

SEP 30 2002

MICHAEL S. RICHIE
CLERK

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

ERIC ANTHONY RIVERA,)
)
Appellant,)
)
-vs-)
)
STATE OF OKLAHOMA,)
)
Appellee.)

NOT FOR PUBLICATION

No. F-2001-444

SUMMARY OPINION

STRUBHAR, JUDGE:

Appellant, Eric Anthony Rivera, was tried by a jury in the District Court of Oklahoma County and convicted of Kidnapping (Count I) and Domestic Abuse (Count II) in case No. CF-2000-2958. The trial was held before the Honorable Virgil C. Black. The jury assessed punishment at ten years imprisonment on Count I and one year in the county jail on Count II. The trial court sentenced Appellant accordingly ordering the sentences run concurrently.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we reverse Count I with instructions to dismiss. In reaching our decision, we considered the following propositions of error and determined this result to be required under the law and the evidence:

- I. The State's evidence was insufficient to support Appellant's conviction for Kidnapping.

- II. Instructional error denied the jury proper guidance for the required elements and the theory of defense.
- III. The trial court deprived Appellant of a fair trial by allowing the prosecutor to conduct improper cross examination.
- IV. Conviction of both Kidnapping and simultaneous Domestic Abuse, Assault and Battery violated the constitutional and statutory prohibition against double punishment.
- V. The cumulative effect of all the errors addressed above deprived Appellant of a fair trial.

We find merit in Appellant's first proposition of error in which he asserts that the evidence was insufficient to support his conviction for Kidnapping. We find that the evidence supported a finding that Appellant, at least part of the time, intended to confine Treat. However, when all of the facts and circumstances are viewed in aggregate, the evidence presented at trial does not support the finding, beyond a reasonable doubt, that Appellant intended to confine her secretly, as is required by 21 O.S.1991, § 741. *Spuehler v. State*, 709 P.2d 202, 203-04 (Okl.Cr.1985). Accordingly, Appellant's conviction for Kidnapping is reversed with instructions to dismiss.

Having found that relief must be granted on error raised in Proposition I, we need not address Appellant's argument in any of the other propositions. Further, having found that none of the issues raised affect Appellant's

conviction on Count II, Domestic Abuse, Appellant's conviction for that crime is affirmed.

DECISION

The Judgment and Sentence of the trial court on Count I, Kidnapping, is **REVERSED** with instructions to **DISMISS**. Appellant's Judgment and Sentence on Count II, Domestic Abuse, is **AFFIRMED**.

APPEARANCES AT TRIAL

RICK E. ROMANO
3801 N.W. 63RD, BLDG 4, STE. 200
OKLAHOMA CITY, OKLAHOMA
73116
ATTORNEY FOR APPELLANT

STEVE DEUTSCH
DEENA TYLER
320 ROBERT S. KERR
OKLAHOMA CITY, OKLAHOMA
73102
ATTORNEYS FOR THE STATE

OPINION BY: STRUBHAR, J.

LUMPKIN, P.J.: CONCUR IN PART/DISSENT IN PART
JOHNSON, V.P.J.: CONCUR
CHAPEL, J.: CONCUR
LILE, J.: CONCUR IN PART/DISSENT IN PART

APPEARANCES ON APPEAL

KIMBERLY D. HEINZE
OKLAHOMA INDIGENT DEFENSE
SYSTEM
1623 CROSS CENTER DRIVE
NORMAN, OKLAHOMA 73019
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF
OKLAHOMA
KEELEY L. HARRIS
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OKLAHOMA
73105
ATTORNEYS FOR APPELLEE

LUMPKIN, PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I agree with Judge Lile the conviction for Kidnapping in Count I should be affirmed. The issue on appeal regarding sufficiency of evidence is a fact question for the judge of the facts to determine. In this case, it was the jury. There is evidence in this record to support the jury's verdict and we should affirm it, not second-guess it. While Proposition 3 has some merit, I find any error harmless beyond a reasonable doubt. The Appellant was convicted after one prior felony conviction and received the minimum sentence. There is no prejudice shown by this record. I would affirm the judgments and sentences in Count I and Count II.

LILE, JUDGE: CONCURS IN PART/DISSENTS IN PART

I concur with affirmation of Count II. I would additionally affirm Count I, because competent evidence was presented to the jury establishing each element of kidnapping. The victim was forcibly seized, secretly confined for hours and raped. Under the law and the facts of this case, Count I should be affirmed.