IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOHN STANTON LEWIS,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**No. F-2016-179**
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

HUDSON, JUDGE:

Appellant, John Stanton Lewis, was tried by a jury and convicted in Comanche County District Court, Case No. CF-2013-667, for Count 1: Possession of Controlled Dangerous Substance—Methamphetamine, After Two or More Previous Felony Convictions, in violation of 63 O.S.Supp.2012, § 2-402; Count 2: Possession of Firearm After Former Felony Conviction, After One Previous Felony Conviction, in violation of 21 O.S.Supp.2012, § 1283(A); Count 3: Unlawful Possession of Controlled Dangerous Substance—Marijuana, After Two or More Previous Felony Convictions, in violation of 63 O.S.Supp.2012, § 2-402; and Count 4: Unlawful Possession of Drug Paraphernalia, in violation of 63 O.S.2011, § 2-405.

The jury recommended the following sentences—Count 1: fifteen (15) years imprisonment; Count 2: two (2) years imprisonment; Count 3: four (4) years imprisonment; and Count 4: ninety (90) days in the county jail plus a $500.00 fine. The Honorable Keith B. Aycock, District Judge, sentenced Lewis

in accordance with the jury's verdicts and ordered the terms of confinement for all four counts to run consecutively with credit for time served. Lewis now appeals, raising four (4) propositions of error before this Court:

I. THE EVIDENCE OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT SHOULD HAVE BEEN SUPPRESSED;

II. THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE APPROPRIATE RANGE OF PUNISHMENT DUE TO IMPROPER ENHANCEMENT;

III. EVIDENCE WAS INSUFFICIENT TO CONVICT APPELLANT OF POSSESSION OF A FIREARM AFTER FORMER FELONY CONVICTION; and

IV. APPELLANT WAS PREJUDICED BY INEFFECTIVE ASSISTANCE OF COUNSEL.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we find that no relief is required under the law and evidence with respect to Appellant's judgments and sentences on Counts 1, 2 and 4 which are **AFFIRMED**. Appellant's Count 3 judgment is **MODIFIED** to reflect a misdemeanor conviction. Appellant's Count 3 sentence is **MODIFIED** from four years imprisonment to one year confinement. Appellant's Count 3 judgment and sentence is **AFFIRMED** as **MODIFIED**.

I

The district court did not abuse its discretion in denying Appellant's motion to suppress. *State v. Alba*, 2015 OK CR 2, ¶ 4, 341 P.3d 91, 92 (setting forth standard of review for claims of illegal search and seizure). Chief Johnston's initial entry into Appellant's mobile home was unquestionably

authorized by *Michigan v. Tyler*, 436 U.S. 499, 98 S. Ct. 1942, 56 L. Ed. 2d. 486 (1978). In *Tyler*, the Supreme Court held that "[a] burning building clearly presents an exigency of sufficient proportions to render a warrantless entry 'reasonable.'" *Id.*, 436 U.S. at 509, 98 S. Ct. at 1950. Officials may conduct warrantless entries of a building not only to extinguish a fire but may also remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished. *Id.*, 436 U.S. at 509-10, 98 S. Ct. at 1950.

In the present case, the record shows Chief Johnston entered Appellant's mobile home while firefighters were still inside extinguishing the blaze on the other end of the trailer. Chief Johnston headed towards the trailer when he first arrived to make contact with the fire chief to determine the cause of the blaze. Chief Johnston discovered the marijuana pipe while firefighters were still on the north end of the trailer extinguishing the blaze. Chief Johnston secured the mobile home, obtained a search warrant then returned and searched the residence. Proposition I is denied.

II

Jury instructions are within the trial court's discretion and we review for an abuse of discretion. *Mitchell v. State*, 2016 OK CR 21, ¶ 24, 387 P.3d 934, 943. "Instructions are sufficient where they state the applicable law." *Id.* In this case, however, Appellant did not object to the trial court's instructions (Tr. 213). He has therefore waived all but plain error review on appeal. *Jackson v. State*, 2016 OK CR 5, ¶ 4, 371 P.3d 1120, 1121. To be entitled to relief under the plain error doctrine, Appellant must prove: 1) the existence of an actual

error (i.e., deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding. *Id.*; 20 O.S.2011, § 3001.1. If these elements are met, this Court will correct plain error only if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Jackson*, 2016 OK CR 5, ¶ 4, 371 P.3d at 1121; *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395.

On Count 1, Appellant fails to show error, let alone plain error, concerning the range of punishment upon which his jury was instructed. The enhancement provision contained in 63 O.S.Supp.2012, § 2-402(B)(1) does not apply here because Appellant's prior felony convictions are not for possession of a Schedule I or II controlled dangerous substance—the acts expressly prohibited by Section 2-402. The plain language of the statute undermines Appellant's argument here. *Watts v. State*, 2008 OK CR 28, ¶¶ 10-11, 197 P.3d 1094, 1096-97. Relief is denied for this aspect of Appellant's Proposition II claim.

Appellant does, however, show plain or obvious error affecting his substantial rights from the trial court's instruction on an erroneous range of punishment for Count 3. A charge of unlawful marijuana possession may be enhanced to a felony under 63 O.S.Supp.2012, § 2-402(B) *only* when the defendant has had a prior § 2-402 violation. Again, the plain language of the statute dictates this result. Because Appellant's prior felony convictions were not for violations of § 2-402, they cannot be used to enhance his possession of

marijuana charge to a felony in this case. Thus, the range of punishment for Appellant's Count 3 conviction was as a misdemeanor punishable by not more than one (1) year of confinement and by a fine not exceeding $1,000.00. 63 O.S.Supp.2012, § 2-402(B)(2). Relief is granted for this aspect of Appellant's Proposition II claim. Appellant's Count 3 judgment is **MODIFIED** to reflect a misdemeanor conviction. Appellant's Count 3 sentence is **MODIFIED** from four years imprisonment to one year confinement.

III

"We review sufficiency of the evidence claims in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Davis v. State*, 2011 OK CR 29, ¶ 74, 268 P.3d 86, 111 (citing *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 2787, 61 L. Ed. 560, 571 (1979) and *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04). This analysis requires examination of the entire record. *McDaniel v. Brown*, 558 U.S. 120, 131, 130 S. Ct. 665, 672, 175 L. Ed. 2d 582 (2010); *Young v. State*, 2000 OK CR 17, ¶ 35, 12 P.3d 20, 35. "This Court will accept all reasonable inferences and credibility choices that tend to support the verdict." *Davis*, 2011 OK CR 29, ¶ 74, 268 P.3d at 111.

Taken in the light most favorable to the State, sufficient evidence was presented at trial to allow any rational trier of fact to find beyond a reasonable doubt the essential elements of the Count 2 Possession of a Firearm After Former Felony Conviction charge. The State presented evidence that Appellant

was a convicted felon who possessed a Ruger revolver. The legislative intent behind 21 O.S.Supp.2012, § 1283(A) "was to keep guns, real or imitation, out of the possession or control of felons. Hence, whether or not the pistol is capable of firing is not an element that must be proven to sustain a conviction under Section 1283." *Sims v. State*, 1988 OK CR 193, ¶¶ 7-8, 762 P.2d 270, 271-72. Proposition III is denied.

IV

To prevail on an ineffective assistance of counsel claim, Appellant must show both that counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *See also Harrington v. Richter*, 562 U.S. 86, 104, 131 S. Ct. 770, 787-88, 178 L. Ed. 2d 624 (2011) (discussing *Strickland* two-part standard).

Appellant alleges that trial counsel was constitutionally ineffective for failing to: 1) object to the range of punishment listed in the instructions for Counts 1—3; and 2) challenge the sufficiency of evidence supporting the Count 3 charge based on the State's failure to present evidence showing the firearm Appellant possessed was capable of firing, as discussed in Proposition III.

As discussed in Proposition II, the range of punishment given in the instructions for the Count 1 charge of possession of methamphetamine accurately stated the applicable law. Trial counsel was not ineffective for failing to make meritless objections and arguments. *Jackson*, 2016 OK CR 5, ¶ 13, 371 P.3d at 1123.

With respect to Count 2, Appellant concedes in his brief-in-chief that the alleged instructional error did not prejudice him. Aplt. Br. at 20-21. Thus, he cannot possibly show *Strickland* prejudice from counsel's purported deficient performance. Moreover, this claim is so inadequately developed on appeal as to be waived from appellate review. Rule 3.5(C), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017). Appellant did not specifically address this issue on appeal because he believed the purported error was to his benefit. Instead, he made passing mention that the punishment range for Count 2 was incorrect. This is wholly insufficient to raise this claim in relation to counsel's purported ineffectiveness and it is waived from review.

Next, we modified Appellant's Count 3 judgment and sentence due to the incorrect range of punishment set forth in the instructions for this count. This renders Appellant's related ineffective assistance of counsel claim moot.

Finally, trial counsel was not ineffective for failing to attack the State's evidence supporting the Count 2 felonious possession of a firearm charge. Appellant fails to show deficient performance or prejudice because, as discussed in Proposition III, whether or not the pistol is capable of firing is not an element that must be proven to sustain a conviction under Section 1283(A). Further, trial counsel reasonably focused his efforts on challenging as deficient the State's proof that Appellant was in possession of the drugs and firearm in light of two other men living in the trailer, both of whom had prior felony convictions for narcotics offenses, and the lack of fingerprint testing performed on the evidence. Counsel was not ineffective. Proposition IV is denied.

DECISION

The judgments and sentences of the district court on Counts 1, 2, and 4 are **AFFIRMED**. Appellant's Count 3 judgment is **MODIFIED** to reflect a misdemeanor conviction. Appellant's Count 3 sentence is **MODIFIED** from four years imprisonment to one year confinement. Appellant's judgment and sentence on Count 3 is **AFFIRMED** as **MODIFIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY
THE HONORABLE KEITH B. AYCOCK, DISTRICT JUDGE

APPEARANCES AT TRIAL

ART MATA
MATA & MATA
609 S.W. E AVENUE
LAWTON, OK 73501
COUNSEL FOR DEFENDANT

KYLE CABELKA
ASSISTANT DISTRICT ATTORNEY
COMANCHE COUNTY COURTHOUSE
315 S.W. 5TH STREET
LAWTON, OK 73501
COUNSEL FOR THE STATE

APPEARANCES ON APPEAL

RANA HILL
P.O. BOX 926
NORMAN, OK 73070
COUNSEL FOR APPELLANT

E. SCOTT PRUITT
OKLAHOMA ATTORNEY GENERAL
JAY SCHNIEDERJAN
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
COUNSEL FOR APPELLEE

OPINION BY: HUDSON, J.
LUMPKIN, P.J.: CONCUR
LEWIS, V.P.J.: CONCUR