IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

LORNE WILLIAM KLOKEID,
Appellant.

No. 2 CA-CR 2016-0336
Filed November 7, 2017

Appeal from the Superior Court in Cochise County
No. CR201500112
The Honorable Wallace R. Hoggatt, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By Kathryn A. Damstra, Assistant Attorney General, Tucson
Counsel for Appellee

Peter A. Kelly, Palominas
Counsel for Appellant

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

E S P I N O S A, Judge:

¶1 Following a seven-day jury trial, Lorne Klokeid was convicted of negligent homicide and sentenced to a three-year prison term. He now appeals, arguing his conviction was not supported by sufficient evidence and the trial court incorrectly instructed the jury on the duty element of the charge. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the jury's verdict. *State v. O'Laughlin*, 239 Ariz. 398, ¶ 2, 372 P.3d 342, 344 (App. 2016). Sometime during the afternoon of April 27, 2012, the victim, seventeen-year-old B.C., arrived at Klokeid's apartment. Later, in the evening, she attempted to get heroin from B.R., who was also present. At some point that night, B.C. obtained and used heroin while at the apartment. She also asked Klokeid, twice, to give her some of his prescription morphine pills, but he declined.

¶3 B.C. went to sleep in Klokeid's apartment around 1:00 a.m. According to Klokeid, she was "fine, sober even," at the time. Klokeid stated he woke up around 5:30 or 6:00 a.m. on April 28 and found B.C. "fully responsive" in the bathroom. He "check[ed] on her every so often" to see whether she would leave the bathroom over the next couple of hours and noticed she began "looking like a little out of it" but thought it was "nothing that [he] would worry about." However, because B.C. "was looking more and more sleepy like someone who's taken a lot of pain pills," Klokeid checked one or more of his prescription bottles of morphine, which he had left on the coffee table overnight, and discovered they were "really low."

¶4 At some point after "[he]'d realized she'd taken [his] pills," Klokeid saw B.C. vomiting in the kitchen. He nevertheless went back to sleep on the couch around 8:00 or 8:30 a.m., and slept until approximately 10:40 a.m., when B.R. and another friend, M.G., arrived. M.G. heard "muffled noises" and "labored breathing" coming from the bathroom, and they found B.C. there, lying on her back on the floor unconscious. They turned her on her side to help her breathe and cleared vomit from her mouth. Klokeid was "really mad" and said B.C. had taken "all" of his pills while he slept and he had been checking on her since early morning but had then gone back to sleep. M.G. repeatedly told Klokeid and B.R. that they needed to call 9-1-1. She was "upset" and "scared," and believing B.R. and Klokeid were going to call for help, left the apartment about ten minutes after arriving, around 10:50 a.m. "[A] short time" after M.G. left, B.R. also left, believing Klokeid was about to call 9-1-1. Klokeid, however, did not do so until 12:14 p.m., over an hour later.

¶5 Throughout the morning, members of B.C.'s family were attempting to contact her both before and after a 10:00 a.m. piano lesson she was scheduled for that day. In particular, B.C.'s father, who had dropped her off at Klokeid's apartment complex the previous afternoon,[1] was calling and sending text messages to her cell phone while on his way to pick her up for her lesson. When he was unable to contact her, he accessed her phone records online and found Klokeid's number. B.C.'s father then phoned Klokeid at 11:24 a.m., and a man, whom the father believed to be Klokeid, told him B.C. had been at his apartment the previous day but had not stayed the night.

¶6 Paramedics arrived within minutes of the 12:14 p.m. 9-1-1 call and found Klokeid performing CPR[2] on B.C., who did not have a pulse. The paramedics were able to restart B.C.'s heart in the ambulance, but tests subsequently performed at the hospital revealed "her brain was damaged and a lot of her organs were damaged" to

---

[1] B.C.'s father was unaware she was going to Klokeid's apartment and instead believed she would be spending the night with a girlfriend in the same apartment complex.

[2] Cardiopulmonary resuscitation.

the extent the injuries were "irreversible" and "could never have been repaired." B.C. ultimately died in the hospital about three days later. A medical examiner who performed an autopsy determined the cause of death was a morphine overdose.

¶7 Klokeid was indicted for manslaughter, second-degree murder, and negligent homicide under A.R.S. § 13-1102. At trial, after the close of the state's evidence, the trial court granted Klokeid's motion for judgment of acquittal as to the manslaughter and second-degree murder charges. The negligent homicide charge was submitted to the jury, which returned a guilty verdict. Klokeid was sentenced as noted above, and we have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Sufficiency of the Evidence

¶8 "We review the sufficiency of evidence presented at trial only to determine if substantial evidence exists to support the jury verdict." *State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 913 (2005). "Substantial evidence" is "evidence that 'reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt.'" *Id.*, *quoting State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 469 (1997). When considering the sufficiency of evidence, we "resolve all inferences against" the appellant. *Id.* Klokeid argues the evidence presented at trial was insufficient to prove (1) his conduct caused B.C.'s death, (2) the relevant standard of care, and (3) his knowledge of and knowing departure from that standard of care. We address each argument in turn.

Causation

¶9 Section 13-1102(A) provides, "A person commits negligent homicide if with criminal negligence the person causes the death of another person." Section 13-203(A), A.R.S., states that "[c]onduct is the cause of a result when" "[b]ut for the conduct the result would not have occurred" and "[t]he relationship between the conduct and result satisfies any additional causal requirements imposed by the statute defining the offense." Because § 13-1102 does not impose any additional causal requirements, the only question here is whether the state presented sufficient evidence that B.C.'s

death would not have occurred but for Klokeid's conduct. *See* § 13-1102.

¶10 Klokeid argues the state failed to prove his conduct was a but-for cause of B.C.'s death because both the state's and his expert witness "agreed that there [wa]s no way to determine a time when B.C.'s brain damage became irreversible" and "it [wa]s not possible to determine what was the latest time Klokeid could have made the [9-1-1 call] in order for B.C. [t]o have survived." Although Klokeid is correct that the experts could not identify a specific point at which it became too late to save B.C.'s life, he overlooks other testimony relating to causation. The medical examiner stated that when someone is coherent and able to sit up and get around, as B.C. was when Klokeid found her and observed her showing signs of increasing distress such as vomiting in the kitchen and becoming less coherent throughout the early morning, "that would be a patient [she] would expect to live, most likely." Similarly, the defense expert acknowledged that calling 9-1-1 when B.C. was conscious and responsive "could [have] help[ed] her" although he did not know if it "would [have] save[d] her."

¶11 Klokeid essentially focuses his appeal on the effect of his delay in calling 9-1-1 after M.G. and B.R. arrived at his apartment around 10:40 a.m., but ignores the five hours prior to that during which he found B.C. in the bathroom, saw her condition worsening, discovered his pills were missing, "was afraid she swallowed them all," and nevertheless decided to go back to sleep rather than seek help. A reasonable jury could readily find causation proven beyond a reasonable doubt from this timeline, the medical examiner's testimony that calling 9-1-1 when someone has taken morphine but is still coherent, stable, and mobile would "most likely" save her life, and the defense expert's concession that getting medical assistance while B.C. was still conscious "could [have] help[ed] her." The law does not require definitive evidence that B.C. would have survived had Klokeid called 9-1-1 earlier. *See State v. Fernane*, 185 Ariz. 222, 224, 914 P.2d 1314, 1316 (App. 1995) (finding sufficient evidence of child abuse for failure to seek medical attention where "there was testimony that K.F. would have had a better chance of survival if she had been brought to the hospital sooner"); *see also Pinkerton v. State*,

784 P.2d 671, 677-78 (Alaska Ct. App. 1989) (medical expert testimony that "most children with this type of injury survive if they are alive when they arrive at the hospital" sufficient to support causation element of negligent homicide).

Standard of Care

¶12 Klokeid next argues the state presented insufficient evidence of the standard of care because, without expert witness testimony, "the appropriate standard of care for an untutored individual under the circumstances" was left "wholly to the jury's speculation." As noted above, negligent homicide under § 13-1102 requires a finding of "criminal negligence," which is defined in A.R.S. § 13-105(10)(d) as "fail[ing] to perceive a substantial and unjustifiable risk," which "must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation." In support of his argument, Klokeid cites *State v. Far West Water & Sewer Inc.*, 224 Ariz. 173, 228 P.3d 909 (App. 2010), and *State v. Salz*, 627 A.2d 862 (Conn. 1993). His reliance on these cases, however, is misplaced.

¶13 As an initial matter, *Salz*, which stemmed from a fatal fire caused by improperly performed electrical work, is readily distinguishable as a second-degree manslaughter case[3] that did not address whether the state had introduced sufficient evidence of the standard of care, although the court noted on a different issue there was "testimony from several witnesses who testified to the cause of

[3]Klokeid identifies Connecticut's second-degree manslaughter charge as "equivalent to Arizona's negligent homicide." We disagree. Section 53a-56(a)(1), Conn. Gen. Stat., under which Salz was charged, requires a determination that the defendant "recklessly cause[d] the death of another person." *See Salz*, 627 A.2d at 863-64. Connecticut's negligent homicide statute, on the other hand, like Arizona's, only requires a finding of "criminal negligence." *See* Conn. Gen. Stat. § 53a-58(a). The court in *Salz* even noted the defendant's unsuccessful argument that his conduct "warranted at most a conviction of criminally negligent homicide rather than reckless manslaughter in the second degree." 627 A.2d at 866-67.

the fire and the quality of the electrical work performed by the defendant." 627 A.2d at 868-70. Additionally, although in *Far West* this court found sufficient evidence of "a gross deviation from the required standard of care and/or conduct" given the expert witness testimony presented on "industry standards," 224 Ariz. 173, ¶ 69, 228 P.3d at 929, our opinion there does not lead to the conclusion that expert testimony on the standard of care was necessary here. Some cases do require an expert to establish the standard of care. *See Hunter Contracting Co. v. Superior Court*, 190 Ariz. 318, 320-21, 947 P.2d 892, 894-95 (App. 1997) ("Expert testimony is necessary to prove professional negligence when 'the question to be determined is strictly within the special and technical knowledge of the profession and not within the knowledge of the average layman.'"), *quoting Revels v. Pohle*, 101 Ariz. 208, 210, 418 P.2d 364, 366 (1966). This, however, is not one of those cases.

¶14 Unlike *Far West* and the professional negligence situations referred to in *Hunter Contracting*, the relevant standard of care here did not relate to industry or professional standards. Rather, the issue was whether a reasonable person in Klokeid's position would have called 9-1-1 earlier. The jurors were competent to answer that question based on their common sense and the testimony they heard. *Cf. Johnson v. Pankratz*, 196 Ariz. 621, ¶ 18, 2 P.3d 1266, 1270 (App. 2000) ("In an ordinary negligence case, 'it is not necessary for the plaintiff to present evidence to establish the standard of care because the [fact finder] can rely on its own experience in determining whether the defendant acted with reasonable care under the circumstances.'"), *quoting Bell v. Maricopa Med. Ctr.*, 157 Ariz. 192, 194, 755 P.2d 1180, 1182 (App. 1988).

¶15 The trial testimony here revealed how B.C.'s condition deteriorated over the course of the morning through Klokeid's own assertions about the timeframe beginning at 5:30 or 6:00 a.m., M.G.'s statements regarding B.C.'s condition at 10:40 a.m., and ultimately a paramedic's testimony about her condition after the 9-1-1 call had finally been made. Additionally, M.G. provided direct insight into what a reasonable person might do under the circumstances by testifying it was "obvious[]" that 9-1-1 needed to be called at 10:40 a.m. because B.C. "almost looked like a corpse" lying on the

bathroom floor "really pale" with "purple" feet. And, when asked during cross-examination how a layperson would know someone was not getting enough oxygen into her bloodstream, the medical examiner indicated that someone "becoming cyanotic or changing colors" would signify that condition. All of this testimony provided insight into the circumstances existing in the hours leading up to the 9-1-1 call and was sufficient for the jury to determine the standard of care—what a reasonable person would have done in that situation. *See* § 13-105(10)(d) (criminal negligence features reasonable person standard of care).

Mens Rea

¶16 Lastly, Klokeid argues the state presented insufficient evidence of his "awareness of the risk" and "conscious disregard of that risk." But neither being aware of the risk nor consciously disregarding it is an element of negligent homicide. As discussed above, the required mental state under § 13-1102 is "criminal negligence," which is "fail[ing] to perceive a substantial and unjustifiable risk" "constitut[ing] a gross deviation from the standard of care" under § 13-105(10)(d). We have previously noted that criminal negligence differs from criminal recklessness because "criminal negligence requires only a failure to perceive a risk, as compared to the recklessness requirement of an awareness and conscious disregard of the risk." *In re William G.*, 192 Ariz. 208, 213 n.1, 963 P.2d 287, 292 n.1 (App. 1997).

¶17 Klokeid's confusion on this point appears to derive from the discussion in *Far West* of the relevant "culpable mental states necessary to meet the statutory elements for each [charged] offense," which there included aggravated assault and endangerment in addition to negligent homicide. *See* 224 Ariz. 173, ¶¶ 62-63, 65, 228 P.3d at 927-28. While the recklessness requirement of aggravated assault requires *awareness* of a substantial risk and *conscious disregard* of that risk, criminal negligence, as noted above, only requires *failure to perceive* a risk amounting to a gross deviation from the standard of care. *Id.* ¶¶ 62-63. Thus, our discussion of the awareness and conscious disregard elements related only to the aggravated assault charge whereas our discussion of the gross deviation element related to negligent homicide. *See id.* ¶¶ 66-69.

¶18 Accordingly, the state was not required to produce evidence showing Klokeid was aware of the risk of harm in delaying the 9-1-1 call. Nor did the state need to prove he consciously disregarded that risk. Rather, the offense required only that Klokeid's failure to perceive the risk constituted "a gross deviation from the standard of care that a reasonable person would observe in the situation." § 13-105(10)(d). A "gross" deviation "must be markedly greater than the mere inadvertence or heedlessness sufficient for civil negligence." *William G.*, 192 Ariz. at 215, 963 P.2d at 294. Gross deviation is "a flagrant, extreme, outrageous, heinous or grievous deviation from th[e] standard." *Id.*

¶19 There was sufficient evidence here for the jury to reach that conclusion. As previously noted, the evidence showed that early in the morning Klokeid saw B.C. vomiting and her condition deteriorating, and he realized she may have taken "all" of his morphine pills. He nevertheless went back to sleep instead of taking any action or even merely watching her. By the time M.G. and B.R. awakened him, B.C. was lying on the bathroom floor unconscious with vomit in her mouth, and visibly cyanotic. Klokeid still did not call 9-1-1 for over an hour. The jury readily could conclude this was "a flagrant, extreme, outrageous, heinous or grievous deviation" from the response of a reasonable person. *See id.*

Jury Instructions on Duty

¶20 Finally, Klokeid argues the trial court erroneously instructed the jury to determine whether he had a duty to aid B.C. "[T]he failure to perform a duty imposed by law may create criminal liability. In the case of negligent homicide . . . , the duty must be found outside the definition of the crime itself, perhaps in another statute, or in the common law . . . ." *Far West*, 224 Ariz. 173, ¶ 30, 228 P.3d at 922, *quoting State v. Brown*, 129 Ariz. 347, 349, 631 P.2d 129, 131 (App. 1981). We review jury instructions to determine if they "misled the jury as to the proper rules of law." *County of La Paz v. Yakima Compost Co.*, 224 Ariz. 590, ¶ 46, 233 P.3d 1169, 1185 (App. 2010), *quoting Rodriguez v. Schlittenhart*, 161 Ariz. 609, 614, 780 P.2d 442, 447 (App. 1989). Klokeid asserts it was error for the jury to decide the issue of his duty to aid B.C. because "the existence of a duty to the victim imposed by law is a legal question to be determined by the court."

Klokeid cites *Gipson v. Kasey*, in which our supreme court noted that "[a] fact-specific analysis of the relationship between the parties is a problematic basis for determining if a duty of care exists" because "[t]he issue of duty is not a factual matter; it is a legal matter to be determined *before* the case-specific facts are considered." 214 Ariz. 141, ¶ 21, 150 P.3d 228, 232 (2007). *Gipson*, however, is distinguishable.

¶21 In *Gipson*, the defendant, who knew the victim's interest in taking prescription pain pills for recreational use, gave some pills to the victim's girlfriend, from whom the victim received them. *Id.* ¶¶ 4-6. The defendant was sued for wrongful death, but the trial court granted summary judgment for the defendant on the basis that he did not owe a duty to the victim. *Id.* ¶ 7. Our supreme court took up the issue and concluded that state statutes criminalizing providing prescription drugs to people without a prescription created a duty while the relationship of the parties did not. *Id.* ¶¶ 23, 32. The court noted that duty is an "obligation, recognized by law, which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *Id.* ¶ 10, *quoting Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 354, 706 P.2d 364, 366 (1985).

¶22 As the court stated in *Markowitz*, "The issue of duty is *usually* one for the court as a matter of law." 146 Ariz. at 354, 706 P.2d at 366. (Emphasis added.) "In some circumstances, however, the existence of a duty may depend on preliminary questions that must be determined by a fact finder." *Diggs v. Ariz. Cardiologists, Ltd.*, 198 Ariz. 198, ¶ 11, 8 P.3d 386, 388 (App. 2000). As the trial court in this case stated during preliminary jury instructions, "It is the jury's function to determine the facts." The court in *Gipson*, considering summary judgment awarded for lack of duty, emphasized duty as a legal question to steer courts away from delving into factual inquiries about the foreseeability of harm or the parties' particular relationship. *See* 214 Ariz. 141, ¶¶ 7, 15, 21, 150 P.3d at 230-32. This case, however, does not involve a duty arising from foreseeability of harm or the relationship of the parties but rather from the "duty to aid another harmed by [the] actor's conduct" recognized in *La Raia v. Superior Court*, 150 Ariz. 118, 122, 722 P.2d 286, 290 (1986).

¶23 The *La Raia* court defined the duty to render aid as:

> If the actor knows or has reason to know that by his conduct, whether tortious or innocent, he has caused such bodily harm to another as to make him helpless and in danger of further harm, the actor is under a duty to exercise reasonable care to prevent such further harm.

Id., *quoting* Restatement (Second) of Torts § 322 (1965). Whether someone has a duty to render aid to another thus involves at least two preliminary factual inquiries: First, did the defendant's conduct cause harm rendering the victim "helpless and in danger of further harm"? And second, did the defendant know or have reason to know he caused that harm?

¶24 Arizona's constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Ariz. Const. art. VI, § 27. Our supreme court has recognized that a judge violates this provision by "express[ing] an opinion as to what the evidence proves," thereby making "the sort of judicial comment upon the evidence that would interfere with the jury's independent evaluation of that evidence." *State v. Rodriguez*, 192 Ariz. 58, ¶ 29, 961 P.2d 1006, 1011 (1998). Had the trial court here instructed the jury that Klokeid had a duty to aid B.C. because he caused the harm that made her helpless, it would have invaded the province of the jury to determine what the evidence proved. Accordingly, the court correctly instructed the jury that, to find Klokeid criminally negligent, it needed to "find that [he] had a duty to act" "to render aid or assistance," and that duty existed "if [he] kn[ew] or ha[d] reason to know that by his conduct he . . . caused such bodily harm to [her] as to make [her] helpless and in danger of further harm."

¶25 In his reply brief, Klokeid expands his argument regarding the jury instructions on duty, asserting the trial court erred in not giving his requested instruction that, prior to considering whether he had a duty to render aid to B.C., the jury should determine whether he had "exposed B.C. [as a social guest] to a hidden peril or

wilfully or wantonly caused her harm." The duty to render aid after causing harm to the victim, however, may arise through conduct either "tortious or innocent." *La Raia*, 150 Ariz. at 122, 722 P.2d at 290, *quoting* Restatement § 322. Therefore, Klokeid's act of leaving the morphine pills on the coffee table where B.C. could easily access them need not have been negligent under the common law applicable to social guests in order to create the duty to render aid. The jury was entitled to find that Klokeid's conduct, although not necessarily tortious in itself, caused grave harm to B.C. and gave rise to a duty to help her.

Disposition

¶26 For all of the foregoing reasons, Klokeid's conviction and sentence are affirmed.