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

FILED BY CLERK
AUG 10 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. KRISTINE ELIZABETH HOWARD, Appellant.	2 CA-CR 2009-0370 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR68211

Honorable Richard Nichols, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
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Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Alex Heveri
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E S P I N O S A, Judge.

¶1 After a jury trial, appellant Kristine Howard was convicted of aggravated assault, aggravated driving under the influence of an intoxicant (DUI), aggravated driving

with a blood alcohol concentration of .10 or more, and two counts of endangerment. She was sentenced to several concurrent, presumptive terms of imprisonment, the longest of which was 7.5 years. On appeal, Howard argues the trial court erred in denying her motion for judgment of acquittal on the aggravated assault and endangerment counts because there was no substantial evidence to support the convictions. We affirm.

Facts and Procedural History

¶2 When reviewing a claim of insufficient evidence, we view the facts in the light most favorable to sustaining the verdict. *State v. Jones*, 188 Ariz. 388, 394, 937 P.2d 310, 316 (1997). On August 7, 1999, Howard was driving with a passenger, J., when she rear-ended a pickup truck that had stopped at a red light. Inside the truck were D., his wife S., their son T., and T.'s friend R. As a result of the collision, D., S., and T. each hit their heads on "the back of the truck," while R. hit his head on the seat. T. and S. were taken to the hospital. J., the passenger in Howard's car, hit his head on the windshield, sustaining a laceration on his forehead.

¶3 A responding Tucson police officer questioned Howard and suspected she was intoxicated. He arrested her for DUI, and two subsequently administered breath tests showed blood alcohol concentrations of .231 and .213, respectively. Howard was charged with two counts of aggravated DUI, three counts of aggravated assault with a dangerous instrument, and two counts of endangerment.

¶4 At trial, two witnesses testified concerning the aggravated assault and endangerment charges. D. stated that, as a result of the impact, "[his] son's head snapped

back and hit the sliding window and bowed the frame on the back window," causing "a big knot on his head," but was not specific about his, his wife's or R's injuries. He further testified there was a passenger in the other vehicle who had "used his face to stop himself on the windshield" of Howard's car.

¶5 The officer who had questioned Howard after the accident testified that, when he arrived, Howard was talking to a man who had struck his head on her windshield and had a laceration on his forehead. The officer further stated Howard told him she had picked up her friend J. immediately before the accident.

¶6 At the close of testimony, Howard moved for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., on all but the DUI counts. She argued there was no substantial evidence establishing the identities of the endangerment victims, J. and R., and no substantial evidence regarding the injuries of D. and S. The state responded that J. had been identified when Howard's attorney, while cross-examining D., had used J.'s full name and said he had been Howard's passenger. After hearing these arguments, the trial court partially granted the motion, including dismissing the aggravated assault charges involving D. and S. Howard was convicted on all remaining counts, and this appeal followed. This court has jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).[1]

[1]Because Howard absconded after her conviction in 2001 and was not sentenced until 2009, the state argues she has waived her right to appeal under A.R.S. § 13-4033(C). The state concedes that, in *State v. Soto*, 223 Ariz. 407, ¶ 14, 224 P.3d 223, 227-28 (2010), this court recently found the statute unconstitutional unless the defendant has personally been advised of her right to appeal and notified that a delay in sentencing

Discussion

¶7 Howard raises several issues on appeal, all challenging the sufficiency of the evidence to sustain her convictions. She first argues there was insufficient evidence supporting the aggravated assault charge because the state failed to present sufficient evidence of T.'s identity or that he had been injured. Because she failed to raise these specific arguments at trial, we review them only for fundamental error. *See State v. Zinsmeyer*, 222 Ariz. 612, ¶ 27, 218 P.3d 1069, 1080 (App. 2009) (sufficiency of evidence claim not raised below reviewed for fundamental error). Howard also contends the trial court erred in failing to grant her Rule 20 motion because the state failed to present sufficient evidence of the identities of endangerment victims J. and R. We review the court's denial of a Rule 20 motion for an abuse of discretion, *State v. Leyvas*, 221 Ariz. 181, ¶ 33, 211 P.3d 1165, 1175 (App. 2009), and "reverse only if no substantial evidence supports the conviction." *State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005).

T.'s Identity

¶8 Howard argues that, because T. was not identified by name in testimony, there was no substantial proof of his identity and, consequently, insufficient evidence to support Howard's conviction for aggravated assault of T. The state concedes that "having . . . the testifying witnesses relate on the stand the full names of the three victims

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could constitute a waiver. Because we have been directed to no evidence Howard was so advised, we find no waiver. *See id.* ¶¶ 15-16.

or, alternatively, the parties' formally stipulating to their identities, would have been the most efficient, prudent means to verify the accuracy of the indictments." But it argues that the lack of such statements here does not necessitate reversal. We agree.

¶9 To prevail on a claim of fundamental error, Howard must establish both that error occurred and that the error "goes to the foundation of h[er] case, takes away a right that is essential to h[er] defense, and is of such magnitude that [s]he could not have received a fair trial." *State v. Henderson*, 210 Ariz. 561, ¶¶ 23-24, 115 P.3d 601, 608 (2005). "A conviction based on insufficient evidence constitutes fundamental error." *Zinsmeyer*, 222 Ariz. 612, ¶ 27, 218 P.3d at 1080.

¶10 In arguing that proving the identities of the victims was necessary, Howard relies on *State v. Tschilar*, 200 Ariz. 427, ¶ 34, 27 P.3d 331, 339 (App. 2001), for the proposition that a victim is a necessary element of proof for aggravated assault. She offers no authority, however, that the identity of the victim is a necessary element of the offense.[2] Indeed, the elements of the offense consist of "[i]ntentionally, knowingly or recklessly" causing physical injury "to another person." A.R.S. § 13-1203(A)(1). Thus, the statute makes clear that the offense is intentional or reckless behavior directed against a person.

[2]Other jurisdictions have found that the only required identification of a victim in an aggravated assault case is that the victim is "a human being." *See Edmund v. State*, 921 A.2d 264, 269 (Md. 2007) (victim of aggravated assault may be identified by name or description); *People v. Griggs*, 265 Cal. Rptr. 53, 58 (Cal. Ct. App. 1989) (identity of victim irrelevant to aggravated assault charge).

¶11 Here, D.'s uncontested testimony that his son was in the truck and was injured is sufficient to establish a "person" for the purposes of the statute. Moreover, even were T.'s identity necessary, we find it was proved sufficiently because the record reflects no confusion or doubt about T.'s identity, nor has Howard alleged any. *See Perez v. Terr.*, 14 Ariz. 163, 165-66, 125 P. 483, 484-85 (1912) (no prejudice to defendant where name on indictment and actual name of victim had same derivation); *State v. Hall*, 136 Ariz. 219, 223-24, 665 P.2d 101, 105-06 (App. 1983) (defendant not prejudiced where victim identified by false name in indictment and by real name at trial).

¶12 Although D. referred to T. at trial only as "my son," that form of familial identification was mentioned, without objection, by the judge during jury selection and by the prosecutor in opening statement. Furthermore, there was no suggestion during trial that D. had any other son to whom he might have been referring, nor was there evidence that any children besides T. and R. were involved in the accident.

¶13 Because the statute does not make the identity of the victim an element of the offense and because D.'s references to "[his] son" reasonably could have referred only to T., we cannot say that Howard's conviction was based on insufficient evidence and therefore conclude Howard has failed to demonstrate fundamental error. *See Zinsmeyer*, 222 Ariz. 612, ¶ 27, 218 P.3d at 1080.

T.'s Injuries

¶14 Howard next argues the evidence presented as to T.'s injuries was insufficient to warrant her conviction for aggravated assault, contending D.'s statements

about his son's injuries were inadmissible hearsay. *See State v. McGann*, 132 Ariz. 296, 299, 645 P.2d 811, 814 (1982) ("When hearsay evidence is the sole proof of an essential element of the state's case, reversal of the conviction may be warranted."). Because Howard failed to raise this claim below, she has forfeited this argument absent prejudicial, fundamental error. *See Zinsmeyer*, 222 Ariz. 612, ¶ 27, 218 P.3d at 1080.

¶15 We need not dwell on this issue, however, as circumstantial evidence supplied by other parts of D.'s testimony would nonetheless warrant a finding that T. was injured in the collision. D. testified he had witnessed "[his] son's head [snap] back and hit the sliding window," with such force that it "bowed the frame on the back window," and T. was taken to the hospital after being examined by firefighters at the scene. Howard at no time refuted or disagreed with this account, and her counsel acknowledged it in his closing argument. Nor does Howard challenge this evidence now on appeal. Because there was ample evidence from which jurors could find T. was injured in the collision, the evidence was sufficient to sustain Howard's aggravated assault conviction.[3]

Identities of Endangerment Victims J. and R.

¶16 Howard's final argument is that, because R. and J. were not identified in testimony by their first and last names, the trial court abused its discretion in denying her

[3]As the state points out, because Howard was convicted of aggravated assault with a deadly weapon or dangerous instrument causing any physical injury, not aggravated assault causing serious physical injury, there was no requirement for the state to present evidence as to the severity of T.'s injuries. *See State v. Molina*, 211 Ariz. 130, ¶¶ 9-10, 118 P.3d 1094, 1097 (App. 2005) (no requirement for victim to suffer serious physical injury for conviction of aggravated assault with a dangerous instrument or deadly weapon).

Rule 20 motion for insufficient evidence of having endangered those victims. As noted earlier, we will reverse the court's denial of a Rule 20 motion only if no substantial evidence supports the conviction. *Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d at 875. Substantial evidence is that which "'reasonable persons could accept as adequate and sufficient to support'" a finding of guilt beyond a reasonable doubt. *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990), *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980).

¶17 Our determination above that proving assault does not require that the victim be precisely identified applies with equal force to endangerment. A.R.S. § 13-1201(A) provides: "A person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury." Although the state has the burden of proving that a person was endangered, nowhere does the statute require or imply that the name or exact identity of the victim is a necessary element of the offense.

¶18 Here, testimony showed there were six people involved in the accident—Howard and her passenger, J., as well as D.'s family, and R., and the full names of each were stated in the indictment, which was provided to the jury. Although no witness testified to the full names of the victims at trial, there was clear testimony about each, including the first names of both R. and J.

¶19 Furthermore, as noted earlier, the record reflects no confusion about the identities of the two endangerment victims at trial. Howard's counsel confirmed J. and

R. as victims of the crash during cross-examination of D. The court, *sua sponte*, raised the issue of the identification of J., and Howard's counsel then reconfirmed that J. and R. were victims during his closing argument. Although Howard is correct in asserting that statements made by attorneys are not evidence, *see State v. Robinson*, 127 Ariz. 324, 329, 620 P.2d 703, 708 (App. 1980), counsel's ready reference to the individual victims in closing makes plain the weakness of Howard's claim that their identities were not established beyond a reasonable doubt. Accordingly, we find no error in the trial court's denial of Howard's motion for judgment of acquittal on the endangerment charges.

Disposition

¶20 For the foregoing reasons, Howard's convictions and sentences are affirmed.

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

CONCURRING:

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

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