

ORIGINAL



FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUN - 1 2021

JOHN D. HADDEN
CLERK

F-2020-659

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

**District Court of Oklahoma County Case Number
CF-2019-1278**

AARON LAMAR FORT,

APPELLANT,

-VS-

THE STATE OF OKLAHOMA,

APPELLEE.

ORIGINAL BRIEF FOR AND ON BEHALF

OF

AARON LAMAR FORT,

APPELLANT.

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June 1, 2021

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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

AARON LAMAR FORT,)	
)	
Appellant,)	APPELLATE CASE
)	NO. F-2020-659
)	
THE STATE OF OKLAHOMA,)	District Court Case No.
)	CF-19-1278
Appellee.)	

BRIEF OF APPELLANT

Appellant, Aaron Lamar Fort, was charged by Information in Oklahoma County District Court Case No. CF-19-1278 with Count 1, trafficking in illegal drugs in violation of Okla. Stat. tit. 63, § 2-415. (O.R. 1-17)

At a jury trial held on September 14-15, 2020, before the Honorable Timothy R. Henderson, the jury found Mr. Fort guilty and set punishment at twenty-three (23) years. (O.R. 187) At formal sentencing held on September 18, 2020, the trial court sentenced the defendant in accordance with the jury's verdict to run consecutive to CF-08-7280, CF-09-5188, and CF-15-3360. Credit for time served was denied. (S.Tr. 10-11)

Mr. Fort now appeals this conviction.

STATEMENT OF FACTS

Sergeant Eric Wooten testified that he is a detective in the Oklahoma City Police Department. On March 15, 2019, he and his partner initiated a traffic stop and during the stop they found "Mexican Brown Heroin." (Tr. I 13, 16) Sergeant Wooten said that the individual was interviewed about where the drugs came from which led the police to an apartment off Northwest 23rd Street. The apartment was put under surveillance and another individual was seen entering the apartment and coming back out. The police made a traffic stop on the car and that person had "black tar" heroin. The individual who had been stopped said that he bought it at apartment 205, 5509 Northwest 23rd Street. (Tr. I 17-19) Sergeant Wooten testified that a search warrant was obtained then executed at the apartment. (Tr. I 19-20) Sergeant Wooten testified that the apartment door was breached. The apartment appeared kind of hazy from what Sergeant Wooten believed to be "Mexican brown heroin" and there were a few people in the living room covered in what looked like "sawdust" and there was an odor of vinegar in the air which is associated with heroin. (Tr. I 22-23) Sergeant Wooten testified that there were four (4) people in the apartment, two (2) males, Zachary Hines and Aaron Fort. (Tr. I 24) Mr. Fort was the first person out of the apartment, then Mr. Hines, then the two (2) females. (Tr. I 25)

Sergeant Wooten said they entered the apartment and on the coffee table in the living room there was a money counter there. (Tr. I 26) (State's Exhibit 7) Sergeant Wooten entered the bedroom but did not see much when officers started yelling to leave because there was heroin all over the bathroom and they

were afraid it was laced with fentanyl. (Tr. I 27) A Hazmat team was called in due to the fentanyl scare and the Hazmat team collected the evidence. (Tr. I 35, 43) Sergeant Wooten ultimately believed that "Mexican brown heroin" was being distributed. (Tr. I 37)

Officer James Runner testified that he is a police officer in the Oklahoma City Police Department. On March 15, 2019, he was working as a patrol officer and assisted in executing a search warrant at an apartment complex. (Tr. I 45, 47-48) Officer Runner testified that he entered the apartment and cleared the bathroom. In the bathroom there was brownish powder all over and a plastic Ziploc bag that was opened that had residue within the bag which matched what was all around the bathroom. (Tr. I 51-52) (State's Exhibit 10) Officer Runner testified that he appeared to him that the individuals were attempting to get rid of the evidence. (Tr. I 55)

Sergeant Jason Suitor testified that he is a patrol officer in the Oklahoma City Police Department. (Tr. I 59-60) Sergeant Suitor executed a search warrant on March 15, 2020, at 5509 Northwest 23rd, apartment 205. (Tr. I 60-61) Sergeant Suitor said the bathroom was covered in a large amount of brown powder. Sergeant Suitor was afraid there was fentanyl inside the apartment and called the Oklahoma City Fire Department's Hazmat unit to check for fentanyl, which there was none. Sergeant Suitor observed the hazmat team collected a sample from the toilet seat of the brown powder which presumptively tested positive for heroin. (Tr. I 65, 70-73)

Detective Darrin Guthrie testified that on March 15, 2019, he received a lead about a potential drug operation after a traffic stop earlier in the day where black tar heroin was found. He and his partner then went to an apartment complex on Northwest 23rd and observed apartment 205. Detective Guthrie testified that they saw a car pull up and someone go into apartment 205 for a few seconds then came out and drive off. Detective Guthrie was in an unmarked car and followed the person then called for a marked unit to pull the person over. Black tar heroin was discovered in the car. (Tr. II 4, 7-10) Detective Guthrie said they served the search warrant on the apartment and recovered heroin, however he never entered the apartment. Detective Guthrie testified that special projects came to the scene and collected the evidence which included 159 grams of heroin in a gallon-size Ziploc bag with the incident number 19-021182. (Tr. II 11-14)

Detective Guthrie testified that Mr. Fort requested to speak with him on the scene, Detective Guthrie said he typically does not interview people in a parking lot but he did that day. (Tr. II 16-17) Detective Guthrie read Mr. Fort his Miranda rights. Mr. Fort waived his rights and told Detective Guthrie that he sold Mexican brown heroin that he got from Mexico. (Tr. II 20-21) Detective Guthrie said that he requested the heroin be analyzed by the lab, the drugs came in packaging but Detective Guthrie was not sure where the packaging came from: "projects and they – because they had to scoop it up." (Tr. II 23-24)

Matthew Scott testified that he is a forensic chemist with the Oklahoma City Police Department. Mr. Scott examined incident number 2019-21182. (Tr.

II 26-27, 29) Mr. Scott examined a black tar-like substance which he determined to be heroin with a total weight of 95.5 grams. (Tr. II 30-32)

PROPOSITION I

THE TRIAL COURT COMMITTED STRUCTURAL ERROR WHEN THE TRIAL JUDGE SEXUALLY ASSAULTED AND/OR HAD AN ILLICIT AFFAIR WITH THE PROSECUTING ATTORNEY ON THIS CASE WHICH RESULTED IN JUDICIAL BIAS.

It has recently come to light that Judge Henderson has had affairs with or has been sexually assaulting female prosecutors.¹ (Appellant's Exhibit's A-E) Oklahoma County District Attorney David Prater requested on March 31, 2021, that the Oklahoma State Bureau of Investigation (OSBI) open a full investigation into allegations that Oklahoma County District Judge Timothy Henderson had committed sexual battery on at least three (3) female attorneys. (Appellant's Exhibit A) Mr. Prater disqualified himself from prosecuting Judge Henderson after Judge Henderson's attorney told The Oklahoman that the relationships with two (2) female assistant district attorneys were consensual. (Appellant's Exhibit D)

In affidavit for search warrant, SW-2021-681, Individual 2 stated that she was assigned to Judge Henderson's courtroom in 2019 and he became a mentor to her such as critiquing how she did in the courtroom and giving her case law to study. Individual 2 stated that in January or February 2020 things changed

¹ Appellant would ask the Court to take judicial notice of Appellant Exhibit A, SW-2021-681, and Appellant Exhibit E, SW-2021-839 under Okla. Stat. tit. 12, § 2202, attached to Appellant's 3.11 motion, filed contemporaneously with this brief requesting an evidentiary hearing to further develop this issue. Attached to the 3.11 motion are multiple news articles reporting about Judge Henderson's indiscretions and two (2) affidavit for search warrants.

and Judge Henderson began to hug her and squeezed her buttocks. The touching began to progress to more hugs and touching her on her back or waist which she did not initiate or want him to do. Individual 2 said that Judge Henderson gave her his personal email address and told her to email him. (Appellant's Exhibit A)

Individual 2 said that in summer 2020 Judge Henderson grabbed her from behind and pulled her against him. Judge Henderson put his face in her hair and on her neck and said "You turn me on." (Appellant's Exhibit A) Individual 2 stated that Judge Henderson then tried to kiss her on the neck and put his hand on her breast. (Appellant's Exhibit A) Individual 2 said that the touching then went from Judge Henderson touching her breast over her clothes to skin-to-skin, grabbing her head to make her kiss him, telling her to put her tongue in his mouth, and putting his fingers inside her. (Appellant's Exhibit A) Individual 2 said that Judge Henderson communicated with her through his personal email address. Judge Henderson would tell her to come to his office, meet with him outside the courthouse and asked her for naked pictures. Judge Henderson once acknowledged that she would move her head to avoid his kisses but "It was bound to happen." (Appellant's Exhibit A)

According to affidavit for search warrant, SW-2021-839, Oklahoma County Assistant District Attorney Carson Turner is named as one of the two female prosecutors who were preyed upon by Judge Henderson. (Appellant's Exhibit E) Ms. Turner is one of the prosecuting attorney's on Mr. Fort's case. Clearly, Judge Henderson had a personal relationship with Ms. Turner and it

cannot be said that Judge Henderson did not show bias towards Ms. Turner during Mr. Fort's trial, violating Mr. Fort's due process rights under the Fifth and Fourteenth Amendments of the U.S. Constitution which resulted in structural error.

Structural error is a defect [] in the constitution of the trial mechanism, which de[fi]es analysis by 'harmless-error' standards." *Riley v. Deeds*, 56 F.3d 1117, 1120, (9th Cir. 1995) (citing *Fulminante*, 499 U.S. at 308-09, 111 S.Ct. at 1264-65). Structural error is immune to the prejudice requirement of harmless error analysis because such error is, by its nature, unquantifiable. *Sullivan v. Louisiana*, 508 U.S. 275, 282, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

In *Chapman v. California*, 386 U.S. 18, 827-828, 87 S.Ct. 824 (1967) the Court stated "there are some constitutional right so basic to a fair trial that their infraction can never be treated as harmless error...the right to an impartial judge." "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it 'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'" *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1907 (2017)(Internal citations omitted)

"The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S.Ct. 1610, 64 L.Ed2d 182 (1980) To demonstrate a violation of due process because of judicial bias, a claimant must show either

actual bias or an appearance of bias. *United States v. Nickl*, 427 F.3d 1286, 1298 (10th Cir. 2005)(Internal citations omitted) A judge must recuse “if sufficient factual grounds exist to cause a reasonable, objective person, knowing all the relevant facts, to question the judge’s impartiality.” *United States v. Pearson*, 203 F.3d 1243, 1277 (10th Cir.2000). A judge’s actual state of mind or prejudice is not at issue. *United States v. Cooley*, 1 F.3d 985, 993 (10th Cr.1993) “The standard is purely objective...the inquiry is limited to outward manifestations and reasonable inferences drawn therefrom.” *Id.* Recusal may be appropriate, however, when a judge’s decisions, opinions, or remarks stem from an extrajudicial source – a source outside judicial proceedings. *Liteky v. United States*, 510 U.S. 540, 554-555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). Recusal is necessary when a judge’s actions or comments “reveal such a high degree of favoritism or antagonism as to make fair judgment impossible” *Id.* at 555. Where there is structural error, such as judicial bias, harmless error analysis is irrelevant. *Edwards v. Balisok*, 520 U.S. 641, 647, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997); *Bracy*, 286 F.3d at 414; *Cartalino v. Washington*, 122 F.3d 8, 9-10 (7th Cir.1997).

Here, structural error has clearly occurred because Mr. Fort’s due process right to an impartial judge has been violated. Judge Henderson was clearly not an impartial and disinterested judge and could not be when he was sexually assaulting or having an affair with the prosecuting attorney on this case. Judge Henderson sexually assaulting or having an affair with a prosecutor who was practicing in his courtroom is prejudicial to Mr. Fort because Judge Henderson

was favoring Ms. Turner. Judge Henderson abused his power by sexually assaulting or being in an affair with Ms. Turner and could have been ruling in Ms. Turner's favor as an incentive to not report the sexual assaults. No reasonable person would believe after these allegations have come to light that there is not actual bias and at the very least there is definitely an appearance of bias. At the very least Judge Henderson should have recused from all cases where Carson Turner was the prosecuting attorney. Structural error has occurred in this case. Judge Henderson also has violated the Oklahoma Judicial Code of Ethics which supports structural error here.

A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding. (2) The judge knows that the judge, the judge's spouse a member of the judge's household, or a person within the third degree of relationship to any of them, or the spouse of such a person is: (b) acting as a lawyer in the proceeding.

Okla. Stat. tit. 5, § Rule 2.11. "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and avoid impropriety and the appearance of impropriety." Okla. Stat. tit. 5, § Rule 1.2. "A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so. Okla. Stat. tit. 5, § Rule 1.3.

Okla. Stat. tit. 5, § Rule 2.3 states:

- (A) A judge shall perform the duties of judicial office including administrative duties, without bias or prejudice.
- (B) A judge shall not, in the performance of judicial duties, by words

or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.²

Judge Henderson has violated the Oklahoma Judicial Code of Ethics which further supports structural error. Judge Henderson clearly had personal bias towards Assistant District Attorney Carson Turner and had a personal relationship with her. Judge Henderson sexually harassing Ms. Turner also is a violation of the Oklahoma Judicial Code of Ethics.

Appellant also respectfully submits that it is fundamentally unfair for a judge who is sexually assaulting the prosecutor in the case or having an affair with the prosecutor who is assigned to the case, to be the presiding judge on the case. No person, including the members of this Court, would want to go to trial in front of a judge who is sexually assaulting or having an affair with the prosecutor on the case then be sentenced by that judge to prison for forty-one (41) years.³ Judge Henderson's misconduct violated Mr. Fort's due process rights under the Fifth and Fourteenth Amendments of the U.S. Constitution which resulted in structural error. As such, Appellant respectfully asks this Court to reverse his sentence and remand this case back for a new trial or grant an evidentiary hearing so that this claim can be further investigated and be

² Sexual harassment includes but is not limited to sexual advances. Requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome. Okla. Stat. tit. 5, § Rule 2.3, Comment [4]

³ Judge Henderson ran this case of twenty-three (23) years to do, consecutive to CF-08-7280, CF-09-5188, and CF-15-3360. (S.Tr. 10-11)

supported with more evidence.

PROPOSITION II

THE STATE FAILED TO PROVE THE CHAIN OF CUSTODY OF THE DRUGS WHICH SHOULD HAVE RESULTED IN SUPPRESSION OF THE EVIDENCE.

At trial during Matthew Scott's testimony, defense counsel objected to State's Exhibit 13 because there had been no chain of custody laid regarding the contents of the bag. Defense counsel argued there was no testimony from officers being asked to identify the contents of State's Exhibit 13. There was no testimony about where the baggies came from in the apartment and there was only testimony about a powder-like substance in the apartment, people being covered in powder-like substance but not testimony about where the black tar came from. Detective Guthrie did not recover the drugs in the apartment and he was not there when the search at the apartment happened, and no witness testified that they recovered the black tar heroin from the apartment. Detective Guthrie was never asked to identify that what he booked in or where he got it from. There was no chain of custody linking Mr. Fort or the apartment to that evidence. (Tr. II 34-36)

The State argued that the individuals that had purchased drugs from the apartment were found with black tar heroin and there was likely two (2) substances in the apartment. The State continued that Detective Guthrie testified that he saw special projects with the bags of heroin and those bags were booked into property and that Matthew Scott received the bags from the property room. (Tr. II 35-36)

The purpose of the chain of custody rule is to guard against substitution or tampering of evidence between the time it was found and the time it is analyzed. *Wilson v. State*, 1998 OK CR 73, ¶ 51, 983 P.2d 448, 462. The burden of showing, to a reasonable certainty, that evidence has not been tampered with or altered rests upon the party offering it. *Grider v. State*, 1987 OK CR 212, ¶ 20, 743 P.2d 678; *Wilson v. State*, 1987 OK CR 86, ¶ 7, 737 P.2d 1197; *Faulkenberry v. State*, 1976 OK CR 131, ¶ 6, 551 P.2d 271. The State must be able to show that the evidence offered is in substantially the same condition upon being offered into evidence as when the crime was committed. *Williamson v. State*, 1991 OK CR 63, ¶ 46, 812 P.2d 384, 397-398. In determining whether an adequate foundation has been laid for the chain of custody of an item, the trial court should consider the nature of the article, the circumstances surrounding its preservation, and the likelihood of contamination or alteration. *Driskell v. State*, 1983 OK CR 22, ¶ 60, 659 P.2d 343, 354-55. A more exhaustive foundation is required where the evidence consists of contraband or bodily specimens. *Fixico v. State*, 1987 OK CR 64, ¶ 6, 735 P.2d 580. When such a standard is applied in Mr. Fort's case, it shows that the evidence should have been suppressed.

In *Faulkenberry v. State*, 1976 OK CR 131, ¶ 7, 551 P.2d 271, 273 the State failed to provide evidence of transporting alleged marijuana to the Oklahoma City laboratory. There was also an unexplained ten-day delay in delivering the substance to the laboratory. This Court reversed the conviction because "[t]he State has the burden of providing proof of such vital links . . . To

hold otherwise could lead to possible abuse by law enforcement officials." *Id.* This Court ordered that, if the State could not provide adequate proof of the missing links, the charge should be dismissed. *Id.* at ¶ 8.

In *Conde-Hernandez v. State*, 1977 OK CR 204, ¶¶ 2-6, 565 P.2d 705, 707, this Court reversed a conviction for delivery of illegal drugs where there was an unexplained delay of ten days in delivering the pills to the laboratory. The State failed to provide adequate proof of the chain of possession. *Id.* at ¶ 6. This Court ordered that, if the State could not provide adequate proof of the missing link, the pills and the results of chemical analysis must be excluded from evidence. *Id.* at ¶ 7.

Matthew Scott testified that the manila envelope was submitted with the case number 19-21182. Mr. Scott said the submitting were officers Reimche and Carli. (Tr. II 42) Detective Guthrie testified that special projects conducted the search of the apartment and recovered 159 grams of heroin in Ziploc bags with the incident number 19-021182 that was taken to the Oklahoma City Police Department drug lab. (Tr. II 12-14) Detective Guthrie said that he was responsible for requesting analysis and he did not request the packing be tested for fingerprints because he was not sure where the packaging came from because "they had to scoop it up. They—they shook it all out. So, no, I just requested the drug analysis." (Tr. II 23-24) Detective Guthrie said the drugs were in some baggies and those weren't submitted for fingerprint or DNA analysis. (Tr. II 24)

The State did not call Officer Reimche or Officer Carli to testify about who they received the drugs from. There was no testimony about when the drugs were booked into the Oklahoma City Police department's drug lab to be tested. The State also failed to call any witnesses to prove where the drugs came from in the apartment. The State also failed to prove who lived in that apartment. The State failed to have Detective Guthrie identify the contents of State's Exhibit 13 as the drugs he saw at the scene. The only testimony from officers was that there was a powder like substance in the apartment. There was no testimony from officers about black tar heroin other than at traffic stops earlier in the day.

Here, the State wholly failed to provide vital links in the chain of custody. Specifically in this case there is a danger of possible abuse from the police because there was no testimony about when State's Exhibit 13 was booked into the Oklahoma City Police department's drug lab so it is unknown if there was a delay. Detective Guthrie testified that the Hazmat team brought out the drugs with the incident number 19-021182. However, Detective Guthrie never testified that he took possession of those drugs and there was no testimony about how Officer Reimche and Officer Carli received those drugs to be booked into evidence. The State failed to prove by a reasonable certainty that the evidence had not been tampered with. The trial court's failure to require the State to provide chain of custody testimony further supports Appellant's Proposition I claim of judicial bias. The admission of the evidence absent the requisite proof of chain of custody violated Mr. Fort's right to a fair proceeding and requires reversal. U.S. Const. amends. V, XIV; Okla. Const. art. 2, § 7.

PROPOSITION III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO INSTRUCT THE JURY ON THE LESSER RELATED OFFENSE OF MISDEMEANOR POSSESSION IN VIOLATION OF MR. FORT'S RIGHT TO A FAIR TRIAL UNDER THE STATE AND FEDERAL CONSTITUTIONS.

The trial court has a duty to instruct on all lesser-included or lesser-related offenses which are supported by the evidence. *Childress v. State*, 2000 OK CR 10, ¶25, 1 P.3d 1006, 1011. This duty exists even when that evidence is in conflict or discredited. *Broadrick v. State*, 1985 OK CR 108, ¶ 9, 706 P.2d 534, 536 (emphasis added). By failing to instruct on this lesser included offense, the trial court committed reversible error and deprived Mr. Fort of due process, a fair trial, and a reliable sentencing determination in violation of both the United States and Oklahoma constitutions. U.S. Const. amend. V, XIV; Okla. Const. art. 2, §§ 7, 20. Okla. Stat. tit. 22, § 916 allows the jury to consider any lesser related offenses. Mr. Fort requested the lesser included charge of simple possession of a controlled dangerous substance. (Tr. II 62) Therefore, the Court should review this as an abuse of discretion. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the issue; a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

Oklahoma defendants have the right to have the jury determine what degree of crime has been committed. Okla. Stat. tit. 22, § 837. Additionally,

Okla. Stat. tit. 22, § 916 allows the jury to convict a defendant on any offenses necessarily included in the charged offense. The district court has a duty to instruct on lesser-included or lesser-related offenses which are supported by the evidence. *Glossip v. State*, 2001 OK CR 21, ¶ 28, 29 P.3d 597, 603-04. The proper test for instructions on a lesser offense is whether prima facie evidence of the lesser offense has been presented. *Id.* ¶ 29, 29 P.3d at 604. *See also, Ball v. State*, 2007 OK CR 42, ¶32, 173 P.3d 81, 90. Sufficient evidence to warrant a lesser-included offense is evidence which would allow a jury rationally to find the accused guilty of the lesser offense and acquit him of the greater.⁴ *Eizember v. State*, 2007 OK CR 29, ¶ 111, 164 P.3d 208, 236.

“In a criminal prosecution, the trial court has the duty to correctly instruct on the salient features of the law raised by the evidence without a request by the defendant.” *Atterberry v. State*, 1986 OK CR 186, ¶ 8, 731 P.2d 420, 422 (citing *Wing v. State*, 1955 OK CR 29, 280 P.2d 740, 747). The trial court failed to meet this duty. The trial court erred by not instructing the jury on the lesser included offense of misdemeanor possession.

“[A]n offense is a lesser included one only where the greater offense cannot be committed without necessarily committing the lesser.” *Shrum v. State*, 1999

⁴ The jury’s ability to consider lesser offenses is a remnant of the common law as an aid to the prosecution but can also be beneficial to the defendant. *Beck v. Alabama*, 447 U.S. 625, 633, 100 S.Ct. 2382, 2387-2388, 65 L.Ed.2d 392 (1980). The right of the defendant to have the jury consider lesser related offenses has been recognized by the United States Supreme Court for well over a century. *Stevenson v. United States*, 162 U.S. 313, 314-315, 16 S.Ct. 839, 839, 40 L.Ed. 980 (1896).

OK CR 41, ¶ 8, 991 P.2d 1032, 1034 (internal citations omitted). “Lesser related offenses are those which are inherently related to the greater offense because they fall within the same category of crime and are designed to protect the same interest, but it is theoretically possible to commit the greater offense without committing the lesser.” *Shrum*, 991 P.2d at 1036 n.3 (internal citations omitted).

Sufficient evidence was presented at trial to make a prima facie case for misdemeanor possession of a controlled dangerous substance. Okla. Stat. tit. 63, § 2-402(1) states, “It shall be unlawful for any person knowingly or intentionally to possess a controlled dangerous substance unless such substance was obtained directly, or pursuant to a valid prescription or order from a practitioner, while acting in the course of his or her professional practice, or except as otherwise authorized by this act.” Therefore, the offense of possession of a controlled dangerous substance requires proof of the following elements:

First, knowing and intentional;

Second, possession;

Third, of the controlled dangerous substance of [heroin];

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Mr. Fort admitted that he sells heroin, however he did not admit to selling the heroin found in the apartment. Admittedly, Mr. Fort was in the apartment where heroin was found and therefore constructively possessed the heroin. The trial court should have given the lesser included misdemeanor possession of a

controlled dangerous substance instruction to the jury. Without a lesser related offense option, the jury was faced with either convicting Mr. Fort of trafficking in illegal drugs which carried a minimum sentence of twenty (20) years or finding him not guilty and not holding him accountable for being in an apartment where heroin was present and admitting to selling heroin. Given that choice, they found him guilty of trafficking in illegal drugs. The realization that juries will do this is the reason why instructions on lesser offenses must be given. *See, e.g., Keeble v. United States*, 412 U.S. 206, 212-13, 93 S.Ct. 1993, 1998, 36 L.Ed.2d 844 (1973). The interests of justice demanded such an instruction in this case. Because the jury was not properly instructed on all the salient features of the law, Appellant respectfully requests that this court reverse his conviction and remand this case for a new trial.

PROPOSITION IV

TRIAL ERRORS, WHEN CONSIDERED IN A CUMULATIVE FASHION, WARRANT A NEW TRIAL.

An accused is entitled to a fair and impartial trial. *Stevens v. State*, 94 Okla. Crim 216, 222, 232 P.2d 949, 958 (1951). When a review of the entire trial record reveals numerous irregularities that tend to prejudice the rights of the accused, and where a cumulation of said irregularities deny the accused a fair trial or sentence, the case will be reversed for a new trial or the sentences modified, even though one of the errors standing alone would not justify reversal. *Skelly v. State*, 1994 OK CR 55, ¶ 32, 880 P.2d 401, 407; *Peninger v. State*, 1991

OK CR 60, ¶ 23, 811 P.2d 609, 613; *Bechtel v. State*, 1987 OK CR 126, ¶ 12, 738 P.2d 559, 561; *Chandler v. State*, 1977 OK CR 324, ¶ 13, 572 P.2d 285, 290. *See also* U.S. Const. amend. XIV; *Donnelly v. DeChristoforo*, 416 U.S. 637, 648-649, 94 S.Ct. 1868, 1874, 40 L.Ed.2d 431, 440 (1974)(Douglas, J., Dissenting); *United States v. Rivera*, 900 F.2d 1462, 1469-1470 (10th Cir.1990); Okla. Const. art. 2, § 7; *McCarty v. State*, 1988 OK CR 271, ¶ 17, 765 P.2d 1215, 1221-1222. A cumulative error analysis aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless. *Rivera*, 900 F.2d at 1470. Considerations of cumulative error override the absence of defense objections or invited error. *Faubion v. State*, 1977 OK CR 302, ¶ 8, 569 P.2d 1022, 1024.


Mr. Fort asks the Court to evaluate all the errors found by the Court for their cumulative impact on his conviction and sentence.

CONCLUSION

Based on the above and foregoing arguments and authorities, Appellant respectfully asks this Court to reverse and remand his convictions for a new trial, modify his sentence, or grant any and all other relief the Court deems necessary to meet the ends of justice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the date of filing of this instrument, a true and correct copy of the same was delivered to the Clerk of the Court of Criminal Appeals with instructions to deliver said copy to the Office of the Attorney General of the State of Oklahoma.


HALLIE ELIZABETH BOVOS