

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

JUAN GABRIEL CUEVAS,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

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) NOT FOR PUBLICATION  
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Case No. F-2016-112

**FILED**  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA  
APR 19 2017

**SUMMARY OPINION**

MICHAEL S. RICHIE  
CLERK

**JOHNSON, JUDGE:**

Appellant Juan Gabriel Cuevas was tried by jury and convicted of Trafficking in Illegal Drugs (Methamphetamine), After Former Conviction of Two or More Felonies (Count 1) in violation of 63 O.S.2011, § 2-415(C)(4)(b), and Obstructing an Officer (Count 3), in violation of 21 O.S.2011, § 540 in the District Court of Tulsa County, Case No. CF-2014-2152. The jury assessed punishment at thirty years imprisonment and a \$250,000.00 fine on Count 1 and one year imprisonment on Count 3. The Honorable Doug Drummond, District Judge, sentenced Cuevas accordingly and ordered the sentences be served concurrently.<sup>1</sup> Cuevas appeals, raising the following issues:

- (1) whether evidence of other crimes and bad acts denied him his due process rights and a fair trial;
- (2) whether he was denied his constitutional right to a fair trial by the introduction of irrelevant evidence;

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<sup>1</sup> Under 21 O.S.2011, § 13.1, Cuevas must serve 85% of the sentence imposed on Count 1 before he is eligible for parole.

- (3) whether the failure of the district court to provide accomplice instructions deprived him of his right to a fair trial and constituted reversible error;
- (4) whether the jury was improperly instructed on the range of punishment which resulted in the imposition of a fine in excess of that allowed by law;
- (5) whether prosecutorial misconduct undermined his right to due process and a fair trial;
- (6) whether the jurors improperly considered parole; and
- (7) whether the accumulation of error requires reversal.

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

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1.

Cuevas argues he was denied a fair trial by the admission of evidence of other crimes and bad acts and by the State's failure to give notice of its intent to introduce evidence of other crimes and bad acts.<sup>2</sup> 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. *Pavatt v. State*, 2007 OK CR 19, ¶ 42, 159 P.3d 272, 286. Some of the evidence at issue was not met with objection at trial. Objections that were made either were not specific or were on grounds

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<sup>2</sup> Cuevas also argues in this same proposition that much of this same evidence was inadmissible hearsay. As the State notes, our rules prohibit raising multiple separate issues within a single proposition. Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017); *Collins v. State*, 2009 OK CR 32, ¶ 32, 223 P.3d 1014, 1023. We do not review the hearsay claims independently. Reviewing the record as a whole, the trial was fairly conducted.

different than what is set forth on appeal. Consequently, we review this claim for plain error.

The evidence of other crimes or bad acts about which Cuevas complains was directly connected to the factual circumstances of the crime and provided necessary contextual and background information to the jury. This evidence was admissible without resort to section 2404(B) and notice was not required. *See Jackson v. State*, 2006 OK CR 45, ¶ 28, 146 P.3d 1149, 1160; *McClendon v. State*, 1989 OK CR 29, ¶ 16, 777 P.2d 948, 952; *Scott v. State*, 1983 OK CR 58, ¶ 6, 663 P.2d 17, 19. Furthermore, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. 12 O.S.2011, § 2403. There was no plain error in the admission of the evidence at issue in this proposition and this claim is denied.

2.

Cuevas argues that evidence that a gun was found in the car he had been driving should not have been admitted because it was irrelevant to the charge of trafficking in illegal drugs. He argues alternatively that if this testimony was relevant, it should have been excluded because its probative value was outweighed by its prejudicial effect. Because defense counsel did not object at trial review on appeal is for plain error only. *See Lowery v. State*, 2008 OK CR 26, ¶ 9, 192 P.3d 1262, 1268. We find that the testimony was relevant and that its probative value was not outweighed by the danger of unfair

prejudice. See 12 O.S.2011, §§ 2401, 2402, 2403. There was no error in the admission of this testimony, plain or otherwise.

3.

Cuevas argues that the district court erred by failing to instruct the jury to determine whether Selerino Ramos was an accomplice and that if he were an accomplice, Ramos' testimony needed to be corroborated.<sup>3</sup> Because Cuevas did not request accomplice instructions review is for plain error only. *See Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

The State concedes that because Ramos was charged with trafficking based on the incident leading to Cuevas' conviction he could have been considered an accomplice and the district court should have given the jury accomplice instructions. It takes more than error alone, however, to warrant relief. There must be error plus injury. *See Grissom v. State*, 2011 OK CR 3, ¶ 25, 253 P.3d 969, 979. Cuevas can show no injury because Ramos' testimony was sufficiently corroborated by independent evidence that Cuevas committed the crime of trafficking methamphetamine. The omission of the accomplice instructions was not plain error and relief is not required.

4.

The State charged Cuevas with trafficking in illegal drugs after former conviction of two felonies, only one of which was drug related. The State elected to enhance under the general enhancement statute, 21 O.S.2011, § 51.1. Thus, it was improper for the jury to be instructed on the fine enhancement

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<sup>3</sup> Selerino Ramos was the man who was with Cuevas at the time of the incident.

provisions found in 63 O.S.2011, § 2-415(C)(4)(b). *See Novey v. State*, 1985 OK CR 142, ¶ 14, 709 P.2d 696, 699 (where the charged predicate offenses are both drug related and nondrug related the State may elect to enhance under either the drug offense enhancement statute or the general enhancement statute but it is not permissible for the State to enhance under both, either by mixing their provisions or by instructing separately). Despite Cuevas' failure to object below, the failure to properly instruct on the range of punishment is plain error here and may be corrected by this Court when raised for the first time on appeal. *See Taylor v. State*, 2002 OK CR 13, ¶ 4, 45 P.3d 103, 105; *Scott v. State*, 1991 OK CR 31, ¶ 14, 808 P.2d 73, 77. The fine improperly assessed on Count 1 under the enhancement provisions of section 2-415(C) is modified to \$10,000.00 as is authorized by 21 O.S.2011, § 64(B) (a fine not exceeding \$10,000.00 may be imposed upon conviction for any felony punishable by imprisonment in any jail or prison as no fine is prescribed by the general enhancement statute).

5.

Cuevas complains that prosecutorial misconduct deprived him of his right to a fair trial. "This Court will not grant relief based on prosecutorial misconduct unless the State's argument is so flagrant and that it so infected the defendant's trial that it was rendered fundamentally unfair." *Williams v. State*, 2008 OK CR 19, ¶ 124, 188 P.3d 208, 230. Reviewing for plain error

only, we reject Cuevas' claim that prosecutorial misconduct denied him a fair trial.

6.

The jury asked about parole during deliberations. The trial court's answer to the jury's question and its instruction regarding the assessment of punishment directed the jury away from any improper consideration of parole. The record shows no plain error and relief is not required.

7.

There are no errors, considered individually or cumulatively, that merit relief in this case. *Jones v. State*, 2009 OK CR 1, ¶ 104, 201 P.3d 869, 894; *DeRosa v. State*, 2004 OK CR 19, ¶ 100, 89 P.3d 1124, 1157. This claim is denied.

### **DECISION**

The Judgment and Sentence of the district court is **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 delivery and filing of this decision.

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**AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY**  
**THE HONORABLE DOUG DRUMMOND, DISTRICT JUDGE**

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**OPINION BY: JOHNSON, J.**  
**LUMPKIN, P.J.: Concur**  
**LEWIS, V.P.J.: Concur**  
**SMITH, J.: Concur**  
**HUDSON, J.: Concur**

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