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DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 08-0812
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
)
) (Not for Publication -
ROBERT CHARLES CHURCH,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2006-012844-001 DT

The Honorable Michael D. Jones, Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals Section
and Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
by Edith M. Lucero, Deputy Public Defender
Attorneys for Appellant

W E I S B E R G, Judge

¶1 Robert Charles Church ("Defendant") appeals his conviction for vulnerable adult abuse, a class 5 felony, and the sentence imposed. For reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 The victim suffers from physical and developmental disabilities caused by a car/pedestrian accident that occurred when she was three years old. She does not have full use of her left arm, walks with a limp, has minor visual impairment and a mild speech impediment. Although she can do most things, she does them at a slower pace and can only take care of herself with supervision.

¶3 The victim attended special classes for children with disabilities and had reading deficiencies. She experienced a high level of anxiety when she had to learn something new and required constant oversight and repetitive instruction to do so. She did not graduate from high school. In addition, the victim has mental health issues for which she takes several medications. She is emotionally dependent, does not have normal relationships with friends, is used by those around her, and craves attention from men.

¶4 At the time of the incident, the victim's stepmother took primary responsibility for looking after her, managing her money and arranging for state programs to assist her. These included services through the Developmental Disability Department of the Department of Economic Security, Behavioral

Health Services and Child Protective Services, which monitored the welfare of the victim's minor child. Because she was unable to work, the victim received governmental aid for her subsistence. Although the victim lived in her own apartment with her child, the victim's stepmother checked on them every seven to ten days and provided care or necessities.

¶15 On October 14, 2005, Defendant was living with the victim in her apartment. That afternoon, the victim called her stepmother and said that she and Defendant had a fight and that she wanted her father and stepmother to pick her up. She sounded scared and anxious. When they arrived, the victim was outside the apartment crying and visibly upset. She had facial abrasions and a puffy swollen area right below her mouth. She also had bruising around her eye which later turned into a black eye. Her stepmother told Defendant they were taking the victim with them, and Defendant responded that "she would be sorry if she left at that time . . . I will be angrier when I see her again".

¶16 The victim later told her stepmother that Defendant got angry, that they were yelling at each other and pushing back and forth. The victim fell on the bed and Defendant restrained her by holding his hands on her wrist and straddling her body with his legs. He then hit her. Because the victim could not contact the police without help, her stepmother called the police and took her to the police station.

¶7 A detective met with the victim and her stepmother after the incident. She observed that the victim had a black eye and bruising on her lip, behind her ear and on her shoulder and arm. She noticed that the victim had speech difficulties and was slow in understanding questions and responding to them.

¶8 At trial, the victim's stepmother testified that the victim was "definitely disadvantaged" in the situation because she is unable to maintain balance, is "more easily taken off guard [and] doesn't have the ability to focus her defense effectively." She stated that, while the victim is strong, because she does not have full use of her upper body and left arm, she would have some difficulty fending off a person attacking her.

¶9 Victim's stepmother also said that although the victim is "able to live independently with supervision" and is "street smart," "she does not have the ability to handle and identify a situation before making an informed decision." She explained that the victim "does not have the ability to think ahead of a situation, to know what the consequences of her actions might be [and] unless it were obvious to her, she could not understand the subtlies [sic] of a problem arising."

¶10 The victim testified she is not able to work because of her disabilities and is unable to manage her own finances. She cannot drive and relies on her stepmother and others to take her grocery shopping if she needs more than just a few items.

The victim testified that she did not remember much about the assault, except that Defendant was high on methamphetamine. The victim thought she said something to Defendant that he took the wrong way and he "flipped." He knocked her on the bed, pinned her down and hit her in the face. She admitted that she also had used methamphetamine that day.

¶11 Defendant was indicted for vulnerable adult abuse, a class 4 felony, and a domestic-violence offense. The jury convicted him of the lesser-included offense of vulnerable adult abuse committed recklessly, a class 5 felony. The court suspended Defendant's sentence and placed him on probation for two years.

¶12 Defendant filed a timely notice of appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001), and 13-4033 (A) (2001).

DISCUSSION

¶13 At the end of the State's case, Defendant made a motion for judgment of acquittal pursuant to Rule 20(a), Arizona Rules of Criminal Procedure, alleging that "the victim lived independently and was able to protect herself." The trial court denied the motion. Defendant's sole argument on appeal is that the evidence was insufficient to support the conviction as the offense was not predicated upon the victim's "inability to

protect herself from abuse because of her mental or physical impairments."

¶14 When reviewing the sufficiency of the evidence, "[a]ll evidence will be viewed in the light most favorable to sustaining the conviction and all reasonable inferences will be resolved against the defendant." *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (quoting *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976)).

¶15 Section 13-3623(B)(2)(Supp. 2008)¹ provides in part that "[u]nder circumstances other than those likely to produce death or serious physical injury to a child or vulnerable adult, any person who causes a child or vulnerable adult to suffer physical injury or abuse . . . ," if done recklessly, is guilty of a class 5 felony. "Physical injury" includes "any skin bruising" or "soft tissue swelling" or "any physical condition that imperils health or welfare." A.R.S. § 13-3623(F)(4). "Vulnerable adult" means "an individual who is eighteen years of age or older and who is unable to protect himself from abuse,

¹We cite the current version of the statute because no revisions material to this decision occurred since the date of the offense.

neglect or exploitation by others because of a mental or physical impairment." A.R.S. § 13-3623(F)(6). "Abuse" of a vulnerable adult means, among other things, "intentional infliction of physical harm." A.R.S. § 13-3623(F)(1)(a).²

¶16 Defendant does not dispute that the victim had physical and mental disabilities, nor does he deny that he caused her physical injury or harm. He argues, however, that the "the assault experienced by [the victim] was not due to her being a 'vulnerable adult' as those words are statutorily defined."

¶17 In particular, he claims that the victim was sufficiently independent and strong enough to ward off his attack, that her disabilities "did not impede her ability to leave the situation," that the "assault was not furthered in any way because of her disability," and that the evidence did not show her injuries "were caused by her disabilities." He concludes that "to be a 'vulnerable adult,' the harm experienced must directly relate to that person's inability to protect themselves because of their mental or physical impairment." Defendant asserts this was merely an assault of a weaker woman by a stronger man, not abuse of a vulnerable adult.

¶18 First, we reject Defendant's interpretation of the statute. "Our primary purpose in interpreting a statute is to

²The jury instructions tracked the language of the statutes.

give effect to the intent of the legislature." *State v. Tschilar*, 200 Ariz. 427, 434, ¶ 25, 27 P.3d 331, 338 (App. 2001). "To that end, we look first to the plain language of the statute as the best evidence of that intent [and] [i]f the statute's language is clear and unambiguous, we give effect to that language and do not apply other rules of statutory construction." *Id.*

¶19 Under the plain language of A.R.S. § 13-3623(B)(2), it is an offense for a person to cause a child or vulnerable adult to suffer a physical injury. The victim's status as a vulnerable adult is an essential element of the offense. See *State v. Olquin*, 216 Ariz. 250, 254, ¶¶ 21, 23, 165 P.3d 228, 232 (App. 2007) (nature of victim is an element of offense of aggravated DUI if defendant commits DUI while person under fifteen years of age is in vehicle). There is nothing in the language of the statute, however, requiring proof that the victim's physical injury is caused by, furthered or results from the victim's status as a vulnerable adult. "Defining crimes and fixing punishments are functions of the legislature . . . [and] [c]ourts may not add elements to crimes defined by statutes." *State v. Miranda*, 200 Ariz. 67, 69, ¶ 5, 22 P.3d 506, 508 (2001) (citation omitted). Defendant's interpretation of the statute does just that.³

³Although we cannot find specific legislative history on this statute, we assume that the legislature intended to provide

¶20 Second, there was sufficient evidence for a reasonable juror to find that the victim was a vulnerable adult, i.e., was "unable to protect herself . . . because of a mental or physical impairment." No Arizona cases have construed the term vulnerable adult under A.R.S. § 13-3623(F)(6). However, in *Davis v. Zlatos*, 211 Ariz. 519, 524-25, ¶ 21, 123 P.3d 1156, 1161-62 (App. 2005), our court construed the same term under A.R.S. § 46-451(A)(10) of the Adult Protective Services Act, which definition is identical to that found in A.R.S. § 13-3623(F)(6).

¶21 In *Davis*, the court first considered whether Zlatos, an elderly woman, suffered from a physical impairment. Relying on dictionary definitions, it defined impairment as "something that causes a 'decrease in strength, value, amount or quality' . . . [or as] 'deterioration; injurious lessening or weakening.'" *Id.* at 525, ¶ 24, 123 P.2d at 1162 (citations omitted). The court found that although Zlatos was not incapacitated, she needed assistance to carry out many of her daily activities, that her "ability to care for herself was plainly lessened due to her age and health problems" and that she was physically impaired. *Id.* at 525-26, ¶¶ 26-27, 123 P.3d

greater protection to children and vulnerable adults who are harmed because it considers that inflicting injury on these classes of persons is more blameworthy. *See Olquin*, 216 Ariz. at 254, ¶ 23, 165 P.3d at 232 (legislature considers conduct of DUI committed with child under fifteen in vehicle more blameworthy).

at 1162-63. The court also found that because of her impairment and her dependence on others, she was unable to protect herself from abuse, neglect or exploitation. *Id.* at 526-27, ¶¶ 28-31, 123 P.3d at 1163-64.

¶22 Here, there was sufficient evidence from which a reasonable juror could conclude that the victim was a vulnerable adult. She did not have full use of her upper body and particularly, her left arm. She walked with a limp, had some visual impairment and a speech impediment. She was unable to maintain her balance. She could not drive and depended on others to assist her with daily activities such as grocery shopping. She was only able to live independently with ongoing assistance and supervision. From these facts, one could reasonably conclude that the victim's physical abilities were lessened and that she was physically impaired.

¶23 In addition, the victim had difficulty learning and attended special classes at school. She could not handle her own finances and was unable to work. She had a high level of anxiety, managed to some extent by medications. She was slow to understand and respond. She did not have the ability to think ahead of a situation, focus on or identify a potential problem and determine how to handle it. From these facts, one could conclude that the victim's mental abilities were lessened and that she was mentally impaired.

¶24 Furthermore, a reasonable juror could have concluded that because of the victim's physical and mental impairments, she was unable to protect herself from abuse. The victim's stepmother testified she was disadvantaged because of her physical limitations, which made it difficult for her to defend against injury or harm. Further, because she did not recognize a problem or know the consequences of her actions, she was unable to take steps to avoid abuse. Although the victim was not incapacitated, there is sufficient evidence from which the jury could have concluded she was a vulnerable adult as that term is defined and that Defendant recklessly committed the offense of abuse of a vulnerable adult.

CONCLUSION

¶25 We have reviewed the issue raised by Defendant. For the foregoing reasons, we affirm his conviction and sentence.

/S/ _____
SHELDON H. WEISBERG, Judge

CONCURRING:

/S/ _____
PATRICIA K. NORRIS, Presiding Judge

/S/ _____
MARGARET H. DOWNIE, Judge