

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.



DIVISION ONE
FILED: 12/14/2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,)
) 1 CA-CR 09-0973
Appellee,)
) DEPARTMENT A
v.)
)
ALVIN DION BROOM,) **MEMORANDUM DECISION**
) (Not for Publication -
Appellant.) Rule 111, Rules of the
) Arizona Supreme Court)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2007-131842-002SE

The Honorable Connie Contes, Judge

AFFIRMED

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

James J. Haas, Maricopa County Public Defender Phoenix
By Stephen R. Collins, Deputy Public Defender
Attorneys for Appellant

K E S S L E R, Presiding udge

¶1 Defendant-Appellant Alvin Dion Broom ("Broom") was
tried and convicted of one count of child abuse, a class four
felony and a domestic violence offense. A jury found that

Broom, having the care or custody of C.K., a child, intentionally or knowingly caused or permitted C.K. to be injured or placed in a situation where C.K.'s health was endangered under circumstances other than those likely to produce death or serious physical injury. Counsel for Broom 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. Broom had an opportunity to file a supplemental brief *in propria persona* but did not do so.

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

FACTUAL AND PROCEDURAL HISTORY

¶13 The State charged Broom with intentional or knowing child abuse, a class four felony and a domestic violence offense. The State alleged that, on or between March 1, 2007 and March 30, 2007, under circumstances other than those likely to produce death or serious physical injury, Broom intentionally or knowingly caused or permitted C.K., a child, to be injured or placed in a situation where C.K.'s person or health was endangered while C.K. was in Broom's care or custody, in violation of Arizona Revised Statutes ("A.R.S.") section 13-

3623(B)(1) (2010). Broom pled not guilty and the case proceeded to a jury trial. The jury found Broom guilty as charged.

¶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 C.K.'s mother, R.K., started dating Broom in August 2006. After Broom became unemployed in January 2007, he spent "four to five" nights a week at R.K.'s house. R.K. testified that C.K. was not in daycare between January 2007 and March 2007 and that Broom took care of C.K. from March 21, 2007 to March 23, 2007, while R.K. was hospitalized.

¶16 Sharon D., R.K.'s mother and C.K.'s grandmother, owned the house in which R.K. and C.K. lived and testified that Broom also lived there during the charged time frame. Sharon D. recalled that when she saw C.K. in December 2006, he was able to run, jump, and feed himself. Sharon D. did not see C.K. between January 2007 and April 2007 because R.K. was "getting involved in a relationship [with Broom and] had started distancing herself from her family."

¶17 Broom's daughter, D.B., visited Broom at R.K.'s house in March 2007. D.B. recalled that C.K. "just cried a lot" and

did not talk or move around much. D.B. testified that C.K. was thin, had swollen arms and legs, did not feed himself, and only used his arms to hold his cup. D.B. said Broom did not do anything to alleviate C.K.'s condition and yelled at her to "mind [her] own business" when she asked about C.K.'s injuries.

¶18 D.B. testified that during her visits, Broom fed C.K. and gave him baths. D.B. said C.K. disliked bath time and would cry while Broom bathed him. During the last visit when C.K. was present, D.B. saw C.K. get in trouble.¹ D.B. testified that when C.K. got in trouble, Broom would yell at him, "pick him up and shake him by his arms and then toss him on the couch."

¶19 On March 29, 2007, R.K. called paramedics because C.K. became lethargic and unresponsive after taking a shower with Broom.² Chandler firefighter-paramedic Richard F. responded to the emergency call at R.K.'s residence. Broom told Richard F. that C.K. may have had a seizure but Richard F. did not observe any seizure or post-seizure activity. Richard F. testified that R.K. told him C.K. never experienced anything similar before.

¶10 An ambulance transported C.K. to Desert Banner Hospital. R.K. said she waited at the hospital for a long time

¹ D.B. testified C.K. got in trouble for "crying and spilling his drink" and "for going to the bathroom on himself that night."

² R.K. testified that when Broom's children visited, Broom would bathe C.K. and his younger daughter together. If C.K. was alone, sometimes he would get a bath by himself but "most of the time he took showers with [Broom]." R.K. also testified that either she or Broom dressed C.K.

before asking a nurse if she could leave because C.K. appeared to have recovered. According to R.K., the nurse told her she did not have to stay, so R.K. called Broom to pick her and C.K. up from the hospital and take them home.

¶11 Broom and R.K. testified that C.K. did not experience any injuries on the following day, March 30, 2007. R.K. said she left to go to the grocery store at ten or eleven o'clock in the evening and received a call from Broom five to ten minutes later telling her that C.K. was vomiting. R.K. told Broom to call the paramedics, who were at R.K.'s house when she arrived. An ambulance took C.K. to Banner Desert Hospital, where doctors informed R.K. and Broom that C.K. had multiple broken bones and a subdural hemorrhage. R.K. testified that both times C.K. became lethargic or unresponsive, he was alone with Broom.

¶12 Dr. James M., an emergency room pediatrician at Desert Banner Hospital, testified that C.K. was seizing when he was brought in on March 30, 2007. Dr. Joseph W., a radiologist specializing in neuroradiology, reviewed C.K.'s scans and found two subdural hematomas, one of which was recent. Dr. M. transferred C.K. to Phoenix Children's Hospital because C.K.'s brain bleed required treatment by a neurosurgeon. Before C.K. was transferred, Dr. M. discovered that C.K. also had acute and

healing fractures to his arms and legs.³ Dr. M. testified that he was not provided with an explanation for C.K.'s condition and that C.K.'s injuries indicated trauma to multiple sites.

¶13 Dr. W. testified that the fractures of different ages on C.K.'s arms and legs were indicative of abuse.⁴ Dr. W. suspected that the recent subdural hematoma was also due to nonaccidental trauma because R.K. and Broom did not provide an explanation for the injury, such as a long fall or a car accident. Dr. W. also noted that the specific type of subdural hematoma observed in C.K. was "highly suggestive" of nonaccidental trauma.

¶14 Dr. Gregory W., an orthopedic surgeon at Phoenix Children's Hospital, testified that C.K.'s arms were broken above the elbows and that his legs were broken above the ankles. Dr. G. W. determined that one of the leg fractures happened within a week of C.K.'s March 30 admission to the hospital. Dr. G. W. testified that pain would have precluded C.K. from using his broken arms and from walking on a leg with an acute fracture.

³ Acute fractures denote breaks that are more recent and thus have not had time to begin healing.

⁴ Dr. Wagner testified that the fracture to one leg was healing, estimated to be between four and eight weeks old, and the fracture to the other leg was acute, estimated to be no more than seven days old. Dr. Wagner believed both of the arm fractures were less than seven days old. The only history provided for the injuries was "pain."

¶15 Dr. Jennifer G., a forensic pediatrician at Phoenix Children's Hospital, testified that the hard swelling on C.K.'s extremities was "[v]ery obvious." Dr. G. added that a child who has suffered multiple fractures may appear to be developmentally delayed due to impaired mobility and a reluctance to interact with others.

¶16 The only history of trauma provided to Dr. G. to explain the injuries was a short fall from a crib two days prior to C.K.'s second hospitalization. Dr. G. testified that the described trauma was not consistent with the subdural hemorrhaging injury. Phoenix Children's Hospital staff Dr. C., an intensive care pediatrician, and Jacqueline S., a social worker, also spoke with R.K. and Broom on March 31, 2007 and testified that neither R.K. nor Broom provided information that explained C.K.'s condition.⁵

¶17 Chandler Police Officer William J. responded to the March 30 emergency call at R.K.'s house. At approximately 1:00 a.m. on March 31, 2007, Officer J. arrived at Banner Desert Hospital to investigate an allegation of child abuse involving C.K. Officer J. spoke with Broom and testified that Broom told

⁵ Dr. C.'s notes stated "They described that he was relatively well until he was noted to be limp, coughing, choking and having difficulty breathing on the day of the admission." R.K. and Broom spoke with Jacqueline S. again after learning of C.K.'s injuries. R.K. and Broom told the social worker that C.K. would get his arms or legs stuck in the rails of his crib after learning about C.K.'s injuries.

him that he was giving C.K. water when C.K. began to vomit. Broom indicated that C.K. continued to vomit, which prompted him to call 9-1-1.

¶18 Broom testified that he stayed at R.K.'s house up to three nights per week but did not live there. Broom also testified that C.K. went to daycare once or twice per week. He was aware of concerns that C.K. was autistic and testified that sometimes C.K. would "stare off into space" and "mumble certain inaudible sounds." Broom said that sometimes C.K. would eat or drink too quickly and start to choke or vomit, but described C.K. as an otherwise easy-going child who did not require discipline.

¶19 According to Broom, on March 29, 2007, C.K. became unresponsive after they took a shower together. No one else was at the house besides Broom, R.K., and C.K. An ambulance took C.K. to the hospital and Broom picked up R.K. and C.K. from the hospital later that day. Broom spent the night at R.K.'s house and the next day "everything was normal." After R.K. left to go to the grocery store at about 10:30 p.m., C.K. walked into the master bedroom, where Broom was playing a video game. C.K. was drinking quickly from his cup and began to vomit, so Broom called R.K. and 9-1-1. Broom testified he was not aware of C.K.'s broken bones until the March 30 hospital visit, that he

did not inflict any injuries on C.K., and that he did not know who was responsible or how the injuries occurred.

ANALYSIS

I. Standard of Review

¶20 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 Broom's conviction or modification of the imposed sentence. Accordingly, we affirm Broom's conviction and sentence.

II. The Evidence Supports the Findings

¶21 Evidence in the record supports the jury's verdict. The jury found that Broom, under circumstances other than those likely to produce death or serious physical injury, intentionally or knowingly caused or permitted C.K. to be injured or placed in a situation where C.K.'s person or health was endangered while having the care or custody of C.K. The jury instructions contained the elements of this child abuse offense, which require proof that the defendant (1) under circumstances other than those likely to produce death or

serious physical injury, (2) intentionally or knowingly (3) caused or permitted a child to be injured or placed in a situation where the person or health of the child was endangered, (4) while having the care or custody of the child. See A.R.S. § 13-3623(B)(1).

¶122 Evidence in the record supports the finding that C.K. was injured under circumstances other than those likely to produce death or serious physical injury.⁶ C.K.'s treating physicians testified that C.K. had numerous acute and healing fractures to his arms and legs and D.B. testified she witnessed Broom pick up C.K. by the arms, shake him, and throw him on the couch. D.B. also testified that Broom yelled at her when she asked him about C.K.'s injuries. Thus, a jury could find that Broom inflicted or failed to obtain medical attention for C.K.'s injuries under circumstances other than those likely to produce death or serious physical injury because fractures generally are not fatal and are not associated with the permanent impairment or disfigurement characteristic of a serious physical injury.

¶123 There is evidence to support the jury's finding that Broom committed the offense intentionally or knowingly.

⁶ "'Serious physical injury' means physical injury that creates a reasonable risk of death or that causes serious or permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb." A.R.S. § 13-3623(F)(5).

"Intentionally" or "with the intent to" means, with respect to a result or to conduct described by a statute defining an offense, that a person's objective is to cause that result or to engage in that conduct.

"Knowingly" means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or believes that the person's conduct is of that nature or that the circumstance exists. It does not require any knowledge of the unlawfulness of the act or omission.

A.R.S. § 13-105(10)(a), (b) (2010). Dr. G. testified that C.K.'s swollen extremities were obvious and D.B. said she noticed C.K.'s injuries and brought them to Broom's attention. Broom regularly bathed C.K. or showered with him and either Broom or R.K. dressed him. Moreover, Broom was alone with C.K. prior to both emergency calls and C.K. did not experience similar incidents before Broom moved in or after contact with Broom ended. Therefore, a jury could conclude that Broom acted intentionally or knowingly.

¶24 Evidence in the record supports the jury's finding that Broom caused or permitted C.K. to be injured or placed in a situation where his person or health was endangered.

"Physical injury" means the impairment of physical condition and includes . . . failure to thrive, malnutrition, . . . fracture of any bone, subdural hematoma, soft tissue swelling, . . . or any physical condition that imperils health or welfare.

A.R.S. § 13-3623(F)(4). Drs. M., W., G. W., and G. testified that C.K. suffered multiple fractures and a subdural hematoma, all of which were determined to occur in March 2007. Dr. G. W. testified that the fractures would have impaired C.K.'s use of his arms and legs and Dr. G. testified that multiple fractures negatively impact a child's welfare by hindering mobility and inhibiting social interactions. Finally, Sharon D. testified that C.K. was weak and emaciated when she saw him in April 2007. Thus, a jury could find that C.K. sustained physical injuries.

¶25 A jury could also find that Broom was responsible for C.K.'s injuries or allowed him to remain in a dangerous situation. Broom bathed, dressed, and fed C.K. during the charged time frame and was alone with C.K. before each emergency call. C.K.'s doctors and a social worker suspected nonaccidental trauma based on the number, type, and ages of C.K.'s injuries. Sharon D. testified that baths frightened C.K. and he experienced nightmares after he was removed from the household. According to D.B., Broom physically disciplined C.K. and ignored the child's cries and injuries. Thus, a jury could conclude that Broom inflicted C.K.'s injuries or permitted C.K. to remain in a situation where his person or health was endangered.

¶26 Evidence in the record supports the court's finding that Broom committed a domestic violence offense. "Domestic

violence" includes any offense defined in A.R.S. § 13-3623 if "[t]he relationship between the victim and the defendant is one of . . . persons residing or having resided in the same household." A.R.S. § 13-3601(A)(1) (2010). The jury found Broom guilty of child abuse, in violation of A.R.S. § 13-3623(B)(1). During trial, the State presented evidence that C.K. was a child and that Broom resided in the same household as C.K. during the charged time frame.⁷ Thus, the trial court properly found that Broom's felony constituted a domestic violence offense pursuant to A.R.S. § 13-3601.

¶127 Broom's sentence is within the statutory range permitted by law. A.R.S. §§ 13-603 (2010); -702(D) (2010); -901(F) (Supp. 2010); -902(E) (Supp. 2010). At sentencing, the superior court offered Broom an opportunity to speak and Broom addressed the court. The court considered the aggravating factors as well as the recommendation in the pretrial services report and Broom's request for lifetime probation and suspended a sentence of incarceration.⁸ The court imposed lifetime probation, including a term ordering Broom to serve five months in jail.

⁷ "'Child' means an individual who is under eighteen years of age." A.R.S. § 13-3623(F)(2).

⁸ The superior court held an aggravating circumstances hearing after the jury returned a guilty verdict. The jury found four aggravating factors.

CONCLUSION

¶128 After careful review of the record, we find no meritorious grounds for reversal of Broom's conviction or sentence. The record reflects Broom had a fair trial and was present and represented by counsel during all critical stages 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).

¶129 We therefore affirm Broom's conviction and sentence. Upon the filing of this decision, counsel's obligations pertaining to Broom's representation have ended. Counsel only needs to inform Broom 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, Broom shall have thirty days from the date of this

decision to proceed, if he so desires, with a pro per motion for reconsideration or petition for review.

/s/

DONN KESSLER, Presiding Judge

CONCURRING:

/s/

DANIEL A. BARKER, Judge

/s/

JON W. THOMPSON, Judge