

NOT DESIGNATED FOR PUBLICATION

DIVISION II

CACR07-260

TYRONE JOHNSON

November 14, 2007

APPELLANT

V.

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT
[NO. CR2005-1899]

STATE OF ARKANSAS

HON. CHRIS PIAZZA,
CIRCUIT JUDGE

APPELLEE

AFFIRMED

Tyrone Johnson was convicted in a Pulaski County jury trial of felony possession of drug paraphernalia, and he was sentenced to twenty years' imprisonment in the Arkansas Department of Correction and fined \$10,000. On appeal, Johnson argues (1) that his conviction for felony possession of drug paraphernalia is void as a matter of law because the trier of fact found him not guilty of the underlying felony charge of possession of cocaine with intent to deliver; and (2) that the trial court erred in denying his motion to instruct the jury at sentencing only on misdemeanor possession of drug paraphernalia. We affirm.

Johnson was charged with three felonies: possession of cocaine with the intent to deliver, possession of marijuana with intent to deliver, and possession of drug paraphernalia while in the course of and furtherance of a felony drug offense. At the close of the State's case-in-chief, the trial court granted Johnson's directed verdict on the marijuana charge and reduced it to misdemeanor possession. The trial court, however, refused to reduce the

paraphernalia charge to a misdemeanor. The jury was unable to reach a verdict on the cocaine and marijuana possession charges, but convicted Johnson of felony possession of drug paraphernalia.

Johnson first argues that his conviction of felony possession of drug paraphernalia is void as a matter of law because the trier of fact found him not guilty of the underlying felony charge of possession of cocaine with intent to deliver. He asserts that this case presents a question of first impression, and he urges this court to apply the same reasoning that is used when felony murder cases are reviewed—that his possession of the paraphernalia must be found to be in furtherance of the felony cocaine possession charge. Further, Johnson contends that a conviction of felony possession of drug paraphernalia cannot stand alone, and therefore, this court should reduce his conviction to a misdemeanor and remand this case for re-sentencing. We find this argument unpersuasive.

First, in *White v. State*, 98 Ark. App. 366, ___ S.W.3d ___ (2007), a case handed down five days before Johnson filed his brief, we specifically rejected an argument that we apply felony-murder analysis to felony-drug-paraphernalia-possession cases. We stand by that precedent. Second, we disagree with Johnson’s assertion that his conviction for felony-drug-paraphernalia possession cannot stand alone, independent of a conviction for felony-drug possession. It is settled law that a defendant may not attack the inconsistency of verdicts on separate charges because the finder of fact is “free to exercise its historical power of lenity if it believes that a conviction on one count would provide sufficient punishment.” *Bridges v. State*, 327 Ark. 392, 938 S.W.2d 561 (1997) (quoting *Jordan v. State*, 323 Ark. 628, 917 S.W.2d 164 (1996)). Here the jury’s instruction

on the paraphernalia charge included the element that Johnson must be found to have possessed cocaine beyond a reasonable doubt.¹ The fact that the jury was deadlocked on the separate possession of cocaine charge is therefore of no moment.

For his second point, Johnson argues that because he could not have been convicted of felony-drug-paraphernalia possession, the trial court erred in instructing the jury on the felony sentencing range for his conviction. But, because we have affirmed his felony conviction, this argument is moot.

Affirmed.

GLOVER and MILLER, JJ., agree.

¹ The jury was instructed as follows:

Tyrone Johnson is charged with the offense of unlawfully possessing drug paraphernalia during the commission of possession of a controlled substance.

As part of this charge, the State contends that Tyrone Johnson committed possession of a controlled substance cocaine. To prove this, the State must prove beyond a reasonable doubt that Tyrone Johnson possessed a controlled substance, cocaine. The State must prove beyond a reasonable doubt that Tyrone Johnson knowingly used or possessed with the intent to use drug paraphernalia to process, prepare, or weigh cocaine in the course of and in the furtherance of possession of a controlled substance, cocaine.

And drug paraphernalia means all equipment, products, materials of any kind which are used, intended to use, or designed to use in planting, propagating, cultivating, growing, harvesting, processing, preparing, testing, analyzing, packing, repacking, storing, containing, concealing, injection, ingestion, inhaling, or otherwise introducing into the human body a controlled substance.