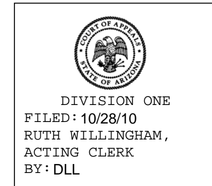
NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 10/28/10
RUTH WILLINGHAM, ACTING CLERK
BY: DLL

STATE OF ARIZONA,	1 CA-CR 09-0829
Appellee,	DEPARTMENT C
v.	**MEMORANDUM DECISION**
VAUGHN MILES DENZ,	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)
Appellant.	

Appeal from the Superior Court in Yavapai County

Cause No. P1300CR2009-0209

The Honorable Thomas B. Lindberg, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Sarah Heckathorne, Assistant Attorney General
Attorneys for Appellee

David Goldberg, P.C. — Fort Collins, CO
By David Goldberg
Attorney for Appellant

D O W N I E, Judge

¶1 Vaughn Miles Denz ("Defendant") appeals his convictions and sentences for child abuse and aggravated assault. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to sustaining the verdicts and resolve all inferences against Defendant. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998). The following evidence was adduced at trial.

¶3 On February 22, 2009, T.D. came home from work and found Defendant, her husband, cleaning their infant son's bloody face. Defendant said he had just finished changing five-month-old J.D.'s diaper, and as he was picking the boy up, J.D. "did a back flip" and landed face down on the carpeted floor.

¶4 The parents took J.D. to the Yavapai Regional Medical Center. Doctors found fractures on J.D.'s skull and concluded that his injuries were inconsistent with Defendant's explanation of the fall. T.D. and J.D. went by ambulance to Phoenix Children's Hospital ("PCH"). Defendant took the couple's vehicle to run errands before traveling to PCH.

¶5 Meanwhile, Prescott police began investigating the incident for possible child abuse. When Detective Martin arrived at PCH the evening of February 22, Defendant had not yet been to the hospital. During the three days that J.D. remained

hospitalized, Defendant did not visit. Examination of J.D. revealed, in addition to the skull fractures, a torn frenelum, liver and spleen lacerations, a bruised adrenal gland, and healing rib fractures.

¶6 On February 25, 2009, Defendant turned himself in to Prescott police. He explained that, instead of going to PCH as planned, he drove to Montana because he was "spooked" and "scared."

¶7 Defendant was charged with one count of intentional or knowing child abuse in violation of Arizona Revised Statutes ("A.R.S.") section 13-3623(A)(1) (2010) ("Count 1"), and two counts of aggravated assault in violation of A.R.S. § 13-1204(A)(1) and (3) (2010).[1] During trial, the court denied Defendant's motion for judgment of acquittal pursuant to Arizona Rule of Criminal Procedure 20, and the jury found him guilty as charged. The court sentenced Defendant to concurrent terms of imprisonment, the longest of which is eighteen years. Defendant timely appealed. 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 and -4033(A)(1) (2010).

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[1] Count 4, charging reckless child abuse, was dismissed before trial.

DISCUSSION

I. Sufficiency of Evidence

¶8 Defendant challenges the denial of his Rule 20 motion and contends insufficient evidence supports his convictions. A judgment of acquittal is appropriate only if there is "no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a); *State v. Fulminante*, 193 Ariz. 485, 493, ¶ 24, 975 P.2d 75, 83 (1999). Our review of the sufficiency of the evidence is limited to determining "whether substantial evidence supports the verdict." *State v. Sharma*, 216 Ariz. 292, 294, ¶ 7, 165 P.3d 693, 695 (App. 2007). We will not reverse the denial of a motion for judgment of acquittal or a guilty verdict unless there is a complete absence of probative facts supporting the conviction. *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987) ("[I]t must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury."); *State v. Johnson*, 215 Ariz. 28, 29, ¶ 2, 156 P.3d 445, 446 (App. 2007).

¶9 We resolve any conflict in the evidence in favor of sustaining the verdict, and we do not re-weigh the evidence, which is the function of the jury. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). Credibility determinations are also for the jury, not this court. *State v. Dickens*, 187 Ariz. 1, 21, 926 P.2d 468, 488 (1996). Finally, no

distinction exists between circumstantial and direct evidence. *State v. Stuard*, 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993).

A. Counts 1 and 2

¶10 To obtain a conviction on Count 1, the State was required to prove that, under circumstances likely to produce death or serious injury, Defendant intentionally or knowingly caused J.D. to suffer physical injury. *See* A.R.S. § 13-3623(A)(1). Relying on *State v. Greene*, 168 Ariz. 104, 108, 811 P.2d 356, 360 (App. 1991), Defendant contends that the evidence merely showed a *possibility*, not the requisite *likelihood*, that J.D.'s injuries could have caused death or serious injury. He also claims there was no evidence the injuries were intentionally inflicted. As for Count 2, Defendant similarly argues that the State failed to present substantial evidence that he caused serious physical injury to J.D. *See* A.R.S. § 13-1204 (A)(1).

¶11 The radiologist who interpreted the emergency CT head scan, in addition to J.D.'s treating nurse practitioner and trauma surgeon, testified that the child's injuries were inconsistent with accidentally landing face first on a carpeted floor from four feet. The testimony revealed that the force required to inflict J.D.'s injuries could have led to death or significant life-long physical disability. Nurse A.T. testified that J.D. "is lucky that he didn't [sustain brain damage,]" and

that she had seen similar injuries in similarly-aged children result in death. Doctor C.E. testified that J.D.'s injuries could have caused death and that the abdominal injuries could have only resulted from "intentional blows to the belly by [an] adult[]."

¶12 The evidence presented jurors with facts from which they could conclude that Defendant intentionally caused injuries that likely could have produced death or serious injury. The record reflects not only a likelihood that J.D. would suffer serious injury, but that he actually sustained serious injuries.[2] *See* A.R.S. § 13-105(38) (2010) ("'Serious physical injury' includes physical injury that creates a reasonable risk of death . . . ."); *see also State v. Johnson,* 181 Ariz. 346, 350, 890 P.2d 641, 645 (App. 1995) (upholding child abuse conviction where children were exposed to drugs, drug paraphernalia, razor blades, and adults using cocaine, though no physical injury actually occurred). Sufficient evidence supports Defendant's convictions on Counts 1 and 2.

[2] J.D.'s physical injuries distinguish this case from *Greene*, where there was no evidence of actual or potential injury to minor children who were living in squalid conditions in a home maintained by their mother, the defendant. *Greene*, 168 Ariz. at 105, 107, 811 P.2d at 357, 359.

B. Count 3

¶13 Defendant also challenges the sufficiency of evidence as to Count 3. He concedes that J.D.'s "skull fracture qualifies under the statute[,]" *see* A.R.S. § 13-1204(A)(3), but argues the State failed to prove that the injury occurred on or between February 21 and 22, 2009, the dates charged in the indictment.

¶14 The date of the offense is not an element of the crime; thus, the State was not required to prove that Defendant assaulted J.D. on a specific date. *See* A.R.S. §§ 13-1203 (2010), -1204. Nonetheless, Doctor C.E. opined that the skull fractures were "new," and, referencing February 22, 2009, occurred "that day." There was substantial evidence that the skull fractures occurred between February 21 and 22, 2009. The trial court did not err by denying Defendant's Rule 20 motion.

II. Expert Testimony

¶15 Defendant contends that the trial court committed fundamental error by not *sua sponte* precluding certain expert testimony by J.D.'s health care providers. He argues that "much of the medical experts' opinions and the medical records were nothing more than their judgment that [Defendant] was lying when he said that he accidentally dropped [J.D.] on the carpeting and that the injuries were caused by intentional child abuse." He further contends that the experts "basically told the jurors how

to decide the case" and thus improperly "invaded the province of the jury."

¶16 To obtain relief under fundamental error review, Defendant has the burden of establishing that error occurred, the error was fundamental, and he was prejudiced thereby. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 20, 115 P.3d 601, 607 (2005). We find no error, fundamental or otherwise.

¶17 We review the admission of expert testimony for an abuse of discretion. *State v. Hummer,* 184 Ariz. 603, 607, 911 P.2d 609, 613 (App. 1995). An expert may offer opinions if his or her specialized knowledge will assist the fact-finder in understanding the evidence. Ariz. R. Evid. 702. Whether an expert's opinion will help the jury is a matter within the sound discretion of the trial court and, absent a clear abuse of that discretion, will not be disturbed on appeal. *State v. Mincey,* 141 Ariz. 425, 441, 687 P.2d 1180, 1198 (1984).

¶18 It is beyond the ken of the average juror to determine whether given injuries were accidentally or intentionally caused. *See State v. Hernandez,* 167 Ariz. 236, 239, 805 P.2d 1057, 1060 (App. 1990) (noting that "jurors, as laymen, lacked the medical expertise to determine whether the child's injuries were more likely to have been accidentally or intentionally inflicted."). And, contrary to Defendant's claims, the experts here did not testify about credibility or tell the jury that

Defendant was the guilty party.[3] The expert evidence merely indicated to the jury "that a child of tender years found with a certain type of injury has not suffered those injuries by accidental means, but rather is the victim of child abuse." *State v. Moyer*, 151 Ariz. 253, 255, 727 P.2d 31, 33 (App. 1986). Such testimony is "not an opinion by a doctor as to whether any particular person has done anything" and is generally admissible. *Id.; see* Ariz. R. Evid. 704; *State v. Gillies,* 135 Ariz. 500, 509, 662 P.2d 1007, 1016 (1983) (medical examiner's opinion that injuries were intentionally and not accidentally caused did not invade province of jury); *State v. Owens,* 112 Ariz. 223, 227, 540 P.2d 695, 699 (1975) (medical opinion that laceration not caused accidentally by child falling on sharp object "properly admissible"); *Hernandez,* 167 Ariz. at 238-39, 805 P.2d at 1059-60 (upholding admission of expert testimony that "child's injuries most likely had been caused by violent

[3] The challenged evidence is distinguishable from testimony that "quantifies the probabilities of the credibility of another witness," *see State v. Lindsey,* 149 Ariz. 472, 475, 720 P.2d 73, 76 (1986), or indicates that a victim was "telling the truth" because her "personality and behavior were consistent with [the crime] having occurred," *see State v. Moran,* 151 Ariz. 378, 385-86, 385 n.9, 728 P.2d 248, 255-56, 255 n.9 (1986) (contrasting such evidence with "medical evidence of physical facts"); *see also State v. Tucker*, 165 Ariz. 340, 350, 789 P.2d 1349, 1359 (App. 1990) (reversible error to admit expert testimony that victim's account of molestation was truthful when dispositive issue at trial "was the victim's word against the defendant's"). Accordingly, Defendant's reliance on these cases is not helpful.

shaking and were consistent with the battered child syndrome.”); *State v. Poehnelt*, 150 Ariz. 136, 150, 722 P.2d 304, 318 (App. 1985) (expert witnesses’ use of term “battered child syndrome” in describing injuries not improper).[4] We find no error--let alone fundamental error--in failing to *sua sponte* preclude the expert evidence.[5]

III. Jury Instruction: Flight

¶19 Without objection, the trial court instructed the jury as follows:

> In determining whether the State has proved the defendant guilty beyond a reasonable doubt, you may consider any of the evidence of the defendant’s running away or hiding, together with all of the other evidence in the case. You may also consider the defendant’s reasons for running away or hiding. Running away or hiding after a crime has been committed does not by itself prove guilt.

Defendant argues the court fundamentally erred in giving this instruction because the evidence showed he “simply left the scene or later engaged in travel.”

¶20 Instructing on flight is appropriate when a defendant’s conduct manifests a consciousness of guilt. *State*

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[4] To the extent Defendant relies on cases from other jurisdictions that contradict Arizona law, they are not controlling. *State ex rel. Ariz. Dep’t of Revenue v. Talley Indus., Inc.*, 182 Ariz. 17, 22, 893 P.2d 17, 22 (App. 1994) (we are not bound by the decisions of other states).

[5] The same analysis applies to the medical records that were admitted into evidence by stipulation.

v. Cutright, 196 Ariz. 567, 570, ¶ 12, 2 P.3d 657, 660 (App. 1999), *overruled on other grounds by State v. Miranda*, 200 Ariz. 67, 22 P.3d 506 (2001). Whether to give a flight instruction is dependent on the facts of a given case. *Id.* Merely leaving the scene of a crime or engaging in travel does not warrant a flight instruction. *State v. Speers*, 209 Ariz. 125, 132, ¶ 28, 98 P.3d 560, 567 (App. 2004). Because Defendant did not flee from police pursuit, a flight instruction was appropriate only if the court could "reasonably infer from the evidence that the defendant left the scene in a manner which obviously invites suspicion or announces guilt." *Id.* (citation omitted).

¶21 The trial judge could have concluded, from the evidence presented, that Defendant did more than merely leave the scene or engage in travel. *Cf. State v. Smith*, 113 Ariz. 298, 299-300, 552 P.2d 1192, 1193-94 (1976) (eyewitness observation of defendant walking to car from crime scene and then driving away held insufficient to support flight instruction); *State v. Bailey*, 107 Ariz. 451, 452, 489 P.2d 261, 262 (1971) (defendant returning to home state after a brief visit in Arizona at the time of the crime does not itself warrant a flight instruction because there was "no evidence to suggest that the defendant would have done anything other than return to Texas regardless of his guilt or innocence"). A reasonable trier of fact could conclude that Defendant abandoned

the agreed-upon plan to join his family in Phoenix and instead fled to Montana, drained the family bank account, and remained *incommunicado* for several days in order to prevent apprehension on child abuse charges that he feared were forthcoming. Such conduct could be viewed as inviting suspicion or announcing guilt. *See Speers*, 209 Ariz. at 132, ¶ 28, 98 P.3d at 567.

¶22 But even assuming *arguendo* that the instruction was improper, we could not find fundamental error on this record. *See, e.g., State v. Moody,* 208 Ariz. 424, 443, 94 P.3d 1119, 1138 (2004) (holding that "fundamental error is 'error of such dimensions that it cannot be said it is possible for a defendant to have had a fair trial.'" (citation omitted)). Evidence about Defendant's flight would still have been admissible, and the prosecutor would still have been free to argue inferences arising from that flight in closing.

IV. Prosecutorial Misconduct

¶23 Finally, Defendant claims that three comments by the prosecutor constitute misconduct and require reversal. We review for fundamental error because Defendant did not object to these statements below. *State v. Lamar*, 205 Ariz. 431, 441, ¶ 50, 72 P.3d 831, 841 (2003).

¶24 During his opening statement, the prosecutor said, "Now, [J.D.'s] story will never be fully known. I don't think anyone will know what went on . . . in that room, except for

[Defendant].” The prosecutor also stated, “I don’t want you to lose sight of how important it is to recognize the doctor’s testimony as to how substantial the injuries were.” During closing argument, the prosecutor said, “Ladies and gentlemen, the medical doctors, [and] the forensic nurse believe this to be intentional inflicted trauma. This story doesn’t gibe.”

¶25 Defendant argues that the first comment improperly shifted the burden of proof and that the remaining comments constitute improper vouching. We disagree.

¶26 To prevail on a prosecutorial misconduct claim, a defendant must show that “(1) misconduct exists and (2) ‘a reasonable likelihood exists that the misconduct could have affected the jury’s verdict, thereby denying defendant a fair trial.’” *State v. Morris*, 215 Ariz. 324, 335, ¶ 46, 160 P.3d 203, 214 (2007) (quoting *State v. Anderson* (*Anderson II*), 210 Ariz. 327, 340, ¶ 45, 111 P.3d 369, 382 (2005)). To warrant reversal, “[t]he misconduct must be ‘so pronounced and persistent that it permeates the entire atmosphere of the trial.’” *Id.* (quoting *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998)).

¶27 The comment that J.D.’s “story will never be fully known” and that only Defendant knew what happened did not improperly shift the burden of proof or violate Defendant’s Fifth Amendment rights. *See State v. Sarullo,* 219 Ariz. 431,

437, ¶ 24, 199 P.3d 686, 692 (App. 2009) (holding that comments on a defendant's failure to produce evidence or support his theory of defense at trial are generally permissible, as long as they "are not intended to direct the jury's attention to the defendant's failure to testify"). Nor do we discern any impermissible vouching. *See State v. Garza*, 216 Ariz. 56, 64, ¶ 23, 163 P.3d 1006, 1014 (2007) ("Prosecutorial vouching occurs 'when the prosecutor places the prestige of the government behind its witness,' or 'where the prosecutor suggests that information not presented to the jury supports the witness's testimony.'" (citation omitted)); *State ex rel. McDougall v. Corcoran*, 153 Ariz. 157, 160, 735 P.2d 767, 770 (1987) ("Even where the defendant does not take the stand, the prosecutor may properly comment on the defendant's failure to present exculpatory evidence which would substantiate defendant's story, as long as it does not constitute a comment on defendant's silence.").

¶28 Moreover, even if the comments were somehow inappropriate, we could not conclude that they reasonably could have affected the verdict. As previously noted, substantial evidence supports the convictions. The challenged statements were not "so persistent and pervasive" that they permeated the trial's atmosphere or otherwise had the cumulative effect of indicating that the prosecutor intentionally engaged in improper

conduct.[6] *See State v. Roque*, 213 Ariz. 193, 228, ¶ 155, 141 P.3d 368, 403 (2006). The absence of any objection at trial reinforces the notion that Defendant was not prejudiced by the remarks. *See State v. Gonzales*, 105 Ariz. 434, 437, 466 P.2d 388, 391 (1970) ("Our refusal to reverse because of the prosecutor's remarks is further supported by defense counsel's failure to object to the remarks at the time they were made.").

¶29 Finally, the court's instructions directed jurors not to consider the lawyers' statements as evidence. The instructions also made clear that the State had the burden of proving Defendant's guilt beyond a reasonable doubt. We presume that jurors follow their instructions, *State v. Newell,* 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006), and we conclude that the State's comments, singularly or cumulatively, did not deny Defendant a fair trial. *See McDougall*, 153 Ariz. at 160, 735 P.2d at 770 (holding that to the extent prosecutor's statement in closing argument may have implied that defendant had the burden of proof, the trial court's cautionary instruction to the jury was sufficient to cure any harm); *State v. Bowie*, 119 Ariz. 336, 340, 580 P.2d 1190, 1194 (1978) ("Any

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[6] Courts "should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974).

possible prejudice from the opening statement was overcome by the court's cautionary instructions that evidence did not come from the attorneys and that the verdict must be determined only by reference to the evidence . . . .").

CONCLUSION

¶30 Defendant's convictions and sentences are affirmed.

/s/

MARGARET H. DOWNIE, Judge

CONCURRING:

/s/

MAURICE PORTLEY, Presiding Judge

/s/

PATRICIA A. OROZCO, Judge