

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED 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: 11-12-2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

STATE OF ARIZONA,)	1 CA-CR 09-0570
)	
Appellee,)	DEPARTMENT C
)	
v.)	
)	MEMORANDUM DECISION
BRETT CLINTON FRANKS,)	(Not for Publication -
)	Rule 111, Rules of the
Appellant.)	Arizona Supreme Court)
)	
)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-030911-001 SE

The Honorable Emmet J. Ronan, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General	Phoenix
By Kent E. Cattani, Chief Counsel,	
Criminal Appeals Section	
Attorneys for Appellee	

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K E S S L E R, Judge

¶1 Defendant-Appellant Brett Clinton Franks ("Franks") was tried and convicted of reckless child abuse, committed under circumstances other than those likely to produce death or

serious physical injury, and sentenced to 2.25 years in prison. Counsel for Franks filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Finding no arguable issues to raise, counsel requests that this Court search the record for fundamental error. Franks had an opportunity to file a supplemental brief *in propria persona* but did not do so.

¶12 For the reasons that follow, we affirm Franks's conviction and sentence.

FACTUAL AND PROCEDURAL HISTORY

¶13 The State charged Franks with child abuse, a class two felony, a dangerous crime against children, and a domestic violence offense. The State alleged that, on or about February 4, 2007, under circumstances likely to produce death or serious physical injury, Franks intentionally or knowingly caused B.F., a child under 15 years, to suffer physical injury in violation of Arizona Revised Statutes ("A.R.S.") section 13-3623(A)(1) (2010). Franks pled not guilty to the charge and the case proceeded to a jury trial.

¶14 On review, we examine the evidence in the light most favorable to sustaining the verdict and resolve all inferences against the appellant. *E.g.*, *State v. Rienhardt*, 190 Ariz. 579, 588-89, 951 P.2d 454, 463-64 (1997) (citing *State v. Mincey*, 141

Ariz. 425, 432, 687 P.2d 1180, 1187 (1984); *State v. Gallegos*, 178 Ariz. 1, 9, 870 P.2d 1097, 1105 (1994)).

¶15 Franks testified that B.F. was hurt when he fell off of a dresser that Franks used as a changing table. The State called witnesses to testify that the injuries sustained by B.F. were not consistent with Franks's explanation. Drs. David Shafron, James McKown, and Amal Jabra testified that B.F.'s severe head injuries were not consistent with a short fall. Dr. Jennifer Geyer, a forensic pediatrician, testified that a baby cannot roll over on its own until it is at least three months old and Dr. McKown, an emergency room pediatrician, testified that a child under six months generally is not able to roll from its back onto its stomach.

¶16 Dr. Jabra testified that a regular fall off of a changing table is unlikely to produce the width of the skull fracture and the subarachnoid and subdural hematomas observed in B.F. Drs. Geyer and McKown also testified that a baby's skull is less susceptible to a fracture than an adult skull because it is still soft and pliable.

¶17 Mesa Police Officer Nicholas B. testified that Franks told him B.F. hurt his head when he fell onto the floor from a changing table. Franks did not mention the possibility that B.F. hit his head on a battery charger. Mesa Police Officer Nicholas

W. testified that Franks told him B.F. rolled off of the dresser and landed on the right side of his head on the carpeted floor.

¶18 Mesa Detective Clay F. examined Franks's living room after the incident and testified that there were no items on the floor directly in front of the dresser, although a battery charger was in the vicinity. Mesa Detective Travis S. testified that he heard Franks tell Dr. Shafron that he left B.F. on the edge of the dresser and that B.F. rolled off of the makeshift changing table and landed on the right side of his head.

¶19 Franks testified that on the evening of February 4, 2007 he was home alone with 23-day-old B.F. and his two-year-old step-daughter. Franks testified that B.F. woke up because of a wet diaper and Franks placed him on a dresser in the living room that was used as a changing table. Franks stepped away from the dresser to get a diaper.

¶10 Franks estimated it took six or seven seconds to get the diaper because he had to use a key to open a new box. While getting the diaper, Franks heard the plastic mat on top of the dresser make a noise. He turned toward the dresser and saw B.F. lying on the floor. Franks testified he did not see B.F. land but a battery charger was on the floor in the area where B.F. landed. When Franks picked up B.F., he noticed swelling on the right side of the child's head. Franks then woke up his step-daughter and called A.F., B.F.'s mother and Franks's wife at the

time, to tell her that he was on his way to Banner Desert Hospital with the children because B.F. fell.

¶11 Drs. McKown and Jabra testified that, in addition to the parietal fracture and intracranial pressure on his brain, B.F. suffered bilateral subdural and subarachnoid hematomas. Due to the severity of B.F.'s injuries, Dr. McKown arranged to have B.F. air lifted to Phoenix Children's Hospital, where Dr. Shafron performed surgery to relieve the pressure on B.F.'s brain. Dr. Shafron subsequently performed two more surgeries, one to repair the skull fracture and another one to insert a tube to drain fluid from a cyst in B.F.'s brain.

¶12 Dr. Shafron testified that B.F. developed seizures because of his severe head injuries. A.F. testified that B.F. has been diagnosed with cerebral palsy and is developmentally delayed. M.C., B.F.'s grandmother and caregiver, testified about B.F.'s physical, occupational, early intervention, vision, feeding, and speech therapies and indicated that B.F. is expected to require assistance for the rest of his life.

¶13 The jury found Franks guilty of reckless child abuse, a class five felony, in violation of A.R.S. § 13-3623(B)(2). Based on the jury's findings, the court found that Franks committed a domestic violence offense pursuant to A.R.S. § 13-3601(A). The court also found that Franks had a prior class six, non-dangerous felony and sentenced him to a presumptive term of 2.25

years of incarceration.¹ Franks filed a timely notice of appeal. This Court has jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2003) and 13-4033(A)(1) (2010).

ANALYSIS

I. Standard of Review

¶14 This Court has reviewed the entire record for fundamental error. Error is fundamental when it affects the foundation of the case, deprives the defendant of a right essential to his defense, or is an error of such magnitude that the defendant could not possibly have had a fair trial. See *State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). After careful review of the record, we find no meritorious grounds for reversal of Franks's conviction or modification of the imposed sentence. Accordingly, we affirm Franks's conviction and sentence.

II. The Evidence Supports the Findings

¶15 Evidence in the record supports the jury's verdict. The jury found Franks guilty of reckless child abuse. The jury instructions contained the elements of this lesser included offense, which require proof that the defendant:

¹ The court considered Franks's conviction for possession of a forgery device, a class six felony, for sentence enhancement purposes.

1. under circumstances other than those likely to produce death or serious physical injury
2. recklessly
3. caused a child to suffer physical injury.

A.R.S. § 13-3623(B)(2).

¶16 There is evidence in the record to support the finding that B.F. was injured under circumstances other than those likely to produce death or serious physical injury. Direct evidence consisted of Franks's testimony that B.F. injured his head when he fell off of a dresser that Franks and A.F. used as a changing table.

¶17 Although Drs. McKown, Jabra, Shafron, and Geyer testified that the severity of B.F.'s injuries was not consistent with what they would expect to see from a four foot fall, the doctors did not testify that B.F.'s injuries were an impossible consequence of a short fall. Thus, a jury could conclude that B.F. was injured in the manner described by Franks, under circumstances not likely to cause death or serious physical harm, even though he suffered unusually severe injuries.

¶18 Franks and A.F. also testified that B.F. was stronger and more mobile than a typical infant. Based on this testimony, a jury could find that it was possible for B.F. to move and

cause himself to roll off of the dresser while Franks turned away to get a diaper.

¶19 There is evidence to support the jury's finding that Franks committed the offense recklessly.

"Recklessly" means, . . . that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

A.R.S. § 13-105(10)(c) (2010). Franks left B.F. on the dresser for at least six to seven seconds while he turned away to get a diaper. A.F. testified that earlier in the day, she warned Franks about leaving B.F. on the bed.² Because Franks knew that B.F. was able to move on his back, a jury could find he was aware of and consciously disregarded the substantial and unjustifiable risk that his conduct would result in injury to B.F. if he left B.F. on the dresser unattended. A jury could also find that Franks disregarded this risk in a manner that constituted a gross deviation from a reasonable person's conduct when he left B.F. on a dresser without barriers.

¶20 Evidence in the record supports the jury's finding that Franks caused a child to suffer physical injury. B.F.'s

² A.F. testified that earlier that day she told Franks "[D]on't you realize he could roll off and hurt himself off of our bed?".

treating physicians testified about the injuries B.F. sustained and Franks did not deny that B.F. suffered serious injuries while under Franks's care and supervision. Therefore, the evidence supports the jury's finding that Franks's reckless conduct caused B.F. to suffer physical injuries.

¶21 Evidence in the record supports the court's finding that Franks committed a domestic violence offense. "Domestic violence" includes any offense defined in A.R.S. § 13-3623 if "[t]he victim is related to the defendant or the defendant's spouse by blood or court order as a parent" A.R.S. § 13-3601(A)(4) (2010). The jury found Franks guilty of reckless child abuse, an offense defined in A.R.S. § 13-3623(B)(2). The jury also found that B.F. was a child under fifteen years of age, that Franks was over eighteen years of age, and that Franks is B.F.'s biological father.³ Thus, the court properly concluded that Franks's offense constituted domestic violence.

III. Sentencing Hearing

¶22 The court properly enhanced the sentence based on a prior historical felony, possession of a forgery device, a class six felony.⁴ Franks admitted to the offense while testifying.

³ "'Child' means an individual who is under eighteen years of age." A.R.S. § 13-3623(F)(2).

⁴ "'Historical prior felony conviction' means . . . [a]ny class 4, 5 or 6 felony committed within the five years immediately

While the prior conviction occurred more than five years before the present offense, at the sentencing hearing the State introduced a certified booking record to show that Franks was incarcerated from June 20, 2003 to September 12, 2003 for a probation violation. The trial court admitted the certified record, which included the defendant's name, date of birth, height, physical description, and photograph. The time served in connection with the felony conviction tolled the time and brought the historical prior within the five year period for enhanced sentencing purposes. A.R.S. § 13-604(W)(2)(c).

¶23 Franks argued that the testimony and record alone were insufficient to prove a prior felony conviction because Franks never admitted to being incarcerated and because the State did not use a fingerprint analyst to identify Franks as the same person described in the certified record. Franks cited *State v. Karr* for the proposition that a latent print comparison is required to conclude that a defendant is the same person named in a record. 221 Ariz. 319, 325, ¶¶ 23-24, 212 P.3d 11, 17 (App. 2008). Franks did not stipulate to the record.

¶24 However, a court may consider a prior conviction for enhanced sentencing purposes if the State proves the underlying

preceding the date of the present offense. Any time spent . . . [while] incarcerated is excluded in calculating if the offense was committed within the preceding five years." A.R.S. § 13-604(W)(2)(c) (2006) (now codified at A.R.S. § 13-105(22)(c) (2010)).

conviction and presents "positive identification establishing that the accused is the same person who previously was convicted" *State v. Bennett*, 216 Ariz. 15, 16, ¶ 2, 162 P.3d 654, 655 (App. 2007) (quoting *State v. Cons*, 208 Ariz. 409, 415, ¶ 16, 94 P.3d 609, 615 (App. 2004)). Fundamental error exists if a court enhances a sentence based on a prior conviction without this proof of identification, regardless of whether the defendant objected. *See, e.g., State v. Thues*, 203 Ariz. 339, 340, ¶ 4, 54 P.3d 368, 369 (App. 2002); *State v. Cox*, 201 Ariz. 464, 468, ¶ 13, 37 P.3d 437, 441 (App. 2002).

¶25 The State provided evidence of positive identification by submitting a certified record and proving that the record refers to the defendant. *See State v. Hauss*, 140 Ariz. 230, 681 P.2d 382 (1984). Although fingerprint identification is one way to show that the defendant is the individual referenced in a criminal record, it is not the only way to establish positive identification. *See id.* at 231, 681 P.2d at 383 (a probation officer's testimony about his personal knowledge of the defendant's prior convictions was sufficient to establish the prior convictions for sentencing purposes).

¶26 In *State v. Karr*, the Court of Appeals held that the trial court properly imposed an enhanced sentence. 221 Ariz. 319, 325, ¶ 24, 212 P.3d 11, 17 (App. 2008). This Court reasoned that the defendant's testimony about a felony conviction within

five years of the subject offense and the fingerprint analyst's positive identification were sufficient to prove the historical prior. *Id.* This Court did not hold that fingerprint examination is necessary to establish positive identification. *See id.*

¶127 A prior conviction may be used to enhance a sentence if the defendant admits the prior conviction while testifying at trial. *See State v. Hunter*, 137 Ariz. 234, 238, 669 P.2d 1011, 1015 (App. 1983) (quoting Ariz. R. Crim. P. 17.6).⁵ In *Hunter*, the court held that an

appellant's admission on the witness stand of the fact of a prior felony conviction and the date of the conviction coupled with the introduction into evidence of the minute entry establishing his prior conviction, was sufficient proof of the prior.

Id. Here, Franks testified about his prior felony conviction in Maricopa County in 2002. He also admitted that the conviction corresponded to Case No. CR2002-091459 and that he received his sentence for that conviction on March 21, 2002. Franks's testimony coupled with the identifying information in the incarceration record established that the record referred to Franks, therefore no fundamental error exists as to this point.

⁵ ARIZ. R. CRIM. P. 17.6 states:

Whenever a prior conviction is charged, an admission thereto by the defendant shall be accepted only under the procedures of this rule, unless admitted by the defendant while testifying on the stand.

¶128 Franks's sentence is within the statutory range permitted by law. A.R.S. § 13-702.01 (2006). The court used an enhanced sentencing structure to reflect Franks's 2002 conviction and imposed a presumptive sentence of 2.25 years of incarceration for a class five felony with one non-dangerous historical prior.

IV. Presentence Incarceration Credit

¶129 Franks was taken into custody on September 7, 2007 and a bond was posted on October 29, 2007, a total of 53 days. The record does not specify a release date. Franks was sentenced on July 17, 2009 to 2.25 years with 55 days of presentence incarceration credit. Although the record only reflects 53 days in custody, the State did not appeal and we do not disturb the court's award of two extra days of presentence incarceration credit. *See State v. Dawson*, 164 Ariz. 278, 286, 792 P.2d 741, 749 (1990) (recognizing that an appellate court cannot correct an illegally lenient sentence, to the detriment of an appellant, if the State does not file a timely cross-appeal).

CONCLUSION

¶130 After careful review of the record, we find no meritorious grounds for reversal of Franks's conviction or sentence. The record reflects Franks had a fair trial and was present and represented by counsel during all critical states prior to and during trial, as well as during the verdict and

sentencing. The jury was properly comprised of eight members pursuant to A.R.S. § 21-102(B) (2002). Additionally, the court properly considered Franks's prior felony conviction for sentence enhancement purposes.

¶31 We therefore affirm Franks's conviction and sentence. Upon the filing of this decision, counsel's obligations pertaining to Franks's representation have ended. Counsel only needs to inform Franks of the appeal's status and of his options. Counsel has no further obligations, 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, Franks shall have thirty days from the date of this decision to proceed, if he so desires, with a proper motion for reconsideration or petition for review.

/s/

DONN KESSLER, Judge

CONCURRING:

/s/

MARGARET H. DOWNIE, Presiding Judge

/s/

PETER B. SWANN, Judge