion. As such, we find that Appellant has

not shown that counsel's performance prejudiced the defense. *Bland v. State*, 2000 OK CR 11, ¶ 112, 4 P.3d 702, 730-31. Appellant's motion and request to supplement the record is **DENIED.** Proposition Seven is denied.

In Proposition Eight, Appellant requests this Court to consider the aggregate impact of the errors presented in the above propositions of error. When there have been numerous irregularities during the course of a trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors is to deny the defendant a fair trial. *Bechtel v. State*, 1987 OK CR 126, 738 P.2d 559, 561. However, a cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by Appellant. *Williams v. State*, 2001 OK CR 9, ¶ 127, 22 P.3d 702, 732. We determined that instructional error in the second stage of the trial requires modification of Appellant's sentence. We have not identified any error which occurred in conjunction with the jury's determination of guilt. Therefore, a new trial is not warranted and this assignment of error is denied.

DECISION

Appellant's conviction is hereby **AFFIRMED** but his sentence is **MODIFIED** to imprisonment for ten (10) years, with one (1) year of post imprisonment supervision, and he shall also be ordered to pay a $1,000.00 court appointed attorney assessment and all court costs. Appellant's Motion For New Trial, Or, In the Alternative Motion to Supplement is **DENIED.** This matter is **REMANDED** to the District Court for entry of Judgment and Sentence consistent with the Opinion. 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 HUGHES COUNTY
THE HONORABLE GEORGE BUTNER, DISTRICT JUDGE

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OPINION BY: LUMPKIN, V.P.J.

SMITH, P.J.: Concur
JOHNSON, J.: Concur
LEWIS, J.: Concur in Part Dissent in Part
HUDSON, J.: Concur in Part Dissent in Part

LEWIS, JUDGE, CONCURS IN PART, DISSENTS IN PART:

I concur in affirming Appellant's finding of guilt by his jury but I would remand for resentencing due to the instructional error.

HUDSON, JUDGE, CONCURS IN PART, DISSENTS IN PART:

I concur with the majority's affirmation of the jury's finding of guilt; however because the second stage of the trial was flawed by not one, but two instances of plain error, I must dissent to modification of the sentence. I believe the case should be remanded for resentencing.