IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JUSTIN LYNN HAMMONS,	]	
	]	NOT FOR PUBLICATION
Appellant,	]	
	]	
v.	]	Case No. F-2004-1277
	]	
THE STATE OF OKLAHOMA,	]	
	]	
Appellee.	]	

SUMMARY OPINION

LEWIS, JUDGE:

Justin Lynn Hammons, Appellant, was tried by jury and found guilty in the District Court of Tulsa County, Case No. CF-2004-1724, of Count 1, trafficking in illegal drugs, in violation of 63 O.S.Supp.2003 § 415; Count 2, possession of marijuana with intent to distribute, in violation of 63 O.S.Supp.2003 § 2-401 (B)(2); Count 3, maintaining a dwelling where controlled drugs are kept, in violation of 63 O.S.2001 § 2-404 (A)(6); Count 4, failure to obtain drug tax stamp, in violation of 68 O.S.2001 § 450.8 (B); Count 5, possession of paraphernalia in violation of 63 O.S.2001 § 2-405.

In a bifurcated proceeding, the jury found Appellant guilty of these offenses after two (2) or more prior felony convictions, and sentenced Appellant to seventy five (75) years imprisonment and a $100,000.00 fine in Count 1; eight (8) years imprisonment and a $10,000.00 fine in Count 2; eight (8) years imprisonment and a $5,000.00 fine in Count 3; eight (8) years imprisonment and a $10,000.00 fine in Count 4; and one (1) year imprisonment and a

$1,000.00 fine in Count 5. The Honorable P. Thomas Thornbrugh, District Judge, imposed judgment and sentence on the verdicts, ordering the terms served consecutively. Mr. Hammons appeals from these judgments and sentences with the following propositions of error:

1. Mr. Hammons Was Questioned By Agent Pinzon In Violation Of His Miranda Rights. Additionally, Mr. Hammons' Statements To Agent Pinzon Were Not Knowing And Voluntary; Thus Any Statements Made To Pinzon Should Have Been Suppressed. The Trial Court Erred In Denying Mr. Hammons' Motion To Suppress On This Basis.

2. Insufficient Evidence Was Presented At Trial To Prove Mr. Hammons Guilt On Any Of The Crimes Charged As The Evidence Failed To Prove That Mr. Hammons Had Constructive Possession Of Any Of The Contraband Found.

3. The Trial Court Erred In Conveying Information To The Jury During Deliberations Through Only The Jury Foreman Rather Than Bringing The Jury Back Into Open Court To Clarify The Jury's Options Regarding Count 3.

4. Mr. Hammons' Sentences, In Particular His Seventy Five (75) Year Sentence For Count 1, Are Excessive And Warrant Modification Given The Facts In His Case.

The Court finds in Proposition 1 that Appellant's statements to police officers were properly admitted in evidence against him. The State demonstrated that Appellant received adequate *Miranda* warnings when he was taken into custody. Officer Pinzon's subsequent inquiries of Appellant to determine whether he remembered and understood his rights prior to further questioning were sufficient. The statements obtained from Appellant were therefore admissible. *Vining v. State*, 1984 OK CR 43, ¶ 7, 675 P.2d 469; *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Proposition 2, challenging the sufficiency of the evidence, is without merit. Appellant admitted his ownership and possession of the drugs in trafficking quantity and his occupancy of the premises where police found them. Viewed in the light most favorable to the State, the evidence permits any rational trier of fact to find the essential elements of the crimes charged beyond a reasonable doubt. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204. This proposition is denied.

In Proposition 3, Appellant argues reversible error occurred when, after deliberations had begun, the District Court communicated with the jury foreman in open court concerning the unanimity requirement after the foreman indicated the jury was deadlocked on Count 3. Rather than conducting the entire jury into open court, the District Court gave further explanation of the unanimity requirement and instructed the foreman to convey its answer to the jury. Trial counsel did not object to the District Court's procedure, and we review the objection on appeal for plain error only. *Simpson v. State*, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 693.

The procedure here employed by the District Court resulted in statutory error under 22 O.S.2001 § 894:

> After the jury have retired for deliberation...if they desire to be informed on a point of law arising in the cause, they must require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to the district attorney and the defendant or his counsel, or after they have been called.

Communications between the Court and the jury covered by this statute must occur in open court. *Perry v. State*, 1995 OK CR 20, ¶ 26, 893 P.2d 521, 528; *Armstrong v. State*, 1903 OK CR, 2 Okl.Cr. 567, 103 P. 658 (communications with the jury on housekeeping matters do not violate the statute). Section 894 is mandatory "with regard to bringing the jury back into the courtroom." *Boling v. State*, 1979 OK CR 11, ¶ 4, 589 P.2d 1089, 1091; *Cipriano v. State*, 2001 OK CR 25, ¶ 48, 32 P.3d 869. A presumption of prejudice arises when a communication covered by the statute occurs in violation of this "open court" rule. *Badgwell v. State*, 1966 OK CR 115, ¶ 12, 418 P.2d 114; *Douglas v. State*, 1997 OK CR 79, ¶ 106, 951 P.2d 651, 679. However, such an error can be harmless, *Wilson v. State*, 1975 OK CR 71, ¶ 7, 534 P.2d 1325, and we will not reverse "unless it had a 'substantial influence' on the outcome, or leaves the reviewing court in 'grave doubt' as to whether it had such an effect." *Simpson*, at ¶ 36, 876 P.2d at 702.

"This Court is of the opinion that the learned trial judge was in good faith, and did not believe he was committing error, nor did he intend to prejudice the defendant" by following this procedure. *Badgwell*, at ¶14. But the record before us cannot dispel that a prejudicial communication of the Court's instructions occurred between the foreman and the remaining jurors, a type of error this statute seeks to prevent. Cf. *Grayson v. State*, 1984 OK CR 87, ¶ 12, 687 P.2d 747, 750 (presumption of prejudice arising from written instruction in violation of statute was overcome where written instruction was

legally correct, conveyed to jury as a whole, and would have been no different in open court). Section 894 places "a cloak of prohibition around the jury against any outside communication whatsoever, except in open court, and in the presence of the defendant and his counsel." *Badgwell*, at ¶ 18. This Court will not now "approve a procedure which would open avenues to the contrary." Id. The Judgment and Sentence in Count 3 is **REVERSED.**

Appellant in Proposition 4 seeks modification of his sentences as excessive. Our review is limited to an examination of whether the sentences imposed are within the statutory range and whether the sentence "shocks the conscience" of the Court. *Rea v. State*, 2001 OK CR 28, 34 P.3d 148. The jury chose severe punishment for the Appellant in assessing a seventy five-year sentence for trafficking and an additional twenty five years on the remaining counts. These punishments are authorized by statute, and understandable in light of Appellant's history of violent criminal behavior and the seriousness of the instant drug offenses. This proposition is denied.

DECISION

The Judgments and Sentences of the District Court of Tulsa County in Counts 1, 2, 4, and 5 are **AFFIRMED.** The Judgment and Sentence in Count 3 is **REVERSED**. Pursuant to Rule 3.15, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE P. THOMAS THORNBRUGH, DISTRICT JUDGE

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OPINION BY LEWIS, J.
CHAPEL, P.J.: Concurs in Results
LUMPKIN, V.P.J.: Concurs in Part/Dissents in Part
A. JOHNSON, J.: Concurs
C. JOHNSON, J.: Concurs

LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the opinion except for the resolution of Proposition 3. The communication between the trial judge and jury foreman took place in open court. The opinion offers only speculation that the foreman incorrectly conveyed the court's instructions to the remaining jurors. There is no evidence in the record to support such a conclusion. The trial court's statement to the foreman was a correct statement of the law. This Court should render opinions on fact – not speculation. The procedure used in this case was no different than the court's answering of a written question without bringing the jury into the courtroom. Therefore, I find Appellant was not prejudiced by the trial court's conduct and reversal is not warranted.