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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellant, v. RANDALL D. WEST and PENNY A. WEST, Appellees.	2 CA-CR 2008-0342 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20063310

Honorable John S. Leonardo, Judge

AFFIRMED IN PART; REVERSED IN PART

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E S P I N O S A, Judge.

¶1 After a jury found appellees Penny and Randall West guilty of child abuse, the trial court granted their post-verdict motions for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. The state appealed from that order, arguing the court had erred, there was sufficient evidence to support the guilt of each defendant, and the verdicts should be reinstated. We determined the court had erred procedurally in granting the motions and reversed. *State v. West*, 224 Ariz. 575, 233 P.3d 1154 (App. 2010). The supreme court vacated our decision and remanded the appeal to this court to consider the merits of the state's appeal in light of its decision. *State v. West*, 226 Ariz. 559, 250 P.3d 1188 (2011). We now have done so and affirm in part and reverse in part.

Factual Background and Procedural History

¶2 In reviewing a trial court's decision on a Rule 20 motion, we view the evidence in the light most favorable to sustaining the jury's verdicts. *See State v. Gillies*, 135 Ariz. 500, 506, 622 P.2d 1007, 1013 (1983); *State ex rel. Hyder v. Superior Court*, 128 Ariz. 216, 223, 624 P.2d 1264, 1271 (1981), *disapproved on other grounds by West*, 226 Ariz. 559, 250 P.3d 1188; *State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005). On August 24, 2005, sixteen-month-old Emily M. died from severe head trauma. At that time, she was a foster child in the care of the Wests. The day before her death, Emily reportedly had exhibited good temperament, eaten well, and behaved normally. Although the events surrounding the child's death were disputed at trial, evidence was presented that the night before, Penny had gone to their daughter C.'s school for a parent-teacher conference and had left Randall alone with Emily and some of the other

children.[1] Penny came home and later left again to pick up their son M. Emily reportedly did not cry or fuss during the night.

¶3 The next morning, Randall left the house at approximately 6:15 to drop M. off at school and continue on to work. During the next fifty minutes, Penny and Randall exchanged approximately nine telephone calls.[2] One was described as a call from Randall and M. to Penny requesting that she settle a bet. Another was a call from Penny to Randall about Emily immediately before she called 9-1-1 and requested emergency assistance. Evidence that the other calls had been placed was admitted, but the trial court prohibited the state from speculating about their contents.

¶4 Penny's two statements to police, both given on the day of Emily's death, were introduced at trial.[3] Penny claimed she had gotten Emily and D. out of their beds between 7:00 and 7:05 that morning, and Emily had appeared normal at that time. She said Emily and D. walked down the stairs holding Penny's hands, and Penny left Emily standing on the carpet in the living room and went into the kitchen. When she next looked at Emily, the child was bent forward at the waist with her hands and feet on the floor; she then fell over backward as if she had fainted. Penny picked her up and saw that

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[1]The Wests have three children, C., K., and M. At the time of Emily's death, C. was seven, K. was ten, and M. was seventeen. The Wests also were caring for two other foster children at the time: D., who was twenty months old, and K.M., who was one month old. Emily and K.M. were sisters.

[2]Six of the calls were under one minute in length, including one that lasted for four seconds.

[3]Neither Penny nor Randall testified at trial.

her eyes were "fluttering." She took Emily to the bathroom, removed her clothes, put her in the bathroom sink, and splashed water on her in an attempt to revive her. She then telephoned Randall, after which she called 9-1-1.

¶5 Responding paramedics found Emily unconscious but breathing. She stopped breathing on the way to St. Joseph's Hospital and was intubated on arrival. Shortly thereafter, Emily was transferred to Tucson Medical Center, where an emergency room doctor noted she had no gag reflex, unreactive pupils, and no response to stimuli. A neurosurgeon performed emergency brain surgery, after which Emily died. The county medical examiner concluded her death was due to one or more "blunt impacts to the head with subdural hemorrhage." Penny and Randall were charged with child abuse under A.R.S. § 13-3623(A)(1).

¶6 During the nineteen-day trial, there were significant contradictions to Penny's accounts of the events surrounding Emily's death. For example, the neurosurgeon who operated on Emily, Dr. Eric Sipos, testified that she had suffered an acute subdural hematoma, the symptoms of which would be "so severe that you [would] find out about it right away." He explained Emily likely would have experienced symptoms such as loss of consciousness, decreased alertness, and impaired ability to wake up, and that some of these symptoms should have appeared immediately after the injury and would have progressed over time. He also stated that she would not have been able to walk down the stairs or act normally with such an injury immediately before she

collapsed and that it was "implausible" for Emily's injury to be caused by a short-distance fall from standing height.

¶7 Dr. Andreas Theodorou, a pediatric intensive-care physician, similarly testified that Emily would have exhibited symptoms immediately after her injury, including "some alteration" in her mental status, coordination, motor skills, and interaction, and that these symptoms would have progressed to a loss of motor function, loss of consciousness, and difficulty breathing. He too stated that Emily would not have been able to walk down the stairs, whether her injury had occurred that morning or the previous day.[4] And he testified such an injury would not have been caused by a standing fall either forward or backward onto carpet.

¶8 The Wests each moved for a judgment of acquittal pursuant to Rule 20, at the close of the state's case and again at the close of evidence, which motions the trial court denied. The jury found Penny guilty of criminally negligent child abuse under circumstances likely to produce death or serious injury and found Randall guilty of reckless child abuse under circumstances not likely to produce death or serious injury.

¶9 After the jury had rendered its verdicts, the Wests renewed their Rule 20 motions, again arguing the evidence was insufficient to warrant their respective convictions. Following a hearing, the trial court granted the motions and set aside the verdicts, explaining that although "a rational trier of fact could find beyond a reasonable

[4]During trial, the defense suggested Emily's death could have been caused or contributed to by other prior head traumas, including a fall the previous afternoon during a visit with her mother in which Emily reportedly had hit the back of her head on a shelf.

doubt that the victim's injury was caused by an act of child abuse," there was "no substantial evidence proving whether it was both or only one defendant that" caused or "permitted the injury." The state appealed.

¶10 In *West*, 224 Ariz. 575, ¶ 12, 233 P.3d at 1157, we reversed the trial court's ruling based on the standard articulated by our supreme court in *Hyder*, 128 Ariz. at 224, 624 P.2d at 1272, which held that once a jury has returned a guilty verdict, a trial court "may only redetermine the quantum of evidence if [it] is satisfied that [it] erred previously in considering improper evidence." *Id*. After granting the Wests' petition for review, our supreme court "disapprov[ed]" *Hyder* and determined "the same standard governs a trial court's rulings on pre-verdict and post-verdict motions for judgment of acquittal." *West*, 226 Ariz. 559, ¶¶ 1, 20-21, 250 P.3d at 1189, 1192. The court vacated our decision and remanded the case for this court to address the merits of the state's appeal. *See id.* ¶ 20. We do so now.

Discussion

¶11 The question of sufficiency of the evidence "is one of law, subject to de novo review on appeal." *West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191. In evaluating a Rule 20 motion, "'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* ¶ 16, *quoting State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990). "'Substantial evidence,' Rule 20's lynchpin phrase, 'is such proof that reasonable persons could accept as adequate and sufficient to

support a conclusion of defendant's guilt beyond a reasonable doubt.'" *Id.*, *quoting Mathers*, 165 Ariz. at 67, 796 P.2d at 869. "Both direct and circumstantial evidence should be considered in determining whether substantial evidence supports a conviction." *Id.*

¶12 "[H]owever, '[t]he fact that a jury convicts a defendant does not in itself negate the validity of the earlier motion for acquittal' because '[i]f it did, a jury finding of guilt would always cure the erroneous denial of an acquittal motion.'" *West*, 226 Ariz. 559, ¶ 17, 250 P.3d at 1191, *quoting Mathers*, 165 Ariz. at 67, 796 P.2d at 869 (second and third alterations in *West*). "'[A] properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt.'" *Id.*, *quoting Mathers*, 165 Ariz. at 67, 796 P.2d at 869 (alteration in *West*). "On the other hand, '[w]hen reasonable minds may differ on inferences drawn from the facts, the case must be submitted to the jury, and the trial judge has no discretion to enter a judgment of acquittal.'" *Id.* ¶ 18, *quoting State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997) (alteration in *West*). "Thus, in ruling on a Rule 20 motion, . . . a trial court may not re-weigh the facts or disregard inferences that might reasonably be drawn from the evidence." *Id.*

¶13 To sustain the Wests' convictions, the state was required to present substantial evidence that both Penny and Randall had committed child abuse under any of three alternate theories: (1) causing a child to suffer physical injury, (2) having custody of a child and causing or permitting the child's person or health to be injured, or

(3) having custody of a child and causing or permitting a child to be placed in a situation where the child's person or health is endangered. § 13-3623.[5] In granting the Wests' Rule 20 motions, the trial court found the evidence insufficient to support their convictions under any of the means of violating § 13-3623, including through delay in seeking medical treatment.[6] The court thus concluded there was no substantial evidence supporting a guilty verdict for either defendant. On appeal, the state contends the trial court erred in acquitting the Wests because substantial evidence supports their convictions under all three means of violating § 13-3623. We examine each defendant's conviction below.

Penny's Conviction

¶14 We first consider the evidence supporting Penny's conviction. Regarding the first means of violating § 13-3623, the state asserts there was substantial, albeit circumstantial, evidence that Penny caused the injury. The state points to testimony that she had been alone with Emily both the night before and the morning of her death, and it highlights the inconsistencies in and implausibility of her subsequent statements to police, particularly in the face of the medical evidence. As the trial court acknowledged, the evidence established that Emily's death was the result of "an act of child abuse."

[5]Randall was convicted under § 13-3623(B) and Penny under § 13-3623(A), which contains the additional requirement of "[u]nder circumstances likely to produce death or serious physical injury." Apart from this additional element, the three methods of violating both subsections are substantially the same.

[6]Because it granted the Wests' Rule 20 motions, the trial court did not address their motion for a new trial and our resolution of this appeal has no bearing on its merits.

However, contrary to the court's ultimate finding, there also was evidence to support the jury's determination that the abuse had been committed by Penny.

¶15 As noted earlier, Penny, who was the only adult in the house when Emily collapsed on the morning of her death, told police that Emily had behaved normally, had walked down the stairs, and had displayed no symptoms until she fell over backwards while standing on the carpet. But virtually every doctor involved in Emily's emergency care testified she would not have suffered her severe head injury from the standing-height fall Penny had described. And several doctors stated Emily would not have been able to walk down the stairs or act normally any time after sustaining such an injury, and that the types of injuries Emily exhibited suggested nonaccidental trauma. This was consistent with the medical examiner's opinion that the cause of death was one or more "blunt impacts to the head."

¶16 There also was evidence Penny had contradicted herself that day. First she told a police detective that Emily had eaten well the night before and had been put to bed at her usual time. But later that afternoon, she said Emily had not been feeling well and had gone to bed early. Penny also initially told the detective and a social worker that after she had dressed Emily that morning, the child had walked down the stairs. Penny later told another social worker she had carried Emily down the stairs. Penny's statements were further contradicted by statements taken from her daughters. They had said D. was already downstairs when Penny went upstairs to get Emily, suggesting Penny had been alone with Emily upstairs. In addition, the state maintains, as it argued to the

jury, that contrary to Penny's account, it would have been impossible for her to dress both Emily and D. that morning, walk them downstairs, prepare D.'s cereal, see Emily fall over, undress Emily and put her in the sink, and call Randall and then 9-1-1, all in under eight minutes—the amount of time suggested by Penny's various statements and the records of the calls between Penny and Randall during the time in question.

¶17 Finally, Dr. Sipos, Dr. Theodorou, and Dr. David Jeck, a neuroradiologist, all testified that Emily's head injury had occurred "recently," "that morning . . . or maybe the evening before," and that she would have displayed symptoms immediately afterwards. Additionally, both Dr. Sipos and Dr. Karadesheh, another pediatric ICU doctor who saw Emily in the emergency room, previously had told the investigating detective that had Emily received her injury the evening before, she would not have survived the night. Indeed, a pediatric neurologist who testified on behalf of the defense, Dr. Scheller, although advocating a preexisting condition theory, stated that Emily's radiologic "CAT scan"[7] was "typical of a very straightforward smack kind of injury," and that it happened "[s]ometime before 7:11 A.M. that morning of August 24th." When Emily was seen a few hours later by Dr. Sipos, he described her as "a devastated baby."

¶18 Viewing the evidence in the light most favorable to the verdict, we conclude the jury reasonably could have inferred from the circumstantial evidence that Emily had been injured that morning while she had been in Penny's care. It also could

[7]Dr. Jeck earlier in the trial had defined a CAT scan as a "computerized axial tomograph[]," a type of detailed x-ray image displaying an "anato[m]ical picture of particular body parts."

readily conclude Penny had not been truthful when she told police what had happened, and the reason she had not told the truth was to avoid responsibility for Emily's death. A defendant's false and inconsistent statements may show consciousness of guilt. *See State v. Fulminante*, 193 Ariz. 485, ¶ 27, 975 P.2d 75, 84 (1999). Although such statements alone are insufficient to establish guilt, they "may be considered by the [j]ury as a circumstance tending to prove a consciousness of guilt." *State v. Kountz*, 108 Ariz. 459, 463, 501 P.2d 931, 935 (1972) (approving of jury instruction on issue). It was for the jury to draw reasonable inferences from this evidence. *West*, 226 Ariz. 559, ¶ 18, 250 P.3d at 1192.

¶19 In sum, over the course of the nineteen-day trial there was much conflicting evidence, the inferences of which were sharply disputed. But it was for the jury, as trier of fact, to resolve those conflicts and decide what conclusions to draw from the evidence based on its evaluation of the competing inferences and theories of the case, its assessment of the credibility of the witnesses, and its determination of how much weight to assign to each. *See State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993); *State v. Parker*, 113 Ariz. 560, 561, 558 P.2d 905, 906 (1976). We conclude there was "'such proof that reasonable persons could accept as adequate and sufficient to support a conclusion [that Penny caused or permitted Emily's injury,] beyond a reasonable doubt.'" *West*, 226 Ariz. 559, ¶ 16, 250 P.3d at 1191, *quoting Mathers*, 165 Ariz. at 67, 796 P.2d at 869. Accordingly, we need not address the other means of violating § 13-3623 urged by the state, and we reverse the trial court's grant of Penny's Rule 20 motion.

Randall's Conviction

¶20 We next address whether substantial evidence supported Randall's conviction. Regarding the first means of violating § 13-3623, the state points to the fact that Randall had been Emily's sole caretaker the night before her death, when Penny had gone to a parent-teacher conference and again when she went to pick up M. at school, and argues the jury "could have found that Randall caused the injury at that time." In addition, the state notes that Randall failed to inform police that he had exchanged several telephone calls with Penny that morning.[8] Finally, the state contends that because the jury could have determined that Penny was lying, they "could have drawn the reasonable inference that [both] Defendants were hiding the truth and that they were guilty." But this evidence, considered independently or together with all of the evidence presented and the reasonable inferences therefrom, is too speculative to constitute substantial evidence that Randall, either alone or in concert with Penny, injured Emily. *See Mathers*, 165 Ariz. at 71, 796 P.2d at 873 (conviction may not be based on "[s]peculation concerning possibilities").

¶21 Relying on *State v. Hernandez*, 167 Ariz. 236, 805 P.2d 1057 (App. 1990), and *State v. Moyer*, 151 Ariz. 253, 727 P.2d 31 (App. 1986), the state further argues that "[i]n other child abuse cases, our courts have recognized that evidence of battered child syndrome, together with evidence that a child's injuries occurred while in the care of a

[8]We note, however, that police had only asked Randall about telephone calls that took place while he was on his way home from the office and while Penny was at the hospital.

defendant, is enough to sustain a guilty verdict for child abuse and negligent homicide." Neither of these cases, however, supports Randall's conviction because battered-child syndrome provides an inference about causation, not identity. In *Hernandez*, the defendant admitted he had shaken the child on the night of her death and the dispute at trial was whether this shaking, as opposed to the defendant's assertion he also had accidentally fallen on the child, had caused her death. 167 Ariz. at 237-38, 805 P.2d at 1058-59. This court upheld the trial court's decision to allow evidence of "battered child syndrome," which "'is not an opinion by a doctor as to whether any particular person has done anything, but rather simply indicates 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,'" because this evidence would be helpful to the jury in its determination as to whether the injuries were accidentally or intentionally inflicted. *Id.* at 238-39, 805 P.2d at 1059-60, *quoting Moyer*, 151 Ariz. at 255, 727 P.2d at 33.

¶22 Likewise, in *Moyer*, the defendant had been alone with the victim when she received burns on her face and arm, which he claimed had been accidentally inflicted. 151 Ariz. at 254, 727 P.2d at 32. The child also had a fractured skull and bruises. *Id.* This court upheld the trial court's decision to admit evidence of battered-child syndrome offered to refute the defendant's argument that the injuries were accidental. *Id.* at 255, 727 P.2d at 33. Neither *Hernandez* nor *Moyer* is applicable here because, while recognizing Emily's death resulted from child abuse and was not accidental, there was no substantial evidence that Randall caused her injuries.

¶23 This case is also unlike those in which evidence established both defendants had been complicit in a child's abuse. *See, e.g.*, *State v. Poehnelt*, 150 Ariz. 136, 139-42, 722 P.2d 304, 307-10 (App. 1985) (affirming child abuse convictions of both stepfather and mother based on physical abuse and malnourishment of child over five-year period). Although there was circumstantial evidence Emily had been the victim of child abuse while in Penny's care, there was no substantial evidence Randall had been involved in it based on the first means of committing the offense under § 13-3623. Therefore, the trial court correctly granted Randall's Rule 20 motion on this basis.

¶24 Because the state apparently concedes there was insufficient evidence to support Randall's conviction under the second means of violating the child abuse statute, we next address whether substantial evidence supported his conviction under the third means: having custody of a child and causing or permitting the child to be placed in a situation where the child's person or health is endangered. *See* § 13-3623(B). The state argues, "[I]f the jury found that Randall caused the injury the night before, it also would have found that he knew that something was wrong," and thus the delay in seeking medical care until the following morning "is sufficient to support a verdict that Randall permitted Emily's health to be endangered." This argument fails, however, because it is based entirely on the assumption that Randall caused Emily's injury, which, as outlined above, is not supported by the evidence.

¶25 The state also argues that even assuming Randall was not aware of Emily's injuries until the morning of her death, his conviction is supported by the number of

telephone calls he and Penny exchanged that morning, beginning fifty minutes before Penny called 9-1-1. Again, we cannot agree. As the trial court explained, "To attribute any inculpatory content to [these] calls under these circumstances is to invite impermissible speculation," and without such speculation, there was insufficient evidence Randall delayed seeking medical care for Emily based solely on the existence of these calls. It is well settled that even when drawing all inferences in favor of the jury's verdicts, a conviction cannot be based on mere speculation. *See Mathers*, 165 Ariz. at 71, 796 P.2d at 873; *State v. Sanchez*, 181 Ariz. 492, 494, 892 P.2d 212, 214 (App. 1995) (speculation alone cannot support determination of guilt).[9]

¶26 In addition, as Randall points out, "[t]he State presented no evidence that Emily's condition could have been treated had either Randall or Penny not delayed in seeking medical attention." When the state alleges that a caretaker has endangered a child by failing to obtain prompt medical treatment for the child's injuries, the state must prove the delay increased the child's risk of harm. *See, e.g., State v. Mahaney*, 193 Ariz. 566, n.4, 975 P.2d 156, 159 n.4 (App. 1999) (sufficient evidence of endangerment where

[9]Citing *State v. Bible*, 175 Ariz. 549, 858 P.2d 1152 (1993), the state asserts the trial court incorrectly drew inferences in the Wests' favor regarding the telephone calls and other evidence. But *Bible* is distinguishable because the inference of molestation in that case was established by specific evidence: the defendant was not wearing underwear when he was arrested, the victim was found naked with her hands bound, the victim's underwear had been "hung on a tree limb," and a "pubic-type hair" similar to the defendant's was found near the victim. *Id.* at 595, 858 P.2d at 1198. Unlike the evidence in *Bible*, the mere fact that there were telephone calls between the Wests is not substantial evidence that Randall knew Emily was injured and delayed her receiving medical assistance.

"ample medical testimony" showed deprivation of anti-seizure medication "exposed [child] to a high possibility of reseizing, which could have caused serious and permanent injury"); *State v. Fernane*, 185 Ariz. 222, 224, 914 P.2d 1314, 1316 (App. 1995) (sufficient evidence of endangerment where child's chance of survival would have improved had she been taken to hospital sooner). Here, the state's medical experts addressed only the nature of Emily's injuries and the cause of her death. Apart from one physician's generalized testimony that any delay in seeking treatment for these types of head injuries is "terrible" and lowers the likelihood of survival, the state presented no evidence regarding the treatment Emily would have received had she been examined earlier, nor what effect, if any, a delay would have had on her prognosis. Thus, in addition to the lack of substantial evidence that Randall endangered Emily through delay in seeking medical attention, the state presented no evidence any such delay endangered Emily by increasing her risk of harm.[10] Accordingly, the trial court correctly determined there was insufficient evidence to support Randall's conviction under the third means of violating § 13-3623.

[10]Although the state argues in its reply brief that it need not prove any delay increased the risk of harm to Emily, this interpretation is inconsistent with the state's burden. As this court held in *Mahaney*, 193 Ariz. 566, ¶ 15 & n.4, 975 P.2d at 158-59 & 159 n.4, the legislature intended to use the term "endangered" in this statute in its ordinary sense, meaning "to expose to potential harm" greater than that risked in everyday life. While the state need not prove that a risk of harm is substantial or that the potential for danger is immediate in order to secure a conviction, *see id.* ¶ 16, endangerment nonetheless remains an element of the offense.

Conclusion

¶27 "The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 309 (1979). Thus, the trial court correctly determined that the evidence was insufficient to support the verdict against Randall. As explained earlier, however, we conclude there was sufficient evidence to support the jury's guilty verdict as to Penny. Accordingly, the trial court's order granting Randall's Rule 20 motion is affirmed and its order granting Penny's Rule 20 motion is reversed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge