NO. COA00-1405

NORTH CAROLINA COURT OF APPEALS

Filed: 16 April 2002

STATE OF NORTH CAROLINA

v.	Wake County No. 98 CRS 3870
HENRY CARLTON LAMM, Defendant-Appellant.	No. 98 CRS 3871 No. 98 CRS 3872

Appeal by defendant from judgment entered 4 August 1999 by Judge David Q. LaBarre in Wake County Superior Court. Heard in the Court of Appeals 17 October 2001.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas J. Ziko, for the State.

John T. Hall, for defendant-appellant.

BRYANT, Judge.

This is an appeal by defendant from jury verdicts finding him guilty of taking indecent liberties with a child, felony child abuse and first degree sexual offense.

Defendant married and had a daughter in 1985. Defendant's wife separated from defendant for ten years, then resumed the marital relationship. When the child was ten, defendant began to physically and sexually abuse her.

Defendant was charged and indicted on a total of six counts of taking indecent liberties with a child, two counts of felony child

abuse and one count of first degree sexual offense. The State dismissed one count of indecent liberties and defendant was tried on the remaining eight charges. At trial, a jury returned guilty verdicts on all charges. Defendant presented no evidence. The judge sentenced defendant to consecutive sentences as follows: 20 to 33 months imprisonment for the three counts of indecent liberties with a child in 98 CRS 3870; 31 to 47 months for each of the two counts of felony child abuse in 98 CRS 3871; and 300 to 369 months for the one count of first degree sexual offense and two counts of indecent liberties with a child in 98 CRS 3872. Defendant appealed.

Defendant raises four assignments of error. Defendant alleges that the trial court erred by: 1) denying defendant's motion to remove a juror who said during the trial that he could not be impartial, thus violating defendant's statutory and constitutional rights; 2) instructing the jury to allow a finding of guilt for actions at variance with allegations in the indictment, thus violating defendant's constitutional rights; 3) instructing the jury in a manner that permitted the return of a non-unanimous verdict, thus violating defendant's constitutional rights; and 4) sentencing defendant in a manner not authorized by law.

I.

Defendant argues that he should be allowed to challenge a juror for cause after impanelment under N.C.G.S. § 15A-1212 because § 15A-1215(a) allows a trial court to replace a juror if the juror becomes disqualified or is otherwise discharged. We disagree.

When selecting and impaneling a juror, any party may make a challenge for cause if a juror has formed an opinion as to the guilt or innocence of the defendant, or for any other reason is unable to render an impartial verdict. N.C.G.S. § 15A-1212(6), (9) (1999). There is no statutory provision for challenging a juror after the jury has been impaneled. *State v. McLamb*, 313 N.C. 572, 575, 330 S.E.2d 476, 478 (1985). Generally, once a jury has been impaneled, the parties have waived their rights to peremptorily challenge jurors. *Id.* at 577, 330 S.E.2d at 479. However, N.C.G.S. § 15A-1215(a) states: "If before final submission of the case to the jury, any juror dies, becomes incapacitated or disqualified, or is discharged for any other reason, an alternate juror becomes a juror, in the order in which selected, and serves in all respects as those selected on the regular trial panel." N.C.G.S. § 15A-1215(a) (1999). A party may challenge a juror after impanelment at the discretion of the trial court. *McLamb*, 313 N.C. at 576, 330 S.E.2d at 479. The trial court's decision will not be disturbed absent a finding of abuse of discretion. To constitute an abuse of discretion, the decision of the trial court must have been so arbitrary that it could not have been the result of a reasoned decision. *Id.*

Defendant contends that he had a statutory right to have a juror, Mr. McNeally, removed because of partiality. We disagree. As we stated above, there is no statutory right to challenge a juror after the jury has been impaneled; the decision to remove a juror remains at the discretion of the trial court. Thus, we

review only to determine whether the trial court abused its discretion in allowing McNeally to remain on the jury.

During the subject trial, McNeally informed the trial court that the evidence presented on the first day had affected him more than he anticipated, and that he did not think he could be impartial. The trial judge reminded McNeally several times that he "should remain open to all the evidence until all the evidence is presented" before making up his mind. McNeally stated that he was willing to do so.

> [McNEALLY]: I am willing to go forward as a juror, Your Honor. But I felt in good consciousness I needed to come forward with my concerns.
>
> THE COURT: Well again, to the extend [sic] that you may . . . find yourself influenced by some of the testimony that you've heard, let me suggest that you listen to all of it, including the cross-examination of the witness, including all of the evidence relating, not only to this witness's testimony, but other witnesses as well.
>
> [McNEALLY]: Uh-huh.
>
> THE COURT: Do you think that you could continue to do that?
>
> [McNEALLY]: [Nods head.] Yes, sir, Your Honor, I think I could.

Defense counsel then requested the court to ask McNeally if he had made up his mind yet. The court further inquired:

> THE COURT: Well, I mean again, you've not heard all the evidence at this point.
>
> Do you think that you can continue to listen to any evidence and to wait until you hear all the evidence, arguments of the

> counsel and then the charge of the Court as to the law before you make up your mind?
>
> [McNEALLY]: That was the issue I had brought to the bailiff this morning. After hearing the testimony yesterday, it is hard for me not to make up my mind on what I've heard and be an unbiased or impartial juror.
>
> I could try to hear the rest of the evidence. I'm willing to try to do that. But the reason I came forward with this I had very strong feelings about what I heard yesterday. And I felt that effected [sic] my impartiality as a juror.
>
> THE COURT: Well, no one can ask [you] or require you not to give whatever weight you care to any of the evidence.
>
> The only thing I would ask you to do, and I am the [sic] sure the defense counsel would ask you, as well as the State, is to listen to all the evidence and wait until you hear all of it before you make any final deliberation.
>
> Do you believe that you are able to do that, sir?
>
> [McNEALLY]: Yes.

This colloquy confirms that the trial court's decision to allow McNeally to remain on the jury was not so arbitrary that it could not have been the result of a reasoned decision. McNeally stated several times that, although he had strong feelings about the testimony he had heard, he could wait until he heard all of the evidence before making up his mind.

Defendant further complains that the trial court asked McNeally if he could "listen to all the evidence and wait until you hear all of it before you make any final *deliberation*." (Emphasis added.) Defendant cites N.C.G.S. § 15A-1236(a)(3), which provides:

"The judge at appropriate times must admonish the jurors that it is their duty not: [t]o form an opinion about the guilt or innocence of the defendant, or express any opinion about the case until they begin their deliberations . . . ." N.C.G.S. § 15A-1236(a)(3) (1999). Defendant argues that the trial court failed to comply with this statutory requirement by using the word "deliberation" rather than "determination" or "conclusion." In essence, defendant contends that when McNeally agreed to try to hear the rest of the evidence, he did not agree to wait until the jury began deliberations to form an opinion. We find defendant's contention to be a distinction without a significant difference. Indeed, Black's Law Dictionary defines "deliberation" as, "The act of carefully considering issues and options before making a decision or taking some action . . . ." Black's Law Dictionary 438-39 (7th ed. 1999). Since we believe the trial court's instructions complied with the requirements of N.C.G.S. § 15A-1236, we hold that this assignment of error is without merit.

II.

Defendant next assigns as error the trial court's instruction to the jury that a finding of guilt was in order if the jury found that the defendant "willfully took or attempted to commit a lewd or lascivious act upon a child by exposing his buttocks *and/or* his genitals." (Emphasis added.) The indictment states that the defendant exposed his "buttocks *and* genitals" to the child. (Emphasis added.) Defendant argues that the trial court erred in changing its instructions from "buttocks and genitals" to "buttocks

and/or genitals," thus creating a "fatal variance between the State's *allegata* and the verdict." We disagree.

Our Supreme Court has stated that

> [t]he use of the conjunctive form to express alternative theories of conviction is proper. The indictment should not charge a party disjunctively or alternatively, in such a manner as to leave it uncertain what is relied on as the accusation against him. The proper way is to connect the various allegations in the indictment with the conjunctive term "and," and not with the word "or."

State v. Birdsong, 325 N.C. 418, 422, 384 S.E.2d 5, 7-8 (1989) (quoting *State v. Swaney*, 277 N.C. 602, 612, 178 S.E.2d 399, 405 (1971)). In *Birdsong*, an inmate in Central Prison died of an apparent suicide while the defendant was a lieutenant with the North Carolina Department of Correction. The Grand Jury indicted the defendant for failing to discharge the duties of his office by: 1) failing to follow the directives of the officer in charge; *and* 2) failing to investigate facts received concerning the possible death of an inmate. *Id.* at 421, 384 S.E.2d at 7. The defendant argued that the use of the conjunction "and" meant that the State had to prove both omissions to make its case; either omission, standing alone, would not suffice under the indictment. *Id.* at 421-22, 384 S.E.2d at 7. Our Supreme Court disagreed, stating:

> In order properly to allege an offense an indictment need only allege the essential elements of that offense. It need not allege the evidentiary support for those elements. Unnecessary terms that are included in the indictment may be disregarded as surplusage.

Id. at 422, 384 S.E.2d at 7 (citations omitted). The Court further stated that "'[w]here an indictment sets forth conjunctively two

means by which the crime charged may have been committed, there is no fatal variance between indictment and proof when the state offers evidence supporting only one of the means charged.'" *Id.* at 423, 384 S.E.2d at 8 (alteration in original) (quoting *State v. Gray*, 292 N.C. 270, 293, 233 S.E.2d 905, 920 (1977)).

In the case at bar, Count II of the indictment in question states:

> And the jurors for the State upon their oath present that . . . the defendant . . . unlawfully, willfully and feloniously did take and attempt to take, immoral, improper and indecent liberties with . . . a child who was under the age of sixteen (16) years at the time, for the purpose of arousing and gratifying sexual desire, *to wit: Strip in front of the child, exposing his bare buttocks and genitals to her.* At the time of the offense the defendant was over the age of sixteen (16) years and at least five years older than said child. This was done in violation of G.S. 14-202.1.

(Emphasis added.) The trial court instructed the jury:

> [I]f you find from the evidence, beyond a reasonable doubt, that . . . the defendant willfully took or attempted to commit a lewd or lascivious act upon a child by exposing his buttocks and/or his genitals and that at the time the defendant was at least five years older than the child and had reached his sixteenth birthday but the child had not reached her sixteenth birthday, it would be your duty to return a verdict of guilty of taking an indecent liberty with a child.

In light of *Birdsong*, we hold that the language under the indictment stating "to wit: Strip in front of the child, exposing his bare buttocks and genitals to her" was mere surplusage. The indictment properly stated the essential elements of the offense of taking indecent liberties with a child. N.C.G.S. § 14-202.1

requires that the defendant be at least sixteen years old and at least five years older than the child victim and either: 1) willfully takes or attempts to take immoral, improper or indecent liberties with a child under sixteen years of age to arouse or gratify the defendant's sexual desire; or 2) willfully commits or attempts to commit a lewd or lascivious act on the child under sixteen years of age. N.C.G.S. § 14-202.1 (1999). The additional information in the indictment regarding defendant's actions — exposing his buttocks and genitals to the child — was mere surplusage. *See State v. Birdsong*, 325 N.C. at 422, 384 S.E.2d at 7. Based on the foregoing, this assignment of error is overruled.

III.

Defendant next argues that the trial court erred by instructing the jury in a manner that permitted the return of a non-unanimous verdict. He argues that allowing the jury to find him guilty if they found as a fact that he exposed either his buttocks or his genitals to a child under sixteen years deprived him of being tried by a unanimous jury on the true bill of indictment. We are not persuaded. As we stated in Section II, it was not error for the trial court to use the conjunctive "and" in the indictment.

Furthermore, our Supreme Court has held that a defendant's right to a unanimous verdict is not violated in cases arising under § 14-202.1 because

> the crime of indecent liberties is a single offense which may be proved by evidence of the commission of any one of a number of acts. The evil the legislature sought to prevent in

> this context was the defendant's performance of any immoral, improper, or indecent act in the presence of a child "for the purpose of arousing or gratifying sexual desire." Defendant's purpose for committing such act is the gravamen of this offense; the particular act performed is immaterial.

State v. Hartness, 326 N.C. 561, 567, 391 S.E.2d 177, 180 (1990). In the case at bar, defendant's right to a unanimous verdict was not violated by the trial court's instruction to the jury that it should return a guilty verdict if it found that defendant "willfully took or attempted to commit a lewd or lascivious act upon a child by exposing his buttocks *and/or* his genitals." (Emphasis added.) The gravamen of the offense was defendant's purpose of arousing or gratifying his sexual desire. Exposing his buttocks *or* genitals to the child would have the same effect. For this reason, this assignment of error is without merit.

IV.

Defendant's final assignment of error is that the trial court erroneously used evidence necessary to prove an element of the offense of felony child abuse to also prove an aggravating factor. Specifically, defendant assigns as error the trial court's finding as one aggravating factor that defendant, as the child's father, took advantage of a position of trust or confidence to commit the offense. Defendant argues that this violates N.C.G.S. § 15A-1340.16(d), which provides, "Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation . . . ." N.C.G.S. § 15A-1340.16(d) (1999). Guilty verdicts of felony child abuse, defendant argues, have as a necessary element

that the defendant was in a position of trust or confidence with respect to the victim. We agree.

"When a defendant assigns error to the sentence imposed by the trial court, our standard of review is 'whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing.'" *State v. Choppy*, 141 N.C. App. 32, 42, 539 S.E.2d 44, 51 (2000) (alteration in original) (quoting *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997)), *appeal dismissed and review denied*, 353 N.C. 384, 547 S.E.2d 817 (2001). "'[W]here the trial court imposes sentences within the presumptive range for all offenses of which defendant was convicted, he is not obligated to make findings regarding aggravating and mitigating factors.'" *State v. Brooks*, 136 N.C. App. 124, 133, 523 S.E.2d 704, 710 (1999), *rev. denied by* 351 N.C. 475, 543 S.E.2d 496 (2000) (quoting *State v. Rich*, 132 N.C. App. 440, 452-53, 512 S.E.2d 441, 450 (1999), *aff'd by* 351 N.C. 386, 527 S.E.2d 299 (2000)).

In the instant case, defendant was found guilty of felony child abuse. To prove felony child abuse, the State must prove: 1) the defendant is a parent or person providing care or supervision of a child under sixteen years of age; and 2) the defendant intentionally inflicts serious physical injury on a child under sixteen years of age; or 3) the defendant intentionally assaults the child, inflicting serious physical injury. N.C.G.S. § 14-318.4 (1999). We agree with defendant that an essential element of the offense is the defendant's relationship to the

child; therefore, the relationship may not be used as an aggravating factor.

This Court has stated that "[t]he infancy of the victim can be used to aggravate a sentence for felony child abuse, but the trust or confidence factor cannot." *State v. Darby*, 102 N.C. App. 297, 299, 401 S.E.2d 791, 792 (1991) (citations omitted). In *State v. Young*, 67 N.C. App. 139, 312 S.E.2d 665 (1984), a mother was convicted of felony child abuse after she bathed her fourteen-month-old daughter in scalding water when the infant soiled herself. The trial court found as an aggravating factor that the mother had taken advantage of a position of trust and confidence. This Court disagreed, holding that "since the crime that she was convicted of is based on the relationship of parent and child, that relationship cannot be used again to exceed the presumptive sentence." *Id.* at 143-44, 312 S.E.2d at 669. Based on the foregoing, we hold that the trial court erred in finding as an aggravating factor that defendant took advantage of a position of trust.

We note for the record that the trial court found the following additional factor in aggravation: "Continuous repetitive aggravating nature of the offenses over a period of time, [in] which the defendant created substantial fear and abusiveness toward [the victim]." In making this finding the trial court stated, "The case is an aggravated case. I don't know that it is the worse [sic] case of child abuse that I've heard in twenty years but it

probably ranks in the top five . . . in terms of the aggravated repetitive nature of it."

On remand the trial court may determine that the repetitive nature of the offense is a sufficient aggravating factor to justify imposing a sentence beyond the presumptive term. However, it is not for this Court to make such a determination. "[I]n every case in which it is found that the judge erred in a finding or findings in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing." *State v. Ahearn*, 307 N.C. 584, 602, 300 S.E.2d 689 701 (1983). We therefore remand 98 CRS 3871 to the trial court for resentencing on the two counts of felony child abuse.

NO ERROR as to 98 CRS 3870 and 98 CRS 3872.

REMANDED for sentencing as to 98 CRS 3871.

Judges WYNN and McCULLOUGH concur.

Report per Rule 30(e).