

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

JOE NATHAN STARGELL, )  
 )  
 Appellant, )  
 )  
 -vs- )  
 )  
 STATE OF OKLAHOMA, )  
 )  
 Appellee. )

NOT FOR PUBLICATION  
No. F-2001-759

FILED IN COURT OF CRIMINAL APPEALS STATE OF OKLAHOMA  MAY 16 2002  JAMES W. PATTERSON CLERK
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**SUMMARY OPINION**

**STRUBHAR, J.:**

Joe Nathan Stargell, Appellant, was tried by jury and convicted of one count of Injury to a Minor Child in the District Court of Pottawatomie County, Case No. CF-00-493, District Judge Glenn Dale Carter presiding. The trial court followed the jury's recommendation and sentenced Appellant to eight years imprisonment plus costs and fees. From this judgment and sentence, Appellant appeals.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm the judgment but remand the matter for the reasons discussed below. We have reviewed the following propositions of error:

- I. The trial court erred in failing to give the requested instruction on the lesser included offense of assault and battery, domestic abuse;
- II. The trial court failed to instruct the jury on the fundamental issue in this case, therefore the conviction should be reversed;

- III. The failure to request an instruction on a parent's right to spank a child constituted ineffective assistance of counsel;
- IV. Prosecutorial misconduct during closing arguments deprived Mr. Stargell of a fair trial;
- V. Mr. Stargell received an excessive sentence;
- VI. The procedure used to impose incarceration fees in this case violated the statutory provision for imposing such fees, as well as the constitutionally protected right to due process;
- VII. The statute under which Mr. Stargell was convicted is unconstitutionally vague as applied to him; and
- VIII. The evidence is insufficient to prove beyond a reasonable doubt that Mr. Stargell "injured" his daughter.

As to Proposition I, assuming arguendo Appellant is correct that the difference between domestic abuse and child abuse is the existence of injury and that domestic abuse is a lesser offense, we find the evidence did not warrant a domestic abuse instruction as the existence of injury was not in dispute. Accordingly, we find no plain error. *Pickens v. State*, 19 P.3d 866, 878 (Okl.Cr.2001). As to Proposition II, we find the instructions as a whole fairly and accurately stated the applicable law. *Omalza v. State*, 911 P.2d 286, 303 (Okl.Cr.1995). Consequently, we find that counsel was not ineffective in failing to request the complained-of instruction as urged in Proposition III. *Williams v. State*, 22 P.3d 702, 730 (Okl.Cr.2001), *cert. denied*, \_\_\_U.S.\_\_\_, 122 S.Ct. 836, 151 L.Ed.2d 716 (2002). As to Proposition IV, we find the prosecutor did err in making statements appealing to the jury's sympathy for the victim. However, we cannot find the improper remarks denied Appellant a

fair trial. *Spears v. State*, 900 P.2d 431, 445 (Okl.Cr.) *cert. denied*, 516 U.S. 1031, 116 S.Ct. 678, 133 L.Ed.2d 527 (1995). We also find Appellant's eight year sentence is well within the statutory limit and is not shockingly excessive in this case. *Rea v. State*, 34 P.3d 148, 149 (Okl.Cr.2001). As to Proposition VII, we find the child abuse statute is constitutional. When 21 O.S.1991, § 844 is considered with 10 O.S.Supp.1999, § 7115, it is clear that a parent cannot wilfully inflict bodily injury under the guise of spanking without threat of criminal sanctions. Based on this record we find persons of ordinary intelligence would know that whipping a child with an extension cord bruising the child's back, neck, arms and legs is prohibited by § 7115. As to his final proposition, we find the evidence was sufficient to prove injury beyond a reasonable doubt. *Spuehler v. State*, 709 P.2d 202, 203-04 (Okl.Cr.1985).

As to Proposition VI, Appellant complains the trial court attempted to impose incarceration fees through the Sheriff's Fees portion of his Judgment & Sentence without a request from the district attorney and a hearing in violation of 22 O.S.Supp.1999, § 979a. The Judgment and Sentence provides that Appellant pay court costs, a \$50.00 Victim's Compensation Assessment and Sheriff's Fees totaling \$2,320.00 plus a continuing Sheriff's Fees at the rate of \$30.00 per day, mileage, transport fee and medical expenses.

"A district court has jurisdiction to assess certain costs of prosecution on a convicted defendant. 28 O.S.1991, § 101." *Hubbard v. State*, 2002 OK CR 8, \_\_\_P.3d\_\_\_. The costs outlined in 28 O.S.1991, § 101 are: court clerk's costs;

Sheriff's fees; fees and mileage of witnesses; and cost deposits in the appellate court. Section 153 sets forth the costs in criminal cases and provides a \$30.00 Sheriff's fee for the serving or attempts to serve each writ, warrant, order, process, command, or notice or pursuing any fugitive from justice. Title 22 O.S.Supp.1999, § 979a (A) extends the costs that may be recouped to include the costs of detention in a city or county jail. *Hubbard*, 2002 OK CR 8, ¶ 6. Costs of incarceration include booking, receiving and processing out, housing, food, clothing, medical care, dental care, and psychiatric services. 22 O.S.Supp.1999, § 979a (A). The costs that make up the \$2,320.00 Sheriff's fee assessed in this case is unknown from this record. The continuing Sheriff's fee includes items included in § 979a, i.e. jail costs. This record does not show the district attorney requested incarceration costs as § 979a mandates. Further, there was no finding by the trial court that the imposition of jail costs would not create a "manifest hardship" upon the defendant, or whether the defendant's property is needed for the maintenance and support of immediate family. Based on *Hubbard*, we find the Sheriff's fee should be vacated and the matter remanded to the district court for an evidentiary hearing, where the Sheriff's fee can be calculated in accordance with the applicable statute. Jail costs may be requested at that time and calculated as prescribed in *Hubbard*, 2002 OK CR 8, ¶ 10.

**DECISION**

The Judgment of the trial court is **AFFIRMED**. The Sheriff's Fees are **VACATED** and the matter is remanded for an evidentiary hearing, where the Sheriff's Fees can be calculated in accordance with the applicable statute.

**APPEARANCES AT TRIAL**

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**OPINION BY: STRUBHAR, J.**

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

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**CHAPEL, JUDGE, CONCURS IN PART/DISSENTS IN PART:**

I concur in affirming the conviction in this case. I dissent, however, to affirming the sentence. I would modify the sentence to three years.