IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

AMY MARIE FLIPPENCE,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	No. F-2003-772
-vs-	)	
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

JOHNSON, P.J.:

Amy Marie Flippence, Appellant, was tried by jury in the District Court of Oklahoma County, Case No. CF-2001-4921, where she convicted of Count 1 – Conspiracy to Manufacture Methamphetamine, Count 2 - Possession of Methamphetamine, Count 3 – Possession of the Precursor Red Phosphorus, Count 4 - Possession of Paraphernalia and Counts 5, 6 and 7 – Child Endangerment. The jury recommended sixty-three (63) years imprisonment on Count 1, ten (10) years imprisonment on Counts 2 and 3, one (1) year imprisonment on Count 4 and four (4) years imprisonment on Counts 5, 6, and 7. The Honorable Ray C. Elliot, who presided at trial, sentenced Appellant accordingly and ordered the sentences to be served consecutively. From this judgment and sentence, she appeals.

Appellant raises the following propositions of error:

I. Ms. Flippence was deprived of her right to a fair trial by the introduction of co-defendant Lathrop's out-of-court statements against Ms. Flippence at their joint trial in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States

Constitution and Article II, §§ 7, 9 and 20 of the Oklahoma Constitution;

II. The State's evidence was insufficient to support the conviction for conspiracy;

III. Ms. Flippence's convictions for both possession of methamphetamine and possession of the precursor of red phosphorous was a violation of the prohibitions against double jeopardy and double punishment;

IV. Because the prosecution charged the manufacturing of methamphetamine as the overt act of conspiracy, and because the manufacturing included the possession of the methamphetamine and the precursor chemicals, it was a violation of the prohibitions against double punishment and double jeopardy to convict Ms. Flippence of both the conspiracy and the possession charges;

V. The three convictions for child endangerment by having a "meth" lab in the residence must be vacated because this provision of the child endangerment statute did not exist at the time the alleged acts of endangerment occurred;

VI. Because the same act of possession of red phosphorous can be both a misdemeanor and a felony under the relevant statute, this Court should modify Ms. Flippence's conviction to a misdemeanor; in the alternative it was plain and fundamental error for the trial court to have failed to instruct on the lesser offense of misdemeanor possession of red phosphorous;

VII. The conviction for possession of paraphernalia should be reversed because the item charged as paraphernalia, a set of scales, is not prohibited under the relevant statute;

VIII. The trial court abused its discretion when it ran all of Appellant's sentences consecutively;

IX. Prosecutorial misconduct during closing arguments deprived Ms. Flippence of a fair trial;

X. There was insufficient evidence of possession to support the convictions for possession of paraphernalia, red phosphorous and methamphetamine; and

XI. Appellant's three convictions for child endangerment violates the double jeopardy provisions of the United States Constitution, and the double punishment provisions of 21 O.S.1991, § 11.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, exhibits and briefs of the parties, we affirm in part, reverse in part.

As to Proposition I, we find the admission of Lathrop's testimonial statements against Appellant when Lathrop was unavailable and Appellant had no prior opportunity to cross-examine Lathrop about the statements denied Appellant of her right to confront witnesses against her. *Crawford v. Washington,* 541 U.S. ---, 124 S.Ct. 1354, 1369-1374, 158 L.Ed.2d 177 (2004). We find any error stemming from the admission of Lathrop's statements about possessing various items associated with the manufacture of methamphetamine and distribution was harmless beyond a reasonable doubt. *Littlejohn v. State,* 85 P.3d 287, 297-98 (Okl.Cr.2004); *Smith v. State,* 765 P.2d 795, 796 (Okl.Cr.1988). However, we find the admission of Lathrop's statement identifying the substance in the prescription medicine bottle as red phosphorous necessitates relief. The record shows the statement was offered to prove that the substance in the pill bottle was red phosphorous and that the State certainly relied on Lathrop's statement to support its case as evidenced by its closing argument. This record shows Lathrop's out-of-court testimonial hearsay statement that the substance was red phosphorous supplied a key piece of proof in the State's case against Appellant for possession of red phosphorous. Consequently, it cannot be said that the admission of the hearsay statement did not contribute to the verdict. Accordingly, we find that Appellant's conviction for possession of red phosphorous must be reversed and remanded for a new trial. The disposition of this claim renders moot

Appellant's Propositions III and VI. Therefore, these claims will not be considered further.

As to Proposition II, we find the evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that there was an agreement between Appellant and Lathrop to manufacture methamphetamine. *Hackney v. State,* 874 P.2d 810, 813 (1994); *Spuehler v. State,* 709 P.2d 202, 203-04 (Okl.Cr.1985).

As to Proposition IV, we find there is no double jeopardy problem with Appellant's convictions for Conspiracy and Possession of Methamphetamine under the elements test as each contains elements the other does not.[1] *Nowlin v. State,* 34 P.3d 654, 655 (Okl.Cr.2001). Further, there is no § 11 violation. We have long held that a conviction for conspiracy to commit a crime and the conviction for that crime does not violate section 11 or double jeopardy. "A conspiracy to commit an unlawful act constitutes an independent crime, complete in itself and distinct from the unlawful act contemplated." *Hawkins v. State,* 46 P.3d 139, 149 (Okl.Cr.2002). Based on our case law, no relief is warranted.

As to Proposition V, we find that Appellant's three convictions for child endangerment for having a "meth" lab in the trailer where her three children resided must be dismissed because the child endangerment statute did not proscribe such conduct at the time Appellant was charged. The crime of

endangering a child by having a "meth" lab in the child's residence did not become effective until July 1, 2001. If the child endangerment statute encompassed such action at the time of Appellant's acts as the State contends, there would have been no need for the Legislature to amend the statute as it did. Because the legislature is presumed not to do a vain act, *State v. Johnson,* 877 P.2d 1136, 1142 (Okl.Cr.1992), we must reverse with instructions to dismiss Appellant's three counts of child endangerment. The disposition of this claim renders moot Appellant's Proposition XI. Therefore, that claim will not be considered further.

As to Proposition VII, we find that weighing scales can be drug paraphernalia whose possession or use is prohibited by 63 O.S.Supp.1999, § 2-405. As to Proposition VIII, we find the trial court did not abuse its discretion when it ran Appellant's sentences consecutively. *Kamees v. State,* 815 P.2d 1204, 1208-09 (Okl.Cr.1991). As to Proposition IX, we find Appellant was not prejudiced by any of the alleged prosecutorial misconduct. *Washington v. State,* 989 P.2d 960, 974 (Okl.Cr.1999). And finally as to Proposition X, we find the evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that Appellant had constructive possession of the methamphetamine and drug paraphernalia. *Hill v. State,* 898 P.2d 155, 166 (Okl.Cr.1995); *Spuehler,* 709 P.2d at 203-04.

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[1] Inasmuch as Appellant's conviction for possession of a precursor without a permit must be reversed, that conviction will not be considered in our analysis of this claim.

DECISION

The Judgment and Sentence of the trial court on Counts 1, 2 and 4 is **AFFIRMED.** Count 3, Possession of a Precursor without a Permit, is **REVERSED and REMANDED for a new trial.** Counts 5, 6 and 7, Child Endangerment, must be **REVERSED with Instructions to DISMISS.**

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE RAY C. ELLIOTT, DISTRICT JUDGE

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

RA/RB

CHAPEL, JUDGE, CONCURS IN PART/DISSENTS IN PART:

I concur in the opinion in all respects, except as to affirming the conspiracy conviction which I would reverse and dismiss.