IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TINA A. ESTES, Appellant, v. STATE OF OKLAHOMA Appellee.	)	**NOT FOR PUBLICATION** Case No. F-2004-939

SUMMARY OPINION

LUMPKIN, VICE-PRESIDING JUDGE:

Appellant Tina A. Estes was tried by jury and convicted of Manufacture of a Controlled Dangerous Substance (Methamphetamine) (Count I) (63 O.S. Supp.2002, § 2-401(G)(1); and Possession of a Controlled Dangerous Substance (Methamphetamine) with Intent to Distribute (Count II) (63 O.S.Supp.2002, § 2-401(B)(2), Case No. CF-2003-92, in the District Court of Cherokee County. The jury recommended as punishment imprisonment for twenty (20) years and a fifty thousand dollar ($50,000.) fine in Count I, and fifteen (15) years in Count II with a twenty thousand dollar ($20,000.) fine. The trial court sentenced accordingly, ordering the sentences to run concurrently, with the last five years in Count I suspended. The trial court also reduced the total fine to ten thousand dollars ($10,000.) It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of her appeal:

I. Appellant's Fourteenth Amendment Due Process rights pursuant to the United States Constitution were violated when the jury was erroneously instructed as to the range of punishment for Count I, Manufacturing of Controlled Dangerous Substances (Methamphetamine).

II. The evidence was insufficient to convict Appellant of Count II, Possession of Controlled Drug with Intent to Distribute.

III. In the alternative, Appellant argues the conviction in Count II, Possession of a Controlled Drug With Intent to Distribute violates the principles of double punishment.

IV. Appellant's sentences are excessive.

V. The cumulative effect of all of the errors addressed above deprived Appellant of a fair trial.

After a thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that reversal is not warranted, but Appellant's sentences in Counts I and II should be modified to seven (7) years imprisonment.

In Proposition I, we find the jury was improperly instructed on the appropriate range of punishment in Count I. Appellant committed her crime in 2003. Therefore, she was subject to the 2001 amendment to 63 O.S. § 2-401(G)(1), and not the earlier provisions of the statute set forth in the jury instruction. *See Bowman v. State*, 1990 OK CR 19, ¶ 3, 789 P.2d 631, 632 (appropriate criminal penalty is the penalty in effect at the time the crime is committed). Despite Appellant's failure to raise an objection, the failure to properly instruct on the range of punishment is plain error which may be corrected by this Court when raised for the first time on appeal. *Scott v. State,*

1991 OK CR 31, ¶ 14, 808 P.2d 73, 77. Based upon the facts and circumstances of the case, and under the authority granted to this Court by 22 O.S.2001, § 1066, Appellant's sentence in Count I is hereby modified to seven (7) years imprisonment. *See Novey v. State,* 1985 OK CR 142, ¶ 15, 709 P.2d 696, 700 (modification appropriate when jury given incorrect sentencing instruction). *See also Turner v. State,* 1990 OK CR 79, ¶ 22, 803 P.2d 1152, 1159; *Ellis v. State,* 1988 OK CR 9, ¶ 7, 749 P.2d 114, 116.

In Proposition II, Appellant's failure to file a motion to quash waives any alleged defect in the preliminary hearing. *Primeaux v. State,* 2004 OK CR 16, ¶ 18, 88 P.3d 893, 900. Reviewing only for plain error, we find none. The purpose of a Preliminary Hearing is to establish probable cause that a crime was committed and probable cause that the defendant committed the crime. *McCracken v. State,* 1994 OK CR 68, ¶ 8, 887 P.2d 323, 327. While there is always the presumption that the State will strengthen its case at trial, the evidence at preliminary hearing must coincide with guilt and be inconsistent with innocence. *Woodruff v. State,* 1993 OK CR 7, ¶ 32, 846 P.2d 1124, 1135. Absent an abuse of the discretion in reaching that determination, the magistrate's ruling will remain undisturbed. *State v. Weese,* 1981 OK CR 19, ¶ 4, 625 P.2d 118, 119. We find the evidence supports the magistrate's finding of probable cause that the crime of possession of methamphetamine with intent to distribute was committed and probable cause that Appellant committed the crime.

We review the sufficiency of the evidence presented at trial under the well established of whether, after reviewing the evidence in the light most favorable to

the prosecution, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *Easlick v.State,* 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559; *Spuehler v. State,* 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204. The presence of scales and amounts of a controlled drug inconsistent with personal consumption provide sufficient evidence of the defendant's intent to distribute. *Billey v. State,* 1990 OK CR 76, ¶ 4, 800 P.2d 741, 743; *Gates v. State,* 1988 OK CR 77, ¶ 12, 754 P.2d 882, 885. Despite conflicts in the evidence, we find sufficient evidence supported the jury's verdict. *See Johnson v. State,* 2004 OK CR 23, ¶ 10, 93 P.3d 41, 44-45; S*mith v. State,* 1996 OK CR 50, ¶ 23, 932 P.2d 521, 530.

In Proposition III, we find Appellant's convictions for both manufacturing methamphetamine and possession of methamphetamine with intent to distribute do not violate the constitutional and statutory prohibitions against double jeopardy. Under the analysis set forth in *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed.2d 306 (1932), the offenses of manufacturing methamphetamine and possession of methamphetamine with intent to distribute each contain at least one element not contained in the other, and are therefore two separate and distinct offenses, each requiring dissimilar proof of their several elements. Therefore, neither the federal nor state constitutional provisions prohibiting double jeopardy are violated. *See McElmurry v. State,* 2002 OK CR 40, ¶¶ 79 – 80, 60 P.3d 4, 24; *Doyle v. State,* 1989 OK CR 85, ¶ 16, 785 P.2d 317, 324. *See also* 21 O.S.1991, § 11; *Hale v. State,* 888 P.2d 1027, 1029 (Okl.Cr.1995). The evidence in this case showed

the methamphetamine supporting the possession charge was the finished product of the manufacturing process, separate and distinct from the substances found in the working methamphetamine lab.

In Proposition IV, we have thoroughly reviewed all of Appellant's arguments for further modification of her sentence and find the sentence in Count II should be modified to seven (7) years. The jury instruction setting forth the wrong range of punishment for Count I provided an incorrect point of reference for the jury in their sentencing determination. The error in the instruction prejudiced Appellant as it impacted the jury's overall sentencing.

In Proposition V, apart from the erroneous jury instruction on the range of punishment in Count I, and its impact on the sentencing in Count II, no further errors warranting relief occurred in this case. *See Williams v. State*, 2001 OK CR 9, ¶ 127, 22 P.3d 702, 732.

DECISION

The Judgment is **AFFIRMED.** The Sentences in both Counts I and II are **MODIFIED** to seven (7) years each and the fines remain as reduced by the trial court to a total of $10,000.00. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CHEROKEE COUNTY
THE HONORABLE MARK DOBBINS, ASSOCIATE DISTRICT JUDGE

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C. JOHNSON, J.: CONCUR
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LEWIS, J.: CONCUR

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