**IN THE COURT OF CRIMINAL APPEALS**
**OF THE STATE OF OKLAHOMA**

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| **BRIAN A. STALEY,** | ) | |
| | ) | **NOT FOR PUBLICATION** |
| **Appellant,** | ) | |
| | ) | **Case No. F-2017-147** |
| **v.** | ) | |
| | ) | |
| **STATE OF OKLAHOMA,** | ) | |
| | ) | |
| **Appellee.** | ) | |



**SUMMARY OPINION**

**HUDSON, JUDGE:**

Appellant, Brian A. Staley, was tried and convicted at a jury trial in Caddo County District Court, Case No. CF-2016-21, of Count 1: Trafficking in Illegal Drugs, in violation of 63 O.S. Supp.2015, § 2-415; Count 2: Acquiring Proceeds from Drug Activity, in violation of 63 O.S.2011, § 2-503.1; Count 3: Possession of Firearm During the Commission of a Felony, in violation of 21 O.S.Supp.2012, § 1287; and Count 4: Unlawful Possession of Drug Paraphernalia, in violation of 63 O.S.2011, § 2-405. The jury recommended a sentence of fifteen (15) years imprisonment and a $75,000.00 fine on Count 1; two (2) years imprisonment on Count 2; five (5) years imprisonment on Count 3; and a $1,000.00 fine on

Count 4. The Honorable Wyatt Hill, Associate District Judge, presided at trial and sentenced Appellant in accordance with the jury's verdicts. Judge Hill imposed various costs and fees and ordered Appellant's sentences to run consecutively.

Staley now appeals, raising eleven (11) propositions of error before this Court:

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE AS THE WARRANTLESS SEARCH OF HIS VEHICLE WAS CONDUCTED IN VIOLATION OF HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO BE FREE FROM UNLAWFUL SEARCHES;

II. APPELLANT WAS DENIED A FAIR TRIAL WHEN THE TRIAL COURT ALLOWED THE JURY TO CONSIDER OTHER CONTROLLED SUBSTANCES THAT WERE FOUND IN THE VEHICLE WHEN HE WAS NOT ON TRIAL FOR CRIMES RELATING TO THIS EVIDENCE;

III. APPELLANT WAS DENIED DUE PROCESS OF LAW WHEN HE WAS CONVICTED OF AN OFFENSE FOR WHICH HE WAS NOT CHARGED;

IV. THE STATE FAILED TO PROVE, BEYOND A REASONABLE DOUBT, THAT APPELLANT ACQUIRED PROCEEDS FROM TRAFFICKING IN MARIJUANA;

V. THE STATE FAILED TO PRESENT EVIDENCE, BEYOND A REASONABLE DOUBT, THAT THE WEAPONS FOUND DURING THE WARRANTLESS SEARCH WERE USED TO FACILITATE THE OFFENSE OF TRAFFICKING IN MARIJUANA;

VI. THE EVIDENTIARY HARPOONS BY TROOPER PAINTER DEPRIVED APPELLANT OF A FAIR TRIAL;

VII. APPELLANT WAS DENIED A FAIR TRIAL BY THE IMPROPER AND PREJUDICIAL ARGUMENT BY THE PROSECUTOR;

VIII. THE STATE PRESENTED INSUFFICIENT EVIDENCE THAT APPELLANT KNOWINGLY BROUGHT MARIJUANA INTO OKLAHOMA OR KNOWINGLY POSSESSED MARIJUANA;

IX. THE TRIAL COURT ERRED IN ADMITTING A HANDWRITTEN NOTE INTO EVIDENCE WHEN IT WAS NOT RELEVANT TO THE CHARGE AND THE STATE DID NOT CONNECT THE EVIDENCE TO APPELLANT;

X. APPELLANT'S CONVICTION SHOULD BE REVERSED AS THE CUMULATIVE EFFECT OF ERRORS DEPRIVED HIM OF A FAIR PROCEEDING AND A RELIABLE OUTCOME; and

XI. APPELLANT'S SENTENCES WERE EXCESSIVE IN VIOLATION OF THE UNITED STATES AND OKLAHOMA CONSTITUTIONS.

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. Appellant's judgment and sentence is **AFFIRMED**.

**Proposition I:** The trial court did not abuse its discretion in denying Appellant's motion to suppress. *See Bramlett v. State*, 2018 OK CR 19, ¶ 10, 422 P.3d 788, 793. Appellant had a right

under both the United States and Oklahoma constitutions to be free from unreasonable searches and seizures. *State v. Strawn*, 2018 OK CR 2, ¶ 21, 419 P.3d 249, 253. In the present case, Trooper Painter's stop of Appellant's truck was for speeding. The traffic stop itself thus was wholly reasonable. *Whren v. United States*, 517 U.S. 806, 809-10, 116 S. Ct. 1769, 1772, 135 L. Ed. 2d 89 (1996); *Strawn*, 2018 OK CR 2, ¶ 22, 419 P.3d at 254. The video of the traffic stop likewise shows that the duration of the stop was reasonable. *Strawn*, 2018 OK CR 2, ¶ 23, 419 P.3d at 254 ("'[A] police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures.'") (quoting *Rodriguez v. United States*, 575 U.S.__, 135 S. Ct. 1609, 1612, 191 L. Ed. 2d 492 (2015)).

Further, Trooper Painter engaged in a consensual encounter when, as Appellant was exiting the patrol unit, he inquired whether Appellant would answer a few questions. "Consensual encounters are not Fourth Amendment seizures since they involve the mere voluntary cooperation with an officer's non-coercive questioning." *Strawn*, 2018 OK CR 2, ¶ 27, 419 P.3d at 255 (and cases cited therein). Our review of the testimony, along with the video of the

traffic stop, shows that Appellant volunteered during this consensual encounter to let the trooper run his K-9 unit around the truck but declined to allow a search inside the truck. The record shows that Appellant's consent was freely and voluntarily given. Appellant's corresponding refusal to consent to a search inside the vehicle demonstrates an obvious awareness of his right to refuse. There was no overbearing show of authority by the trooper and it is clear that a reasonable person under the circumstances would feel free to leave the patrol unit and proceed on his or her way. Under the totality of circumstances presented here, Appellant's consent was voluntary and, thus, the dog sniff was lawful. Proposition I is denied. *See Strawn*, 2018 OK CR 2, ¶¶ 27-33, 419 P.3d at 255-56. *See also United States v. Drayton*, 536 U.S. 194, 206-07, 122 S. Ct. 2105, 2113, 153 L. Ed. 2d 242 (2002); *Holbird v. State*, 1982 OK CR 130, ¶¶ 15-17, 650 P.2d 66, 69.

**Proposition II:** We review the trial court's evidentiary rulings for abuse of discretion. *Bramlett*, 2018 OK CR 19, ¶ 19, 422 P.3d at 795 (defining "abuse of discretion" in context of appellate review of trial court evidentiary rulings). Evidence of the hashish and methamphetamine found inside Appellant's truck was admissible

*res gestae* evidence. *See Griffith v. State*, 1987 OK CR 42, ¶¶ 1-2, 13, 734 P.2d 1301, 1304; *Bridges v. State*, 1982 OK CR 189, ¶¶ 3-4, 654 P.2d 1067, 1069; *Davis v. State*, 1977 OK CR 81, ¶¶ 15-17, 560 P.2d 1051, 1056-57; *Barnhart v. State*, 1977 OK CR 18, ¶¶ 1-6, 15, 559 P.2d 451, 454-55, 456. There was no abuse of discretion from the admission of this evidence. Proposition II is denied.

**Proposition III:** Appellant did not object to the scrivener's error on the amended Information for Count 2 which cited the incorrect statute number for the crime of acquiring proceeds from drug activity. Thus, our review is limited to plain error. To show plain error, Appellant must show an actual error, which is plain or obvious and that affects his substantial rights. *Lamar v. State*, 2018 OK CR 8, ¶ 40, 419 P.3d 283, 294. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*

Appellant shows an actual or obvious error but he fails to show it affected his substantial rights. A defendant has a due process right to notice of the crimes with which he is charged. *Parker v. State*, 1996 OK CR 19, ¶¶ 21-24, 917 P.2d 980, 985-86. A

defendant also has the right to have a jury instructed on the essential elements of the offenses with which he is charged. *Atterberry v. State*, 1986 OK CR 186, ¶ 8, 731 P.2d 420, 422. Here, the amended Information clearly set out the factual basis for each of the essential elements and provided notice of the State's intent to proceed under the correct statute, i.e., 63 O.S.2011, § 2-503.1. Indeed, the charge itself labeled the Count 2 crime as "Acquire Proceeds From Drug Activity." Appellant was advised by the amended Information of the crime with which he was charged and against which he must defend himself at trial. *Parker*, 1996 OK CR 19, ¶¶ 19, 24, 917 P.2d at 985-86 (the essential purpose of the charging document is notice to the accused).

The record shows no confusion concerning the charge intended by the State for which Appellant was tried and convicted. Nor does it show Appellant was misled concerning what he must defend against. The jury was correctly instructed on the crime set forth in Section 2-503.1 along with appropriate sentencing range. The record suggests no prejudice whatsoever to Appellant from the error in the statute number listed for the Count 2 charge. Because the actual or obvious error here did not affect Appellant's

substantial rights, there is no plain error. 22 O.S.2011, § 410; *Sims v. State*, 1988 OK CR 193, ¶ 10, 762 P.2d 270, 272. Proposition III is denied.[1]

**Propositions IV, V and VIII:** 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. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979); *Davis v. State*, 2011 OK CR 29, ¶ 74, 268 P.3d 86, 111; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04. This analysis requires examination of the entire record. *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. Further, the law makes no distinction between direct and

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[1] We note that the judgment and sentence document in this case also references the wrong statute number for Count 2. "This Court has noted that a request to correct a scrivener's error should first be presented to the District Court by motion for order *nunc pro tunc*." *Winbush v. State*, 2018 OK CR 38, ¶ 15, __P.3d__. However, nothing prevents the district court from initiating the process of *nunc pro tunc* correction of such an error by providing notice to both parties, and an opportunity to be heard, concerning the court's proposed correction. *See Ex parte Pruitt*, 1949 OK CR 66, 89 Okl.Cr. 312, 319-20, 207 P.2d 337, 341.

circumstantial evidence and either, or any combination of the two, may be sufficient to support a conviction. *Miller v. State*, 2013 OK CR 11, ¶ 84, 313 P.3d 934, 965. 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 that Appellant committed the crimes of trafficking in illegal drugs, acquiring proceeds from drug activity and possession of a firearm during commission of a felony as alleged in this case. Propositions IV, V and VIII are denied.

**Proposition VI:** "An evidentiary harpoon occurs when an experienced police officer makes a voluntary, willfully jabbed statement injecting other crimes, which is both calculated to prejudice, and [is] actually prejudicial to, the rights of the defendant." *Martinez v. State*, 2016 OK CR 3, ¶ 60, 371 P.3d 1100, 1115, *cert. denied*, __U.S.__, 137 S. Ct. 386, 196 L. Ed. 2d 304 (2016). Only one of the challenged comments here was erroneous. The district court sustained defense counsel's objection to a speculative comment by the trooper and admonished the jury to disregard the witness's answer. We have held that a trial court's ruling sustaining an objection and admonishing the jury to

disregard the challenged testimony cures any error unless, after considering the evidence, the testimony appears to have determined the verdict. *Hager v. State*, 1983 OK CR 88, ¶ 9, 665 P.2d 319, 323. Under the total circumstances, the challenged testimony was not outcome determinative. Appellant was not deprived of a fundamentally fair trial from the challenged testimony. Proposition VI is denied.

**Proposition VII:** We will not grant relief for improper argument unless, viewed in the context of the whole trial, the statements rendered the trial fundamentally unfair, so that the jury's verdict is unreliable. *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471, 91 L. Ed. 2d 144 (1986); *Tryon v. State*, 2018 OK CR 20, ¶ 137, 423 P.3d 617, 654. The trial court sustained defense counsel's objection to the prosecutor's argument that hydroponic marijuana came from northern California and admonished the jury to disregard this statement by the prosecutor. Review of the record shows this comment was not of such magnitude as to have determined the verdict, and the error was cured by the admonition. *Cooper v. State*, 1983 OK CR 154, ¶ 9, 671 P.2d 1168, 1173. The balance of comments challenged by

Appellant, with one exception discussed below, amounted to proper commentary on the evidence and reasonable argument by the State. *See Tart v. State*, 1981 OK CR 113, ¶ 2, 634 P.2d 750, 750-51 ("Prosecutorial comments should be confined to the evidence presented at trial and any reasonable inferences that can be fairly drawn therefrom.").

We condemn as outrageous and indefensible, however, the prosecutor's interruption of defense counsel's final remarks during the defense closing. The record shows the prosecutor improperly mocked defense counsel's closing argument within earshot of the jury.[2] Suffice it to say, this was the type of mistake any competent attorney would know to avoid. *See McElmurry v. State*, 2002 OK CR

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[2] During his final remarks, defense counsel thanked the jury for its time, urged the jury to find Appellant not guilty and explained that his closing argument was "the only chance I get to speak." Referring to the State, defense counsel said too that "They get another chance to talk, but--" (Tr. III 46). At this moment, the transcript shows the prosecutor said "Thank God." (Tr. III 46). The trial court immediately admonished the prosecutor who, in turn, apologized to the jury and said that he didn't mean to say it (Tr. III 46-47). The trial court responded that "I could hear that way up here. I'm going to admonish you not to say stuff like that." (Tr. III 47). The prosecutor once again apologized "to the Court and the jury." (Tr. III 47). Defense counsel then concluded his argument, observing that while he "[does] take a while" and did cover a lot, it was because of the importance to make sure that an innocent person was not sent to prison for life. Defense counsel told the jury "I'm sorry if it took too damn long for [the State]. But it is that important that ya'll look at this and take as much time as you need to make sure that an innocent person doesn't go to jail. Thank you." (Tr. III 47).

40, ¶ 131, 60 P.3d 4, 31 (the prosecutor should avoid mocking defense arguments).

Despite this conduct, we find that the trial court's admonishment cured the error. The prosecutor's erroneous remark was neutralized by the trial court's stern admonishment immediately after the improper comment was made; the prosecutor's repeated apology to the jury and the Court; and defense counsel's ability to respond immediately to the prosecutor's comments within the confines of the final passages of the defense closing argument. We observe too that the evidence of Appellant's guilt was overwhelming and the sentences recommended by the jury were somewhat on the low end of the punishment range for each crime. Indeed, the fifteen (15) year sentence of imprisonment on Count 1 is far less than the forty (40) year sentence requested by the prosecutor. Under the total circumstances presented here, we can be confident that the prosecutor's comment did not deprive Appellant of a fundamentally fair trial in violation of due process. Proposition VII is denied.

**Proposition IX:** The trial court did not abuse its discretion in admitting State's Exhibit 38. The handwritten list was relevant

because it bolstered the State's theory that Appellant was engaged in drug trafficking in marijuana; that the $19,472.00 cash found in the floorboard was proceeds from that activity; and that the guns found in the truck were part of Appellant's drug trafficking activities. The note was not offered to prove the truth of the matter asserted. Rather, the note is relevant because of what it says. Even if the list was written by someone else, the jury could still infer, based on the total evidence, that it was a handwritten shopping list of marijuana in close proximity to the drugs, guns and money found inside Appellant's truck. The evidence was relevant and its probative value was not outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. 12 O.S.2011, §§ 2401-2403; *Dodd v. State*, 2004 OK CR 31, ¶ 38, 100 P.3d 1017, 1032. Proposition IX is denied.

**Proposition X:** We deny relief for cumulative error. "'Cumulative error . . . does not deprive the defendant of a fair trial when the errors considered together do not affect the outcome of the proceedings.'" *Postelle v. State*, 2011 OK CR 30, ¶ 94, 267 P.3d 114, 146 (quoting *Hanson v. State*, 2009 OK CR 13, ¶ 55, 206 P.3d 1020, 1035). Proposition X is denied.

**Proposition XI:** This Court will not disturb a sentence within statutory limits unless, under the facts and circumstances of the case, it is so excessive as to shock the conscience of the Court. *Pullen v. State*, 2016 OK CR 18, ¶ 16, 387 P.3d 922, 928. We review the district court's decision to run a defendant's sentences consecutively or concurrently for an abuse of discretion. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. Here, the sentences imposed for each count do not shock the conscience. The trial court did not abuse its discretion in running the sentences in this case consecutively. Proposition XI is denied.

## DECISION

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. (2019), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CADDO COUNTY
THE HONORABLE WYATT HILL, ASSOCIATE DISTRICT JUDGE

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**OPINION BY: HUDSON, J.**
**LEWIS, P.J.: CONCUR**
**KUEHN, V.P.J.: CONCUR IN PART/DISSENT IN PART**
**LUMPKIN, J.: CONCUR**
**ROWLAND, J.: CONCUR**

**KUEHN, V.P.J., CONCURRING IN PART/DISSENTING IN PART:**

I agree with the resolution of all claims except Propositions II and IX, which allege error in the admission of certain evidence – specifically, quantities of other controlled drugs that Appellant was not charged with possessing, and what appeared to be a handwritten "order list" of different types of marijuana. Although I do not believe this evidence materially affected the outcome, I do believe it was improperly admitted.

If a defendant's conduct can be punished under more than one criminal statute, the State may usually elect which crime to charge him with. *State v. Haworth*, 2012 OK CR 12, ¶ 13, 283 P.3d 311, 316. The evidence here supported a charge of either (1) Possession of Marijuana with Intent to Distribute, which obviously requires proof of an intent to distribute the substance, or (2) Trafficking in Marijuana, which requires only proof that the defendant possessed a specified quantity of the drug. An intent to distribute is irrelevant to the latter offense.

Given the quantity of marijuana discovered here, the State understandably charged Appellant with Trafficking in Marijuana.

The State also charged Appellant with possessing several other kinds of contraband: drug paraphernalia, firearms, and cash alleged to be proceeds from drug sales. Naturally, the smoking pipes, firearms, and cash found in Appellant's truck were required to prove those crimes. But Appellant was not on trial for possessing methamphetamine or hashish, or for intending to distribute the marijuana in the truck.[1] Whether he possessed those other drugs, and whether the handwritten document was an "order list" of marijuana that he intended to deliver, did not tend to make it more likely that Appellant knowingly possessed the marijuana or the other contraband. It tended to prove too much, and was clearly intended to prejudice him. Even if this evidence had some marginal relevance, the potential for unfair prejudice was too high. 12 O.S.2011, §§ 2401-03. *See Lowery v. State*, 2008 OK CR 26, ¶ 15, 192 P.3d 1264, 1270 (evidence should be excluded if it does not tend to resolve a disputed issue and is unnecessary to the State's burden of proof). The State was essentially allowed to up the ante, turning this case into one about methamphetamine, not just marijuana. The only

[1] The State had to dismiss the trafficking in methamphetamine charge at preliminary hearing as the drugs were not tested by O.S.B.I. and therefore, there was no determination on the content of the substance.

purpose of introducing evidence that Appellant possessed large amounts of other drugs was to show he was generally a bad person, and to enhance whatever punishment was imposed for the crimes he *was* charged with.

The Majority invokes the pre-Evidence Code "*res gestae*" exception to justify admission of the other drugs that were discovered. While the concept of *res gestae* may help the offering party explain why certain evidence is relevant, it is not immune from the Code's mechanics. Relevance is not assumed, and unfair prejudice is not ignored, just because the offering party utters the phrase, "*res gestae.*" The Evidence Code requires exclusion of even relevant evidence when its probative value is substantially outweighed by unfairly prejudicial effect. 12 O.S.2011, § 2403.

As for the handwritten "order list," the Majority finds it relevant for "what it says," concluding that it tends to link Appellant to the other contraband and to show the connection of that contraband to drug activity. Even relevant evidence should be excluded if it is cumulative to other evidence. 12 O.S.2011, § 2403. The cash, firearm, drug paraphernalia, and receipts showing Appellant's travels to Oklahoma from California, were quite enough to show that he

knowingly possessed over 55 pounds of marijuana. The handwritten list was not needed to disprove Appellant's story that he was clueless to all the illegal items in his truck. It was error to admit the notations.

The properly-admitted evidence was sufficient for a rational juror to find Appellant guilty as charged; and as the Majority observes, the jury rejected the prosecutor's punishment requests out of hand, and sentenced on the lower end of each count. I therefore conclude that the evidence complained of in Propositions II and IX had no substantial effect on the verdict. But I urge trial courts to exercise care when considering whether to admit evidence under the umbrella of "*res gestae.*"