DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 07-0685
	)	DEPARTMENT D
v.	)	**MEMORANDUM DECISION**
KIMU MARIE PARKER, Appellant.	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2005-009256-002 DT

The Honorable Thomas O'Toole, Judge (Retired)

AFFIRMED

Terry Goddard, Attorney General — Phoenix
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J O H N S E N, Judge

¶1 Kimu Parker appeals her convictions of three counts of child abuse, each a dangerous crime against a child and a domestic violence offense and a Class 2 felony. We affirm the convictions and resulting sentences.

FACTS AND PROCEDURAL HISTORY

A. Background Facts.

¶2 Parker and her husband, Blair, are the parents of M, a daughter born in May 1993; C, a son born in March 1996; and Z, a daughter born in December 2001.[1] According to those who observed them, the parents and their children were affectionate toward each other. A physician said Parker and her husband "were really loving to their children."

¶3 Parker home-schooled the children and prepared all their meals. The family was vegan, and Parker's meal preparation was based on information she learned through studying nutrition and a nutrition plan her husband created while taking a nutrition course. The family shopped for groceries at health food stores, and Parker made all of their meals from scratch, emphasizing fresh fruits and vegetables and foods low in fats. The family ate three meals a day and did not snack between meals. Breakfast might be a tofu vegetable

[1] Upon review, we view the facts in the light most favorable to sustaining the jury's verdicts and resolve all inferences against Parker. *See State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

scramble with rice over pasta or a tofu egg salad sandwich, and dinner would be oatmeal with granola, fruit, bread and fruit or vegetable juice. Parker and the children exercised after each meal in order to stay healthy and keep their bowels moving because Parker believed that healthy bowels were essential. Parker spoke with confidence about nutritional issues, using scientific and medical terms in describing her views on nutrition.

¶4 The family practiced Seventh Day Adventism and followed religious writings that advocated specific nutritional guidelines. Parker helped distribute literature about her religious beliefs, including "Steps to Radiant Living," under the acronym NEWSTART. NEWSTART stands for "Nutrition, Exercise, Water, Sunshine, Temperance, Air, Rest, Trust in God." Its teachings included a daily schedule for healthy living that suggested eating a "good breakfast," "a moderate lunch," and "a very light evening meal or skip[ping] supper altogether and tak[ing] a walk instead."

¶5 Unfortunately, Parker's beliefs about nutrition and health led to tragic results. Evidence at trial was that Parker held her children to a strict diet that she believed had resolved her own childhood problems with asthma. But while the food Parker was providing her children may have been healthy, she did not permit her children to consume enough of that food

to promote growth. Moreover, Parker believed that a healthy person's bowels should move 20-30 minutes after every meal. She monitored the toilet habits of her children, and if their bowels did not perform in the manner she considered healthy, she would give them supplements designed to promote bowel movements. If one of her children went a day without a bowel movement, she would give the child an enema. Parker's concern with bowel movements arose from her belief that a "sluggish bowel" may lead to health ailments such as seizures and asthma.

¶6 Parker was aware that her three children were very thin and very small for their ages. Parker understood that other persons might think that her undersized children were victims of parental neglect. But she told others that vegan children tend to be smaller than other children. Moreover, she told others her children suffered from malabsorption syndrome, in which the absorption of nutrients from the gastro-intestinal tract is impaired.[2]

¶7 C, the middle child, saw a medical doctor once in 1998, when he was two years old. At that time, C was diagnosed

[2] Malabsorption syndrome is "characterized by anorexia, weight loss, abdominal bloating, muscle cramps, bone pain, and steatorrhea." Mosby's Dictionary of Medicine, Nursing & Health Professions 1129 (8th ed. 2009). "Steatorrhea" means "greater than normal amounts of fat in the feces," characterized by, *inter alia*, "any condition in which fats are poorly absorbed by the small intestine." *Id.* at 1757. Malabsorption may be caused by any one of several conditions. *Id.* at 1129.

with poor growth, and the physician expressed concerns about failure to thrive, anemia and developmental delay. The doctor scheduled follow-up appointments for more tests, but Parker did not return C to the doctor and the tests were not performed.

¶8 The Parkers preferred herbal and naturopathic remedies to those prescribed by medical doctors. Rather than take the children to medical doctors, Parker administered natural cures that she learned from books. Parker hoped to find a physician who would not "judge" her or the children based upon their size, but she had been unable to find one. Sometimes she consulted with an acquaintance, Wendi Skeete, who lived in Wisconsin and had a certificate in naturopathic medicine and some training in Western herbalism. In December 2004 or January 2005, Parker telephoned Skeete for advice about herbs to give to Z, who Parker told Skeete was losing weight due to malabsorption. Skeete, who was not a licensed naturopathic doctor, performed some research, then recommended two herb supplements for Z.

¶9 The Parker family came to the attention of police during the predawn hours of April 23, 2005. Z had not felt well the day before. She was excessively thirsty and by early evening was cold to the touch. When she began having seizures, Parker telephoned Skeete for advice. Parker spoke to Skeete four times early the morning of April 23 about Z and asked her for advice on an herbal seizure remedy. Parker explained to

Skeete during one of the calls that she wanted to use a naturopathic remedy for Z because her children were a "little bit underweight" and she did not want Child Protective Services ("CPS") to get involved. Parker applied a Lobelia skunk cabbage tincture to Z and gave her a warm bath, but the child continued to seize. Eventually, on Skeete's advice, Parker called 9-1-1. Z had stopped seizing when the paramedics arrived at 2:24 a.m., but was nonresponsive. Paramedics transported Z and her father to a nearby hospital; she later was transferred to Phoenix Children's Hospital ("PCH").

¶10 After seeing Z and learning there were other children at home, a hospital social worker asked police to check on them. When a police officer arrived at the Parker home later that morning, he saw C, who appeared to him to be the size of a 4-year-old although he was 9, and M, who appeared to be the size of a 6-year-old although she was nearly 12. Both children were wearing very baggy clothing, and their skin appeared "loose." Although the refrigerator was "fully stocked with beans, rice and just other type of beans and rice items," as well as fresh vegetables, roots and mixed grains, the "kitchen cabinets were bare."

¶11 The officer called for medical assistance, and the paramedics who had transported Z earlier in the day returned to the home. To paramedic Danny Ramirez, M and C seemed energetic.

They "would jump up on the bed," they "answered all [his] questions" and did not appear to have any joint pain. The children were alert, well-educated, clean and neat. They were "extremely smart" and responded "very quickly" to the paramedics' questions.[3] For her part, Parker was eager to talk to the paramedics about nutrition issues and said that she ate the same meals she prepared for her children. One of the paramedics saw a "bookshelf full of nutrition books" at the house. After examining C and M for at least 30 minutes, the paramedics found no bruises or burns and concluded there was no medical reason to bring the children to the hospital. Accordingly, the paramedics departed, leaving C and M behind with Parker.

¶12 At PCH, however, doctors requested C and M be brought to the hospital, and police and a CPS social worker went to the home and told Parker that medical personnel had demanded to see the children. With Parker's consent, the social worker drove Parker, C and M to the hospital. Once at the hospital, however, Parker and her husband declined to have C and M admitted. At that, CPS took custody of C and M, and they were admitted. C

[3] According to Ramirez, "They were eager to tell us everything about their house. They were happy. Appeared happy that they were home schooled. They wanted to show us their room, which they did. House was very neat."

and M remained in the hospital for approximately 40 days; Z was released nine days after that.

B. Evidence Relating to Z's Condition.

¶13 Z was gravely ill when paramedics arrived at the Parker home early the morning of April 23, 2005. She could have died without medical attention. At three years of age, Z weighed 5.6 kilograms (12.3 pounds) and was 81 centimeters tall, below the fifth percentile for her age. (Photographs of each of the children documenting their appearance upon their admission to the hospital were admitted in evidence at trial.)

¶14 Z had very low blood sugar and salt levels and a very low body temperature, all conditions that can cause seizures. She suffered from cardiomyopathy and anemia, which required her to undergo a blood transfusion. Z was admitted to the PCH Intensive Care Unit, where she remained for five days. Concerns about refeeding syndrome remained even after she was released from intensive care into a general pediatric ward.[4] When she left intensive care, Z was unable to walk without assistance. She was fed intravenously and then through a feeding tube; it

[4] Refeeding syndrome is characterized by "moderate to severe electrolyte and fluid shifts occurring during a period of refeeding," which in turn means "restoration of normal nutrition after a period of fasting or starvation." Mosby's Dictionary of Medicine, Nursing & Health Professions at 1593. According to evidence at trial, if normal amounts of food are introduced too quickly after a period of fasting or starvation, life-threatening conditions may result.

was more than a month before she was able to receive food by mouth. Even upon her discharge from the hospital, Z remained on a feeding tube.

¶15 With her brother and sister, Z was placed in foster care upon her release from the hospital. By the time of trial, two years later, Z was above the 50th percentile for her age and witnesses described her as "pudgy."

C. Evidence Relating to C's Condition.

¶16 Although his condition was not life-threatening on April 23, 2005, C was diagnosed with failure to thrive. He was hospitalized so that tests could be performed and his progress could be observed. He weighed 31.8 pounds and was well below the fifth percentile for his age. He was only as tall as the average 4-year-old. Dr. John Hartley, a PCH physician, testified that given C's parents' heights and weights, he would expect C to be above the 75th percentile for children his age. A social worker who saw C said that "[f]rom the back you could count every bone in [his] body." Although one physician testified C was extremely malnourished, his condition did not require he be admitted to the Intensive Care Unit. According to a specialist who treated the children, thyroid malfunction is the most obvious explanation for stunted growth, but C's thyroid was not causing his failure to thrive. Nor did C demonstrate any chemical imbalance that might have slowed his growth.

¶17 When he was first admitted to the hospital, C was permitted to take food by mouth. Because he then showed early signs of refeeding syndrome, he was fed intravenously for five days before normal feeding was resumed. In the hospital, C used a "shuffling" gait that was unusual for a nine-year-old. He also reported pain in his bones, particularly in his knees. A physician testified that such pain is common when malnutrition has caused low bone density; the pain occurs when refeeding begins and bones begin to grow again.

¶18 C's discharge diagnosis included failure to thrive, malnutrition, anemia, refeeding syndrome, delayed boneage and a dilated aortic root.[5] C made "really very impressive" gains in both height and weight over the 40 days he was hospitalized. Hartley testified that despite those gains, however, he doubted C would reach the height he would have reached as an adult had he not experienced malnutrition.

¶19 Although the evidence was that C's gait "improved over the [hospital] stay," upon discharge, he still had an "old man" walk. He needed assistance going up and down stairs and could not jump rope, skip, ride a bike or climb monkey bars. His foster mother testified that by the time of trial, two years later, C still had "a different kind of walk" but that "[m]ost

[5] There was no evidence that C's dilated aortic root was related to malnutrition.

everything has gone away" in terms of the pain in his legs. She testified that by the time of trial, C weighed 88 pounds and had grown "at least a foot" since he was released from the hospital. By the time of trial, he was between the 25th and 50th percentile in size. When he was released from the hospital, C wore a "size four toddler," but by the time of trial, he wore "10/12 boy sizes."

¶20 Asked what long-term consequences of malnutrition C would suffer, Hartley responded that "only time will tell." A pediatric gastroenterologist at PCH testified that "the most concerning part of malnutrition in children would be the development of the brain." There was no evidence at trial, however, that C had lost any mental capacity. His foster mother testified that after he was released he had not had to return to the hospital, nor had he suffered any complications from the malnutrition.

D. Evidence Relating to M's Condition.

¶21 Upon her arrival at PCH, M's condition was not life-threatening and did not require her to be admitted to the Intensive Care Unit. Although she was 11 (nearly 12), she weighed 17.1 kilograms (37.6 pounds), the weight of an average four-and-a-half year old. A pediatrician who treated M in the hospital said that upon admission, she was "[j]ust pretty much bone with a little bit of skin over it." "Really wasn't any

body fat. Minimal muscle, even." A social worker testified that, as with C, "[f]rom the back you could count every bone in [her] body."

¶22 The progress notes on her hospital chart reflected M had "severe malnutrition secondary to misguided parental beliefs." Tests showed her thyroid function was normal, and she showed no chemical imbalance. Her discharge summary listed failure to thrive, malnutrition, anemia, refeeding syndrome and adjustment disorder, but she never exhibited any signs of refeeding syndrome and did not require intravenous nutrients.

¶23 During her hospitalization, M would order food from the hospital cafeteria and would ask hospital personnel to obtain other food at her direction from specialty health food stores. M then would prepare meals for C and herself using garlic, oregano and other spices. She seemed happy to be able to eat all that she could, and demonstrated to a social worker a portion size that her mother might feed her at home that, according to the social worker, was "very small" for a child of her age.

¶24 Over the course of her hospital stay, M steadily gained weight and height. By the time of trial, M weighed 80 pounds and was in about the 25th percentile for height and weight. Hartley testified, however, that because M was nearing puberty, he would not expect that she would attain the height as

an adult she would have reached but for the malnutrition. At the time she was released from the hospital, M wore size six clothes, but was wearing a "10 and 12" by the time of trial. The children's foster mother testified that when M first was released from the hospital, she was unable to jump rope, run or skip or ride a bicycle, and was sensitive to touching. According to the foster mother, by the time of trial, those issues had gone away. One of the physicians called M "extremely bright." As with C, there was no evidence that the malnutrition had affected M's mental capacity, nor had she had to return to the hospital due to any complications.

E. Parker's Trial and Appeal.

¶25 Parker and her husband were charged with three counts of child abuse, Class 2 felonies and dangerous crimes against a child in the first degree, pursuant to Arizona Revised Statutes ("A.R.S.") section 13-3623(A)(1) (2010).[6] The jury convicted Parker of all three counts,[7] after which the court sentenced her to three consecutive 10-year prison terms, the minimum sentence allowed under the charges pursuant to what is now A.R.S. § 13-

[6] Absent material revisions after the date of an alleged offense, we cite a statute's current version.

[7] The trials of Parker and her husband were severed; she was tried first. A jury convicted her husband of three lesser-included charges, and the court imposed aggravated sentences totaling 14.75 years' incarceration.

705(P)(1)(h) (2010). *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 17, 29 (2nd Reg. Sess.) (renumbering).

¶26 Parker timely appealed, and her attorney filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967). *See also State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). We issued an order pursuant to *Penson v. Ohio*, 488 U.S. 75 (1988), directing the parties to brief whether there was sufficient evidence to support Parker's convictions with respect to M and C and directed the parties' attention to *State v. George*, 206 Ariz. 436, 79 P.3d 1050 (App. 2003).

¶27 We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010) and -4033 (2010).

DISCUSSION

A. Standard of Review.

¶28 "In reviewing the sufficiency of evidence, we view the facts in the light most favorable to upholding the jury's verdict and resolve all reasonable inferences against the defendant." *George*, 206 Ariz. at 440, ¶ 3, 79 P.3d at 1054. We will not disturb the verdict unless it clearly appears "that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987); *see also State v. Whalen*, 192 Ariz. 103, 111, 961 P.2d 1051, 1059

(App. 1997) ("Evidence is sufficient to support a verdict if a rational trier of fact could have found the elements of the offense beyond a reasonable doubt.").

¶29 In interpreting a statute, our primary consideration is to determine legislative intent. *Cicoria v. Cole*, 222 Ariz. 428, 431, ¶ 12, 215 P.3d 402, 405 (App. 2009). We look first to the statute's plain meaning. *Wells Fargo Credit Corp. v. Tolliver*, 183 Ariz. 343, 345, 903 P.2d 1101, 1103 (App. 1995). If the statute is ambiguous, we then "consider the statute's context; its language, subject matter, and historical background; its effects and consequences; and its spirit and purpose." *Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 268, 872 P.2d 668, 672 (1994).

B. The Relevant Statute.

¶30 The statute under which Parker was convicted, A.R.S. § 13-3623(A), provides:

> Under circumstances likely to produce death or serious physical injury, any person who causes a child . . . to suffer physical injury or, having the care or custody of a child . . . , who causes or permits the . . . health of the child . . . to be injured or who causes or permits a child . . . to be placed in a situation where the . . . health of the child . . . is endangered is guilty of an offense as follows:
>
> 1. If done intentionally or knowingly, the offense is a class 2 felony and if the victim is under fifteen years of age it is punishable pursuant to § 13-705.
>
> 2. If done recklessly, the offense is a class 3 felony.

> 3. If done with criminal negligence, the offense is a class 4 felony.

Part B of § 13-3623 applies to acts of a similar nature but committed under less dangerous circumstances:

> Under circumstances other than those likely to produce death or serious physical injury to a child . . . , any person who causes a child . . . to suffer physical injury or abuse or, having the care or custody of a child . . . , who causes or permits the . . . health of the child . . . to be injured or who causes or permits a child . . . to be placed in a situation where . . . health of the child . . . is endangered is guilty of an offense as follows:
>
> 1. If done intentionally or knowingly, the offense is a class 4 felony.
>
> 2. If done recklessly, the offense is a class 5 felony.
>
> 3. If done with criminal negligence, the offense is a class 6 felony.

¶31 Parker argues the evidence was legally insufficient to support a finding that she acted "[u]nder circumstances likely to produce death or serious physical injury" to the children, within the meaning of A.R.S. § 13-3623(A). She also argues the evidence was insufficient to support the conclusion that she acted intentionally or knowingly within the meaning of subpart (A)(1) of the statute.

C. Evidence of "Circumstances Likely to Produce . . . Serious Physical Injury."

¶32 A conviction under A.R.S. § 13-3623(A) requires the defendant to have acted "[u]nder circumstances likely to produce

death or serious physical injury." The statute defines "[s]erious physical injury" 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). By contrast, the statute defines (mere) physical injury as "the impairment of physical condition and includes any skin bruising, pressure sores, bleeding, failure to thrive, malnutrition, dehydration, burns, fracture of any bone, subdural hematoma, soft tissue swelling, injury to any internal organ or any physical condition that imperils health or welfare." A.R.S. § 13-3623(F)(4).

¶33 There was evidence at trial that Z, the youngest child, was in a life-threatening condition when she arrived at the hospital early the morning of April 23, 2005. That evidence, along with a wealth of other evidence at trial, was sufficient for the jury to conclude that Parker acted with respect to Z "[u]nder circumstances likely to produce death or serious physical injury."

¶34 After carefully reviewing the record and the parties' supplemental briefs, we also conclude there was evidence from which the jury could find that Parker acted with respect to C and M "[u]nder circumstances likely to produce . . . serious physical injury," within the meaning of the statute.

¶35 While the State did not argue at trial that Parker acted under circumstances likely to cause the death or permanent disfigurement of C or M, it argued evidence supported the conclusion that the circumstances were likely to cause a "serious impairment" of their health. We agree. The evidence was that C, who at nine was the size of a four-year-old, and M, who was nearly 12 but was only as tall as a seven-year-old and as heavy as a four-year-old, were horrifically emaciated because they had been subjected to severe malnutrition for five years or longer. *See State v. Poehnelt*, 150 Ariz. 136, 140-41, 722 P.2d 304, 308-09 (App. 1985) (affirming conviction under "under circumstances likely to produce death or serious physical injury" when child was severely malnourished, "severely underweight and short for her age").

¶36 We considered the distinction between "serious physical injury" and "physical injury" in the context of a gunshot wound and an assault conviction in *George*. The defendant in that case shot a woman in the neck, causing her to spend two days in the hospital. *George*, 206 Ariz. at 439, ¶ 2, 79 P.3d at 1053. The injury provision in the statute at issue in that case was substantially identical to the statute at issue here; it defined "[s]erious physical injury" to mean injury that "creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or

protracted impairment of the function of any bodily organ or limb." A.R.S. § 13-105(38) (2010).

¶37 The victim in *George* "had not regained full function of her arm during her two-day hospital stay," but the physician "refused to speculate on whether that impairment would be temporary, protracted, or permanent." *Id.* at 440, ¶ 4, 79 P.3d at 1054. We observed that "the plain meaning of 'serious impairment of health' suggests that the degree of the impairment must be significant rather than minor." *Id.* at ¶ 7 (citing *State v. Greene*, 182 Ariz. 576, 582-83, 898 P.2d 954, 960-61 (1995)). We analyzed the statutory scheme relating to assaults, noting the legislature had enacted a tiered sentencing scheme based upon the severity of the injury. *Id.* at 441, ¶ 8, 79 P.3d at 1055. We held "that the legislature intended 'serious physical injury' to refer to an injury more serious than those injuries justifying a mere nondangerous, class four felony classification" and held that a "serious impairment of health" "must be more than a 'temporary but substantial' impairment of health and more than the usual temporary impairment caused by the fracture of a body part." *Id.* at ¶ 9 (citations omitted). Ultimately we concluded "that the legislature intended 'serious impairment of health' to be comparable in terms of its gravity to an injury that creates a reasonable risk of death or substantial and permanent disfigurement." *Id.* at ¶ 10. On the

facts presented, we held the evidence was insufficient to support a finding of serious physical injury because there was "no evidence that [the victim]'s injuries had caused her to suffer a sustained impairment of her health or a protracted impairment of the use of her arm." *Id.* at 442, ¶ 14, 79 P.3d at 1056.

¶38 As in *George*, we must interpret the statute under which Parker was convicted to give meaning to the tiers of offenses the legislature created. That is to say that "physical injury . . . that causes serious impairment of health," pursuant to A.R.S. § 13-3623(F)(5), must be something significantly more than mere "failure to thrive" or "malnutrition," which by themselves can constitute "[p]hysical injury" within the meaning of A.R.S. § 13-3623(F)(4).[8]

¶39 The evidence was that C and M made remarkable gains in both height and weight after they were hospitalized and throughout their time in foster care prior to trial, two years later. Although C continued to walk with an abnormal gait,

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[8] Failure to thrive is "the abnormal retardation of growth and development of an infant resulting from conditions that interfere with normal metabolism, appetite, and activity." Mosby's Dictionary of Medicine, Nursing & Health Professions at 696. The dictionary further explains, "Metabolic disturbances of short duration, as occur during acute illness, usually have no long-term effects on development and are usually followed by a period of rapid growth. Prolonged nutritional deficiency may cause permanent and irreversible retardation of physical, mental, or social development." *Id.* Malnutrition means "any disorder of nutrition." *Id.* at 1136.

neither of the children showed any signs of permanent organ impairment or diminished mental capacity as a result of the malnutrition they suffered. But we conclude that a conviction under A.R.S. § 13-3623(A) and (F)(5) for acting "[u]nder circumstances likely to produce" a "physical injury . . . that causes . . . serious impairment of health" does not require proof that the victim was likely to suffer or had suffered *permanent* impairment of health. While we acknowledge that a "serious impairment of health" must be both significant and protracted, *see George*, 206 Ariz. at 441, ¶ 9, 79 P.3d at 1055, nothing in the statute compels us to conclude that an "impairment of health" must be permanent to be "serious."

¶40 The evidence was that C and M plainly had suffered significant malnutrition and failure to thrive over a period of several years. Thus, their long-term malnutrition and failure to thrive constituted significantly more than mere "[p]hysical injury" pursuant to A.R.S. § 13-3623(F)(4); it constituted "[s]erious physical injury" within the meaning of A.R.S. § 13-3623(F)(5) because it resulted in a protracted "serious impairment" to the children's health.

D. Evidence of Culpable Intent.

¶41 Parker was convicted under A.R.S. § 13-3623(A)(1), which requires the defendant to have acted "intentionally or knowingly." On appeal, Parker argues that the evidence did not

support her convictions under that provision and suggests that, at worst, the evidence was that she acted recklessly, pursuant to A.R.S. § 13-3623(A)(2).[9]

¶42 The State does not argue forcefully that Parker acted intentionally; instead, it contends the evidence supported a finding that she acted knowingly. "Knowingly" means "a person is aware or believes that the person's conduct" will have a particular result. A.R.S. § 13-105(10)(b). "Recklessly" means "that a person is aware of and consciously disregards a substantial and unjustifiable risk that [a] result will occur or that [a particular] circumstance exists." A.R.S. § 13-105(10)(c).

¶43 The superior court denied Parker's motion for a directed verdict pursuant to Arizona Rule of Criminal Procedure 20, in which she argued the State had failed to prove she acted intentionally or knowingly. During sentencing, however, the court stated, "[T]he evidence at the trial showed that you acted in good faith in your belief that you were properly raising these children, that you did not act with criminal intent; however, you did act recklessly in your grossly misguided sense of how to raise and properly nurture your children." The court added, "There's no doubt you love your children. There's no

[9] A conviction pursuant to A.R.S. § 13-3623(A)(2) is a Class 3 felony and does not constitute a dangerous crime against a child pursuant to A.R.S. § 13-705.

doubt your children are happy, in their own little world, being raised by you and your husband."

¶44 On appeal, Parker argues these statements constituted findings of fact and conclusions of law by the court that she acted only recklessly and not with the intent required for a conviction pursuant to A.R.S. § 13-3623(A)(1). We disagree. We understand that by these statements, the court was expressing its own view of the evidence rather than stating a conclusion that as a matter of law, the evidence did not support the jury's verdicts of guilt under A.R.S. § 13-3623(A)(1). Indeed, just prior to the comments at issue, the court stated that "the evidence at trial clearly supports the jury verdicts."

¶45 We have closely examined the record to determine whether there was evidence to support the jury's finding that Parker acted either intentionally or knowingly in violation of A.R.S. § 13-3623(A)(1).

¶46 The uncontradicted evidence was that Parker was a loving and devoted mother to Z, C and M. Witnesses who observed Parker with her children prior to and during their hospitalizations testified uniformly that Parker was affectionate toward her children, and the only evidence was that she went to great effort to maintain a well-kept home and to prepare meals from scratch for them using fresh fruits and vegetables and beans, rice and grains; she even home-schooled

the children in an area of the home she had made up to look like a classroom.

¶47 The evidence was that Parker knew that her children were small for their ages, but all of the witnesses who described conversations with Parker about the topic (law enforcement, a paramedic, social workers and medical personnel) testified she said the children were small because they suffered from malabsorption syndrome. These same witnesses testified that Parker seemed to be highly educated about nutrition and that she seemed very certain about her belief that malabsorption was to blame for the children's failures to grow. Indeed, once Z, C and M were hospitalized, Parker decried the doctors' plans to refeed the children, declaring that refeeding would not help them to gain weight because they were unable to absorb nutrients properly. Of course, the "malabsorption" diagnosis she gave her children, while a recognized syndrome, proved not to be accurate. Tests performed in the hospital showed the children did not have malabsorption syndrome; they simply were not getting enough to eat, and her insistence that the children have frequent bowel movements only exacerbated the problem.

¶48 In sum, the jury did not hear direct evidence that Parker knew or even that she had been told that her children were abnormally undersized because of the diet and other health regimes she imposed on them. To the contrary, the only direct

evidence of Parker's knowledge of the cause of her children's condition was her stated belief that they suffered from malabsorption syndrome.

¶49 The State contends the jury inferred that Parker acted knowingly based on evidence that she was reluctant to have others view her children. For example, Parker commented that "she knew what it [the children's sizes] would look like to anyone outside the family." The State points out that when Parker took the children outside for exercise, they remained on the porch because of what the neighbors might think, and that Parker eschewed traditional medicine for her children, ostensibly because medical doctors would not understand a vegan lifestyle. Even when Z began to seize the evening of April 22, 2005, the State points out, Parker was reluctant to call 9-1-1 because she feared CPS would not understand why the children were small. The State also notes that although Parker took C to a medical doctor when he was not growing in 1998, she did not follow up when the physician recommended tests to determine the cause of his failure to thrive.

¶50 A conviction under A.R.S. § 13-3623(A)(1) may result from a finding that, "[u]nder circumstances likely to produce . . . serious physical injury," the defendant knowingly "cause[d] a child . . . to suffer physical injury." To convict Parker under this theory, the jury would have had to conclude that she

knowingly caused the children's injuries; that is, that Parker knew that her children were severely malnourished *because* of the dietary restrictions and other health regimes she imposed on them (and not because they had malabsorption syndrome).

¶51 We need not decide whether the evidence cited *supra* ¶ 49 would have supported that finding. Instead, we conclude the evidence supported a finding by the jury that Parker was guilty of A.R.S. § 13-3623(A)(1) because, "[u]nder circumstances likely to produce . . . serious personal injury," Parker, "having the care" of the children, knowingly "cause[d] or permit[ted]" them "to be placed in a situation where the . . . health of the [children] . . . is endangered." Under these provisions of A.R.S. § 13-3623(A)(1), Parker need not have known the cause of her children's horrific emaciation; she only had to know their health was endangered and yet fail to obtain treatment for them. The evidence fully demonstrated that Parker knew for some years that her children were severely malnourished and failing to thrive, yet she failed to take appropriate steps to have the children treated. The evidence was that Parker did not want to seek help from medical doctors and preferred naturopaths who would better understand the vegan lifestyle. Her crime was not that she failed to take the children to a medical doctor for treatment; it is that she failed to obtain proper treatment for the children from any health-care provider.

E. Fundamental Error Review.

¶52 The record reflects Parker received a fair trial. She was represented by counsel at all stages of the proceedings against her and was present at all critical stages, except that she was absent during the morning session of the ninth day of trial.[10] Parker was entitled to be present during the testimony against her. *See State v. Christensen*, 129 Ariz. 32, 38, 628 P.2d 580, 586 (1981). Assuming without deciding it was error to proceed in Parker's absence, after reviewing the record we conclude such error was not prejudicial.[11]

¶53 The court held appropriate pretrial hearings. As discussed above, the State presented both direct and circumstantial evidence sufficient to allow the jury to convict. The jury was properly comprised of 12 members with three alternates. The court properly instructed the jury on the elements of the charges, the State's burden of proof and the necessity of a unanimous verdict. The jury returned unanimous verdicts, which were confirmed by juror polling. The court considered a presentence report, addressed its contents during the sentencing hearing and imposed legal sentences.

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[10] The transcript contains no mention of whether Parker was present, but the court's minute entry shows she was not present.

[11] The absence of a timely objection prevented the superior court from curing any potential error. *See State v. Dann*, 205 Ariz. 557, 575, ¶ 71, 74 P.3d 231, 249 (2003).

CONCLUSION

¶54 We have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. After the filing of this decision, defense counsel's obligations pertaining to this appeal have ended. Defense counsel need do no more than inform Parker of the outcome of this appeal and her future options, unless, upon review, counsel finds "an issue appropriate for submission" to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, Parker has 30 days from the date of this decision to proceed, if she wishes, with a *pro per* motion for reconsideration. Parker has 30 days from the date of this decision to proceed, if she wishes, with a *pro per* petition for review.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
PATRICIA A. OROZCO, Judge

/s/
SHELDON H. WEISBERG, Judge