

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 09AP-716
v.	:	(C.P.C. No. 07CR-10-7086)
	:	
Andrew L. Ford,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on May 20, 2010

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*Ron O'Brien*, Prosecuting Attorney, and *John H. Cousins, IV*,  
for appellee.

*Yeura R. Venters*, Public Defender, and *John W. Keeling*, for  
appellant.

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APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendant-appellant, Andrew L. Ford ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas convicting him of four counts of nonsupport of a dependent in violation of R.C. 2919.21, all felonies of the fifth degree.

{¶2} Appellant is the biological father of two children born on June 15, 1994 and January 22, 1997. On October 22, 2002, the Franklin County Court of Common Pleas, Division of Domestic Relations, ordered appellant to pay child support for his children in the amount of \$459 per month. On October 1, 2007, appellant was indicted by a Franklin

County Grand Jury on four counts of nonsupport of dependents. The first two counts alleged appellant failed to support his dependents from September 19, 2003 to September 19, 2005. Counts three and four alleged appellant failed to support his dependents from September 20, 2005 to September 20, 2007. All four counts of the indictment were charged as fifth-degree felonies as each count contained an allegation that appellant failed to provide support for 26 weeks out of 104 consecutive weeks.

{¶3} Appellant pleaded not guilty and the matter proceeded to a jury trial that commenced on April 20, 2009. The jury returned a verdict of guilty on all four counts. A pre-sentence investigation report was ordered, and on June 25, 2009, appellant was sentenced to 12 months on each count to be served consecutively. The sentence, however, was held in abeyance on condition of appellant not violating the terms of a two and one-half year period of community control that included 40 hours of community service, an obligation to obtain/maintain employment, and payment of \$24,794 in restitution to the Franklin County Child Support Enforcement Agency ("FCSEA").

{¶4} This appeal followed, and appellant brings the following assignment of error for our review:

THE TRIAL COURT ERRED WHEN, IN RESPONSE TO A QUESTION FROM THE JURY, IT INSTRUCTED THE JURY THAT THEY WERE NOT REQUIRED TO FIND THAT THE DEFENDANT HAD FAILED TO PROVIDE CHILD SUPPORT FOR A TOTAL ACCUMULATED PERIOD OF TWENTY-SIX WEEKS OUT OF ONE HUNDRED AND FOUR CONSECUTIVE WEEKS AND BY SUBMITTING REVISED JURY VERDICTS DELETING THIS FINDING THAT A JURY MUST MAKE IN ORDER TO ENHANCE A NONSUPPORT CONVICTION TO A FELONY-LEVEL OFFENSE. THE COURT FURTHER ERRED BY IMPOSING FELONY JUDGMENTS AND SENTENCES WHEN THE JURY

VERDICTS COULD ONLY JUSTIFY MISDEMEANOR  
CONVICTIONS.

{¶5} R.C. 2919.21(B) states that "[n]o person shall abandon, or fail to provide support as established by a court order to, another person whom, by court order or decree, the person is legally obligated to support." It is an affirmative defense to a charge under R.C. 2919.21(B) that "the accused was unable to provide adequate support or the established support but did provide the support that was within the accused's ability and means." R.C. 2919.21(D).

{¶6} Additionally, R.C. 2919.21(G)(1) provides in relevant part:

Except as otherwise provided in this division, whoever violates division (A) or (B) of this section is guilty of nonsupport of dependents, a misdemeanor of the first degree. If \* \* \* the offender has failed to provide support under division (A)(2) or (B) of this section for a total accumulated period of twenty-six weeks out of one hundred four consecutive weeks, whether or not the twenty-six weeks were consecutive, then a violation of division (A)(2) or (B) of this section is a felony of the fifth degree. \* \* \* If the offender is guilty of nonsupport of dependents by reason of failing to provide support to the offender's child as required by a child support order issued on or after April 15, 1985 \* \* \* the court, in addition to any other sentence imposed, shall assess all court costs arising out of the charge against the person and require the person to pay any reasonable attorney's fees of any adverse party other than the state, as determined by the court, that arose in relation to the charge.

{¶7} It is undisputed in the case sub judice that the trial court erred in its initial instruction to the jury when it defined all four counts of the indictment without instructing the jury that they had to find appellant failed to provide support for a total of 26 weeks out of 104 consecutive weeks ("the felony enhancement provision"). After realizing the omission, the prosecutor brought the issue to the trial court's attention outside the

presence of the jury, and the trial court indicated at that time that it would modify jury verdict forms. Thereafter, closing arguments were conducted whereupon the prosecutor informed the jury of the elements of all four counts, including the state's requirement to prove beyond a reasonable doubt that appellant failed to provide support for a total accumulated period of 26 weeks out of 104 weeks.

{¶8} The trial court then modified the jury verdict forms to reflect the felony enhancement provision. The trial court indicated the specific changes on the record outside the presence of the jury as follows:

And the change that the court has made on the guilty verdict forms is as follows:

The first part remains as originally presented to counsel which is: We, the jury, find the defendant, Andrew Ford, guilty of nonsupport of dependents as he stands charged in Count One of the indictment.

However, I have added another paragraph:

After having found the defendant guilty of Count One, we further find beyond a reasonable doubt that the defendant did/did not – circle one – accumulated period of 26 weeks out of 104 consecutive weeks. That change will be in all of the other verdict forms as regards to the counts.

(Tr. 163.)

{¶9} The trial court also reinstructed the jury on all four counts. The trial court explained to the jury that it "failed to include an element" in the four counts that it read and instructed the jury as it did originally but with the following addition:

Here is the addition: And that he failed to provide such support for a total accumulated period of 26 weeks out of 104 consecutive weeks.

(Tr. 165-66.)

{¶10} During deliberations, the jury expressed some confusion to the bailiff as to the need to make this additional finding. Thereafter, the jury submitted the following written question:

What is the need to have the guilty verdict include a finding of "did or did not fail to provide such support for a total accumulated period of 26 weeks out of 104 consecutive weeks?

If the answer is "did not," then why would we be answering guilty in the first place? How is this different from not guilty?

(Tr. 178-79.)

{¶11} The trial court answered the question as follows:

After further consideration, the court feels your concern with the current verdict forms is correct. I am, therefore, providing you with revised verdict forms. The revised forms are a modification only of the guilty of nonsupport decision, the four of them.

I am deleting from that a determination by the jury as regards to the period of time and the number of payments.

(Tr. 179.)

{¶12} The revised verdict forms stated:

We the jury find the defendant, Andrew Ford, **GUILTY OF NON-SUPPORT OF DEPENDENTS**, as he stands charged in Count One of the indictment a felony of the fifth degree.

{¶13} Identical verdict forms were prepared for each count in the indictment.

{¶14} Appellant states the trial court was "clearly wrong" in its final decision, and his trial counsel was correct that the verdict returned by the jury was only sufficient to warrant a misdemeanor penalty. In support, appellant relies on *State v. Smith*, 121 Ohio St.3d 409, 2009-Ohio-787, in which the Supreme Court of Ohio affirmed the defendant's

conviction for fifth-degree felony theft after a trial to the bench. In that case, Smith argued she could not be convicted of fifth-degree felony theft because her original indictment did not specify that the value of the property allegedly stolen was between \$500 and \$5,000. It was Smith's position that the value constituted an essential element of the offense and that the omission of this element from the indictment meant that she could be convicted of only the lowest degree of the offense pursuant to R.C. 2945.75(A).

{¶15} However, though Smith was convicted of theft as a fifth-degree felony, the court noted that Smith was actually indicted for robbery. The court found that, because Smith was indicted for robbery, the indictment, therefore, charged Smith with theft as a lesser-included offense, and the indictment necessarily included all of the elements of all lesser-included offenses together with any of the special statutory findings dictated by the evidence produced in the case. *Id.* at ¶15. With respect to the enhancement provision, the court explained, "the value of stolen property is not an essential element of the offense of theft but, rather, is a finding that enhances the penalty of the offense. As such, it is submitted to a fact-finder for a special finding in order to determine the degree of the offense." *Id.* at ¶13. In conclusion, Smith's fifth-degree felony theft conviction was affirmed.

{¶16} We find that the matter before us does not run afoul of *Smith*, despite appellant's reliance on the same. The focus in *Smith* was the correctness of the indictment, and, in the case sub judice, the indictment clearly charged appellant with nonsupport of dependents as fifth-degree felonies for failing to provide support for 26 weeks out of 104 consecutive weeks. Additionally, *Smith* indicated that such enhancement provision must be submitted to the fact finder, and, indeed, the jury was

instructed on this issue. As the trial court explained when it reinstructed the jury, it failed to include an element of the offenses in its initial instructions, and, therefore, it proceeded to instruct the jury on the felony enhancement provision. Thus, it is clear the felony enhancement provision was submitted to the fact finder as required by *Smith*.

{¶17} Nonetheless, appellant argues that, because the verdict forms did not contain the felony enhancement finding, he could only be convicted of misdemeanor offenses. Crim.R. 31(A) provides that verdicts shall be unanimous, in writing, signed by all jurors concurring, and returned by the jury to the judge in open court. R.C. 2945.75 states, in relevant part:

(A) When the presence of one or more additional elements makes an offense one of more serious degree:

(1) The affidavit, complaint, indictment, or information either shall state the degree of the offense which the accused is alleged to have committed, or shall allege such additional element or elements. Otherwise, such affidavit, complaint, indictment, or information is effective to charge only the least degree of the offense.

(2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.

{¶18} Additionally, in *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, the Supreme Court of Ohio held:

Pursuant to the clear language of R.C. 2945.75, a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense.

Id. at syllabus. See also *State v. Chaney*, 3d Dist. No. 13-05-12, 2006-Ohio-6489 (it could be inferred from the jury verdict that the jury considered an enhancement factor where the defendant was indicted as such, and the judge specifically told the jury that they had to find the enhancement factor as an element of the offense).

{¶19} As is applicable here, the indictment specified and alleged nonsupport of dependents as fifth-degree felonies; thus, pursuant to the above, the guilty verdict had to state *either* the degree of the offense of which appellant was found guilty *or* that appellant failed to provide support for 26 weeks out of 104 consecutive weeks.

{¶20} As set forth above, the verdict forms indicated the jury was finding appellant guilty of nonsupport of dependents "as he stands charged in \* \* \* the indictment a felony of the fifth degree." Hence, the verdict forms are in accord not only with R.C. 2945.75 but also with the Supreme Court of Ohio's decision in *Pelfrey*. Finding that the jury was properly instructed and that the verdict forms complied with both R.C. 2945.75 and *Pelfrey*, we find no error in the trial court's judgment.

{¶21} Despite the foregoing, the author of the dissent believes this matter must be reversed because the trial court's actions "necessarily left the jury confused" as to whether it was required to find the felony enhancement provision. (Dissent at ¶37.) Contrary to the view in the dissent, the majority finds the jury was never confused over this issue. The issue and necessity of the jury's responsibility for finding the felony enhancement provision proven beyond a reasonable doubt was clearly before the jury by way of the indictment, the corrected jury instructions, and the arguments of counsel. In fact, it was the jury that appropriately brought to the trial court's attention the potential inconsistency which existed on the initial verdict forms because to find appellant guilty

**required** that the jury had already found the felony enhancement provision proven beyond a reasonable doubt. The dissent emphasizes the trial court's statement that it was deleting the felony enhancement provision from the jury verdict form; however, just prior to that statement, the trial court expressed it understood the jury's concern that the initial verdict form was incorrect. In removing the potential redundant and/or inconsistent additional finding language from the final verdict form, the trial court did nothing to augment confusion or disturb the jury's sound understanding of the elements of the charges as indicted, as argued by counsel, and as instructed by the trial court. Thus, contrary to the dissent, we find the jury was never confused as to its responsibility and the issue regarding the felony enhancement provision.

{¶22} For the foregoing reasons, we overrule appellant's single assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BROWN, J., concurs.

BRYANT, J., dissents.

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BRYANT, J., dissenting,

{¶23} Being unable to agree with the majority opinion, I respectfully dissent.

{¶24} Defendant was indicted on four counts, each of which was substantively identical. In pertinent part, each count alleged defendant, during the two-year period specified in the indictment, violated R.C. 2929.21, as he "did recklessly abandon, or fail to provide support as established by a court order to \* \* \* Andrianna Ford, whom by court order or decree, Andrew L. Ford was legally obligated to support \* \* \*." The indictment

further specifically alleged defendant "failed to provide such support for a total accumulated period of twenty-six (26) weeks out of one hundred four (104) consecutive weeks," making the indicted offenses felonies of the fifth degree.

{¶25} Defendant was tried on the four counts alleged in the indictment. After the parties rested at trial and prior to closing arguments, the court instructed the jury on the charges, employing substantially the same language as to each count: "Before you can find the defendant guilty of nonsupport of dependents, as alleged in Count One, you must find beyond a reasonable doubt that on or about September 19, 2003 to September 19, 2005, in Franklin County, Ohio, the defendant did recklessly fail to provide support as established by a court order to another person, to-wit: Andrianna Ford, whom by court order or decree the defendant was legally obligated to support." (Tr. 128-29.) The court did not instruct the jury on the further allegation that defendant failed to provide the support for a total accumulated period of 26 weeks out of 104 consecutive weeks. Instead, the court proceeded to define "recklessly" and then issued similar instructions for Counts Two, Three and Four. (Tr. 128-31.)

{¶26} After the court completed its instructions to the jury, the prosecution advised the court of a problem with the instruction. The prosecution observed that misdemeanor nonsupport is enhanced to a fifth-degree felony if a defendant fails to provide support for 26 total accumulated weeks out of 104 consecutive weeks. The prosecution advised the court that the court essentially instructed the jury on nonsupport as a misdemeanor offense because the court's instructions failed to include the language pertaining to defendant's failure to provide support for 26 total accumulated weeks out of 104

consecutive weeks. See Tr. 133. Defense counsel indicated he had the same concern, and the court stated that it would modify the verdict forms.

{¶27} At the end of closing arguments, the court informed the jury of a recess because the court "realized I made a mistake in the instructions. I am going to go back and correct that." (Tr. 161.) Outside the presence of the jury, the court told counsel it would add a paragraph to the verdict forms for each count so the jury could make a special finding with regard to the indicted language concerning 26 total accumulated weeks out of 104 consecutive weeks. The court informed counsel the verdict forms on which the jury could find defendant guilty would state:

We, the jury, find the defendant, Andrew Ford, guilty of nonsupport of dependents as he stands charged in Count One of the indictment.

\* \* \*

After having found the defendant guilty of Count One, we further find beyond a reasonable doubt that the defendant did/did not—circle one—failed to provide such support for a total accumulated period of 26 weeks out of 104 consecutive weeks.

(Tr. 163.)

{¶28} Following the court's discussion with counsel, the jury was brought back to the courtroom, where the trial court apologized for failing to include an element in the instructions on the four counts of the indictment. Although the court noted the instructions the jury would receive in the jury room would contain the correction, the court read the correction as it applied to one count of the indictment, since "it is exactly the same addition on all of the counts." (Tr. 165.)

{¶29} The trial court read to the jury the new instruction for Count One, and when it reached the additional language it specifically noted, "Here is the addition"; the court then read the additional language to the jury. (Tr. 166.) Due to the additional language, the court not only allowed counsel the opportunity to present supplemental closing arguments in light of the change to the instructions on the charges against defendant but read to the jury the verdict forms which comported with the court's revised instructions on the charges against defendant. See Tr. 168. Neither counsel objected to the modified verdict forms the court read to the jury.

{¶30} After the jury began its deliberations, the court asked the bailiff to relay to counsel what the jury asked when the bailiff took the verdict forms in to the jury. Specifically, the bailiff stated, "They were confused as to the addendum, or whatever you are calling it, on the guilty form. \* \* \* If they found him guilty, and then circled 'did not,' wasn't he then not guilty? They are very confused about that issue." (Tr. 175.)

{¶31} Defense counsel and the court discussed the need for further clarification and the possibility of the jury's finding defendant guilty of a misdemeanor offense rather than the fifth-degree felony offense on which defendant was indicted. The court determined the jury would either find defendant guilty of the fifth-degree felony offense or not guilty, because the court did not instruct on a lesser included offense. The court decided that, absent a written note from the jury, things would remain as they were. (Tr. 176-78.)

{¶32} The court, however, subsequently received a written note from the jury that inquired, "What is the need to have the guilty verdict include a finding, quote, 'did or did not fail to provide such support for a total accumulated period of 26 weeks out of 104

consecutive weeks?' If the answer is 'did not,' then why would we be answering guilty in the first place? How is this different from not guilty?" (Tr. 178-79.) The court advised counsel it would answer the jury as follows:

After further consideration, the court feels your concern with the current verdict forms is correct. I am, therefore, providing you with revised verdict forms. The revised forms are a modification only of the guilty of nonsupport decisions, the four of them.

*I am deleting from that a determination by the jury as regards to the period of time and the number of payments.*

(Emphasis added; Tr. 179.)

{¶33} Defense counsel objected to the court's revised verdict forms and requested that the jury still be required to find defendant failed to pay support for 26 weeks out of 104 weeks in order to find defendant guilty of fifth-degree felony nonsupport. The court declined to change its answer to the jury and advised counsel that "[t]he answers are going back with the verdict forms." (Tr. 180.) The court subsequently advised counsel that the "revised verdict form" for each count would state as follows:

#### REVISED VERDICT

We the jury find the defendant, Andrew Ford, **GUILTY OF NON-SUPPORT OF DEPENDENTS**, as he stands charged in Count One of the indictment a felony of the fifth degree.

(See Tr. 182-84.)

{¶34} Continuing to contest the court's failure to include on the verdict forms the language making nonsupport a fifth-degree felony, defense counsel further noted "that this is now the third set of verdict forms that were given to the jury. Obviously, that is due to certainly myself not necessarily catching it. But, Your Honor, I think we are treading

close to this idea that we are going to be confusing the jury at this point and, perhaps, impacting Mr. Ford's right to a fair trial and his due process rights here. So with that, Your Honor, I object." (Tr. 184-85.) The court overruled defense counsel's objections and submitted the revised verdict forms to the jury without further instruction. According to the record, the jury was not provided with a copy of the indictment against defendant. The jury reached its verdict the following afternoon, finding defendant guilty on each count.

{¶35} Initially, I disagree with defendant's contention that *State v. Smith*, 121 Ohio St.3d 409, 2009-Ohio-787, applies here. Unlike *Smith*, the present action does not involve a lesser included offense or what needs to be alleged in the indictment to support a lesser included offense. Rather, *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, controls. The requirements of *Pelfrey* were met.

{¶36} The syllabus of *Pelfrey* states that, under the language of R.C. 2945.75, a verdict form must include two components: (1) the jury must sign the verdict form, and (2) the form "must include *either* the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense." (Emphasis added.) The jury signed the verdict forms here, and the forms included the degree of the offense for which defendant was convicted.

{¶37} My disagreement with the majority opinion, however, lies in affirming the jury's verdicts where the language to be placed on the verdict forms was not only fluid but necessarily left the jury confused. To the prosecution's credit, it candidly admitted and even argued its responsibility to prove defendant failed to provide support for a total accumulated period of 26 weeks out of 104 consecutive weeks. To the jury's credit, it at

some point seemed to understand what the verdict forms should say in the context of the indicted offenses. Nonetheless, the jury was presented with multiple different verdict forms, in itself a confusing matter for lay jurors.

{¶38} Even if the number of forms alone was not sufficient reason to conclude the resulting confusion requires reversal, the language the trial court submitted to the jury in its answer to the jury's questions, coupled with the various verdict forms, supports defendant's assignment of error and warrants reversal for a new trial. In answering the jury's question, the court told the jury it was "deleting from that a determination by the jury as regards to the period of time and the number of payments." (Tr. 179.) While the trial court most likely intended to convey to the jury that the language added to the second verdict form was being deleted, the trial court's statement also suggests the jury need not be concerned at all with whether defendant failed to provide support for a total accumulated period of 26 weeks out of 104 consecutive weeks, making defendant's offense a misdemeanor.

{¶39} In the final analysis, the jury's question expressed confusion, and the trial court's answer not only did not alleviate the confusion but arguably wrongly advised the jury in what it needed to find in order to conclude defendant was guilty of the indicted offense. Accordingly, I would sustain defendant's assignment of error, reverse the judgment of the trial court, and remand for a new trial.

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