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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. SCOTT DAVID SULLIVAN, Appellant.	)	2 CA-CR 2010-0132 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20083472

Honorable Richard S. Fields, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and David A. Sullivan
Tucson
Attorneys for Appellee

R. Lamar Couser
Tucson
Attorney for Appellant

V A S Q U E Z, Presiding Judge.

¶1 Scott Sullivan was convicted after a jury trial of reckless child abuse and sentenced to a presumptive, 3.5-year prison term.[1] In this appeal, he asserts police officers lacked probable cause to arrest him and, therefore, the trial court erred by denying his motion to suppress statements he had made during a post-arrest interview with police. We affirm.

¶2 Typically, "[i]n reviewing the denial of a motion to suppress evidence, we consider only the evidence that was presented at the suppression hearing." *State v. Kinney*, 225 Ariz. 550, ¶ 2, 241 P.3d 914, 917 (App. 2010). Here, however, the trial court did not conduct an evidentiary hearing, instead basing its ruling on the parties' filings and its review of "the files and record." Sullivan did not request a hearing or object to this procedure. Nor does he argue on appeal that the court erred in denying his motion without conducting a hearing or that any of the court's factual findings were incorrect. Additionally, the relevant facts appear undisputed. We view those facts in the light most favorable to upholding the court's ruling. *Id.*

¶3 In August 2008, Tucson Fire Department (TFD) and Tucson Police Department (TPD) personnel responded to a 9-1-1 call made by Sullivan's wife, Terri, in which she stated her infant was "unresponsive." At the scene they found Sullivan attempting to administer cardiopulmonary resuscitation to his daughter, six-week-old K. She appeared severely malnourished, so thin that her face was sunken, her skin "was very

[1]The jury acquitted Sullivan of first-degree felony murder and failed to reach a verdict on the charge of intentional or knowing child abuse.

loose and elastic," and "her bones were protruding through her skin." TFD personnel were unable to resuscitate her and pronounced her dead at the scene.

¶4 Terri told a TPD officer she did not wish to remain in the residence, so the officer allowed Terri and Sullivan to sit in her patrol car. Approximately an hour later, Sullivan was moved to a separate patrol car. After another hour had passed, officers placed Sullivan under arrest and read him the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). Sullivan waived his rights and agreed to speak with police. Before trial, Sullivan moved to suppress the statements he had made during the subsequent interview. The trial court denied Sullivan's motion, concluding the death of a six-week-old, emaciated infant provided sufficient factual basis for officers to conclude an offense had occurred, and that Sullivan's presence in the home as a custodial parent was sufficient for officers to conclude "he had committed, or was involved in committing, the offense."

¶5 "We review rulings on motions to suppress evidence for a clear abuse of discretion." *State v. Sanchez*, 200 Ariz. 163, ¶ 5, 24 P.3d 610, 612 (App. 2001). However, we review de novo the trial court's legal conclusions, such as whether probable cause existed. *See id.* Sullivan argues on appeal that, when he initially was "placed in a patrol car," he had been arrested illegally and that the statement he later made to police was improperly "used to establish probabl[e] cause for the arrest." But Sullivan fails to challenge properly the trial court's conclusion that, even if that were the case, police officers had probable cause to arrest him at that time. He merely recites without elaboration an argument similar to the one he made below—that officers lacked probable

cause because they did not know at that time the cause of K.'s death, whether K. had "underlying health problems," how much time Sullivan had "spent taking care of [her]," what Sullivan "knew about [her] health," or "if a crime had been committed."

¶6 A police officer may make a warrantless arrest if "the officer has probable cause to believe" that "[a] felony has been committed and probable cause to believe the person to be arrested has committed the felony." A.R.S. § 13-3883(A)(1).[2] "[P]robable cause exists if the collective knowledge of the officers establishes that they had 'reasonably trustworthy information of facts and circumstances which are sufficient in themselves to lead a reasonable [person] to believe an offense . . . has been committed and that the person to be arrested . . . did commit it.'" *State v. Aleman*, 210 Ariz. 232, ¶ 15, 109 P.3d 571, 576 (App. 2005), *quoting State v. Richards*, 110 Ariz. 290, 291, 518 P.2d 113, 114 (1974) (alterations in *Aleman*).

¶7 A person commits child abuse if, "[u]nder circumstances likely to produce death or serious physical injury," that person recklessly injures a child, or "having the care or custody of a child," "causes or permits" a child to be injured or "placed in a situation where the . . . health of the child . . . is endangered." A.R.S. § 13-3623(A).[3] The definition of physical injury includes malnutrition. § 13-3623(F)(4). Irrespective of whether K. had some "underlying health problem[]," her physical appearance was so abnormal that any reasonable person would have concluded she needed prompt medical

[2]This statute has been amended since Sullivan committed this offense, but none of the changes are material here. 2010 Ariz. Sess. Laws, ch. 113, § 6.

[3]This statute is the same, in relevant part, as when Sullivan committed his offense. *See* 2008 Ariz. Sess. Laws, ch. 301, § 85.

attention which apparently had not been obtained. Moreover, her physical appearance also permitted officers to conclude malnutrition had played a significant role in her death. These facts plainly were sufficient for the officers to have concluded reckless child abuse had occurred.

¶8 Sullivan was present when officers arrived, and he does not suggest they were unaware that he was K.'s father or had any reason to believe he did not live in the home. Thus, they reasonably could conclude he was involved in K.'s care, was aware of her condition, and had failed to take any action to remedy it. Despite Sullivan's suggestion to the contrary, the officers were not required to confirm those conclusions definitively or learn the precise extent of his involvement with K., or his knowledge of her condition, before arresting him. *See State v. Dixon*, 153 Ariz. 151, 153, 735 P.2d 761, 763 (1987) ("Only the probability and not a prima facie showing of criminal activity is the standard of probable cause."). We find no error in the trial court's denial of Sullivan's motion to suppress.

¶9 In any event, we conclude any error was harmless beyond a reasonable doubt. *See State v. Davolt*, 207 Ariz. 191, ¶ 64, 84 P.3d 456, 474 (2004) (erroneous admission of evidence reviewed for harmless error). The evidence that Sullivan had committed reckless child abuse was overwhelming. *See id.* (error harmless if properly admitted evidence of guilt "overwhelming"). Although he admitted in his statements to police that he had participated in caring for K. and acknowledged that she seemed underweight, those facts were demonstrated amply by other evidence as well. The evidence established that it would have taken several weeks for K. to starve to death, that

she had not been fed for "many hours" before her death, and that no reasonable person would have believed she did not require medical care as her condition deteriorated. And the evidence established Sullivan had been involved in K.'s care and therefore had known of and consciously disregarded her condition. *See* A.R.S. § 13-105(10)(c) (person reckless if "aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists"; disregard of risk must be "gross deviation from the [reasonable] standard of conduct"); *see also* § 13-3623(A)(2).

¶10 For the reasons stated, we affirm Sullivan's conviction and sentence.

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

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

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