

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

KENNETH OLIVER ROSS,

Appellant,

vs.

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

No. F-2018-678

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

NOV 21 2019

**JOHN D. HADDEN
CLERK**

S U M M A R Y O P I N I O N

KUEHN, VICE PRESIDING JUDGE:

Appellant, Kenneth Oliver Ross, was convicted by a jury in Tulsa County District Court, Case No. CF-2017-1413, of two counts of Lewd Molestation of a Minor (21 O.S.2011, §1123) (Counts 1 and 3); one count of Assault and Battery (21 O.S.2011, § 645) (Count 4); and Human Trafficking of a Minor for Commercial Sex (21 O.S.Supp.2015, § 748(A)(6)) (Count 6). On June 25, 2018, the Honorable William D. LaFortune, District Judge, sentenced him in accordance with the jury's recommendation as follows: Count 1, fourteen years imprisonment and a \$10,000 fine; Count 3, twenty years imprisonment and a \$10,000 fine; Count 4, ninety days in jail and a \$1000 fine; and Count 6, fifty years imprisonment and a \$50,000 fine. The sentences are to be served

consecutively. Appellant must serve 85% of the sentences on Counts 1, 3, and 6 before parole consideration.

Appellant raises twelve propositions of error in support of his appeal:

PROPOSITION I. MR. ROSS SUFFERED DOUBLE PUNISHMENT BY HIS CONVICTIONS OF TWO COUNTS OF LEWD MOLESTATION.

PROPOSITION II. MR. ROSS WAS IMPROPERLY CHARGED AND CONVICTED OF CHILD HUMAN TRAFFICKING IN VIOLATION OF OKLAHOMA STATUTE TITLE 21, SECTION 11, WHICH MANDATES THAT A SPECIFIC STATUTE TAKES PRECEDENCE OVER A MORE GENERAL STATUTE.

PROPOSITION III. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. ROSS OF CHILD HUMAN TRAFFICKING.

PROPOSITION IV. THE UNIFORM JURY INSTRUCTIONS GIVEN TO THE JURY DID NOT FULLY AND SUFFICIENTLY EXPLAIN THE LAW, AND THE JURY WAS NOT PROPERLY INSTRUCTED ON THE COUNT OF CHILD HUMAN TRAFFICKING.

PROPOSITION V. CONVICTION FOR CHILD HUMAN TRAFFICKING VIOLATED THE CONSTITUTIONAL PROHIBITION AGAINST EX POST FACTO PROSECUTION, SINCE MR. ROSS WAS DEPRIVED OF HIS RIGHT TO PRESENT A DEFENSE UNDER THE STATUTE IN EFFECT AT THE TIME OF THE COMMISSION OF THE ACT.

PROPOSITION VI. THE COURT ABUSED ITS DISCRETION WHEN IT GAVE A NON-UNIFORM JURY INSTRUCTION THAT DID NOT ACCURATELY STATE THE LAW.

PROPOSITION VII. THE JURY SHOULD HAVE BEEN INSTRUCTED OF LESSER INCLUDED OFFENSES OF CHILD HUMAN TRAFFICKING.

PROPOSITION VIII. THE JURY SHOULD HAVE BEEN INSTRUCTED ON THE LESSER OFFENSES OF LEWD MOLESTATION, AS REQUESTED BY DEFENSE COUNSEL.

PROPOSITION IX. MR. ROSS DID NOT HAVE NOTICE THAT HE WOULD HAVE TO DEFEND AGAINST CHARGES UNDER OKLAHOMA STATUTE TITLE 21, SECTION 748.

PROPOSITION X. OKLAHOMA STATUTE TITLE 21, SECTION 748 IS UNCONSTITUTIONAL, AS WRITTEN AND AS APPLIED TO MR. ROSS.

PROPOSITION XI. THE SENTENCE IMPOSED BY THE TRIAL COURT FOR CHILD HUMAN TRAFFICKING WAS SHOCKINGLY EXCESSIVE AND SHOULD BE FAVORABLY MODIFIED BY THIS COURT.

PROPOSITION XII. APPELLANT WAS PREJUDICED BY CUMULATIVE ERROR.

After thorough consideration of these propositions, the briefs of the parties, and the record on appeal, we affirm. Appellant was convicted of sexually assaulting a 14-year-old girl, beating her, and attempting to enlist her into prostitution. At trial, he admitted having sexual relations with the girl but claimed he thought she was an adult. He denied beating her or trying to get her to work as a prostitute.

In Proposition I, Appellant claims his two convictions for Lewd Molestation constitute double punishment for the same offense, which is prohibited by 21 O.S.2011, § 11. He raised this complaint below, preserving it for appellate review. The two Lewd Molestation charges describe discrete acts of sexual abuse. The fact that they occurred in rapid succession does not mean Appellant cannot be punished for each one separately. *Riley v. State*, 1997 OK CR 51, ¶ 13, 947 P.2d 530, 533. Proposition I is denied.

In Proposition II, Appellant claims the conduct alleged in the Human Trafficking charge (Count 6) should have been prosecuted under 21 O.S. § 1087, Procuring a Minor for Prostitution, because that crime is more specifically tailored to the facts in this case. He cites 21 O.S.2011, § 11 in support of this argument. This claim was not made below, so it is reviewed for plain error. Appellant must demonstrate a

plain and obvious deviation from a legal rule which prejudiced him; if he does, we may correct the error if it seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

Appellant's argument is undermined by the plain language of § 11, which states that "an act or omission which is made punishable in different ways by different provisions of this title may be punished under any of such provisions [with exceptions not applicable here]." Both Human Trafficking, and Procuring a Minor for Prostitution, are found in Title 21 of the Oklahoma Statutes. The prosecutor had discretion in which crime to charge. *State v. Haworth*, 2012 OK CR 12, ¶ 13, 283 P.3d 311, 316. Proposition II is denied.

In Propositions III and IV, Appellant takes issue with the legislative description of Human Trafficking as "modern-day slavery." 21 O.S.Supp.2015, § 748(A)(4).¹ In Proposition IV, he claims the trial

¹

"Human trafficking" means modern-day slavery that includes, but is not limited to, extreme exploitation and the denial of freedom or liberty of an individual for purposes of deriving benefit from that individual's commercial sex act or labor.

21 O.S.Supp.2015, § 748(A)(4).

court should have instructed the jury that before it could convict him of Human Trafficking, it had to find his conduct amounted to “modern-day slavery.” In Proposition III, he claims his interaction with the victim was an isolated event, and that the crime of Human Trafficking is aimed at something more extensive and organized. We disagree.

The Legislature has described certain conduct punishable under the name of “human trafficking” – specifically, human trafficking for labor, human trafficking for commercial sex, and human trafficking of a minor for commercial sex. It has also described human trafficking as a sort of “modern-day slavery.” 21 O.S.Supp.2015, § 748(A)(4)–(6). However, the latter description plays no part in deciding whether certain conduct actually constitutes the crime of Human Trafficking, whose variants are explicitly defined. See *e.g.* 21 O.S.Supp.2015, § 748(A)(6) (“Human trafficking for commercial sex’ means: . . .”). The term “modern-day slavery” in the statute does not add to, or alter, the elements of the *specific* kind of human trafficking Appellant was charged with: human trafficking for commercial sex. OUJI-CR 4-113C. The trial court did not plainly err by failing to craft a non-OUJI instruction on a non-element. Furthermore, we find no textual support for excepting single incidents from the reach of the Human Trafficking statute. Only

one victim, and only one act, are necessary to complete the crime. *Id.* Propositions III and IV are denied.

Appellant next complains because the trial court instructed the jury that ignorance of the victim's age was not a defense to Human Trafficking of a Minor for Commercial Sex. In Proposition VI, he faults the trial court for amending the Uniform Jury Instructions to include this language. In Proposition V, he claims this instruction violated his constitutional protection from *ex post facto* laws. See U.S. Const. art. I, § 10; Okla. Const. art. II, § 15. The latter claim is premised on the fact that the language added by the trial court resembles text added by the Legislature to the Human Trafficking statute in late 2017, after the conduct at issue here was committed.²

A law violates the constitutional bans on *ex post facto* legislation only when it (1) criminalizes an act, after the act was committed; (2) increases the severity of a crime after it was committed; (3) increases the punishment for a crime after it was committed; or (4) alters the rules of evidence, allowing conviction on less or different testimony than the law

² The added statutory text reads: "Lack of knowledge of the age of the victim shall not constitute a defense to the activity prohibited by this section with respect to human trafficking of a minor." 21 O.S.Supp.2017, § 748(F).

required at the time the act was committed. *Carmell v. Texas*, 529 U.S. 513, 522–25, 120 S.Ct. 1620, 1627–29, 146 L.Ed.2d 577 (2000); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648 (1798). The 2017 amendment to § 748 did none of these things. While Appellant claimed he thought the victim was an adult, ignorance of the victim’s age has *never* been a defense to Human Trafficking of a Minor. There is no *ex post facto* problem here, and the trial court’s amendment to the jury instructions was proper as an accurate statement of the law (even if it was not expressly stated as such before 2017). *Littlejohn v. State*, 2008 OK CR 12, ¶¶ 12-13, 181 P.3d 736, 740-41. Propositions V and VI are denied.

In Proposition VII, Appellant claims the evidence presented at trial to support the Human Trafficking charge also supported a conviction on the lesser offense of Procuring a Minor for Prostitution (21 O.S.2011, § 1087), and that his jury should have been so instructed. Appellant never requested instructions on this alternative, so our review is only for plain error. When lesser-offense arguments are presented for the first time on appeal, this Court considers (1) whether the evidence reasonably supports the lesser option, and (2) whether any rational juror could have rejected evidence distinguishing the crime the defendant was convicted

of from the lesser alternative. *McHam v. State*, 2005 OK CR 28, ¶ 21, 126 P.3d 662, 670. Assuming for the sake of argument that the evidence could have reasonably supported a conviction for Procuring a Minor for Prostitution, we find no reasonable probability that, faced with both options, the jury would have convicted Appellant of the lesser. The maximum sentence for Procuring a Minor for Prostitution is ten years. The minimum sentence for Human Trafficking of a Minor is fifteen years. The jury felt that Appellant's conduct with regard to this charge warranted fifty years imprisonment – over three times the minimum. 21 O.S.Supp.2015, § 748(C); 21 O.S.2011, § 1087. Such a punishment would not have been available to the jury with the lesser option. The trial court did not plainly err in failing to give jurors the lesser option, and Proposition VII is denied.

In Proposition VIII, Appellant claims the trial court erred in refusing his requested instructions on two lesser options to Lewd Molestation (Count 3): Contributing to the Delinquency of a Minor (21 O.S.2011, § 856) and Assault with Intent to Commit a Felony (21 O.S.2011, § 681). We disagree. The State's evidence, if believed, showed that Appellant did more than encourage the victim to be a "delinquent" or "runaway" child; he told her to follow directions regarding selling her body, or risk being

beaten. The evidence also showed that Appellant did not just attempt to sexually assault the victim, but that he actually did so. No rational juror could have found Appellant guilty of either lesser alternative on these facts. *McHam*, 2005 OK CR 28, ¶ 21, 126 P.3d at 670. The trial court did not abuse its discretion in rejecting these instructions. Proposition VIII is denied.

In Proposition IX, Appellant notes that the Amended Information contained an incorrect statutory reference for the Human Trafficking charge. It does, but the error was noticed during trial, and defense counsel had no objection to correcting the scrivener's error. We find no evidence that Appellant was prejudiced in any way. *Day v. State*, 1989 OK CR 83, ¶ 13, 784 P.2d 79, 83. Proposition IX is denied.

In Proposition X, Appellant claims the Human Trafficking statute is unconstitutionally vague. He claims the phrase, "modern-day slavery" as used in the statute is so vague that it fails to put citizens on notice of what conduct is prohibited. The statute's vagueness, he asserts, is illustrated by the fact that it appears to punish conduct already covered by other criminal laws.

When a law is challenged on the grounds that it violates the Fifth Amendment right to fair notice of what is criminal, the traditional rule is

that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it might conceivably be applied unconstitutionally to others in other situations. *Wilkins v. State*, 1999 OK CR 27, ¶ 6, 985 P.2d 184, 185; *New York v. Ferber*, 458 U.S. 747, 767, 102 S.Ct. 3348, 3360, 73 L.Ed.2d 1113 (1982). As discussed in Proposition IV, the term “modern-day slavery” plays no part in the actual legislative definitions of the ways in which Human Trafficking can be committed. And the fact that conduct punished as Human Trafficking may also be prosecuted under other laws does not render the statute unconstitutionally vague. See discussion of Proposition II. We presume that a statute is constitutional. *State v. Howerton*, 2002 OK CR 17, ¶ 18, 46 P.3d 154, 158. Appellant has not demonstrated otherwise. Proposition X is denied.

In Proposition XI, Appellant complains that his 50-year sentence for Human Trafficking is shockingly harsh. The State’s evidence – which the jury chose to believe – showed that Appellant forced a 14-year-old, mentally impaired girl to submit to sexual acts; that he beat her; and that he tried to force her into a life of prostitution. On these facts, the recommended sentence does not shock the conscience. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149. Proposition XI is denied.

In Proposition XII, Appellant asks this Court to grant relief based on the accumulation of errors previously described. No error was identified in the preceding claims, so there can be no relief for cumulative error. *Engles v. State*, 2015 OK CR 17, ¶ 13, 366 P.3d 311, 315. Proposition XII is therefore denied.

DECISION

The Judgment and Sentence of the District Court of Tulsa County 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 TULSA COUNTY
THE HONORABLE WILLIAM D. LAFORTUNE, DISTRICT JUDGE

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OPINION BY KUEHN, V.P.J.

LEWIS, P.J.: CONCUR
LUMPKIN, J.: CONCUR IN RESULTS
HUDSON, J.: CONCUR
ROWLAND, J.: CONCUR