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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

SHILOW LYNN DUMAS,	)	
	)	**NOT FOR PUBLICATION**
Appellant,	)	
	)	**Case No. F-2019-950**
v.	)	
	)	**FILED**
STATE OF OKLAHOMA,	)	IN COURT OF CRIMINAL APPEALS
	)	STATE OF OKLAHOMA
Appellee.	)	OCT 21 2021
	)	JOHN D. HADDEN
		CLERK

SUMMARY OPINION

HUDSON, VICE PRESIDING JUDGE:

Appellant, Shilow Lynn Dumas, was tried by jury in Nowata County District Court, Case No. CF-2018-116, and convicted of Child Abuse by Injury in violation of 21 O.S.Supp.2014, § 843.5(A). The jury recommended a sentence of five years imprisonment. The Honorable Linda S. Thomas, District Judge, presided at trial. Judge Thomas sentenced Dumas in accordance with the jury's verdict and also imposed a $1,000.00 fine. Dumas must serve 85% of his sentence before becoming eligible for parole. 21 O.S.Supp.2015, § 13.1(14).

Dumas now appeals and raises the following propositions of error before this Court:

I. THE COURT'S INSTRUCTIONS FAILING TO INSTRUCT APPELLANT'S JURY THAT USING REASONABLE AND ORDINARY FORCE AS DISCIPLINE IS NOT CHILD ABUSE, AND IMPROPERLY ALLOWING CONVICTION WITHOUT "ACTUAL PHYSICAL HARM," DENIED HIS SIXTH AMENDMENT RIGHT TO A FAIR TRIAL;

II. THE TRIAL COURT'S IMPOSITION OF A MONETARY FINE INCONSISTENT WITH THE JURY VERDICT WAS UNAUTHORIZED BY LAW;

III. THE CONVICTION MUST BE REVERSED WITH INSTRUCTIONS TO DISMISS, BECAUSE THE STATE FAILED TO ESTABLISH, BEYOND A REASONABLE DOUBT, APPELLANT'S DISCIPLINE USING UNREASONABLE FORCE PHYSICALLY INJURED [THE VICTIM];

IV. THE DENIAL OF APPELLANT'S CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL REQUIRES REVERSAL; and

V. CUMULATIVE ERRORS DEPRIVED APPELLANT OF A FAIR TRIAL AND A RELIABLE VERDICT AND SENTENCE.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we **AFFIRM** the Judgment and Sentence of the district

court except the $1,000.00 fine imposed which is **STRICKEN** as discussed *infra.*

Proposition I: Appellant complains instructional omissions and errors denied him of his Sixth Amendment right to a fundamentally fair trial. Relief on a claim of instructional error will be denied "when the jury instructions, as a whole, accurately state the applicable law." *Mitchell v. State*, 2018 OK CR 24, ¶ 22, 424 P.3d 677, 684. *See also Sadler v. State*, 1993 OK CR 2, ¶ 49, 846 P.2d 377, 387. Our review of Appellant's claims is limited, however, because he did not preserve his instructional challenges below. Appellant failed to object to the instructions as given and thus waived all but plain error review of these claims. *Splawn v. State*, 2020 OK CR 20, ¶ 5, 477 P.3d 394, 397.

To be entitled to relief under the plain error doctrine, Appellant must demonstrate "1) the existence of an actual error (i.e., deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding." *Id.*; *Baird v. State*, 2017 OK CR 16, ¶ 25, 400 P.3d. 875, 883; 20 O.S.2011, § 3001.1. Even where this showing is made, this Court will only correct plain error if the error seriously

affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Baird*, 2017 OK CR 16, ¶ 25, 400 P.3d. at 883; *Tollett v. State*, 2016 OK CR 15, ¶ 4, 387 P.3d 915, 916; *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. Appellant fails to show plain error warranting relief.

Omission of Instructions: Appellant contends the jury should have been instructed that "[i]t is not child abuse for a parent/teacher/person to use reasonable and ordinary force to discipline a child, including, but not limited to, spanking, switching, or paddling, so long as the force is reasonable in manner and moderate in degree." OUJI-CR (2d) No. 4-35B (Supp. 2015). *See* 21 O.S.2011, § 844 (providing that "ordinary force as a means of discipline, including but not limited to spanking, switching or paddling" is not prohibited). Appellant further asserts the trial court should have defined "unreasonable force" for the jury instead of the definition it provided for "force."[1] Instruction No. 4-40D, OUJI-CR

[1] The trial court instructed the jury that "force" means "any force, no matter how slight, necessary to accomplish the act without the consent of the victim. The force necessary to constitute an element need not be actual physical force since fear, fright, or coercion may take the place of actual physical force."

(2d) (Supp. 2012), defines "unreasonable force" as "[m]ore [force] than that ordinarily used as a means of discipline."

The omission of these instructions was not actual or obvious error. At no point during trial did Appellant assert that the victim's injuries were the result of Appellant's use of reasonable and ordinary force to discipline the victim. Appellant's defense at trial was that the State failed to prove he inflicted the victim's injuries, and that the victim's six-year-old brother was responsible for the victim's injuries. Under these circumstances, jury instructions defining "unreasonable force" and advising that the use of ordinary force to discipline a child is not child abuse (*see* 21 O.S.2011, § 844) were not mandated.

Definitional Instructions: Appellant asserts the definitions provided for "force" and "harm to the health or safety of a child" erroneously allowed the jury to convict him "absent evidence he physically injured [the victim], let alone that he did so using unreasonable force to discipline [the victim]." Appellant fails to demonstrate actual or obvious error affecting his substantial rights with this claim.

Neither of the challenged definitions were applicable to this case. The trial court utilized the definition of "force" typically used in

sex crime prosecutions. *See* 21 O.S.Supp.2016, § 111(A) (providing that "[i]n all instances of sexual assault . . . the term 'force' shall mean any force, no matter how slight, necessary to accomplish the act without the consent of the victim[,] and that "[t]he force necessary to constitute an element need not be actual physical force since fear, fright or coercion may take the place of actual physical force."). *See also* OUJI-CR (2d) No. 4-139. Further, while the definition for "harm to the health or safety of a child" came from definitions used in the prosecution of crimes against children, *see* OUJI-CR (2d) No. 4-40D (Supp. 2012), it was not needed in this case as the State alleged only that Appellant physically injured the victim.

Despite the inapplicability of the challenged definitions, Appellant fails to demonstrate that actual or obvious error affecting his substantial rights occurred. Whether the victim had been physically injured was not at issue in this case. The disputed issue at trial was *who* caused the victim's physical injuries. The State did not allege—and no evidence was presented—that the victim had been mentally or emotionally injured. The challenged definitions thus were unnecessary surplusage that were benign when the instructions are considered as a whole. The term "Child Abuse" was properly defined

for the jury as "Injuring/Torturing/Maiming a child under the age of eighteen." This definition, coupled with the trial court's proper instruction on the elements of the crime, rectified any confusion possibly caused by the unnecessary and irrelevant definitions. Moreover, as determined in Proposition III *infra*, the evidence overwhelmingly showed Appellant willfully and maliciously physically injured the victim. Thus, in light of the totality of the instructions given, the defense presented and the total facts, we find the trial court's inclusion of the surplus definitions in the jury instructions was not actual or obvious error affecting substantial rights and was thus not plain error.

Based upon the foregoing, Proposition I is denied.

Proposition II: Appellant complains that the trial court lacked authority to impose a fine in addition to the punishment recomended by the jury. Our review of this claim is limited to plain error as Appellant failed to raise this issue below. As conceded by the State, Appellant shows plain error warranting relief.

Where a fine is prescribed by law, and the jury was given the option of imposing a fine but did not do so, the trial court lacks authority to impose a fine in addition to the jury's sentencing verdict.

See 21 O.S.Supp.2014, § 843.5(A) (prescribing imprisonment and/or *a fine* for crime of Child Abuse by Injury); 21 O.S.2011, § 64(B) (allowing the trial court to impose a fine when "no fine is prescribed by law."). Plain error thus occurred when the trial court imposed a fine that the jury specifically elected not to impose. We grant Appellant relief and vacate the $1,000.00 fine imposed by the trial court.

Proposition III: The issue in this proposition is whether, taken in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Cochlin v. State*, 2020 OK CR 23, ¶ 4, 479 P.3d 534, 535-36; *Davis v. State*, 2011 OK CR 29, ¶ 74, 268 P.3d 86, 111. This analysis requires examination of the entire record. *Young v. State*, 2000 OK CR 17, ¶ 35, 12 P.3d 20, 35. "This Court will accept all reasonable inferences and credibility choices that tend to support the verdict." *Davis*, 2011 OK CR 29, ¶ 74, 268 P.3d at 111. "Further, the law makes no distinction between direct and circumstantial evidence and either, or any combination of the two, may be sufficient to support a conviction." *Baird v. State*, 2017 OK CR 16, ¶ 31, 400 P.3d 875, 884.

Taken in the light most favorable to the State, sufficient evidence was presented at trial to allow any rational trier of fact to find the essential elements of the charged crime beyond a reasonable doubt. The elements of child abuse by injury as alleged in this case are (1) willfully/maliciously; (2) injuring; (3) a child under the age of eighteen. *See also* 21 O.S.Supp.2014, § 843.5(A). Contrary to Appellant's assertion on appeal, "extraordinary or unreasonable" force was not an element the State was required to prove in this case. Appellant did not contend at trial that the victim's injuries were the result of ordinary and reasonable force used by Appellant in disciplining the victim. *See* 21 O.S.2011, § 844. Rather, Appellant asserted he did not cause the victim's injuries. Thus, the State was only required to present sufficient evidence at trial to prove that Appellant willfully injured the four-year-old victim. The State met its burden.

Although no one witnessed Appellant physically abuse and injure the victim, "the focus of a *Jackson* inquiry is not on what evidence is missing from the record, but whether the evidence in the record, viewed in the light most favorable to the prosecution, is sufficient for any rational trier of fact to find the defendant guilty

beyond a reasonable doubt." *Matthews v. Workman*, 577 F.3d 1175, 1185 (10th Cir. 2009). Applying the governing standard of review, we find that sufficient evidence was presented at trial to sustain Appellant's conviction. As an appellate court on direct review, we are not allowed to reweigh conflicting evidence or consider the credibility of the witnesses. *Cavazos v. Smith*, 565 U.S. 1, 2 (2011) ("it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury."); *McDaniel*, 558 U.S. at 133 ("a reviewing court 'faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'") (quoting *Jackson*, 443 U.S. at 326, 99 S. Ct. at 2793).

To the extent Appellant attempts to raise a freestanding challenge to the admission of certain evidence,[2] we should find this

[2] Appellant complains that evidence was erroneously admitted into evidence through "leading questions and [the improper] injection of new ideas into the

claim is waived from our review. Combining multiple issues in a single proposition of error violates Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021) ("Each proposition of error shall be set out separately in the brief. . . . Failure to list an issue pursuant to these requirements constitutes waiver of alleged error."); *Collins v. State*, 2009 OK CR 32, ¶ 32, 223 P.3d 1014, 1023 ("Under our recently revised Rule 3.5(A)(5), combining multiple issues in a single proposition is clearly improper and constitutes waiver of the alleged errors."). While Appellant's additional allegation is somewhat connected to his sufficiency of the evidence claims, the issues are nonetheless separate and distinct from his primary claim—i.e., sufficiency of the evidence. Moreover, when reviewing a sufficiency of the evidence claim, "'a reviewing court must consider all of the evidence admitted by the trial court,' regardless of whether that evidence was admitted erroneously." *McDaniel v. Brown*, 558 U.S.120, 131 (2010). Relief should be denied for this superfluous claim. Proposition III is denied.

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victim's story[.]" He specifically claims Forensic Interviewer Marts "guess[ed], assume[d], [led] and inject[ed] her own ideas into what [the victim] said" in the forensic interview.

Proposition IV: Appellant complains trial counsel was constitutionally ineffective for failing to adequately preserve for appellate review his Proposition I and II claims. He further asserts generally that trial counsel failed to adequately "prepare to defend and advocate on [Appellant's] behalf[.]"

This Court reviews claims of ineffective assistance of counsel to determine: (1) whether counsel's performance was constitutionally deficient; and (2) whether counsel's performance prejudiced the defense so as to deprive the defendant of a fair trial with reliable results. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. This Court need not determine whether counsel's performance was deficient if there is no showing of prejudice. *See Malone*, 2013 OK CR 1, ¶ 16, 293 P.3d at 207.

We denied relief for Appellant's instructional error claims in Proposition I. In light of that analysis, Appellant fails to show *Strickland* prejudice. In Proposition II, we found the trial court's erroneous imposition of a $1,000.00 fine at sentencing amounted to plain error and granted Appellant relief. The Court's resolution of this issue renders Appellant's corresponding claim of ineffective

assistance of counsel moot. *Stewart v. State*, 2016 OK CR 9, ¶ 34, 372 P.3d 508, 515. Appellant's final claim—asserting trial counsel generally failed to "prepare to defend and advocate on [Appellant's] behalf"—is conclusory and speculative at best and does not carry his burden to prove his claim of ineffectiveness. *Fulgham v. State*, 2016 OK CR 30, ¶ 18, 400 P.3d 775, 780-81 (rejecting "conclusory and speculative" ineffective assistance claim).

Finding no Sixth Amendment violation under *Strickland*, Proposition IV is denied.

Proposition V: Appellant complains in his final proposition that relief is warranted based on cumulative error. Other than the error found and corrected in Proposition II, Appellant has not demonstrated the existence of two or more harmful errors in this appeal that we can cumulate. *Nicholson v. State*, 2018 OK CR 10, ¶ 24, 421 P.3d 890, 897. This is simply not a case where the accumulation of harm from individually harmless errors during Appellant's trial tended to prejudice his rights or otherwise deny him a fair trial. *Id.* Proposition V is denied.

DECISION

The Judgment and Sentence of the District Court is **AFFIRMED** except the $1,000.00 fine imposed which is **STRICKEN**. This matter is **REMANDED** to the trial court with instructions to **MODIFY** the Judgment and Sentence document in accordance with this pronouncement. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT
OF NOWATA COUNTY
THE HONORABLE LINDA S. THOMAS, DISTRICT JUDGE

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OPINION BY: HUDSON, V.P.J.

ROWLAND, P.J.:	**CONCUR**
LUMPKIN, J.:	**CONCUR**
LEWIS, J.:	**CONCUR**