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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



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FILED: 08/31/2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

STATE OF ARIZONA,) 1 CA-CR 09-0482
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
)
RAUL JOSEPH MORENO,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-008206-001 DT

The Honorable Michael D. Jones, Judge

VACATED AND REMANDED WITH INSTRUCTION

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Attorney for Appellant

H A L L, Judge

¶1 Raul Joseph Moreno (defendant) appeals from his
conviction and sentence for one count of assault, a class one

misdemeanor and domestic violence offense. For the reasons that follow, we vacate his conviction and enter a judgment of acquittal.

FACTS AND PROCEDURAL BACKGROUND

¶12 In the fall of 2008, defendant, age 35, lived with his elderly parents. Defendant suffers from severe diabetes and is prone to seizures and other medical problems and, as a result, has lived with his parents his entire life other than "brief periods in custody." In November 2008, defendant's father (Father) became ill and was hospitalized. Medical personnel informed defendant's mother (Mother) that Father had only one week to live. After receiving this news, Mother, quite distraught, returned home to find some "papers" to take to the hospital. While Mother looked for the papers in her bedroom closet, defendant entered her room. At some point, while she and defendant were in her bedroom, Mother sustained a cut and bruising to her hand.

¶13 Two days later, Mother and her daughter, Elizabeth, were visiting Father. Elizabeth questioned Mother about her hand injuries and Mother initially refused to discuss it. After more prodding, however, Mother finally disclosed that defendant became angry at her for not bringing Father home, yelled at her, and then "came at her," and she fell backward into a door and slammed her hand. Mother asked Elizabeth to contact the police

and she did. Two police officers came to the hospital to interview Mother. The officers took pictures of Mother's hand and questioned her about her injuries. During the taped interview, Mother reported that defendant hit her hand "too hard" with a closed fist.

¶14 On December 11, 2008, defendant was charged by indictment with one count of aggravated domestic violence, a class five felony and a domestic violence offense. On April 10, 2009, the indictment was amended and he was charged with one count of assault, a class one misdemeanor.

¶15 Defendant pled not guilty and the matter proceeded to a one-day bench trial. At trial, Mother testified that she lied when she told the police that defendant had hit her and caused her injuries. She explained that Father wanted to come home to die and that Adult Protective Services would not allow him to return home so long as defendant continued to reside there because of defendant's previous conduct. Accordingly, she reported her injuries to the police so that they would remove defendant from the home.

¶16 Contrary to her statements during the police interview, Mother testified that as she was searching for papers in her bedroom closet, she lost her balance and caught her hand on a sharp corner of the unhinged closet door as she fell. She

further testified that defendant was not upset at that time and that they had not been arguing.

¶17 Elizabeth also testified and confirmed that Adult Protective Services had informed Mother that she could not take Father home while defendant lived there. Elizabeth stated that when she had asked Mother how her hand was injured, Mother told her that defendant "came at her" and that she fell into the closet door as she backed away from him. Elizabeth also stated that, based on Mother's explanation of what happened, she interpreted Mother's statement that defendant "came at her" as meaning that defendant "charged her" in an aggressive and intimidating manner.

¶18 After the State's presentation of evidence, defendant moved for a judgment of acquittal pursuant to Arizona Rule of Criminal Procedure 20. The trial court denied the motion and defendant rested.

¶19 The trial court then found defendant guilty as charged. In doing so, the trial court noted that there were three accounts of how Mother sustained her injuries: (1) Elizabeth's version that Mother was physically intimidated by defendant's aggression and fell backward; (2) Mother's version told to police that defendant hit her with a closed fist; and (3) Mother's version relayed at trial that she lost her balance and fell. In attempting to reconcile these different accounts

with the physical evidence, the trial court found Elizabeth's testimony "extremely credible" and consistent with the physical evidence.

¶10 The trial court then sentenced defendant to six months of incarceration with presentence incarceration credit of 164 days. Defendant timely appealed, and 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 -4033(A)(1) (2010).

DISCUSSION

¶11 Defendant contends that the evidence presented at trial was insufficient to support the crime for which he was convicted, class one misdemeanor assault. Although he frames the issue as a challenge to the trial court's denial of his Rule 20 motion, the thrust of his argument is one of insufficiency of the evidence, namely, that the underlying facts, as determined by the trial court, do not support the conclusion that he knowingly injured Mother. We accordingly construe his argument on appeal more generally as insufficiency of the evidence to support the conviction, which we review for fundamental error. See *State v. Stroud*, 209 Ariz. 410, 412 n.2, ¶ 6, 103 P.3d 912, 914 n.2 (2005).

¶12 "To set aside a [] verdict for insufficient evidence, it must clearly appear that upon no hypothesis whatever is there

sufficient evidence to support" the conviction. *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987). "It is [] fundamental error to convict a person of a crime when the evidence does not support the conviction." *Id.* at 412 n.2, ¶ 6, 103 P.3d at 914 n.2.

¶13 To prove that defendant committed class one misdemeanor assault, the State was required to show that defendant intentionally or knowingly caused physical injury to Mother. See A.R.S. § 13-1203(A)(1), -1203(B) (2010). Thus, the State had to demonstrate that either defendant's objective was to injure Mother or that he was aware or believed that his conduct would injure Mother. See A.R.S. § 13-105(10)(a)(b) (2010) (defining "intentionally" and "knowingly").

¶14 In her police interview, Mother reported that defendant struck her with a closed fist. At trial, however, Mother testified that defendant never hit her or acted aggressively toward her. Instead, she simply lost her balance and fell. Elizabeth, on the other hand, testified that two days after Mother sustained her hand injuries she disclosed that defendant had "come at her" and she had fallen backward. The trial court specifically found that Elizabeth's account was "extremely credible" and consistent with the nature of Mother's injuries. It is the role of the fact-finder to determine the credibility of the witnesses and resolve any conflicts in the

evidence, and we therefore defer to the trial court's assessment here. *State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995).

¶15 After receiving the evidence at trial, the court concluded that defendant's "physical movement toward his mother" was a "knowing activity . . . [that] clearly resulted in the injury" to Mother. The trial court then found defendant guilty because he "knowingly cause[d] physical injury" to Mother.

¶16 The underlying facts as determined by the trial court, however, do not satisfy the elements of class one misdemeanor assault. Elizabeth specifically testified that, according to Mother's account to her, defendant made no physical contact with Mother. Although defendant's intimidating approach toward Mother was a "knowing activity," absent any physical contact, there is no substantial evidence to support the trial court's conclusion that defendant believed or was aware that his aggressive advance alone would cause Mother to fall backward and strike her hand against an unhinged closet door. Defendant may have disregarded a substantial and unjustifiable risk that such a result may occur, see A.R.S. § 13-105(10)(c) (defining "recklessly"), but the credible evidence, as determined by the trial court, does not support the conclusion that he believed it would happen. Thus, the trial court fundamentally erred by finding defendant guilty of class one misdemeanor assault.

CONCLUSION

¶17 Because our decision is based on the insufficiency of the evidence, double jeopardy principles bar retrial. See *State v. Ortiz*, 120 Ariz. 384, 586 P.2d 633 (1978); see also *Peak v. Acuna*, 203 Ariz. 83, 85, ¶ 8, 50 P.3d 833, 835 (2002) (“When a conviction is reversed for insufficiency of the evidence, the reversal is, in effect, an implied acquittal of the charges.”). Therefore, we vacate the conviction and remand for entry of judgment of acquittal.

/s/
PHILIP HALL, Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Presiding Judge

/s/
JOHN C. GEMMILL, Judge