IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

KYRON DALE GROW,
Appellant.

No. 2 CA-CR 2014-0277
Filed July 14, 2015

Appeal from the Superior Court in Gila County
No. S0400CR201300213
The Honorable Monica L. Stauffer, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Jonathan Bass, Assistant Attorney General, Tucson
Counsel for Appellee

Emily Danies, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Miller and Chief Judge Eckerstrom concurred.

E S P I N O S A, Judge:

¶1 After a jury trial, Kyron Grow was convicted of first-degree murder, aggravated assault, and two counts of child abuse with death or serious physical injury likely. On appeal, he contends the trial court erred in denying his "motion to include certain . . . statements to 'complete the story' for fairness" pursuant to Rule 106, Ariz. R. Evid. He also argues the evidence was insufficient to support his convictions. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *See State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 2, 312 P.3d 123, 126 (App. 2013). Grow began dating Marcelina Rich sometime during late 2012 or early 2013. In February 2013, Rich and two of her children, N.L. and A.L., had begun staying at Grow's residence with his two daughters "two or three nights a week." Throughout March 2013, Rich's three-year old son, N.L., sustained a series of injuries, culminating in a fatal blow to his abdomen, which lacerated his liver and ultimately caused his death on March 26. Grow was consistently the only adult present when N.L. was injured.[1]

¶3 On March 26, after N.L. had been taken to a nearby hospital, Grow provided a Gila County Sheriff's deputy with the

[1]Rich was home on one occasion, but it is undisputed that she was sleeping when the injury occurred.

following account of the events leading up to N.L.'s hospitalization.[2] Grow stated Rich, N.L., and A.L. had spent the previous night at his residence. That morning, Rich had left for work around 6:00 a.m., and Grow got his daughters "ready for school and off to the bus" by 7:00 a.m. Grow was then left alone with N.L. and A.L. N.L. got up around 7:00 a.m., walked into the living room, said he was hungry, and asked for something to eat. While Grow was preparing a bowl of cereal, N.L. "projected vomit . . . and then collapsed to the floor." Grow said he had "assessed" N.L. and "started CPR"[3] before eventually calling Rich and 9-1-1.[4] Rich rushed home from work, and N.L. was transported to the local hospital.

¶4 Grow also volunteered that N.L. had recently sustained two head injuries, claiming the first had occurred on March 13 when N.L. "hit his head on [a] concrete slab" after "fall[ing] off . . . the steps outside of his residence," and the second on March 17, when he tripped and hit his head on some rocks at Roosevelt Lake. Grow had provided the first responders a similar history of N.L.'s injuries earlier that morning when they arrived at the house.

¶5 Shortly after Grow spoke with the deputy on March 26, N.L. was transferred to Phoenix Children's Hospital, where he eventually succumbed to his injuries later that day. It was subsequently determined that N.L.'s death was caused by "[c]omplications of acute abdominal trauma" and was ruled a homicide.

¶6 On March 27, Grow provided a written statement and claimed during an interview with Detective Emmett Dickison of the Gila County Sheriff's Office that N.L.'s March 17 injury had

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[2]At the time the deputy spoke with Grow at the hospital, N.L. was still alive.

[3]Cardiopulmonary resuscitation.

[4]N.L. collapsed sometime between 7:00 a.m., the time Grow's second child got on the bus, and 7:14 a.m., the time Rich was seen on a surveillance video leaving work.

occurred when N.L. "fell on a rock and hit his head" during a family camping trip to Eads Wash.[5] But during an April 1 interview with Detective Johnny Holmes, Grow indicated he had "lied" about the events surrounding the March 17 injury. Grow then claimed N.L. had actually been injured behind his house—not at Roosevelt Lake or Eads Wash—and said he and Rich had made up that story to avoid scrutiny by Child Protective Services (CPS).

¶7 Grow was eventually charged with first-degree murder, aggravated assault, and two counts of child abuse. As noted above, the jury found him guilty on all counts. The trial court imposed a life sentence without the possibility of release for thirty-five years on the first-degree murder count, and concurrent seventeen-year prison terms on the remaining counts.

Exclusion of Evidence

¶8 Grow first argues the trial court erred in denying his motion to admit into evidence certain statements "to complete the story," pursuant to Rule 106, Ariz. R. Evid. At trial, after the state introduced Grow's statements from the March 27 interview claiming N.L. had been injured at Eads Wash, Grow sought to introduce his statements from the April 1 interview to explain why "he and [Rich]—at [Rich's] suggestion—concocted that story about Eads Wash/Lake Roosevelt." Specifically, he wanted the jury to hear that he and Rich had lied because "[t]hey were afraid that if [N.L.] was injured at home, that they would be investigated [by CPS]."

¶9 The state objected, arguing the April 1 statements were inadmissible "self-serving hearsay," which did not "qualify, explain or place into context the portion [of a statement] already introduced," because the state did not introduce any of Grow's

[5] Detective Dickison testified that Roosevelt Lake is in a "different location entirely" from Eads Wash, and that the locations are "at least a half hour drive" apart.

April 1 statements at trial.[6] Further, it argued that allowing Grow to introduce the April 1 statements to qualify or explain his March 27 statements would not comport with "the spirit" of Rule 106, which did not contemplate "complet[ing] the record with an interview that was . . . conducted four days later." Grow responded that he was "entitled to introduce [the April 1] statements" to complete the record, characterizing the latter as an extension of his earlier statement. Grow argued "fairness require[d] . . . that . . . the jury should hear the rest of the statement" or "they[we]re not going to get the full extent of what [he] had to say about the various stories told."

¶10 The trial court determined the April 1 statements were inadmissible under Rule 106. In doing so, the court noted the statements "may come in some other way . . . [through] other testimony, but . . . the Court will not admit them [under Rule 106]." We will not disturb the trial court's evidentiary rulings absent a clear abuse of discretion. *State v. Johnson*, 212 Ariz. 425, ¶ 25, 133 P.3d 735, 743 (2006).

¶11 Rule 106 "is a partial codification of the rule of completeness." *State v. Prasertphong*, 210 Ariz. 496, ¶ 14, 114 P.3d 828, 831 (2005). If a party introduces all or part of a writing or recorded statement, an adverse party may introduce any other part or any other writing or recorded statement that in fairness ought to be considered at the same time. Ariz. R. Evid. 106. Under this rule, only the portion of a statement "'necessary to qualify, explain or place into context the portion already introduced' need be

[6]The state introduced a portion of a video from April 1, in which Grow was talking to his mother on the phone in an interview room. At one point during his conversation, Grow said he had showed Detective Holmes "where [he] found [N.L.]" and "[Holmes] took that rock." Holmes testified that Grow had been referring to the rock behind his house where he claimed he found N.L. on March 17. Holmes also testified he and Grow "did [a] walk[-]through of the scene," at which time Holmes had collected the rock to be tested for physical evidence.

admitted." *State v. Cruz*, 218 Ariz. 149, ¶ 58, 181 P.3d 196, 209 (2008), *quoting Prasertphong*, 210 Ariz. 496, ¶ 15, 114 P.3d at 831. The rule may be applied to unrecorded oral statements, *see State v. Ellison*, 213 Ariz. 116, ¶ 47 & n.9, 140 P.3d 899, 913-14 & n.9 (2006), and to hearsay evidence, *see Prasertphong*, 210 Ariz. 496, ¶ 22, 114 P.3d at 833, but it "does not create a rule of blanket admission for all exculpatory statements simply because an inculpatory statement was also made," *Cruz*, 218 Ariz. 149, ¶ 58, 181 P.3d at 209.

¶12 Grow asserts the trial court erred in finding his April 1 statements inadmissible under Rule 106. He contends "fairness demanded that his statements admitting his lies and the reason for them should [have] be[en] presented to the jury[,] [o]therwise, [they are] left with the impression that [he] never acknowledged his wrongdoing in this regard or that he had a reason other tha[n] consciousness of guilt to make up a story about how N[.L.] was injured." We need not, however, determine whether the trial court erred in precluding Grow's statements because any error would have been harmless in light of other testimony at trial. *See State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993).

¶13 Grow's neighbor L.S.C. testified she had spoken with Grow on March 26, at which time he said he "had [to] tell [the police] that [N.L.] fell at the river, because he actually fell out back and [he] was scared [he] would get arrested for neglect." The jury therefore heard through L.S.C. that Grow had "admitt[ed] his lies" and had a "reason other than consciousness of guilt to make up a story about how N[.L.] was injured." We thus can say beyond a reasonable doubt that the jury's verdicts would not have changed even had they received Grow's April 1 statements. *See State v. Payne*, 233 Ariz. 484, ¶ 157, 314 P.3d 1239, 1274 (2013) (error harmless if no reasonable doubt it did not contribute to or affect verdict).

Sufficiency of the Evidence

¶14 Grow next contends the trial court erred in denying his motion pursuant to Rule 20, Ariz. R. Crim. P., because the evidence was "insufficient to identify [him] as the person causing any injury

to [the victim]." We review the denial of a Rule 20 motion de novo, *State v. Parker*, 231 Ariz. 391, ¶ 69, 296 P.3d 54, 70 (2013), viewing the evidence and reasonable inferences in the light most favorable to sustaining the verdict, *State v. Borquez*, 232 Ariz. 484, ¶ 9, 307 P.3d 51, 54 (App. 2013). If "'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,'" the case must be submitted to the jury. *State v. West*, 226 Ariz. 559, ¶¶ 16, 18, 250 P.3d 1188, 1191-92 (2011) (emphasis omitted), *quoting State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990).

¶15 In support of his claim that "there was insufficient evidence to take the charges against [him] to the jury," Grow merely quotes and summarizes the argument made by trial counsel below, offering no citations to the portions of the record relied upon. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (argument on appeal "shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on"); *see also State v. Barraza*, 209 Ariz. 411, ¶ 20, 104 P.3d 172, 178 (App. 2005) (disapproving of method of incorporating arguments at trial by reference on appeal). Such failure to develop a claim on appeal can constitute waiver of that claim. *See State v. King*, 226 Ariz. 253, ¶ 11, 245 P.3d 938, 942 (App. 2011).[7]

¶16 In any event, substantial evidence was presented from which reasonable jurors could have found Grow caused N.L.'s injuries and death. *See Borquez*, 232 Ariz. 484, ¶ 9, 307 P.3d at 54. Maricopa County's chief medical examiner, who finalized N.L.'s autopsy report, testified that death had been caused by "complications of acute abdominal trauma" resulting from a large laceration to N.L.'s liver, "nearly tearing it in half." The medical examiner further testified that N.L.'s liver injury was "consistent

[7]To the extent Grow asserts that count two of the indictment was "duplicitous," we do not address that claim because he does not properly develop it apart from his Rule 20, judgment of acquittal, argument. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *King*, 226 Ariz. 253, ¶ 11, 245 P.3d at 942.

with an adult punching [him] in the stomach" and inconsistent with an injury resulting from CPR or a child running into an object, such as a coffee table. He also determined N.L. most likely had become unresponsive within seconds or minutes of sustaining the trauma to his stomach, and concluded N.L.'s death was a "[h]omicide."

¶17 In addition to the fatal injury, N.L. had injuries in various stages of healing all over his body, including to his head, face, buttocks, and penis, and he had scabs on his body consistent with cigarette burns. There was testimony that Grow smoked cigarettes and Rich did not. Further, Dr. Leslie Quinn, a child abuse pediatrician, explained that N.L.'s penis injury was a "classic pinch mark," a common form of "potty-training child abuse,"[8] and was not an injury she would expect to see as a result of a child "falling down" or from insertion of a urinary catheter, part of the medical intervention N.L. received on March 26. She also testified that a child with a liver laceration as severe as N.L.'s would not have been "[w]alking, talking, being hungry, asking for food[,] . . . [s]o the liver laceration had to [have] occur[red] after that point in time."

¶18 There also was evidence that Grow was the only adult present on March 13 and 17 when N.L. had received the injuries to his head and face, and, finally, when he sustained the fatal blow to his abdomen on March 26. Further, the story Grow provided to explain N.L.'s injuries and the events leading up to his death completely conflicted with the medical evidence presented at trial. Accordingly, we conclude sufficient evidence supported the jury's verdicts and the trial court properly denied Grow's motion for acquittal.

Disposition

¶19 For the foregoing reasons, Grow's convictions and sentences are affirmed.

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[8] There was testimony N.L. had only recently been toilet-trained and still had accidents from time to time.