IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SAHIB QUIETMAN HENDERSON,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
v.	)	Case No. F-01-1338
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

CHAPEL, JUDGE:

Sahib Quietman Henderson was tried by jury and convicted of Count I, Distribution of a Controlled Substance (Cocaine) in violation of 63 O.S.Supp.2000, § 2-401(A), and Count II, Conspiracy to Distribute a Controlled Dangerous Substance in violation of 63 O.S.1991, § 2-408, both after former conviction of one felony, in the District Court of Stephens County, Case No. CF-2001-29. In accordance with the jury's recommendation the Honorable George W. Lindley sentenced Henderson to thirty-five (35) years imprisonment on each count, to run consecutively, and a $10,000 fine on each count. Henderson appeals from these convictions and sentences.

Henderson raises five propositions of error in support of his appeal:

I. Henderson's conviction for conspiracy to distribute a controlled dangerous substance and distribution of a controlled dangerous substance violates the double jeopardy clause, Section 11, and Wharton's Rule on merger of offenses;

II. The State presented insufficient evidence to prove the essential elements of the crimes of distribution of a controlled dangerous substance and conspiracy to distribute a controlled dangerous substance beyond a reasonable doubt;

III. The admission of numerous incidents of other crimes or bad acts evidence was unduly prejudicial and deprived Henderson of a fair trial;

IV. The paid informant expressed improper, unfounded and speculative opinions denying Henderson a fair trial; and

V. Trial errors, when considered in a cumulative fashion, warrant a new trial or a modification of Henderson's sentencing.

After thorough consideration of the entire record before us on appeal including the original record, transcripts, briefs and exhibits of the parties, we find that the law and evidence requires Count II, Conspiracy to Distribute a Controlled Substance, be reversed with instructions to dismiss.

In Proposition I, Henderson argues his convictions for distribution of cocaine and conspiracy to distribute cocaine violate the Section 11 statutory prohibition against double punishment.[1] Under normal circumstances, a conspiracy to commit a crime is an independent crime complete and distinct from the crime itself.[2] This is because the facts necessary to prove a conspiracy are usually independent from those necessary to prove the act constituting the underlying crime. However, the Information in this case is unusually specific in its description of the conspiracy charge.

Henderson was charged in Count I with knowingly distributing cocaine, and in Count II with conspiring to distribute cocaine with Walker by giving Walker crack and retrieving the money from that sale from under a yard ornament. This exactly describes the facts used to support both the conspiracy and distribution charges. The only act of distribution proved at trial in order to support Count I was Henderson's distribution to Walker, and Walker's

[1] 21 O.S.2001, § 11. The convictions do not violate the prohibition against double jeopardy because each crime requires proof of an element that the other does not. *Mooney v. State*, 1999 OK CR 34, 990 P.2d 875, 884.

subsequent distribution to Story. This is the sequence alleged in the Information to support Count II. Under these extremely unusual circumstances, Henderson has shown that the facts in support of Counts I and II are exactly the same and constitute one act. This violates the § 11 statutory provision against double punishment for one act. Section 11 will apply where, focusing on the relationship between the crimes, this Court determines that the crimes "truly arise out of one act".[3] Thanks to the explicit language charging Count II, plus the actual proof at trial, that is the case here. This proposition is granted, and Count II, Conspiracy to Distribute, is dismissed.[4]

We find in Proposition II that any rational trier of fact could find beyond a reasonable doubt that Henderson possessed and distributed cocaine.[5] We find in Propositions III and IV that the admission of other crimes evidence, and the informant's testimony, was substantially elicited in part by defense counsel and, in any case, did not rise to the level of plain error.[6] We find in Proposition V that (a) the trial court did not abuse its discretion in admitting portions of Story's testimony;[7] (b) the prosecutor did not argue from facts outside the evidence; (c) the prosecutor's misstatement in first stage closing , and the trial court's curative comment, were not prejudicial; and (d) the trial court conducted a sufficient examination to rule out juror misconduct, and the

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[2] *Littlejohn v.State*, 1998 OK CR 75, 989 P.2d 901, 909-10; *Harjo v. State*, 1990 OK CR 53, 797 P.2d 338, 342 (and cases cited therein).
[3] *Davis v. State*, 1999 OK CR 48, 993 P.2d 124, 126.
[4] Given this resolution we need not address Henderson's "Wharton's Rule" claim.
[5] *Spuehler v. State*, 1985 OK CR 132, 709 P.2d 202, 203-04; *Hill v. State*, 1995 OK CR 28, 898 P.2d 155, 166.
[6] *Tate v. State*, 1987 OK CR 21, 732 P.2d 902, 904.

record fails to support any inference that Henderson was prejudiced under the circumstances. As neither these allegations nor the preceding propositions contained error, there was no cumulative error.[8]

Decision

The Judgment and Sentence as to Counts I is **AFFIRMED**. Count II is **DISMISSED**.

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OPINION BY: CHAPEL, J.
LUMPKIN, P.J.: CONCUR
JOHNSON, V.P.J.: CONCUR IN PART/DISSENT IN PART
STRUBHAR, J.: CONCUR IN RESULTS
LILE, J.: CONCUR IN RESULTS

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[7] *Miller v. State*, 1998 OK CR 59, 977 P.2d 1099, 1110, *cert. denied*, 528 U.S. 897, 120 S.Ct. 228, 145 L.Ed.2d 192 (1999).
[8] *Alverson v. State*, 1999 OK CR 21, 983 P.2d 498, 520, *cert. denied*, 528 U.S. 1089, 120 S.Ct. 820, 145 L.Ed.2d 690 (2000).