IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

BILLY DALE LATHROP,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	No. F-2004-82
-vs-	)	
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

C. JOHNSON, J.:

Billy Dale Lathrop, Appellant, was tried by jury in the District Court of Oklahoma County, Case No. CF-2001-4921, where he was 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 Count 2, ten years imprisonment on Count 3, one (1) year imprisonment on Count 4 and four (4) years imprisonment on Counts 5, 6, and 7.[1] 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, he appeals.

Appellant raises the following propositions of error:

[1] The trial court waived the jury's recommended fines.

I. The admission at trial of co-defendant Flippence's statements to law enforcement which implicated Lathrop were inadmissible and denied him a fair trial by violating his rights under the Sixth Amendment;
II. Lathrop received ineffective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and accordingly, his convictions and sentences must be reversed;
III. The trial court erred in overruling Lathrop's motion to sever; and
IV. The trial errors complained of herein cumulatively denied Lathrop's right to a fair trial under the United States and Oklahoma Constitution and therefore, Lathrop's convictions and sentences must be reversed.

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 Flippence's testimonial statements against Appellant when Flippence was unavailable and Appellant had no prior opportunity to cross-examine her about the statements denied Appellant of his right to confront witnesses against him. *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 1369-1374, 158 L.Ed.2d 177 (2004). We find, however, any error stemming from the admission of Flippence's statements was harmless beyond a reasonable doubt. *Littlejohn v. State,* 85 P.3d 287, 297-98 (Okl.Cr.), *cert. denied,* ___U.S.___, 125 S.Ct. 358, 160 L.Ed.2d 261 (2004); *Smith v. State,* 765 P.2d 795, 796 (Okl.Cr.1988).

As to Proposition II, we find that Appellant has not shown that he was denied the effective assistance of trial counsel and therefore, his claim must fail. *Lockett v. State,* 53 P.3d 418, 424 (Okl.Cr.2002), *cert. denied,* 538 U.S.

982, 123 S.Ct. 1794, 155 L.Ed.2d 673 (2003). As to Proposition III, we find that any failure to sever did not contribute to the verdicts or prejudice Appellant. Therefore, relief is not warranted. *See Plantz v.State,* 876 P.2d 268, 280 (Okl.Cr.1994), *cert. denied,* 513 U.S. 1163, 115 S.Ct. 1130, 130 L.Ed.2d 1091 (1995).

Although not raised, this Court finds error requiring the dismissal of Appellant's three convictions for Child Endangerment.[2] Appellant was convicted of three counts of child endangerment for having a "meth" lab in the trailer where his three children resided. However, 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 was argued below, 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.

As to Proposition IV, we find that dismissal of Appellant's Child Endangerment counts remedies any error with regard to those counts. Any other errors and irregularities, even when considered in the aggregate, do not require further relief, because they did not render his trial fundamentally

unfair, taint the jury's verdicts, or render his sentencing unreliable on the remaining counts. As such, no other relief is warranted. *Matthews v. State*, 45 P.3d 907, 924 (Okl.Cr.), *cert. denied*, 537 U.S. 1074, 123 S.Ct. 665, 154 L.Ed.2d 570 (2002).

DECISION

The Judgment and Sentence of the trial court on Counts 1, 2, 3 and 4 is **AFFIRMED.** Counts 5, 6 and 7, Child Endangerment, must be **REVERSED with Instructions to DISMISS.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeal*, 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 OKLAHOMA COUNTY
THE HONORABLE RAY C. ELLIOTT, DISTRICT JUDGE

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[2] We dismissed Appellant's co-defendant's same convictions for Child Endangerment based on the same reasoning. *Flippence v. State*, Case No. F-2003-772 (Okl.Cr. Jan. 7, 2005).

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

RE

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

I concur in affirming Counts 2, 3, and 4, and in reversing Counts 5, 6, and 7. However, I would also reverse Count 1, the Conspiracy conviction, and order it dismissed.

LUMPKIN, V.P.J.: CONCUR IN PART, DISSENT IN PART

I concur with the Court in denying propositions I, II, III, & IV. However, I dissent to the Court raising issues on Appellant's behalf, *sua sponte* and in contravention of our rules and case law.

This Court has repeatedly held (1) that we will not search the record or the books for authority to support propositions an appellant has actually raised on appeal[1] and (2) that any allegations of error not raised are waived.[2] It is not our job to adjudicate issues that were never raised by an appellant or his/her attorney. Our adversarial system relies on competent counsel from both sides to raise issues and request relief that furthers their clients' particular causes. When we step in and do the work for them, that system is cheapened and the constitutionally guaranteed right to counsel becomes virtually meaningless. Ultimately, if the Court proceeds in this type of a course of conduct, at some future date it will be faced with an allegation of error of ineffective assistance of appellate judge, when a member of the Court fails to address an otherwise waived allegation of error in an opinion. I do not think we want to create that kind of precedent.

However, if I were inclined to venture out into this Court's equity jurisprudence, which I'm not, I would argue that the *sua sponte* relief

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[1] *Phillips v. State*, 1999 OK CR 38, ¶ 65, 989 P.2d 1017, 1036, n. 6; *Alverson v. State*, 1999 OK CR 21, ¶ 77, 983 P.2d 498, 520; *Armstrong v. State*, 1991 OK CR 34, ¶ 24, 811 P.2d 593, 599;

[2] *Simpson v. State*, 1994 OK CR 40, ¶ 17, 876 P.2d 690, 693; *Fowler v. State*, 1989 OK CR 52, 779 P.2d 580, 584.

granted here is not warranted as this was a procedural, not substantive, change in the law. *See Hain v State*, 1993 OK CR 22, 852 P.2d 744, 753-56 (Lumpkin, P.J.: Concur in Part/Dissent in Part). In other words, I am unconvinced that Appellant could not have been convicted for the crime of child endangerment under these facts pursuant to the 1999 version of the statute. The latest amendments merely clarify the legislatures position in that regard.

Be that as it may, I continue to believe equity jurisprudence is as errant as that attempted by this *sua sponte* usurpation of our precedent. Therefore, based upon an unaltered application of our rules and case law, I would affirm each of the judgments and sentences in this case.