

FILED
 IN COURT OF CRIMINAL APPEALS
 STATE OF OKLAHOMA
 FEB 27 2002
 JUDITH PATTERSON
 CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

HAROLD EDWARD McHAM,)	NOT FOR PUBLICATION
)	
Appellant,)	
v.)	Case No. F 2001-46
)	
THE STATE OF OKLAHOMA,)	
)	
Appellee.)	

SUMMARY OPINION

JOHNSON, VICE-PRESIDING JUDGE:

Harold Edward McHam, Appellant, was convicted in Choctaw County District Court, Case No. CF 99-139, of Kidnapping (Count 2), in violation of 21 O.S.Supp.1999, § 741(1) and Indecent Proposal (Count 5), in violation of 21 O.S.Supp.1999, § 1123(A)(1).¹ Jury trial was held October 10, 2000 through October 12, 2000, before the Honorable Willard Driesel, District Judge. The jury set punishment at one (1) year imprisonment on each count. At sentencing, Judge Driesel ordered the sentences to be served consecutively and ordered Appellant to pay One Thousand Dollars (\$1,000.00) in incarceration fees. From the Judgment and Sentence imposed, Appellant filed this appeal.

Appellant raises three propositions of error:

1. The imposition of incarceration fees pursuant to Okla. Stat. Tit. 22, § 979(A), violated Mr. McHam's Fourteenth Amendment rights as neither the statute nor the Rules of this Court provide for any

¹ Appellant was charged three counts of Kidnapping, Lewd Molestation and Indecent Proposal. (O.R. 1-5) At trial, Judge Driesel sustained Appellant's demurrer to Counts 1 and 3 and directed a verdict of acquittal on those Counts. (Tr. 430-436). The jury returned a not guilty verdict on Lewd Molestation (Count 4). (Tr. 618-620)

mechanism wherein the amount of incarceration fees assessed can be determined to be the "actual costs of incarceration." Furthermore, the fees were not imposed in accordance with the statutory requirements. Accordingly, the case must be remanded to the District Court wherein the incarceration fees assessed against Mr. McHam can be adequately determined or the incarceration fees dismissed;

2. The evidence presented at trial was insufficient to support the verdicts that Mr. McHam was guilty of kidnapping and indecent proposals; and,
3. Mr. McHam's Fourteenth Amendment due process rights were violated by the imposition of an excessive sentence.

After thorough consideration of the propositions raised and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we have determined that some relief is warranted for the reasons set forth below.

At sentencing, the trial court ordered Appellant to "reimburse the County for 50 days of your stay at the previously determine [sic] rate of \$20.00 per day for an assessment of \$1,000.00 under 22 O.S., Section 979 (A)." However, the record does not demonstrate the trial court considered whether the imposition of incarceration costs would pose a manifest hardship to Appellant or to his immediate family. It also does not show how the trial court determined the "actual costs" of incarceration. The trial court did not comply with the mandates of 22 O.S.1991, § 979a(A) before assessing incarceration fees. Accordingly, the assessment of incarceration fees should be and hereby is **VACATED** and this matter is hereby **REMANDED** to the district court for an evidentiary hearing to follow the proper procedure for calculating such incarceration costs, in accordance

with this Court's recent opinion in *Hubbard v. State*, 2002 OK CR 8, --- P.3d ----, and to determine whether the imposition of such costs would impose a manifest hardship on Appellant.

In Proposition Two, Appellant contends the evidence was insufficient to sustain his conviction for Kidnapping (Count 2), and we agree. The intent to confine secretly is an essential element of a kidnapping charge brought under 21 O.S.1991, § 741(1). *Vandiver v. State*, 97 Okl.Cr. 217, 261 P.2d 617, 624, *overruled on other grounds in Parker v. State*, 1996 OK CR 19, 917 P.2d 980. Reviewing the evidence in a light most favorable to the State, we cannot say the State proved this essential element of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Accordingly, Appellant's conviction for Kidnapping (Count 2) is hereby **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS**.

We find the evidence sufficient to sustain the conviction for Indecent Proposal (Count 5). See *Roldan v. State*, 1988 OK CR 219, ¶¶ 7-8, 762 P.2d 285, 286-287.

Proposition Three is rendered moot by our decision to reverse Count 2 and therefore need not be addressed.

DECISION

The Judgment and Sentence imposed on Count 5, Indecent Proposal, is **AFFIRMED**. The Judgment and Sentence for Kidnapping, Count 2, is **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS**. The order imposing incarcerations fees is hereby **VACATED**, and the matter **REMANDED** for an evidentiary hearing consistent with this Opinion.

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OPINION BY: JOHNSON, V.P.J.

LUMPKIN, P.J: JOINS IN LILE'S CONCURS IN PART/DISSENTS IN PART
CHAPEL, J.: CONCURS
STRUBHAR, J.: CONCURS
LILE, J.: CONCURS IN PART/DISSENTS IN PART

RE

**HAROLD EDWARD McHAM vs. STATE OF OKLAHOMA
CASE NO. F-2001-46 (Johnson, V.P.J.; Sum. Opn.; Circ'd. 10/1/01)**

LILE, JUDGE: CONCURS IN PART/DISSENTS IN PART

I agree with the Court's holding in all regards except as to the Judgment and Sentence for Kidnapping. I would sustain that conviction. Appellant took the girls into his house, against their expressed refusal to enter. This evidence, if accepted by the jury, is sufficient evidence of secret confinement.