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, v. CHRISTOPHER LANGIN, Appellant.	)	No. 1 CA-CR 08-1097 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2005-104343-001 DT

The Honorable Teresa A. Sanders, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
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Attorney for Appellant

W E I S B E R G, Judge

¶1 Christopher Langin ("Defendant") appeals from his convictions for murder, child abuse, and aggravated assault following a jury trial and from the sentences imposed.

Defendant argues that the trial court erred by refusing to give lesser-included offense instructions and by denying his motion to preclude evidence. For reasons that follow, we affirm.

BACKGROUND

¶2 Defendant was indicted on one count of first-degree felony murder, a class 1 felony; one count of child abuse, a class 2 felony and dangerous crime against children; and one count of aggravated assault, a class 4 felony. The charges stemmed from the death of A.P., a three-year-old girl left in Defendant's care by her father. When Defendant contacted A.P.'s father approximately twenty-hours later to report there was something wrong with A.P., she had been dead for a number of hours. The cause of death was determined to be blunt force trauma to the head. In addition to the head injury, A.P.'s entire body was covered with contusions, abrasions and lacerations, indicating she had been beaten with multiple objects over a period of time prior to her death. There were also several marks on her body consistent with bite marks and Defendant's DNA was present on the marks on her arm and buttocks.

¶3 When interviewed by the police, Defendant acknowledged that A.P. was in his care at the time of her death, but denied knowing how she was injured, claiming he had "passed out hard" from drinking. Defendant admitted to pushing A.P. on one

occasion when she stepped on the cords to his video game console, but stated he did not injure her. He further told the police there was no problem when he put A.P. to bed and that he later awoke after sleeping in the same bed with her to find she had been beaten.

¶4 The jury found Defendant guilty as charged. At the conclusion of the penalty phase, the jury declined to impose the death penalty. The trial court sentenced Defendant to life imprisonment on the murder conviction and to aggravated prison terms of twenty-four years on the child abuse conviction and three and three-quarter years on the aggravated assault conviction, with all sentences to be served consecutively. Defendant timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1)(2003), 13-4031 and -4033 (2010).

DISCUSSION

Denial of Lesser-Included Offense Instructions

¶5 Defendant contends that the trial court erred in denying his request to give lesser-included offense instructions on the child abuse and murder charges. The trial court refused the requested instructions on the grounds that the evidence did not support lesser-included offense instructions on the child abuse charge and that Arizona law does not recognize lesser-included offenses for felony murder. We review a trial court's

refusal to give requested instructions for abuse of discretion. *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995).

¶6 Defendant was charged with child abuse in violation of A.R.S. § 13-3623(A)(1) (2010).[1] This statute provides, in pertinent part, that a person commits child abuse by intentionally or knowingly causing physical injury to a child under circumstances likely to produce death or serious physical injury. It further designates the offense a class 2 felony and makes it punishable as a dangerous crime against children if the victim is under the age of fifteen in accordance with A.R.S. § 13-705 (2010).

¶7 Defendant claims that he was entitled to instructions on the lesser-included offenses of reckless and negligent child abuse based on his admission to pushing A.P. on one occasion, causing her to fall down when she stepped on the cords to his video game console. He argues this conduct could be reasonably viewed by the jury as merely reckless or criminally negligent and as not likely to produce death or serious injury.

¶8 In addition to knowingly or intentionally, child abuse can be committed with the lesser culpable mental states of recklessly or with criminal negligence. A.R.S. §§ 13-3623(A), 13-2623(B). Reckless child abuse is a class 3 felony when committed under circumstances likely to produce death or serious

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

physical injury. A.R.S. § 13-3623(A)(2). When reckless child abuse is committed under circumstances other than those likely to produce death or serious physical injury, it is a class 5 felony. A.R.S. § 13-3623(B)(2). Criminally negligent child abuse is similarly classified as either a class 4 or a class 6 felony depending on these circumstances. A.R.S. §§ 13-3623(A)(3), 13-3623(B)(3). Not only would conviction on one of these lesser offenses reduce the applicable punishment on the child abuse charge, if Defendant was found guilty of an offense other than intentional or knowing child abuse under circumstances likely to produce death or serious injury, he could not be convicted of felony murder because none of the lesser offenses is a predicate offense for felony murder. *See* A.R.S. § 13-1105(A)(2) (2010) (listing felony murder predicate offenses).

¶9 A defendant is entitled to an instruction on a lesser-included offense if an instruction is requested, the offense is in fact a lesser-included offense, and the evidence supports the instruction. *State v. Miranda*, 200 Ariz. 67, 68, ¶ 2, 22 P.3d 506, 507 (2001); *State v. Detrich*, 178 Ariz. 380, 383, 873 P.2d 1302, 1305 (1994); *see also* Ariz. R. Crim. P. 23.3. (requiring forms of verdicts for all offenses necessarily included in the offense charged). Our supreme court has held that evidence is "sufficient" to require instruction on a lesser-included offense

if two conditions are satisfied: "The jury must be able to find (a) that the State failed to prove an element of the greater offense and (b) that the evidence is sufficient to support a conviction on the lesser offense." *State v. Wall*, 212 Ariz. 1, 4, ¶ 18, 126 P.3d 148, 151 (2006). However, it is not enough that the jury might simply disbelieve the state's evidence on one element "because this 'would require instructions on all offenses theoretically included' in every charged offense." *Id.* (quoting *State v. Schroeder*, 95 Ariz. 255, 259, 389 P.2d 255, 258 (1964)); *see also Bolton*, 182 Ariz. at 309, 896 P.2d at 849 ("The fact that a jury could disbelieve all the evidence of the greater charge in a given case except the elements of the lesser does not necessarily require an instruction on the lesser."). "Instead, the evidence must be such that a rational juror could conclude that the defendant committed only the lesser offense." *Wall*, 212 Ariz. at 4, ¶ 18, 126 P.3d at 151. Our review of the trial evidence shows that neither condition was met in this case.

¶10 First, to commit the offense of child abuse as charged and, thus, the lesser-included offenses of reckless or negligent child abuse on which Defendant sought to have the jury instructed, a person must cause a child to "suffer physical injury." A.R.S. § 13-3623(A). For purposes of this statute, "physical injury" is defined as "the impairment of physical

condition and includes but shall not be limited to 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 a child's health or welfare." A.R.S. § 13-3623((F)(4). Although Defendant admitted pushing A.P. and causing her to fall, he denied that he injured her and stated she was fine when he gave her a bottle and put her to bed. Thus, if the jury were to accept Defendant's version of his conduct regarding A.P., there would be no factual basis to convict him of either reckless or criminally negligent child abuse because there is no evidence that Defendant's act of pushing A.P. caused her to "suffer physical injury."

¶11 Second, the evidence is clear that the injuries that A.P. suffered were not the result of mere reckless or criminal negligent conduct. The medical examiner testified that A.P.'s injuries where consistent with being subjected to repeated beating with a variety of different objects such as fists, electrical cords, and curtain rods over an ongoing period of time. He further opined that the head injury was inflicted by slamming her head into a hard flat surface like a wall or floor. Given the extensive nature of A.P.'s injuries and multiple methods used to inflict them, there is no logical factual scenario in which the injuries could have been caused other than

deliberately. Because the evidence does not permit a rational juror to conclude that the person who injured and killed A.P. did so recklessly or negligently as opposed to knowingly or intentionally, the trial court did not abuse it discretion in refusing Defendant's requests for instructions on reckless and negligent child abuse.

¶12 Further, the trial court did not err in refusing to instruct the jury on second-degree murder and reckless manslaughter as lesser-included offenses on the murder charge. The State charged Defendant with first-degree felony murder, not premeditated murder. It is well established that there is no lesser-included homicide offense to felony murder "because the *mens rea* necessary to satisfy the premeditation element of first-degree murder is supplied by the specific intent required by the felony." *State v. LaGrand*, 153 Ariz. 21, 30, 734 P.2d 563, 572 (1987); *see also State v. Davolt*, 207 Ariz. 191, 213, ¶ 92, 84 P.3d 456, 478 (2004) (noting "there is no lesser included offense to felony murder"). "Where no lesser included offense exists, it is not error to refuse the instruction." *LaGrand*, 153 Ariz. at 30, 734 P.2d at 572.

Denial of Motion to Preclude Evidence

¶13 Defendant moved *in limine* to preclude admission of any evidence of molestation of A.P. by Defendant based on the fact that A.P. was found to have a scratch on her genitalia at the

time of her death. Defendant argued that the evidence was irrelevant and unduly prejudicial. The trial court denied the motion, ruling that evidence of the injury was admissible for purposes of showing an element of the offense of child abuse and to show motivation for the offenses charged. We review rulings on the admissibility of evidence for abuse of discretion. *State v. Gulbrandson,* 184 Ariz. 46, 60, 906 P.2d 579, 593 (1985).

¶14 The medical examiner testified about the laceration he observed in A.P.'s vaginal area and opined that it occurred during the same time frame as the victim's other injuries. He further explained that there existed two possibilities for the injury: a self scratch or an object being forced into the area causing it to tear. Based on this testimony and evidence of other injuries to the victim, including the bite mark on A.P.'s buttocks and a zipper injury on her inner thigh, the prosecutor argued to the jury in closing that the beating may have resulted from the victim resisting a sexual assault by Defendant.

¶15 On appeal, Defendant contends the trial court abused its discretion in admitting evidence of the laceration because the medical examiner's testimony indicated that the injury to the victim's genitalia occurred outside the time period Defendant was alleged to have committed the abuse. Citing *State v. Anthony*, 218 Ariz. 439, 444, ¶ 33, 189 P.3d 366, 371 (2008), Defendant argues that the evidence was therefore other act

evidence and its admission violated Rule 404(b) of the Rules of Evidence.

¶16 However, Defendant misstates the medical examiner's testimony about the timing of the injury. Although the medical examiner testified that a microscopic examination of a section taken from the victim's vagina showed older cell injury, he attributed the older injury to chronic vaginitis and explained he believed that the section did not come from the precise area where he observed the "fresh laceration." The medical examiner further testified that based on his observation of the actual laceration, he was confident that the vaginal injury occurred during the last day of A.P.'s life and at the same time as her other injuries. Given the testimony that the injury to the victim's vaginal area occurred at the same time as her other injuries, there was no error in the trial court's finding that "the evidence offered is not [Rule] 404(b) evidence, but evidence relevant to an element of the charged offense of "'child abuse.'" *See State v. Dickens*, 187 Ariz. 1, 18 n.7, 926 P.2d 468, 485 n.7 (1996) (noting that evidence intrinsic to the crime is not governed by Rule 404(b)).

¶17 Defendant further argues that the trial court erred by allowing evidence that A.P.'s hymen was perforated. While testifying about the collection of vaginal swabs for DNA testing, the medical examiner referred to A.P.'s hymen being

perforated. However, he made it clear that A.P.'s hymen had been perforated at some point prior to the last day of her life and did not offer any more specific testimony on that subject. Defendant argues on appeal that this evidence should have been precluded by the trial court as irrelevant and unduly prejudicial.

¶18 Defendant did not move to preclude evidence of the perforated hymen in his motion *in limine* and did not object at trial to this testimony. Accordingly, we review this claim for fundamental error only. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To obtain reversal under this standard of review, the defendant must establish both that fundamental error occurred and actual prejudice resulted. *Id.* at ¶ 20. Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Id.* at ¶ 19 (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)). In determining whether error is fundamental, we consider the entire record and the totality of the circumstances. *State v. Hughes*, 193 Ariz. 72, 86, ¶ 62, 969 P.2d 1184, 1198 (1998).

¶19 Defendant argues that testimony about the perforated hymen constitutes other act evidence indicating that he molested

A.P. The State did not, however, tie the existence of the perforated hymen to Defendant. To the contrary, the medical examiner mentioned the condition of the victim's hymen simply to explain his examination of her body and to document what portion of the vaginal area was swabbed for DNA. Moreover, his testimony established that A.P.'s perforated hymen was unrelated to the time period that she was in Defendant's care and no evidence was offered that the perforated hymen was the result of molestation. In addition, the prosecutor did not argue that the perforated hymen was caused by Defendant or that it was otherwise evidence of his guilt. Under these circumstances, the medical examiner's reference to the victim's perforated hymen does not rise to the level of fundamental error and Defendant is unable to meet his burden of showing he was prejudiced by this testimony.

CONCLUSION

¶20 Finding no reversible error, we affirm Defendant's convictions and sentences.

/s/_____
SHELDON H. WEISBERG,
Presiding Judge

CONCURRING:

/s/_____
PETER B. SWANN, Judge

/s/_____
JON W. THOMPSON, Judge