IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JASON KENNETH DIMAGGIO, Jr.,	)	NOT FOR PUBLICATION
	)	
Appellant,	)	
	)	
v.	)	Case No. F-2011-656
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

C. JOHNSON, JUDGE:

Appellant, Jason Kenneth Dimaggio, Jr., was convicted by a jury in Pottawatomie County District Court, Case No. CF-2010-744, of the following crimes, all After Conviction of Two or More Felonies, and the jury recommended the following sentences:

Count	Charge	Sentence
1	Robbery with a Weapon (21 O.S.2001, § 801)	Life
2	Assault with a Dangerous Weapon (21 O.S.Supp.2006, § 645)	20 years
3	Eluding a Police Officer (21 O.S.2001, § 540A)	3 years
4	Conspiracy to Commit a Felony (21 O.S.2001, § 421)	Life
5	Robbery with a Weapon (21 O.S.2001, § 801)	100 years
6	Assault with a Dangerous Weapon (21 O.S.Supp.2006, § 645)	Life
7	Possession of a Controlled Substance (63 O.S.Supp.2009, § 2-402)	10 years
8	Conspiracy to Commit a Felony (21 O.S.2001, § 421)	25 years

On July 18, 2011, the Honorable John Gardner, Associate District Judge, sentenced Appellant in accordance with the jury's recommendation, ordering

all sentences to be served consecutively to one another.[1] This appeal followed.

Appellant raises the following propositions of error:

1. Appellant was denied a fair trial by the introduction of other-crimes evidence.

2. The trial court erred in allowing certain hearsay evidence.

3. The trial court abused its discretion in admitting irrelevant and prejudicial photographs.

4. Prosecutor misconduct denied Appellant a fair trial.

5. The trial court erred in instructing the jury on the issue of flight.

6. The cumulative effect of all errors denied Appellant a fair trial.

7. The trial court erred in ordering consecutive service of sentences.

8. Appellant's convictions for both Count 2 and Count 3 constitute double jeopardy and/or double punishment.

9. Appellant's convictions for Counts 5, 6 and 7 constitute double jeopardy and/or double punishment.

10. The evidence is insufficient to support Appellant's convictions for Conspiracy (Counts 4 and 8).

11. The evidence is insufficient to support Appellant's convictions for Count 1 (Robbery) and Count 2 (Assault).

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we find that Count 7 must be reversed, but otherwise affirm. Appellant was convicted of several offenses arising from a violent crime spree that spanned two Oklahoma counties in less than one hour. In Proposition 1, he

[1] Appellant is required to serve at least 85% of his sentences for Robbery before being eligible for parole. 21 O.S. § 13.1(8).

complains that evidence of crimes committed in the first half of this crime spree (in Seminole County) was improper other-crimes evidence; in Proposition 2, he claims he was denied his right to confront witnesses because some of that information was presented in the form of an investigative summary. Appellant timely objected to the evidence on these grounds, so these claims are preserved for appellate review. The evidence shows that Appellant and his accomplice embarked on an uninterrupted series of armed robberies. The crimes committed in Seminole County were admissible as part of the *res gestae*. *Warner v. State*, 2006 OK CR 40, ¶ 68, 144 P.3d 838, 868; *Knighton v. State*, 1996 OK CR 2, ¶ 38, 912 P.2d 878, 889-890. Although an OSBI agent gave a summary of the Seminole County crimes without any personal knowledge thereof, the State ultimately presented first-hand testimony from the victims of most of these events anyway. Given the strength and nature of the evidence as to the charges in Pottawatomie County, we can confidently conclude that any hearsay problems with a small part of the Seminole County information was harmless beyond a reasonable doubt. *Andrew v. State*, 2007 OK CR 23, ¶ 31, 164 P.3d 176, 189; *Logsdon v. State*, 2010 OK CR 7, ¶ 37, 231 P.3d 1156, 1169. Propositions 1 and 2 are denied.

As to Proposition 3, while we agree that photographs of Appellant after his arrest (in particular, those of his tattoos which included an offensive exhortation directed at the police) were ultimately of no probative value, no relief is warranted. Appellant's conduct in these crimes showed such disregard for the lives of others (including the police) that any possible error in admitting

these photographs was harmless beyond a reasonable doubt. *Gilbert v. State*, 1997 OK CR 71, ¶ 81, 951 P.2d 98, 119. Proposition 3 is denied.

As to Proposition 4, Appellant did not object at trial to the prosecutor's comments in closing argument, and we find no plain error in them. *Hancock v. State*, 2007 OK CR 9, ¶ 101, 155 P.3d 796, 820. Proposition 4 is denied. As to Proposition 5, while the court's instruction on flight (OUJI-CR (2nd) No. 9-8) was not warranted because Appellant never offered an explanation for his departure from any crime scene, defense counsel did not object to it, and given the overwhelming evidence of guilt, we find no plain error in it. *Dawkins v. State*, 2011 OK CR 1, ¶ 16, 252 P.3d 214, 219. Proposition 5 is denied.

As to Proposition 6, we will not grant relief unless any errors committed at trial, taken together, denied Appellant's substantial rights. 20 O.S.2011, § 3001.1. Given the strength of the evidence and Appellant's criminal history, Appellant's cumulative-error claim is meritless. *Taylor v. State*, 2011 OK CR 8, ¶ 58, 248 P.3d 362, 379. Proposition 6 is denied.

As to Proposition 7, Appellant has failed to show that the trial court's decision to run his sentences consecutively was based on any improper factor. 22 O.S.2011, § 976; *Riley v. State*, 1997 OK CR 51, ¶¶ 20-21, 947 P.2d 530, 534-35. Proposition 7 is denied.

Appellant's double-jeopardy and double-punishment claims in Propositions 8 and 9 were not raised below, so we review them only for plain error. *Logsdon*, 2010 OK CR 7, ¶ 15, 231 P.3d at 1164. As to Proposition 8, Appellant and his accomplice, driving at high speeds, chose to intentionally

switch lanes several times to force one police officer off the road as he approached them, while they were in the process of eluding another officer who was behind them. The former crime was not an integral or inseparable part of the latter.[2] Furthermore, each crime contains at least one element that the other does not. Convictions on both Counts 2 and 3 constitute neither double jeopardy nor double punishment. *Logsdon*, 2010 OK CR 7, ¶¶ 18-19, 231 P.3d at 1165. As to Proposition 9, Appellant's demand that a pharmacist direct him to the store's oxycodone (Count 5) was completed before Appellant fought with the pharmacist over a firearm and attempted to shoot him (Count 6). These were separate crimes, with different elements, based on different facts, and did not constitute double jeopardy or double punishment. *Ashinsky v. State*, 1989 OK CR 59, ¶ 29, 780 P.2d 201, 208. However, Appellant's possession of oxycodone (Count 7) was inseparable from the completed robbery in which he demanded the drug (Count 5). Count 7 is therefore **REVERSED** as it violates Oklahoma's statutory ban on multiple convictions based on the same act. 21 O.S.2011, § 11; *Shackelford v. State*, 1971 OK CR 49, ¶ 9, 481 P.2d 163, 165-66; *Hammon v. State*, 1995 OK CR 33, ¶ 74, 898 P.2d 1287, 1304.

As to Proposition 10, the evidence was sufficient for a rational juror to infer, beyond a reasonable doubt, that Appellant and his accomplice had a pre-existing agreement to commit robbery and obtain controlled drugs. *Powell v.*

[2] Appellant cites several unpublished decisions where this Court vacated convictions that we found to be inseparable from the primary offense of Eluding an Officer. We find each case distinguishable; in none did the defendant affirmatively turn his attention to a different victim or purpose.

State, 2000 OK CR 5, ¶ 72, 995 P.2d 510, 528. Proposition 10 is denied. As to Proposition 11, the evidence was likewise sufficient for a rational juror to conclude that Appellant aided and abetted his accomplice throughout the crime spree, even when he was not making demands personally or driving the stolen vehicle himself. 21 O.S.2011, § 172; *Douglas v. State*, 1997 OK CR 79, ¶¶ 66-67, 951 P.2d 651, 672. Proposition 11 is denied.

DECISION

Count 7 is **REVERSED WITH INSTRUCTIONS TO DISMISS**. In all other respects, the Judgment and Sentence of the district court is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF POTTAWATOMIE COUNTY
THE HONORABLE JOHN GARDNER, ASSOCIATE DISTRICT JUDGE

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OPINION BY C. JOHNSON, J.
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LEWIS, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR
SMITH, J.: CONCUR