DIVISION ONE
FILED: 9/17/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JESSICA AMADOR, Petitioner, v. THE HONORABLE DAVID M. HAWS, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of YUMA, Respondent Judge, STATE OF ARIZONA; JON SMITH, Yuma County Attorney, Real Party in Interest.	)	1 CA-SA 13-0219 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Petition for Special Action
from the Superior Court in Yuma County

Cause No. S1400CR201300100
The Honorable David M. Haws, Judge

JURISDICTION ACCEPTED, RELIEF DENIED

Kris A. Moe, Yuma County Deputy Public Defender — Yuma
Attorney for Petitioner

Jon R. Smith, Yuma County Attorney — Yuma
by Karolyn Kaczorowski, Deputy County Attorney
Attorneys for Real Party in Interest

T H U M M A, Judge

¶1 On December 3, 2012, while Petitioner Jessica Amador was at work, her seven month old child K.F. died at home. Petitioner was indicted on ten counts, the most serious of which is second degree murder, a Class 1 felony and a domestic violence (DV) offense or, in the alternative, manslaughter, a Class 2 felony and a DV offense or, in the alternative, negligent homicide, a Class 4 felony and a DV offense. The other nine counts allege child abuse, Class 4 felonies and DV offenses, against nine of Petitioners' children, occurring "on or about November 2010 through December 2012." The indictment alleges Petitioner was on felony probation at the time of these offenses and that Petitioner has one historical prior felony conviction.

¶2 Petitioner filed a timely motion to remand to the grand jury, challenging various aspects of the grand jury presentment and the indictment. After full briefing and argument, the superior court denied the motion. Petitioner then filed this special action.[1] This court has reviewed the Petition and attachments, the State's response and attachments and Petitioner's reply.

[1] Petitioner also requested a stay. When Petitioner's counsel contacted the court on September 3, 2013, a stay hearing was scheduled for and held on September 4, 2013 and the stay request was denied. At that same time, the court granted Petitioner's request to file a reply on or before September 10, 2013.

ANALYSIS

I. Special Action Jurisdiction.

¶3 "A challenge to the denial of a motion for remand generally must be made by special action before trial, and is not reviewable on direct appeal." *Francis v. Sanders*, 222 Ariz. 423, 426, ¶ 9, 215 P.3d 397, 400 (App. 2009). Because the Petition raises purely legal issues, and because Petitioner has no equally plain, speedy or adequate remedy by appeal, this court accepts special action jurisdiction. *See* Ariz. R.P. Spec. Act. 1(a); *Bashir v. Pineda*, 226 Ariz. 351, 353, ¶ 6, 248 P.3d 199, 201 (App. 2011).

II. The Superior Court Properly Denied The Motion To Remand.

¶4 As applied, "grand jury proceedings may be challenged only by motion for a new finding of probable cause alleging that the defendant was denied a substantial procedural right." Ariz. R. Crim. P. 12.9(a). This court reviews the superior court's legal interpretations *de novo*. *State v. Getz*, 189 Ariz. 561, 563, 944 P.2d 503, 505 (1997). With this background, the court addresses the issues properly raised in the Petition.[2]

[2] The Petition, in a footnote, purports to "incorporate[] all arguments briefed" before the superior court. Such attempted incorporation by reference does not properly raise any issues not set forth in the Petition itself. *State v. Rodgers*, 134 Ariz. 296, 302, 655 P.2d 1348, 1354 (App. 1982). Accordingly, this decision addresses the issues properly raised in the Petition itself.

A. The Grand Jury Properly Was Instructed On Causation.

¶5 Petitioner claims the grand jury was not properly instructed on causation,[3] arguing:

> Grand jurors cannot conclude that [Petitioner] caused the death of her child unless they understand the legal definition. The indictment is "deemed to conform with the evidence", but on December 3, 2012, the evidence shows that [Petitioner] was at work, and her baby was at home with two able adults and her teen-aged sister. The State charged [Petitioner] with homicidal conduct that caused the death of her baby but failed to establish or advise that 1) but for [Petitioner's] conduct the death would not have occurred, and 2) the relationship between the conduct and result satisfies any additional requirements imposed by the statute defining the offense. A.R.S. § 13-203. As to all counts, causation is an element of the offense. The case should be remanded for this reason alone.

Before the superior court, the State construed this argument as asserting "the State did not present [Petitioner's] defense of lack of causation to the Grand Jury." Causation, however, is

[3] A portion of the Petition titled "Nature and Cause of the Accusation" states Petitioner "was at work when the death of her child occurred at her home in Yuma. Her conduct did not result in K.F.'s death. . . . The homicide counts, charged alternatively, were not supported by the evidence of a dirty house and more importantly lacked any causation or nexus to Amador's conduct." This portion of the Petition appears to be subsumed by Petitioner's causation argument. To the extent it claims the indictment does not properly inform Petitioner of the accusations, Petitioner has not shown a basis for remand. To the extent it challenges the factual basis for the indictment, as discussed below, that is not a proper subject for a motion to remand. Finally, to the extent it claims the State cannot prove the counts beyond a reasonable doubt, that is a trial issue.

part of the showing the State must make and the grand jury must find. In substance, Petitioner argues remand is required because the State did not read to the grand jury Arizona Revised Statutes (A.R.S.) section 13-1203(A) (2013).[4]

¶6 By statute,

> Conduct is the cause of a result when both of the following exist: 1. But for the conduct the result in question would not have occurred. 2. The relationship between the conduct and result satisfies any additional causal requirements imposed by the statute defining the offense.

A.R.S. § 13-203(A). As applied, Petitioner has not argued the presence of "any additional causal requirements imposed by the statute defining the offense[s]." A.R.S. § 13-203(A)(2). Rather, Petitioner argues only that the State was required to instruct the grand jury that "[c]onduct is the cause of a result when . . . [b]ut for the conduct the result in question would not have occurred," as set forth in A.R.S. § 13-203(A)(1).

¶7 Although the State did not read A.R.S. § 13-203(A) to the grand jury, the parties have cited, and the court has found, no statute, rule or case requiring the State to read that statute to the grand jury.[5] This absence of such authority is

---

[4] Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

[5] In arguing this point before the superior court, Petitioner cited four Arizona cases, none of which address grand jury instructions. *See State v. Wilkinson,* 202 Ariz. 27, 29, 39 P.3d

particularly significant given that causation is a required element in many criminal offenses and has been for decades.

¶8 The grand jury was instructed that, to constitute an offense, Petitioner had to cause K.F.'s death. Twice, the grand jury was instructed that "second degree murder is committed without premeditation under circumstances manifesting extreme indifference to human life, the person recklessly engages in conduct that creates a grave risk of death and *thereby causes the death of another person*." (Emphasis added.) Similarly, the grand jury twice was instructed that "a person commits manslaughter by *recklessly causing the death of another person*." (Emphasis added.) Also on two occasions, the grand jury was instructed that "a person commits negligent homicide if with criminal negligence the person *causes the death of another person.*" (Emphasis added.) Each of these statements accurately reflects the statutory definition for these offenses, including the causation requirement. *See* A.R.S. §§ 13-1104(A)(3) (second degree murder); 13-1103(A)(1) (manslaughter); 13-1102(A)

1131, 1133 (2002) (addressing "but for" causation for criminal restitution); *State v. Bass*, 198 Ariz. 571, 575, ¶ 11, 12 P.3d 796, 800 (2000) (addressing jury "instructions on superseding cause" at trial); *State v. Lawson,* 144 Ariz. 547, 559, 698 P.2d 1266, 1278 (1985) (rejecting argument "that it was inconsistent to give a 'but for' test for causation with a proximate cause instruction" in jury instructions at trial addressing felony murder); *State v. Wiley,* 144 Ariz. 525, 540, 698 P.2d 1244, 1259 (1985) (same), *overruled on other grounds by Arizona v. Superior Court*, 157 Ariz. 541, 760 P.2d 541 (1988).

(negligent homicide). Similarly, the grand jury was instructed on causation for the child abuse counts. *See also* A.R.S. § 13-3623(A). In short, the grand jury was repeatedly instructed that causation is an element of the offenses charged in all counts.[6]

¶9 The grand jury heard testimony that Petitioner was at work when the incident occurred and then later arrived at the house. The grand jury also heard testimony that Petitioner's 20-year-old son and his 22-year-old girlfriend were at the house when the incident occurred and, along with Petitioner's 14-year-old daughter, were caring for K.F. In fact, the grand jury asked how long Petitioner's son and his girlfriend had lived at the house and was told "[t]he accounts have gone from shorter than one month to a couple of years. So it is not pinpointed." Although asking other questions, the grand jury did not ask about causation, request a definition of causation or appear to be confused about the causation requirement.[7]

---

[6] The grand jury also was instructed on the definition of the meaning of the various required mental states and that the alternative second degree murder, manslaughter and negligent homicide charges were "not linked together. You have to deliberate on each one of them separately as if they were separate charges."

[7] Although relevant to show a lack of confusion, this absence of questions is not dispositive on whether an instruction was required. *See Trebus v. Davis*, 189 Ariz. 621, 623, 944 P.2d 1235, 1237 (1997) (noting State must "instruct the grand jury on all the law applicable to the facts of the case, even if the grand jury does not make any specific request for additional legal instruction").

¶10 In seeking a remand, Petitioner has the burden to show that she was "denied a substantial procedural right." Ariz. R. Crim. P. 12.9(a). With regard to the A.R.S. § 13-203(A) causation definition, Petitioner has failed to show the State was required to read that provision to the grand jury. Moreover, in light of the instructions given and from the court's review of the grand jury transcript, Petitioner has not otherwise shown a denial of a substantial procedural right arising out of how the grand jury was instructed on the issue of causation.

B. The Indictment Is Not A Double Jeopardy Violation.

¶11 In May 2011, Petitioner pled guilty to child abuse, a Class 6 non-dangerous, non-repetitive undesignated felony, committed on October 14, 2010. Petitioner's child K.F. (not the child who died on December 3, 2012) was the victim of that offense and is the alleged victim in count 8 in this case. The factual basis Petitioner provided in her written plea agreement for the October 2010 offense is as follows:

> On or about October 14, 2010, police did a welfare check on my children. I had been stopped for a traffic violation, cited and searched by a female [Yuma Police Department] officer who asked who was staying with my children. I told her my nephew was staying with the children but when they arrived to do a welfare check, he was not there. Officers found the front door did not latch. Upon entry, officers saw cockroaches on the floors, walls, and ceilings, medicine bottles on the floor with pills in them and general unsanitary

> conditions. I was criminally negligent in permitting the unsafe and unsanitary conditions in the home.

For that conviction, on July 13, 2011, Petitioner was placed on supervised probation for three years.

¶12 The grand jury heard testimony that "on October 14, 2010, [Petitioner] was contacted at her home. At that time her home was described as filthy and infested with roaches similar to its current condition." Petitioner argues this reference violates her double jeopardy rights, arguing "[i]t is the sole evidence for the continuous nature of the child abuse allegations from November 2010 through December 2012."

¶13 This reference to the condition of the home in mid-October 2010 was not offered to prosecute or punish Petitioner for the conduct underlying her prior conviction. Rather, the evidence was offered to suggest the condition of the home as of November 2010 (the beginning date alleged for the child abuse counts) and was followed by a chronological summary about the subsequent condition of the home. The October 2010 incident predates the child abuse counts, which allege abuse from on or about November 2010 to December 2012. Because the indictment does not allege child abuse in October 2010, Petitioner is not at risk for multiple prosecutions or punishments for the same conduct, the primary evil double jeopardy prohibits. *See, e.g.*, *United States v. Wilson*, 420 U.S. 332, 343 (1975).

¶14 Contrary to Petitioner's argument, the reference to the October 2010 incident was not the "sole evidence for the continuous nature of the child abuse allegations from November 2010 to December 2012." The grand jury heard testimony about the condition of each child in December 2012, which included: skin bruising, discoloration or scratches; scarring; rashes; cuts and untreated tooth decay, most of which originated days, weeks or months before being observed by law enforcement. The grand jury also heard testimony about the condition of the lot and house where Petitioner and her children lived in December 2012. For the lot, a wood fence was broken, the yard was not well kept and contained a pile of dried food and trash was scattered on the yard. When a witness went in the home, he "immediately smelled a strong odor of feces" and observed "dirty dishes, food, trash, clothes, shoes and other items" scattered about; roaches "crawling throughout the floor and on the furniture and on the walls" and everywhere in the kitchen area, "both dead and alive, in the cabinets, on the counter, walls and on the floor" and a toilet with "what appeared to be days of unflushed human feces." Again, these issues would have originated days, weeks or months before being observed by law enforcement in early December 2012.

¶15 The grand jury heard testimony about significant unexcused school absences and tardy days for Petitioner's children, both in the current school year and, where applicable,

prior years. Still other evidence reflected contacts with Petitioner during the time of the alleged child abuse, including evidence of marijuana use in the home and an eviction notice for nonpayment of rent and failure to maintain the property received shortly before K.F.'s death. Thus, contrary to Petitioner's argument, the brief mention to the grand jury of the condition of the home in mid-October 2010 was not the only evidence supporting the continuous child abuse allegations.

¶16 To further avoid any issue, the grand jury presentment was bifurcated; the grand jury returned a true bill on all ten substantive counts before the State presented evidence that Petitioner had a prior felony conviction and was on probation during some of the time applicable to the child abuse offenses (as ultimately alleged in the indictment). Thus, the grand jury did not have any evidence of Petitioner's prior conviction until returning a true bill on the substantive counts.

¶17 The dates (including date ranges) for the charges are specified in the indictment. Moreover, in response to a question, the grand jury was instructed the date range for Counts 2 to 10 was "up to you to decide." Petitioner has not supported –- either factually or legally -– her claim that the date ranges in the indictment deprive her "of any meaningful opportunity to prepare a defense in that the amorphous charge does not admit a single alibi and does not put the defendant on

notice of the exact charge." Whether the State can prove beyond a reasonable doubt that Petitioner is guilty of child abuse "on or about November 2010 through December 2012" as charged is a trial issue.[8] Petitioner, however, has not shown how the indictment is a double jeopardy violation.

C. Petitioner Has Not Shown A Due Process Deprivation By The State's Grand Jury Presentation.

¶18 Petitioner alleges the State improperly provided the grand jury other bad act evidence (consisting of "evidence of an altercation at a bar" in June 2012) and improperly offered testimony about "minor bumps, scrapes and abrasions" observed on the children but did not also present the grand jury photographs of the children. "'[A]n indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence.'" *State* ex rel. *Collins v. Kamin*, 151 Ariz. 70, 72, 725 P.2d 1104, 1106 (1986) (quoting *State* ex rel. *Preimsberg v. Rosenblatt*, 112 Ariz. 461, 462, 543 P.2d 773, 774 (1975)). A court "is prohibited from 'considering an attack on an indictment based on the nature, weight or sufficiency of the evidence presented to the grand jury.'" *State v. Snelling*, 225 Ariz. 182, 186, ¶ 12, 236 P.3d

[8] Counts 9 and 10 of the indictment allege this date range for victims born March 6, 2011 and May 7, 2012 respectively. Petitioner has not argued in the superior court or in the Petition that this date range should be narrowed.

409, 413 (2010) (quoting *Crimmins v. Superior Court*, 137 Ariz. 39, 42-43, 668 P.2d 882, 885-86 (1983)).

¶19 This court has reviewed the transcript of the grand jury presentment as well as color photographs of the children Petitioner provided in a September 3, 2013 supplement. Petitioner provides no authority for the proposition that photographs (as opposed to observations) were required to be presented to the grand jury. *Kamin*, 151 Ariz. at 72, 725 P.2d at 1106 ("'[N]either the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act.'") (quoting *Costello v. United States*, 350 U.S. 359, 362 (1956)). The evidence of the altercation at a bar was brief, provided in the context of Petitioner's contact with law enforcement and was within the date range of the child abuse allegations. Moreover, as applicable here, the Arizona Rules of Evidence (including Rule 404 Petitioner cited to the superior court) "do not apply to grand jury proceedings." Ariz. R. Evid. 1101(d). Petitioner has not shown the deprivation of a due process right by the State's presentation to the grand jury.

D. Petitioner Has Not Shown Impermissible Joinder Requiring Remand.

¶20 Petitioner alleges the murder/manslaughter/negligent homicide count improperly was joined with the child abuse

counts. The victim named in the murder/manslaughter/negligent homicide count, however, is also named as a victim in a child abuse count. Moreover, Petitioner does not claim that the nine child abuse counts were improperly joined with each other. In any event, any defect in joinder properly may be addressed in a motion to sever. *See* Ariz. R. Crim. P. 13.4. Petitioner has not shown impermissible joinder requiring remand to the grand jury.

E. Petitioner Has Not Shown The Indictment Is Duplicitous Or Multiplicitous.

¶21 Petitioner's final argument is that the child abuse counts are duplicitous and multiplicitous, primarily objecting to a flow chart used by the State to explain child abuse under A.R.S. § 13-3623. An indictment is duplicitous if it charges more than one crime in the same count. *See State v. Anderson*, 210 Ariz. 327, 335, ¶ 13, 111 P.3d 369, 377 (2005) (citing *State v. Axley*, 132 Ariz. 383, 392, 646 P.2d 268, 277 (1982)). An indictment is "multiplicitous when it charges a single offense in multiple counts." *State v. Barber*, 133 Ariz. 572, 576, 653 P.2d 29, 33 (App. 1982) (citing *State v. O'Brien*, 123 Ariz. 578, 601 P.2d 341 (App. 1979)). Petitioner has not shown how any of the counts in the indictment suffer from these defects.

¶22 Each child abuse count alleges a single, different victim. Moreover, Petitioner has not argued that the flow chart used to explain the many facets of A.R.S. § 13-3623 was

inaccurate and has not shown how its use was improper. Finally, Petitioner cites no authority to support any remaining argument that the indictment was duplicitous or multiplicitous.

CONCLUSION

¶23 This court accepts special action jurisdiction and denies relief.

/S/_____
SAMUEL A. THUMMA, Judge

CONCURRING:

/S/_____
RANDALL M. HOWE, Presiding Judge

/S/_____
KENT E. CATTANI, Judge