IN THE COURT OF APPEALS 09/17/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-01297 COA

ANDREW ANTHONY ALBANESE

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JAMES E. THOMAS

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JIM DAVIS

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: PAT FLYNN

DISTRICT ATTORNEY: CONO CARANNA

NATURE OF THE CASE: CRIMINAL (FELONY)

TRIAL COURT DISPOSITION: DEFENDANT CONVICTED OF THE CRIME OF INTERSTATE REMOVAL OF A CHILD UNDER THE AGE OF FOURTEEN BY A NONCUSTODIAL PARENT OR RELATIVE IN VIOLATION OF SECTION 97-3-51 OF THE MISSISSIPPI CODE AND SENTENCED TO SERVE THREE YEARS IN THE CUSTODY OF MDOC.

BEFORE BRIDGES, P.J., BARBER, AND MCMILLIN, JJ.

MCMILLIN, J., FOR THE COURT:

This case is an appeal from a criminal conviction in the Circuit Court of Harrison County of Andrew Anthony Albanese for violating the provisions of section 97-3-51 of the Mississippi Code of 1972. This section makes it a crime for a noncustodial parent to remove a child from the State in wilful violation of a court order.

The defendant alleges four grounds for reversal, all of which this Court finds to be without merit. We will discuss our conclusions on each of the issues presented for our consideration after a brief recitation of the pertinent facts.

I.

The Facts

The defendant and his wife, in a contested Mississippi adoption concluded in 1992, had their parental rights terminated to their natural child, who was approximately thirteen years old at the time. The chancery court ordered the child to be adopted by his grandparents, Mississippi residents with whom the child had resided for a large part of its life. The defendant was a resident of the State of New York, but personally appeared in the Mississippi adoption proceeding.

A few months after the adoption judgment, the defendant and his wife came to Mississippi on business. While in the State, they traveled to a ballfield where the child was engaged in a sporting activity, persuaded the child to enter their car, drove first to Louisiana, and then to New York. They were both indicted under section 97-3-51. On motion of the State and over the objection of both defendants, the two cases were severed for purposes of trial, and the defendant, Andrew Anthony Albanese, was convicted.

II.

The Severance

The defendant and his wife were jointly indicted. The State moved to sever the two trials, and the trial court granted the motion. Both this defendant and his wife opposed the severance. Such matters, whether requested by the State or the defendant, lie within the sound discretion of the trial court. *Gossett v. State,* 660 So. 2d 1285, 1289 (Miss. 1995) (citations omitted); *Price v. State*, 336 So. 2d 1311, 1312 (Miss. 1976) (citations omitted). The defendant has not advanced any meaningful argument as how his rights were adversely affected by the severance, and we can independently discover no such prejudice from our review of the record. Absent such a conclusion, there is no basis

to hold that the trial court abused its discretion in granting the State's severance motion.

III.

The Failure of the Trial Court to Direct a Verdict for the Defendant

Actually, the defendant raises several separate issues under the umbrella of this general issue, going to the impropriety of the indictment, the sufficiency of the evidence, and a unique challenge to the applicability of the statute to him.

A.

The Indictment

The defendant claims that his alleged crime was equally cognizable under section 97-5-39, which deals with contributing to the delinquency or neglect of a minor. A violation of section 97-3-51 is a felony, yet section 97-5-39 is only a misdemeanor. The defendant argues that the rule announced in *Grillis v. State* suggests the necessity of charging him under the less serious statute. *Grillis v. State,* 196 Miss. 576, 17 So. 2d 525, 527 (1944). *Grillis* provides that "[w]hen the facts which constitute a criminal offense may fall under either of two statutes, or when there is substantial doubt as to which of the two is to be applied, the case will be referred to the statute which imposes the lesser punishment." *Id.* at 527.

We do not agree that the facts of this case necessarily fall under section 97-5-39. That section involves either the element of purposely facilitating a minor in improper conduct (delinquency) or engaging in activity that may be detrimental to the child's physical or mental welfare (neglect). *See* Miss. Code Ann. § 97-5-39 (1972). Such considerations may be present when a noncustodial parent improperly removes a child from the state, but it is not necessarily the case. In this instance, there was no indication that the minor child was predisposed to delinquent activity or that the purpose of removing him from Mississippi was to facilitate any such activity. The State does not claim that this defendant's activities worked toward the physical or mental neglect of the child.

We find these two statutes to be materially different and designed to address different areas of public concern. Proof that this defendant's conduct was somehow detrimental to the behavior or the welfare of this child, an integral part of a charge under section 97-5-39, was not shown and need not be shown as an element of the offense charged in this case. There is no merit to this sub-issue.

B.

The Sufficiency of the Evidence

The defendant claims that his conviction cannot stand because of evidence that he was not aware of the existence of the court order entered in the adoption proceeding. He bases this proposition on his

testimony that he had never been formally served with a copy of the order. Thus, he argues, though he may have violated the order by removing the child from the state, he cannot have had the necessary "intent to violate a court order awarding custody of a child to another" as required by the statute. *See* Miss. Code Ann. § 97-3-51(2) (1972).

There was evidence presented that the defendant was physically present during the course of the adoption proceeding and was aware of the ruling of the court to the extent that he filed a motion for a new trial. There was other evidence demonstrating the defendant's knowledge that the court proceeding had resulted in a legal removal of the child from his custody and control. We conclude that this was sufficient evidence to permit the jury to draw an inference that the defendant had actual knowledge of the existence of the court order, whether or not he had actually physically viewed a copy of it. Under these circumstances, his testimony that he was unaware that custody of the child had been legally removed from him and his wife created, at best, a contested issue of fact for resolution by the jury. *See, e.g., Eakes v. State*, 665 So. 2d 852, 871 (Miss. 1995) (citations omitted). The jury evidently chose to disbelieve the defendant on this point, and, on this record, that cannot be said to be reversible error.

C.

The Applicability of the Statute

The defendant advances the unique argument that because his parental rights were terminated in the adoption proceeding, he has ceased to be a "parent" in the eyes of the law; therefore, because the statute in question limits its applicability to "any noncustodial *parent or relative,*" it cannot apply to him. *See* Miss. Code Ann. § 97-3-51(2) (1972). The State counters with the proposition that, by virtue of the fact that the child was adopted by its maternal grandparents, the father is now the child's brother-in-law and thus a noncustodial *relative*.

We consider this issue to be without merit; however, not for the argument advanced by the State, which we specifically reject. The American Heritage Dictionary defines a parent as "[o]ne who begets, gives birth to, or nurtures and raises a child." *American Heritage Dictionary* 992 (3d. ed. 1993). We interpret section 97-3-51(2) as intending to bring within its terms the biological parents without regard to the extent to which the law may have subsequently interfered with those rights normally found to exist in a parent. A parent whose parental rights have been terminated is nonetheless the child's biological parent, and it is in that context that we interpret the statute. The statute itself contemplates some preliminary interference by the State in the normal parent-child relationship in that it addresses a "noncustodial" parent or relative. The degree of the State's interference in the normal rights of custody can move along a continuum from a simple custody judgment in an irreconcilable differences divorce, through increasingly restrictive limits on parental access due to perceived failings on the part of the parent, to the ultimate adjudication permanently severing *any* of the rights associated with parenthood.

The State's interest in seeing that its adjudications regarding parental contact are obeyed would appear to increase, not diminish, as the adjudications restricting contact grow more severe. It would be remarkable to remove from the operation of the statute those parents who have suffered the

ultimate sanction of the law in this area, and we will not apply such a strained interpretation to the common words used in the statute. The more logical interpretation of the statute produces a result in harmony with the evident purpose of the statute, and that is the one this Court will apply.

The proposition advanced by the State that family relationships arising by virtue of the adoption decide this issue would, in future cases similar to the one now before us, produce the most arbitrary of results. The issue of the biological parents being subject to the dictates of the statute would depend on the accidental fact of whether or not they enjoyed some family relationship with the adopting parents. Whether new "relatives" created solely by virtue of an adoption proceeding are relatives within the meaning of the statute is a question that it is not necessary for the Court to answer in this instance. Neither do we address the issue of whether former relatives more distant than the biological parents remain "relatives" for purposes of the statute after a legal adoption. It is unnecessary for the decision we reach today to consider either question, and they are, thus, reserved for the proper time. A parent does not cease to be a parent within the common understanding of that term by virtue of the fact that the State has found it necessary to sever any -- or all -- of the connections otherwise existing under our law.

IV.

Instruction S-1

The defendant claims reversible error occurred when the trial court agreed to give proposed Jury Instruction S-1, which purported to set out the specific elements of the crime. The defendant finds the instruction to be fatally indefinite as to exactly which custody order he was accused of intentionally violating. The indictment identified the order by issuing court, cause number and date of entry. Instruction S-1 identified the order as "the order of the Chancery Court of the First Judicial District of Harrison County, Mississippi, awarding custody of Anthony Titus to Donald A. Titus and Bonnie Titus." Thus, the cause number and the entry date of the order were contained in the indictment but omitted from the instruction. The record reflects that a copy of the order itself was made an exhibit at trial. There was nothing in the record to indicate that there may have been more than one relevant order, and the sole consideration raised by the defense was that he had never actually seen a copy of this order. In these circumstances, we find that the instruction sufficiently identified the specific court order which the defendant was accused of violating, and that the issue was thus properly framed for resolution by the jury without any potential for confusion or uncertainty on its part. Thus, there was no defect in the instruction that would require this Court to disturb the jury’s verdict on this ground. *Henderson v. State,* 660 So. 2d 220, 222 (Miss. 1995).

V.

Lesser Included Offense Instruction

The defendant claims he was entitled to a lesser included offense instruction that would have permitted the jury to convict him of contributing to the neglect or delinquency of a child under

section 97-3-39. As we have already discussed, the elements of these two crimes are different, since section 97-3-39 requires consideration of factors necessary for conviction that simply do not come into play in the statute under which the defendant was indicted. Thus, an offense cognizable under section 97-3-39 is not a lesser included offense to the crime of which this defendant stands convicted. *Sanders v. State*, 479 So. 2d 1097, 1106-07 (Miss. 1985). This issue is without merit.

VI.

Conclusion

There is no basis to disturb the jury's verdict and the resulting judgment of sentence, and we, therefore, affirm.

THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT FINDING ANDREW ANTHONY ALBANESE GUILTY OF THE CRIME OF INTERSTATE REMOVAL OF A CHILD UNDER THE AGE OF FOURTEEN BY A NONCUSTODIAL PARENT OR RELATIVE IN VIOLATION OF SECTION 97-3-51 OF THE MISSISSIPPI CODE AND SENTENCE OF THREE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AS A HABITUAL OFFENDER IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO HARRISON COUNTY.

FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., AND PAYNE, J., NOT PARTICIPATING.