DIVISION ONE
FILED: 9/24/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 12-0607
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
TRICIA VARELA,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-007018-002

The Honorable Pamela H. Svoboda, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Joseph T. Maziarz, Chief Counsel
Criminal Appeals Section
and Jana Zinman, Assistant Attorney General
Attorneys for Appellee

Michael J. Dew — Phoenix
Attorney for Appellant

T H O M P S O N, Judge

¶1 Tricia Varela (defendant) appeals her convictions for child abuse. For the reasons set forth below, we affirm defendant's convictions and sentences.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The four-year-old victim, E.V., was placed with defendant and her husband in August 2008 and then formally adopted by them in April 2009. Although E.V. was already potty-trained, she began to hold her urine and stool, and would defecate on herself at times. E.V.'s behavior worsened and it became a constant "power struggle" to "force her to go to the bathroom." Defendant would "hold [E.V.] onto the toilet . . . sometimes upwards of 45 minutes to an hour to try to get her to use the bathroom."

¶3 On April 25, 2009, E.V.'s refusal to go to the bathroom resulted in a three-hour fight between defendant and E.V. Defendant held E.V. on the toilet with E.V.'s head between her legs, "pushing on her back so [E.V.'s] chest was going into her knees." At some point during the incident, defendant removed all of E.V.'s clothing and took her into the closet where she restrained E.V. face down on the ground with her hands pulled up behind her back so E.V. couldn't move, and struck E.V. repeatedly with a "patent leather shoe." Defendant admitted to striking E.V. six times and "restrain[ing] her against the wall." Defendant explained that her fingernails or wedding ring "caused the scratching [found] on [E.V.'s] back."

¶4 Two days later, defendant took E.V. to the hospital because she was vomiting "green bile." Nurses were concerned

about possible abuse because of "lots of bruising on [E.V.'s] extremities and her legs" from "suspected nonaccidental trauma," and they contacted Child Protective Services (CPS) and the Goodyear police department. Dr. David Rosenberg, a pediatric critical care physician, admitted E.V. to the Intensive Care Unit (ICU) because she was "seriously ill."

¶5 E.V. had multiple bruises and abrasions on her abdomen and back, as well as scattered bruising all over the remainder of her body, with scabs and multiple bruises of different colors and ages on her extremities. She suffered from a distended abdomen with decreased bowel sounds, vomiting, severe dehydration, decreased kidney functions, red blood cells and protein in her urine, abnormal blood counts, and abnormal liver function tests. E.V. exhibited swelling throughout her body, including a "very swollen" pubic region with an abrasion, and an abrasion on her neck. E.V. had a fever, "was very confused," and had "slurred speech."

¶6 Doctors discovered bleeding in the muscle layers of E.V.'s abdomen that became infected and caused an abscess requiring two surgeries. Dr. Rosenberg testified that it was unusual for someone to have this type of injury and that it was the result of "blunt trauma," "most likely a blow of some kind." E.V. also had an infection in her right groin area that was related to her abdominal infection. She received a blood

transfusion because her hemoglobin blood counts were so low that the doctors were worried she would not be able to maintain getting oxygen in her body. E.V. received intravenous fluids and nutrition, and antibiotics for infection. She was in the hospital for thirty days. Several doctors testified that E.V.'s condition was "life-threatening," "could have been fatal," "extremely critically ill," and that "[s]he could have died" if she had not received medical attention, and that her "injuries were consistent with nonaccidental trauma given the entire clinical picture and the history . . . as well as from the medical chart."

¶7 The state charged defendant with four counts of child abuse, class 2 felonies, and dangerous crimes against children (counts 1, 2, 4, and 5).[1] In March 2012, a jury found defendant guilty of count 4, reckless child abuse, a class 5 felony and domestic violence offense.[2] The trial court declared a mistrial on the remaining three counts. Defendant was retried on counts 1 (abdominal tear), 2 (failure to seek medical care), and 5 (prior bruising), and the jury found her guilty of the following: count 1, reckless child abuse, a class 3 felony and domestic violence offense committed in an especially heinous or

[1] Defendant's husband was charged with counts 3 and 6. He is not a party to this appeal.

[2] Defendant does not contest the conviction for count 4.

depraved manner; count 2, intentional or knowing child abuse, a class 2 felony and domestic violence offense committed in an especially cruel, heinous or depraved manner that caused physical or emotional harm to the victim; and count 5, intentional or knowing child abuse, a class 4 felony and domestic violence offense, committed in an especially cruel manner that caused physical or emotional harm to the victim. The trial court sentenced defendant to concurrent terms of 3.5 years' imprisonment for count 1, 17 flat years for count 2, 1.5 years for count 4, and 2.5 years for count 5. The trial court gave defendant seventy-two days of presentence-incarceration credit for each count.

¶8 Defendant timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2003), 13-4031, and 13-4033(A) (2010).

DISCUSSION

¶9 Defendant argues insufficient evidence existed for counts 1 and 2 to show her actions were committed "under circumstances likely to produce death or serious physical injury," or that she was even minimally aware that her actions could produce such a result. Claims of insufficient evidence are reviewed de novo. *State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011). We view the evidence in the light

most favorable to sustaining the verdict and resolve all reasonable inferences against defendant. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005). We do not reweigh the evidence. *State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981).

¶10 On a motion for a judgment of acquittal "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Parker*, 231 Ariz. 391, ¶ 70, 296 P.3d 54, 70 (2013) (emphasis omitted) (citations omitted). If the record contains substantial evidence establishing the elements of the offense then the motion for judgment of acquittal must be denied. *See id.* Substantial evidence is "such proof that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *West*, 226 Ariz. at 568, ¶ 16, 250 P.3d at 1191 (citation omitted).

¶11 Counts 1 and 2 required evidence that defendant committed the acts "[u]nder circumstances likely to produce death or serious physical injury." A.R.S. § 13-3623(A) (2010). "Serious physical injury" is defined as "physical injury that creates a reasonable risk of death or that causes serious or permanent disfigurement, serious impairment of health or loss or

protracted impairment of the function of any bodily organ or limb." A.R.S. § 13-3623(F)(5).

¶12 Defendant asserts that E.V. was kept in the hospital only because the doctors "could not figure out what was wrong," that she was only diagnosed and treated for an infected abscess caused by a hematoma, and that no medical expert testified that E.V. "ever experienced" serious physical injury. The evidence presented at trial, however, was sufficient to prove otherwise.

¶13 E.V. had extensive injuries and symptoms, as discussed *supra* ¶¶ 5-6, that resulted in two surgeries and a thirty-day hospital stay. Dr. Rosenberg testified that E.V.'s condition was "life-threatening," and that she "could have died" if she had not received medical treatment. Dr. Koteswarn Chundu opined that E.V.'s injuries could have been "fatal." Dr. Linda Kirsch determined that E.V. "could have potentially died," that she was "extremely critically ill," and that her injuries were "life-threatening" had she not received medical treatment. Consequently, the state presented sufficient evidence that counts 1 and 2 were committed under circumstances likely to produce death or serious physical injury.

¶14 Defendant next argues that there was no way she could have "known that holding a child on a toilet to produce a bowel movement . . . had the remotest capability of producing 'death or serious physical injury.'" A similar argument was recently

addressed by our supreme court in *State v. Payne*, __ Ariz. __, __, ¶¶ 68-73, 306 P.3d 17, 33-35 (2013). Payne argued that the state "had to show that he intended or knew that the 'circumstances were likely to produce death or serious injury.'" *Id.* at __, ¶ 69, 306 P.3d at 34. The supreme court held that the mens rea portion of the statute "refers to the act that the defendant 'does,' and not to the background circumstances." *Id.* at ¶ 71. Thus, the state must prove that defendant "caused or permitted abuse or injuries . . . to occur in circumstances likely to cause serious injury or death"; the state is not required to prove defendant's "intent that the circumstances be such that death or serious injury might occur." *Id.* at __, ¶¶ 70, 75, 306 P.3d at 34-35. "[A]bsent a person's outright admission regarding his state of mind, his mental state must necessarily be ascertained by inference from all relevant surrounding circumstances." *In re William G.*, 192 Ariz. 208, 213, 963 P.2d 287, 292 (App. 1997); *see also State v. Routhier*, 137 Ariz. 90, 99, 669 P.2d 68, 77 (1983) ("Criminal intent, being a state of mind, is shown by circumstantial evidence. Defendant's conduct and comments are evidence of his state of mind.").

¶15 On count 1, the level of intent is less than intentional or knowingly because defendant was convicted of *reckless* child abuse. Defendant admitted that the April 25

incident was a three-hour long fight where she "held" E.V. on the toilet, put her head between defendant's knees and defendant would "squeeze" her legs to hold E.V. in place while she would push on E.V.'s lower back and mid-section. Defendant admitted to restraining E.V. against the wall and on the floor face down with her hands pulled up while defendant "struck" her with a shoe. She admitted that she was "the only one who was responsible for [E.V.] being injured" and "the only person . . . who restrained" E.V. The detective investigating the case testified that he concluded defendant "knowingly" caused E.V.'s injuries and that defendant "knew what [she was] doing was causing injury to [E.V.]." This evidence was sufficient to support the jury's finding.

¶16 Defendant relies on *Martineau v. Angelone*, 25 F.3d 734 (9th Cir. 1994), to argue that there was insufficient evidence that she delayed in seeking treatment for E.V. because she did not know the extent of injury or risk involved and that she immediately sought help after E.V. began throwing up. In *Martineau*, the two-year-old victim had been with a babysitter overnight when she was picked up the next afternoon by her mother. *Id.* at 736-37. After the victim went swimming with her family, she appeared "very sleepy," and fell asleep at the dinner table. *Id.* at 738. Later, the victim's mother noticed that the victim was "foaming at the mouth and having trouble

breathing," and she immediately attempted CPR and called 911. *Id*. The victim had "no obvious injuries or bruises," and nothing presented at trial proved that the defendants knew the victim was seriously injured, yet delayed in seeking help. *Id.* at 736-41.

¶17 In contrast, defendant inflicted the injuries to E.V. herself. Although she may not have noticed at the time of the incident on Saturday night that E.V. was injured, she admitted that on Sunday morning she knew E.V. was "bruised and hurt." Defendant kept E.V. home from church on Sunday because she was "complaining about her stomach hurting," and stated that she thought E.V. had the stomach flu or constipation, but she did not have a working thermometer to take E.V.'s temperature. Later on in the day defendant noticed that E.V. was "very stiff," "wasn't moving the way she normally would," and "couldn't get up on the bed by herself." However, defendant still did not seek medical attention for E.V. until the following evening, forty-eight hours after the incident. Additionally, defendant indicated that she knew CPS would be called based on E.V.'s injuries, which suggests that she knew E.V. was potentially seriously injured. Therefore, there was sufficient evidence to support the jury's findings that defendant failed to seek medical treatment.

¶18 Defendant also challenges the sufficiency of the evidence for count 5. Count 5 alleged that between November 27, 2008, and April 24, 2009, defendant intentionally or knowingly caused E.V. to suffer physical injury or abuse. *See* A.R.S. § 13-3623(B). "Physical injury" is defined as "the impairment of physical condition and includes any skin bruising . . . ." A.R.S. § 13-3623(F)(4).

¶19 Defendant asserts that she did not intend to cause E.V. harm and that she never noticed any bruises on E.V. prior to April 25. However, the evidence at trial showed that E.V. had multiple bruises and abrasions on her abdomen and back, as well as scattered bruising all over the remainder of her body, with scabs and multiple bruises of different colors and ages on her extremities. Dr. Kirsch was concerned about the "extensive bruising" on E.V.'s back, abdomen, the inside of her legs and knees, and the inside of her elbow because the bruising was consistent with nonaccidental injuries. She concluded that E.V.'s injuries were from inflicted trauma because she was told that "there was fighting between [E.V.] and the parents and that [E.V.] was being forced on the toilet and that there was a lot of squeezing" and "crushing" of E.V.'s abdominal area. Additionally, defendant's husband told police that bruising to E.V. "did occur in the past, that it was common that bruising

occurred." E.V. was homeschooled and defendant and her husband were "the only two adults that [were] around [E.V.]."

¶20 Therefore, we conclude the state presented sufficient evidence.

CONCLUSION

¶21 For the foregoing reasons, we affirm defendant's convictions and sentences.

/s/
JON W. THOMPSON, Judge

CONCURRING:

/s/
LAWRENCE F. WINTHROP, Presiding Judge

/s/
MARGARET H. DOWNIE, Judge