

¹ Appellant was found not guilty of Count 4, running a roadblock, and Count 9, leaving scene of accident damaged fixture.

Counts 1 through 3; and thirty years (30) years imprisonment in each of Counts 5 through 8, with the last five years suspended; all to be served concurrently and with credit for time served. The court further ordered the suspension pursuant to the rules and conditions of probation entered by the court and imposed various fines and costs. Smith appeals in the following propositions of error:

1. The multiple punishments for one course of criminal conduct violated 21 O.S. § 11;
2. The State presented insufficient evidence to convict on Counts V-VIII;
3. Smith received ineffective assistance of counsel when counsel failed to preserve his double punishment claim.

Appellant argues in Proposition One that his convictions for felony eluding and running a roadblock violate the protections against double punishment under 21 O.S.2011, § 11. He makes the same argument for the four counts of assault with a dangerous weapon. Appellant did not raise these claims in the district court, and must now prove the existence of a plain or obvious error that affected the outcome at trial. *See Hogan v. State*, 2006 OK CR 19 ¶ 38, 139 P.3d 907, 923. This Court will correct the plain error only if

it seriously affects the fairness, integrity, or public reputation of the proceedings. *Id.*

Proper analysis of a section 11 claim focuses on the relationship between the crimes. If two or more crimes truly arise out of one act, section 11 prohibits prosecution and punishment for more than one crime. *Irwin v. State*, 2018 OK CR 21, ¶ 5, 424 P.3d 675, 676. Section 11 does not bar the charging and conviction of separate crimes which may only tangentially relate to one or more crimes committed during a continuing course of conduct. *Id.* And section 11 does not prohibit prosecution of more than one offense if the conduct sets out separate and distinct crimes. *Davis v. State*, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126. Traditional double jeopardy analysis is conducted only if section 11 does not apply. *Mooney v. State*, 1999 OK CR 34, ¶ 14, 990 P.2d 875, 883.

In this proposition, Appellant wishes to be absolved of every crime he committed while he was running from the police. He claims that his four (4) separate convictions for the crime of assault with a dangerous weapon and his conviction for running a roadblock merged into the crime of the single act of “continuous eluding.”

First, running a roadblock, 21 O.S.2011, § 540B, is a separate crime defined by legislation. The statute states, “[a]ny operator of a motor vehicle approaching such roadblock has a duty to stop at the roadblock unless directed otherwise by a peace officer in attendance thereof and the willful violation hereof shall constitute a separate offense from any other offense committed.” Clearly there is no violation of double punishment here, thus there can be no plain error.

With regard to the offenses of assault with a dangerous weapon and felony attempting to elude, this Court also finds no violation. Felony attempting to elude, 21 O.S.2011, § 540A(B), is a crime when any person eludes “in such manner as to endanger any other person” Attempting to elude is completed when a driver who is directed to stop by visual and audible signal from a peace officer willfully increases the speed or extinguishes the lights of the vehicle in an attempt to elude such peace officer, or willfully attempts in any other manner to elude the peace officer. 21 O.S.2011, § 540A(A).

Appellant completed the crime of felony attempting to elude when he fled from peace officers in speeds in excess of one hundred

thirty (130) miles per hour with a passenger in his vehicle. His actions endangered his passenger and the troopers who began the pursuit. After that Appellant steered his vehicle at oncoming cars causing them to move or stop to avoid being struck by Appellant. These crimes were separate as they constituted a series of events. *Watts v. State*, 2008 OK CR 27, ¶ 16, 194 P.3d 133, 139; *Ziegler v. State*, 1980 OK CR 23, 610 P.2d 251, 254; *Davis*, 1999 OK CR 48, ¶¶ 12-13, 993 P.2d at 126-27.

These crimes are analogous to the crime of burglary and the crimes committed once inside the burgled building. See *State v. Kistler*, 2017 OK CR 24, ¶ 8, 421 P.3d 899, 901 (holding that first degree burglary and robbery committed once inside the residence are separate offenses).²

² See also *Patton v. State*, 1998 OK CR 66, ¶ 44, 973 P.2d 270, 287, where this Court held that first degree burglary with intent to commit murder and first degree murder do not violate double jeopardy. Furthermore, this Court has a long history of cases where a burglary and the crimes committed after entry do not merge into one transaction. For example, in *Taylor v. State*, 1995 OK CR 10, ¶45, 889 P.2d 319, 339, we stated:

"[B]urglary and other offenses committed within the structure burgled do not merge, and conviction of both does not violate double jeopardy protections." The burglary Taylor perpetrated was complete when he entered the victims' residence with the intent to commit a crime. "The offenses [he] committed after entry [were] separate and distinct." [footnotes omitted](quoting *Williams v. State*, 807 P.2d 271, 273 (Okla. Cr. 1991))

Because there is no clear or obvious error under section 11, there can be no plain error. This proposition is denied.

In Proposition Two Appellant claims the evidence was insufficient to convict him on the four counts of assault with a dangerous weapon because the State failed to prove that he had a specific intent to do bodily harm to any of the alleged victims, the fifth element of the crime. OUJI-CR 4-12.

Evidence is sufficient to support a conviction if, viewing the evidence and all reasonable inferences from it in the light most favorable to the State, any rational trier of fact could find the defendant guilty beyond a reasonable doubt. *Coddington v. State*, 2006 OK CR 34, ¶ 70, 142 P.3d 437, 456; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04.

Assault with a dangerous weapon requires an assault upon another person, with a dangerous weapon, without justifiable or excusable cause, with intent to do bodily harm. 21 O.S.2011, § 645; OUJI-CR 2d, 4-12. The evidence showed that Appellant steered his vehicle toward several oncoming cars in a manner sufficient to show that he intended to do bodily harm.

We find that any rational trier of fact could find beyond a reasonable doubt that Appellant committed multiple acts of assault with a dangerous weapon, i.e., his vehicle, based on the evidence presented at trial. See *Logsdon v. State*, 2010 OK CR 7, ¶ 5, 231 P.3d 1156, 1161; *Spuehler*, 1985 OK CR 132, ¶ 7, 709 P.2d at 203-04. Proposition Two is denied.

Finally, in Proposition Three, Appellant raises a claim of ineffective assistance of counsel. He claims counsel was ineffective for failing to preserve his double jeopardy claim for appellate review. We review this claim under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), requiring that Appellant show not only that counsel performed deficiently, but that Appellant was prejudiced by it. *Id.*, 466 U.S. at 687.

In Proposition One it was determined that there was no double punishment violation. Under a review for ineffective assistance, there is no basis to find that counsel performed deficiently. Using our case law on double punishment there is no reasonable conclusion that counsel failed to act within an objective standard of reasonableness and that, but for counsel's unreasonable conduct,

the result of the proceeding would have been different. *Id.*, 466 U.S. at 687, 104 S.Ct. at 2064. Proposition Three is denied.

DECISION

The judgment and sentence 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.

APPEAL FROM THE DISTRICT COURT OF BRYAN COUNTY THE HONORABLE MARK R. CAMPBELL, DISTRICT JUDGE

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OPINION BY: LEWIS, P.J.
KUEHN, V.P.J.: Concur
LUMPKIN, J.: Concur
HUDSON, J.: Concur
ROWLAND, J.: Concur

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