

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: 11-09-2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 09-0450
)
Appellee,) DEPARTMENT E
)
v.) MEMORANDUM DECISION
)
KIMBERLY NICOLE ALANDAR,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-150191-001 DT

The Honorable Kristin Hoffman, Judge

AFFIRMED

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

James J. Haas, Maricopa County Public Defender Phoenix
By Edith M. Lucero, Deputy Public Defender
Attorneys for Appellant

H A L L, Judge

¶1 Kimberly Nicole Alandar appeals the trial court's conviction and sentence imposed for one count of aggravated

assault, a class one misdemeanor. For the following reasons, we affirm.

BACKGROUND¹

¶2 Alandar was initially indicted on one count of aggravated assault, a class six felony and domestic violence offense, for "intentionally, knowingly or recklessly caus[ing] physical injury to . . . a child of 15 years of age or under" in October 2007. The State moved to designate the count as a class one misdemeanor, which the court granted. Prior to trial, the court held a comprehensive pretrial conference and asked if the parties anticipated requesting a lesser included offense. Alandar's attorney responded, "[n]o."

¶3 The case proceeded to a bench trial and neither party requested that the court consider a lesser-included offense. The victim testified he was born in November 2001 and was therefore five years old at the time of the October 2007 incident. After closing arguments, the court found Alandar "guilty of this offense, which is a misdemeanor -- Class 1 misdemeanor." The trial minute entry, filed the following day, stated that the court found Alandar "guilty of Aggravated Assault[,] a class 1 misdemeanor." The sentencing minute entry

¹ We view the facts in the light most favorable to affirming the conviction. See *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

also reflected that Alandar was guilty of aggravated assault and suspended imposition of sentence and placed her on probation for one year. At the sentencing hearing, however, the court found Alandar "guilty of Count 1, Assault, a Class 1 misdemeanor."

¶14 Alandar timely appeals and we have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2003), 13-4031, and -4033(A)(1) (2010).

DISCUSSION

¶15 Alandar presents the sole issue on appeal of whether the court erred by finding Alandar guilty of aggravated assault when it found her guilty of assault at the sentencing hearing. Upon finding a discrepancy between an oral pronouncement at a sentencing hearing and a minute entry, we must determine the trial court's intent through a review of the record. *State v. Stevens*, 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992). Pursuant to A.R.S. § 13-1204(A)(6) (2010), Alandar was charged with one count of aggravated assault because she was over eighteen years of age at the time of the incident and the victim was less than fifteen years old. Neither Alandar nor the State requested the court consider a lesser-included offense. Thus, the court considered whether Alandar was guilty of the charged offense, aggravated assault, at the time of the trial. At the conclusion of the trial, the court stated that Alandar was

"guilty of this offense, which is a misdemeanor -- Class 1 misdemeanor." Although the court failed to specify the offense, we believe it is clear from the record that the court was referring to aggravated assault. The court further found in two separate minute entries that Alandar was guilty of aggravated assault.

¶16 Thus, the court misspoke at the sentencing hearing when it pronounced Alandar guilty of assault rather than aggravated assault. Alandar's reliance on case law holding that the oral pronouncement of sentence controls over a discrepancy in the written judgment, *see e.g., State v. Zinsmeyer*, 222 Ariz. 612, 622, ¶ 23, 218 P.3d 1069, 1079 (App. 2009), is misplaced. That line of cases simply stands for the logical proposition that what the trial court actually says is to be preferred over a written misdescription of what the court stated. It is not applicable in a circumstance in which the discrepancy only arises at a subsequent hearing when the court misstates its previous finding. Instead, as in *Stevens*, we examine the entire record to determine the court's intent. Our review of the record leads us to conclude that the court found Alandar guilty of aggravated assault and intended that she be sentenced for that offense. We therefore need not remand for clarification. *See State v. Contreras*, 180 Ariz. 450, 453 n.2, 885 P.2d 138, 141 n.2 (App. 1994) (if "we are able to ascertain the trial

court's intention by reference to the record, remand for clarification is unnecessary.").

CONCLUSION

¶7 For the foregoing reasons, we affirm Alandar's suspended sentence and conviction of one count of aggravated assault, a class one misdemeanor.

_____/s/_____
PHILIP HALL, Presiding Judge

CONCURRING:

_____/s/_____
SHELDON H. WEISBERG, Judge

_____/s/_____
PETER B. SWANN, Judge