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NO. COA01-1510

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

STATE OF NORTH CAROLINA

v.

Mecklenburg County
No. 00 CRS 51061

JONATHAN DAVID DUNN

Appeal by defendant from judgment entered 24 September 2001 by Judge L. Oliver Noble in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 July 2002.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen U. Baldwin, for the State.

Stowers & James, P.A., by Paul M. James, III, for defendant-appellant.

WALKER, Judge.

Defendant pled guilty to felony child abuse in violation of N.C. Gen. Stat. § 14-318.4. After examining defendant under oath pursuant to N.C. Gen. Stat. § 15A-1022 regarding the voluntariness of his plea, the court accepted defendant's guilty plea. Defendant stipulated to the factual basis for the plea. The State's evidence disclosed that, in late October of 2000, Michelle Smith's thirteen-month-old boy, the victim, had been ill with a fever due to an ear infection. On 1 November 2000, Smith left the victim in the care of defendant, her boyfriend. While in the care of defendant, the

boy would cry and "wouldn't be still." Defendant "lost it" and "put [his] hand across [the victim's] face, basically covering his face, and . . . slammed his head up and down forcibly into the mattress with [his] right hand, maybe ten to fifteen times." The victim vomited several times throughout the day and had trouble breathing. When emergency personnel were summoned, the victim was unconscious. At the hospital, the victim was diagnosed with subdural hematomas and suffered from lack of oxygen to his brain. The victim is now severely developmentally delayed, wears braces on his limbs to prevent him from having muscle contractions, has a feeding tube, and is blind.

Before sentencing, the trial court found two aggravating factors: (1) the victim was very young; and (2) the victim suffered serious injury that is permanent and debilitating. The trial court also found four mitigating factors: (1) defendant voluntarily acknowledged wrongdoing at an early stage of the criminal process; (2) defendant has accepted responsibility for his criminal conduct; (3) defendant has a support system in the community; and (4) defendant has a positive employment history or is gainfully employed. The trial court determined the aggravating factors outweighed the mitigating factors and sentenced defendant to twenty-eight to forty-three months in prison. Defendant appeals.

Defendant first contends the trial court erred by using evidence necessary to prove an element of the offense to also prove the aggravating factor that the victim suffered a serious injury which was permanent and debilitating in violation of N.C. Gen.

Stat. § 15A-1340.16. Defendant acknowledges that case law is "not supportive of [his] position."

N.C. Gen. Stat. § 15A-1340.16(d) provides that "[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation" N.C. Gen. Stat. § 15A-1340.16(d) (2001). Our legislature has defined serious bodily injury "as bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization." See N.C. Gen. Stat. § 14-32.4.

Our Supreme Court has held that long-term effects which arise from the victim's injuries may be properly used as an aggravating factor. See *State v. Brinson*, 337 N.C. 764, 770, 448 S.E.2d 822, 826 (1994) ("evidence relating to the victim's broken neck, aside from evidence relating to the resulting paralysis, was sufficient to establish the element of the crime that the defendant inflicted a 'serious injury' upon the victim"). Relying on *Brinson*, this Court has held that gunshot wounds suffered by victims resulted in serious injuries at the time they were inflicted, and that these injuries were separate and apart from their consequences. *State v. Crisp*, 126 N.C. App. 30, 39, 483 S.E.2d 462, 468, *disc. rev. denied*, 346 N.C. 284, 487 S.E.2d 559 (1997). Most recently, in *State v. Wampler*, 145 N.C. App. 127, 549 S.E.2d 563 (2001), this Court held that the broken wrist, chewed fingers, and gash in the

victim's head established the "serious injury" element of the crime. However, this Court also held that the permanent disfigurement of fingers, surgery and implantation of a steel plate and five screws in his arm, and the loss of use and physical impairment to victim's fingers, hand, and arm were aggravating factors for sentencing purposes. *Id.* at 133, 549 S.E.2d 568.

Like *Brinson, Crisp and Wampler*, the victim's injuries here went beyond the "serious injury" necessary to convict defendant of the offense. After suffering subdural hematomas, the victim is blind, has braces for his legs and arms, and is developmentally delayed. Accordingly, the trial court properly found as an aggravating factor that the victim suffered serious injury which is permanent and debilitating.

Defendant next argues the trial court erred in finding that the victim was very young. He asserts that, because the age of the victim is an element of the offense of felonious child abuse, the trial judge should not have considered the age of the victim as an aggravating factor. Defendant, nevertheless, concedes that "decisions of this Court and the North Carolina Supreme Court do not support this position but [he] contends that these cases are wrongly decided." See *State v. Ahearn*, 307 N.C. 584, 603, 300 S.E.2d 689, 701 (1983) (the fact that two-year-old victim was very young was not an element necessary to prove felonious child abuse and was therefore properly considered as an aggravating sentencing factor); see also *State v. Burgess*, 134 N.C. App. 632, 637, 518 S.E.2d 209, 213 (1999) (the fact that victim was of a very young age

was not an element necessary to prove felonious child abuse and, therefore, was properly considered by trial court as an aggravating factor in prosecution for felony child abuse and second-degree murder).

"[A] panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Accordingly, we hold the trial court properly found the aggravating factor that the victim was very young.

Defendant also assigns error to the trial court's determination that the aggravating factors outweighed the mitigating factors. Defendant, however, has not cited any authority or presented this Court with any argument. "Questions raised by assignments of error but not presented and discussed in a party's brief are deemed abandoned." *State v. Wilson*, 289 N.C. 531, 535, 223 S.E.2d 311, 313 (1976); see N.C.R. App. P. 28(b)(6). Accordingly, this assignment of error is deemed abandoned.

Affirmed.

Judges THOMAS and BIGGS concur.

Report per Rule 30(e).