

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

ISAAC AVILA,) NOT FOR PUBLICATION

Appellant,)

v.)

THE STATE OF OKLAHOMA,)

Appellee.)

Case No. F-2017-1285

FILED

IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAY - 2 2019

JOHN D. HADDEN
CLERK

SUMMARY OPINION

LEWIS, PRESIDING JUDGE:

Isaac Avila, Appellant, was tried by jury and found guilty of Counts 1 through 4, kidnapping, in violation of 21 O.S.Supp.2012, § 741; Count 5, possession of a firearm during the commission of a felony, in violation of 21 O.S.Supp.2012, § 1287; and Count 6, resisting an officer, in violation of 21 O.S.2011, § 268, in the District Court of Stephens County, Case No. CF-2016-457. The jury sentenced him to five (5) years imprisonment on Count 1, fifteen (15) years imprisonment on each of Counts 2 through 4, five (5) years imprisonment on Count 5, and a \$100.00 fine on Count 6. The Honorable G. Brent Russell, Associate District Judge, pronounced judgment and ordered the sentences on Counts 1 and

5 to run concurrently to one another, but consecutively to Counts 2 through 4. Counts 2 through 4 were ordered to run consecutively to one another. Mr. Avila appeals in the following propositions of error:

1. Mr. Avila's convictions for the purported kidnapping of his own children, Counts 2, 3, and 4, must be reversed as they are contrary to the law;
2. Mr. Avila's convictions for the purported kidnapping of his own children, Counts 2, 3, and 4, must be reversed as they are contrary to the evidence;
3. The evidence presented by the State was not sufficient to sustain the verdict of the jury with regard to the charge of kidnapping in Count 1 of the Information;
4. The State's evidence was insufficient to convict Appellant of possession of firearm during commission of a felony;
5. Error occurred when the jury was not instructed with respect to the affirmative defense of consent;
6. Ineffective assistance of counsel denied Mr. Avila due process and his right to a fundamentally fair trial;
7. Appellant's sentence is excessive and should be modified.

Appellant argues in Proposition One that his convictions for kidnapping his own children (Counts 2, 3, and 4) infringe his constitutionally protected rights as a custodial parent and must be reversed. He argues in Proposition Two that these convictions must

be reversed for insufficient evidence. In Proposition Three, he argues that the evidence is also insufficient to support his conviction in Count 1 for kidnapping his estranged wife. In Proposition Four, he challenges the sufficiency of the evidence to convict him of possessing a firearm in the commission of kidnapping.

As pertinent here, a person commits the crime of kidnapping when he or she, without lawful authority, seizes or confines another with intent to cause such person to be confined against the will of the other person. 21 O.S.2011, § 741. In Counts 1 through 4, the State charged, and the jury found Appellant guilty of, “forcibly seizing” and “confining” the victims “without lawful authority and with the intent to cause [them] to be confined/imprisoned against [their] will.”

We find from the evidence that Appellant’s actions exceeded any constitutionally protected authority to restrain his children that he possessed as a custodial parent. *In re S.B.C., et al*, 2002 OK 83, 64 P.3d 1080 (2002) (recognizing constitutionally protected liberty interest of a parent in the management of children). The

convictions in Counts 2-4 do not infringe Appellant's due process rights.

Reviewing his claims in Propositions Two, Three, and Four, we take the evidence in the light most favorable to the State to determine whether any rational trier of fact could find the elements of kidnapping, and possessing a firearm in the commission of kidnapping, beyond a reasonable doubt. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204. The evidence is sufficient. Propositions Two, Three, and Four are denied.

In Proposition Five Appellant argues that the trial court's failure to instruct the jury on the defense of consent requires reversal. In Proposition Six, he argues that counsel's failure to request instruction on the defense of consent denied him the effective assistance of counsel. Counsel clearly failed to object to the court's instructions or request instructions on this defense at trial, waiving all but plain error.

Appellant must therefore show that a plain or obvious error affected the outcome of the proceeding. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. The Court will correct plain error only where it seriously affects the fairness, integrity, or public reputation

of the proceeding. *Simpson v. State*, 1994 OK CR 40, ¶ 30, 876 P.2d 690, 701. We review his related claim of ineffective counsel 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, 104 S.Ct. at 2064.

We find the trial court's instructions were not plainly or obviously in error, and any error in failing to further instruct on consent did not seriously affect the fairness, integrity, or public reputation of the proceedings. Applying the *Strickland* standard to Appellant's related Sixth Amendment claim, Appellant cannot show either unreasonably deficient performance by counsel or prejudice to his defense from the failure to request these instructions. Propositions Five and Six are denied.

Appellant argues in Proposition Seven that his sentences are excessive. This Court will not disturb any 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. Appellant's sentences

are supported by the violent and dangerous nature of his actions against vulnerable family members. No relief is warranted.

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 STEPHENS COUNTY HONORABLE G. BRENT RUSSELL, ASSOCIATE 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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