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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| JONATHAN PAUL SALVATIERRA, a single man, Plaintiff/Appellant, v. SHANNA MARIE TROJANOVICH, a single woman, Defendant/Appellee. | 2 CA-CV 2012-0038<br>DEPARTMENT A<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 28, Rules of Civil Appellate Procedure |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20087040

Honorable Kyle Bryson, Judge

AFFIRMED

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E C K E R S T R O M, Presiding Judge.

**¶1** This personal injury case arose from a crosswalk accident involving a bicyclist (the plaintiff/appellant Jonathan Salvatierra) and a motorist (the defendant/appellee Shanna Trojanovich). On appeal, Salvatierra contends the trial court erred by denying his motion for a directed verdict on the question of negligence, refusing to provide certain instructions to the jury, admitting testimony about bicycle laws and ordinances, and denying his motion for a new trial based on "jury misconduct" related to damages. For the reasons set forth below, we affirm.

## Factual and Procedural Background

**¶2** The accident occurred at the intersection of Broadway Boulevard and Aviation Highway in Tucson, near the city's distinctive "rattlesnake bridge." Broadway is an east-west street, and drivers exiting Aviation, south of Broadway, who wish to travel east on Broadway must enter a single right-turn lane that is abutted on both sides by sidewalks, with a marked crosswalk extending between them. The lane is marked with a yield sign, as well as a sign with a bicycle on it.

**¶3** In March 2007, Trojanovich was driving her pickup truck on Aviation Highway. She had stopped before the crosswalk next to the yield sign, intending to turn right to travel east on Broadway. After she glanced to her right and saw no one approaching on the sidewalk, she looked left for about thirty seconds while waiting for traffic to clear. Without glancing to the right again, she then began her turn and moved her car forward about five to seven feet, striking Salvatierra in the crosswalk with the front, middle portion of her truck. Trojanovich admitted she had not seen Salvatierra in

the crosswalk before striking him. As a result of the collision, Salvatierra fell off his bicycle and primarily injured his shoulder and arm.

**¶4** Salvatierra, who was fifty-three at the time of the accident, had been riding his bicycle westbound on the sidewalk on Broadway and had been travelling downtown to attend a bicycle rally. He observed Trojanovich stopped in her truck as he approached the crosswalk, and he also saw that she was looking away from him the entire time he approached. Salvatierra had been riding downhill on his bicycle and, although he had been applying his brakes before he entered the crosswalk, he did not stop before entering it. As he positioned his bicycle to go through "the cut in the curb" and enter the crosswalk, he observed the truck's tires "roll slightly," but he proceeded through the crosswalk and attempted to reach the opposite end.

**¶5** Salvatierra testified that, as "an experienced bicyclist," he knew the best practice would be "to establish eye contact with a driver in a situation such as this so that you know the driver has seen you." He further testified he believed he had the right-of-way as soon as he entered the crosswalk.

**¶6** The jury found both parties negligent. It attributed ninety percent of the fault to Salvatierra and the remaining ten percent to Trojanovich. The jury determined Salvatierra's total damages were $14,367.60. Because Salvatierra had rejected a more favorable offer of judgment than he ultimately obtained, the trial court awarded sanctions pursuant to Rule 68(g), Ariz. R. Civ. P., and entered a final judgment in favor of

Trojanovich for approximately $5,000. The court denied Salvatierra's motion for a new trial and his renewed motion for a directed verdict.[1] This timely appeal followed.

**Directed Verdict**

**¶7** Salvatierra first contends the trial court erred by denying his motions for a "directed verdict" on the issue of his own negligence. The motions were made pursuant to Rule 50, Ariz. R. Civ. P., which requires a trial court to grant a party judgment as a matter of law if "there is no legally sufficient evidentiary basis for a reasonable jury to find" an issue necessary to a claim or defense. Ariz. R. Civ. P. 50(a); *see Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, n.4, 180 P.3d 986, 992 n.4 (App. 2008) (noting legal equivalence of motions for "directed verdict" and for "judgment as a matter of law"). We review a court's denial of such motions de novo, and we will not disturb a verdict "'if any substantial evidence exists permitting reasonable persons to reach such a result.'" *Salica v. Tucson Heart Hosp.-Carondelet, L.L.C.*, 224 Ariz. 414, ¶ 11, 231 P.3d 946, 949-50 (App. 2010), *quoting Acuna v. Kroack*, 212 Ariz. 104, ¶ 24, 128 P.3d 221, 228 (App. 2006).

**¶8** As he argued below, Salvatierra maintains Trojanovich's "sole defense" was that "he had not established eye contact with [her] before entering the crosswalk." Because he claims "he did not have a duty to do so," he concludes he could not have been found negligent and therefore argues the court should have granted judgment in his favor as a matter of law.

[1]After we stayed the appeal and revested jurisdiction in the trial court, it clarified this ruling in a nunc pro tunc order.

**¶9** As a threshold matter, we agree with Trojanovich that this argument mischaracterizes and unduly narrows the question in the case. "[T]he concept of duty should not be equated with specific details of conduct." *Alhambra Sch. Dist. v. Superior Court*, 165 Ariz. 38, 41, 796 P.2d 470, 473 (1990). Whether a duty exists is "a legal matter" that "involves generalizations about categories of cases." *Gipson v. Kasey*, 214 Ariz. 141, ¶ 10, 150 P.3d 228, 230 (2007).

**¶10** We may assume here, without deciding, that a person lawfully may ride a bicycle through a marked crosswalk and that such a person has a right-of-way when doing so. *See Maxwell v. Gossett*, 126 Ariz. 98, 100, 612 P.2d 1061, 1063 (1980) (rejecting interpretation of former traffic statutes "as prohibiting the riding of a bicycle in a crosswalk"); *see also* A.R.S. § 28-792(A) (requiring driver of vehicle to yield right-of-way to pedestrian within crosswalk). Yet even with a right-of-way, a person must exercise reasonable care when entering a crosswalk. "A pedestrian shall not suddenly leave any curb or other place of safety and walk or run into the path of a vehicle that is so close that it is impossible for the driver to yield." § 28-792(A). Similarly, "[a] bicyclist[,] like a driver having the right-of-way at an intersection[,] has a duty to exercise the degree of care which a reasonably prudent person would use under the circumstances to discover dangerous situations and avoid injury." *Valenzuela v. Bracamonte*, 126 Ariz. 472, 473, 616 P.2d 932, 933 (App. 1980). "What is reasonable under the circumstances is a matter for the jury to decide." *Id.*

**¶11** We find *Valenzuela* instructive in deciding the issue here. In *Valenzuela*, we upheld a jury verdict in favor of a defendant motorist who had struck a teenage

plaintiff while he was riding a bicycle through an intersection. *Id.* at 472, 473, 616 P.2d at 932, 933. Although the motorist had been "negligent in failing to yield the right-of-way" to the bicyclist, we determined the evidence supported a finding of contributory negligence by the plaintiff. *Id.* at 473, 616 P.2d at 933. Specifically, the record showed that while the teenager was crossing the street on his bicycle, his three-year-old cousin was following on a tricycle, and the younger child's entrance into the intersection had caused the motorist to swerve out of her lane and strike the plaintiff. *Id.* at 472, 616 P.2d at 932. On that record, the trial court concluded the plaintiff could be found negligent for "attempt[ing] to cross the street . . . without maintaining a proper look-out." *Id.* at 473, 616 P.2d at 933. We agreed that the plaintiff was negligent for failing to exercise reasonable care, given the dangerous circumstances surrounding his crossing. *See id.*

**¶12** Here, the jury similarly could have concluded Salvatierra did not keep a proper lookout and exercise the care necessary "to discover dangerous situations and avoid injury." *Id.* As noted above, Salvatierra was riding downhill and applying his brakes before he entered the crosswalk. He saw the truck's tires move before he entered the crosswalk, but he did not stop before entering. He also knew the driver was looking away from him, and he never made eye contact with her to ensure she was aware of his presence, although he knew this was the safest practice. Furthermore, given his vantage point and the direction he was travelling, Salvatierra was capable of seeing a break in eastbound traffic and anticipating the movement of a vehicle in a designated turn lane.

**¶13** Under these circumstances, the jury could have found Salvatierra's bicycle riding analogous to a careless jogger who darts into a crosswalk despite an obvious risk

of injury. *Cf.* § 28-792(A) (prohibiting sudden, unsafe movements into crosswalk by pedestrian). Given that Trojanovich was undisputedly negligent as well in proceeding through the crosswalk while Salvatierra was plainly in it, the division of liability in this case, placing almost all of the liability on Salvatierra, was perhaps surprising. But apportionment of fault is a matter "solely within the jury's discretion." *Ritchie v. Krasner*, 221 Ariz. 288, ¶ 34, 211 P.3d 1272, 1284 (App. 2009). Because the evidence supports a finding that Salvatierra failed to safely enter the crosswalk as a reasonably careful person would, we have no basis to disturb the verdict or the trial court's rulings.

**Jury Instructions**

**¶14** Salvatierra next challenges the trial court's refusal to provide two of his requested jury instructions. "A trial court must give a requested instruction if (1) the evidence presented supports the instruction, (2) the instruction is proper under the law, and (3) the instruction pertains to an important issue that is not dealt with in any other instruction." *Czarnecki v. Volkswagen of Am.*, 172 Ariz. 408, 411, 837 P.2d 1143, 1146 (App. 1991).

**¶15** The first requested instruction quoted language from A.R.S. § 28-701(A) and stated as follows: "A person shall control the speed of a vehicle as necessary to avoid colliding with any object, person, vehicle or other conveyance on, entering or adjacent to the highway in compliance with legal requirements and the duty of all persons to exercise reasonable care for the protection of others." The trial court denied the request on the ground that § 28-701 did not apply to this case. The record supports the court's ruling.

**¶16** Section 28-701(A) "requires that speed be controlled." *Dykeman v. Engelbrecht*, 166 Ariz. 398, 402, 803 P.2d 119, 123 (App. 1990). "It does not apply . . . to every motor vehicle accident, regardless of the circumstances." *Id.* The accident here involved a low-speed impact caused, in part, by driver inattentiveness. Trojanovich's negligence came not from excessive speed but rather from her failure to reconfirm visually that it was safe to proceed before she moved her vehicle forward. Accordingly, the trial court did not err in refusing to give the requested instruction. *Cf. Newman v. Piazza*, 6 Ariz. App. 396, 400, 433 P.2d 47, 51 (1967) (finding no error in omission of speed instruction when record indicated driver in rear-end collision "follow[ed] too close to the vehicle ahead, or fail[ed] to keep a proper lookout").

**¶17** Salvatierra also argues "the [trial] court erred in refusing to instruct on negligence per se." He has failed to provide any citations to the record where the proposed instruction or the court's ruling may be found. *See* Ariz. R. Civ. App. P. 13(a)(6) (opening brief must contain "citations to the . . . parts of the record relied on" for each contention raised on appeal). Nor does Salvatierra include the text of the specific instruction in his opening brief. *See* Ariz. R. Civ. App. P. 13(d)(1) (requiring text of proposed instruction in brief or appendix). "We have no obligation to search the record for this error." *Spillios v. Green*, 137 Ariz. 443, 447, 671 P.2d 421, 425 (App. 1983). We therefore find the argument waived. *See id.*; *see also Dykeman v. Ashton*, 8 Ariz. App. 327, 330, 446 P.2d 26, 29 (1968) (finding waiver based on failure to provide text of jury instruction in compliance with appellate rules).

**Statutes and Ordinance**

**¶18** Salvatierra maintains the trial court "erred in permitting testimony on inapplicable state statutes and a Tucson City Ordinance concerning bicycles." To support this contention, he refers almost entirely to comments made by defense counsel during closing argument. Comments by attorneys, however, are not testimony, as the court correctly informed the jury in its preliminary instructions. "'[T]estimony' is defined as '[e]vidence that a competent witness under oath or affirmation gives at a trial or in an affidavit or deposition.'" *Ryan v. San Francisco Peaks Trucking Co.*, 228 Ariz. 42, ¶ 29, 262 P.3d 863, 871 (App. 2011), *quoting Black's Law Dictionary* 1514 (8th ed. 2004). "The remarks of counsel are not evidence, whether they are made during opening argument or during closing argument." *Quine v. Godwin*, 132 Ariz. 409, 412, 646 P.2d 294, 297 (App. 1982) (citation omitted).

**¶19** Once summation had ended, the trial court again explained to the jury the proper role of the attorneys' arguments and reminded the jurors that its final instructions contained the only law applicable to this case. Because Salvatierra has not challenged any of the court's evidentiary rulings relating to the exhibits or testimony admitted at trial, and because he has provided neither a standard of review nor any legal authority to support the present contention in his opening brief, we find no basis to conclude that the matters referred to by defense counsel "hopelessly polluted the jury." *See* Ariz. R. Civ. App. P. 13(a)(6) (opening brief shall provide "proper standard of review" and argument containing "citations to the authorities . . . relied on" for each contention raised); *Ritchie*, 221 Ariz. 288, ¶ 62, 211 P.3d at 1289 (failure to develop argument according to

procedural rules may result in waiver); *see also In re $26,980.00 U.S. Currency*, 199 Ariz. 291, ¶ 28, 18 P.3d 85, 93 (App. 2000) (declining to consider "bald assertion" unsupported by legal authority).

**Misconduct and Damages**

**¶20** Last, Salvatierra argues the trial court erred when it denied his motion for new trial on the ground of "jury misconduct." He specifically claims that when the jury awarded damages in an amount equal to "his medical bills to the very penny," it "violated its oath and charge from the court because [it] did not find any damages for the nature[,] extent and duration of plaintiff's injury," including damages "for his pain, discomfort, suffering, disability, disfigurement, and anxiety."

**¶21** Salvatierra has not provided any law to support his characterization of the issue as "jury misconduct." We therefore disregard this aspect of his argument. *See In re $26,980.00*, 199 Ariz. 291, ¶ 28, 18 P.3d at 93.

**¶22** Salvatierra does cite legal authority supporting the proposition that a trial court should vacate or adjust a damage award that is inadequate in light of the uncontroverted evidence. *See Creamer v. Troiano*, 108 Ariz. 573, 575, 576-77, 503 P.2d 794, 796, 797-98 (1972); *Bustamante v. City of Tucson*, 145 Ariz. 365, 367, 701 P.2d 861, 863 (App. 1985); *Anderson v. Muniz*, 21 Ariz. App. 25, 26, 28, 515 P.2d 52, 53, 55 (1983), *overruled on other grounds by Lopez v. Safeway Stores, Inc.*, 212 Ariz. 198, 129 P.3d 487 (App. 2006); *see also* Ariz. R. Civ. P. 59(a)(5), (7), (8) (permitting new trial on grounds of insufficient damages, verdict resulting from jury passion or prejudice, or verdict contrary to law). But he does not provide any record citations, as required by

Rule 13(a)(6), to support this fact-dependent claim about the jury's calculation and the evidence supporting it.[2] Instead, he asserts, "There can be no dispute as to how the jury arrived at that exact sum."

**¶23** Our decision in *Burgy v. Hubbard*, 119 Ariz. 415, 417, 581 P.2d 260, 262 (App. 1978), illustrates that what appears to be "at first blush . . . an award of medical expenses only," sometimes includes an amount for "pain and suffering." In any event, "[w]e are not required to assume the duties of an advocate and search voluminous records and exhibits to substantiate an appellant's claims." *Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 343, 678 P.2d 525, 528 (App. 1984). Because Salvatierra has failed to direct us to the pertinent portions of the record that might support his argument, he has waived any challenge to the damages awarded here. *See Ritchie*, 221 Ariz. 288, ¶ 62, 211 P.3d at 1289.

[2]His opening brief refers only to the following statement by opposing counsel during summation: "He has $15,000 in medical bills. I would suggest that in addition to the $15,000, you would give him an additional $25,000 for his pain and suffering." As we noted above, attorneys' statements are not evidence, and they provide no basis for this court to disturb the jury's verdict or the trial court's ruling denying a new trial. *See Welch v. McClure*, 123 Ariz. 161, 164, 598 P.2d 980, 983 (1979) ("[I]f the verdict is supported by adequate evidence it will not be disturbed, and the greatest possible discretion is in the hands of the trial judge."). As the trier of fact, the jury was primarily responsible for deciding compensation for matters such as "pain and residual disability." *Waqui v. Tanner Bros. Contracting Co.*, 121 Ariz. 323, 325, 589 P.2d 1355, 1357 (App. 1979).

## Disposition

**¶24** For the foregoing reasons, the judgment is affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge