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NO. COA11-1231
NORTH CAROLINA COURT OF APPEALS

Filed: 19 June 2012

STATE OF NORTH CAROLINA

v.

Yancey County
Nos. 10 CRS 050790
11 CRS 000016

KARL HENDERSON QUINN

Appeal by defendant from judgments entered 1 June 2011 by Judge Bradley B. Letts in Yancey County Superior Court. Heard in the Court of Appeals 26 April 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert R. Gelblum, for the State.

Winifred H. Dillon for defendant.

ELMORE, Judge.

On 1 June 2011, a jury found Karl Henderson Quinn (defendant) guilty of one count of felony assault on a handicapped person and one count of misdemeanor assault on a woman. Following his conviction, the jury determined that two aggravating factors applied to defendant. Taking these aggravating factors into account, Judge Bradley B. Letts

sentenced defendant to 27-33 months' imprisonment for the felony assault and 150 days' imprisonment for the misdemeanor assault. Defendant now appeals.

At trial, the State's evidence showed that Jean Quinn (victim) lived in a rest home starting in January 2010 but was released in July 2010 to live with defendant, her adult son. The victim was 84 years old at the time.

In the late night hours of 22-23 August 2010, Tyler Parsley and Drew McMahan heard the sound of a woman screaming from an apartment across from the one where McMahan lived. Through a back window, they saw the victim standing in the bathroom yelling for help. They observed defendant enter the bathroom and begin pulling the victim's hair and punching her in the back. They further observed that the victim had a black eye.

Parsley and McMahan called 911, and Burnsville police officers arrived shortly thereafter. The first officers to arrive testified that they heard defendant yelling and swearing at the victim before they knocked on the door and identified themselves as police. Defendant answered the door, told the officers that nothing was wrong, and refused to allow them to enter the apartment. After obtaining an arrest warrant for defendant based on the information given by Parsley and McMahan,

police broke down the door and arrested defendant. Officers described the apartment as "very dirty and nasty," "very cluttered," and "unhygienic" - with "soiled linens, bed pans, and diapers throughout the home."

When questioned by police as to how she received the bruises covering her body, the victim refused to answer, stating, "It would make it harder on me if I answered those questions." The victim was transported to Celo Health Center, where Dr. Philip Mitchell examined her. Dr. Mitchell testified that the victim had both old and new bruises, with the new ones being less than 48 hours old. At the time, the victim said that her bruises were caused by a fall; however, Dr. Mitchell testified that the victim's new bruises were inconsistent with a fall.

Defendant alleges that the trial court erred by: (1) imposing an aggravated sentence where the evidence necessary to convict was also used to find one of the aggravating factors, in violation of N.C. Gen. Stat. § 15A-1340.16(d); and (2) abusing its discretion by imposing an aggravated sentence by failing to make an independent determination that a departure from the presumptive range was warranted.

"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. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (quoting N.C. Gen. Stat. § 15A-1444(al)). "The reviewing court must also determine whether the trial court abused its discretion in weighing the aggravating and mitigating factors." *State v. Summerlin*, 98 N.C. App. 167, 177, 390 S.E.2d 358, 363 (1990) (citation omitted).

Defendant argues that the evidence used to convict him of felony assault on a handicapped person was the same evidence used to find the aggravating factor of the victim being "very young, or very old, or mentally or physically infirm, or handicapped," N.C. Gen. Stat. § 15A-1340.16(d)(11) (2011), and thus his aggravated sentence was improper. Defendant argues that the evidence of the victim's mental and physical infirmity - which is also evidence of one element of the crime - is the only evidence that could support this aggravating factor. We disagree.

On the verdict sheet, the jury found the following four aggravating factors: (1) "The victim was very old." (2) "The victim was mentally infirm." (3) "The victim was physically

infirm." (4) "The defendant took advantage of a position of trust or confidence which includes a domestic relationship to commit the offense." The wording on the verdict sheet notwithstanding, § 15A-1340.16(d)(11) sets out but one aggravating factor, which itself has five separate prongs, any one of which will support a finding of the aggravating factor. See *In re Duckett*, 271 N.C. 430, 437, 156 S.E.2d 838, 844 (1967) ("[T]he disjunctive participle 'or' is used to indicate a clear alternative. The second alternative is not a part of the first, and its provisions cannot be read into the first."). The first three factors on the verdict sheet clearly refer to three of the five prongs that comprise the single aggravating factor laid out in § 15A-1340.16(d)(11). The trial judge stated that he omitted the "handicapped" prong of the factor because the victim being handicapped is an element of felony assault on a handicapped person. However, the definition of "handicapped," for purposes of an assault, includes having "[a] physical or mental disability" or an "[i]nfirmary," either of "which would substantially impair [the victim's] ability to defend [her]self." N.C. Gen. Stat. § 14-32.1(a) (2011). We need not address whether the "mental infirmity or physical infirmity" prongs of the aggravating factor can be applied to a felony

assault on a handicapped person conviction because the evidence supports the "very old" prong of the aggravating factor, which is, alone, sufficient to support a finding of that aggravating factor.

In addition, the jury found another aggravating factor, that "defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense." N.C. Gen. Stat. § 15A-1340.16(d)(15) (2011). Defendant has not challenged this factor and, regardless, it is clearly supported by the evidence presented at trial.

The trial court did not abuse its discretion by sentencing defendant in the aggravated range because the jury found no mitigating factors for the trial court to balance the aggravating factors against. See N.C. Gen. Stat. § 15A-1340.16(b) (2011) ("If aggravating factors are present and the court determines they are sufficient to outweigh any mitigating factors that are present, it may impose a sentence that is permitted by the aggravated range[.]"); see also *Summerlin*, 98 N.C. App. at 177, 390 S.E.2d at 363 ("[I]n the instances where the trial judge finds aggravating, but no mitigating factors, specific findings that such factors outweigh the nonexistent mitigating factors are unnecessary.") (citation omitted). In

the judgment, the trial court specifically found that the aggravating factors outweighed the mitigating factors, justifying an aggravated sentence.

Accordingly, we conclude that defendant received a trial free from error.

No error.

Judges GEER and THIGPEN concur.

Report per Rule 30(e).