IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

STEVEN CRAIG MOHL,
Appellant.

No. 2 CA-CR 2016-0340
Filed July 31, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20154072001
The Honorable Casey F. McGinley, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART AND REMANDED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By Karen Moody, Assistant Attorney General, Tucson
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Abigail Jensen, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Judge Espinosa and Judge Kelly[1] concurred.

S T A R I N G, Presiding Judge:

¶1 Following a jury trial, Steven Mohl was convicted on three counts of sexual conduct with a minor, one count of molestation of a child, and one count of child abuse. The victim was his daughter, A.M., who was born in 2000. The trial court sentenced Mohl to life in prison, without the possibility of parole for at least thirty-five years, for each of the three counts of sexual conduct with a minor. For molestation of a child, it sentenced him to ten years' imprisonment, and, for child abuse, he received a one-year sentence of imprisonment. All of the sentences run consecutively.

¶2 On appeal, Mohl contends there was insufficient evidence to convict him of child abuse under A.R.S. § 13-3623(B)(3) because A.M. did not suffer a "physical injury" as required by the statute. He also contends the trial court erroneously sentenced him on the child abuse count, employing a sentencing range applicable to a class four felony rather than a class six felony, which was the appropriate classification for his child-abuse conviction. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031 and 13-4033, and, for the reasons that follow, we conclude there was sufficient evidence to convict Mohl of child abuse "[u]nder circumstances other than those likely to produce death or serious physical injury" pursuant to § 13-3623(B)(3). However, because the court sentenced him for child abuse "[u]nder circumstances likely to produce death or

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[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

serious physical injury," pursuant to § 13-3623(A)(3), we remand with instructions.[2]

Factual and Procedural Background

¶3 We view the evidence in the light most favorable to sustaining the jury's verdict and resolve all reasonable inferences against Mohl. *State v. Felix*, 237 Ariz. 280, ¶ 30, 349 P.3d 1117, 1126 (App. 2015). When A.M. was approximately seven years old, Mohl struck her in the face because he wanted her to be quiet. The blow left a mark that was painful and "was red for a while."

¶4 A.M. and her mother moved out of the family home in 2008. But A.M. did not tell her mother about being struck, or about incidents of sexual conduct and molestation, all of which had occurred during approximately the same time period.[3] Mohl had told A.M. "if [she] ever told anyone . . . he would kill [her]." When she was almost fourteen, however, A.M. told a behavioral health counselor about the incidents, and the counselor contacted police. A.M. disclosed Mohl's acts in a subsequent forensic interview conducted by the Child Advocacy Center. Mohl's indictment and trial followed.

Sufficiency of the Evidence

¶5 Whether sufficient evidence exists to support a conviction is a question of law we review de novo. *Felix*, 237 Ariz. 280, ¶ 30, 349 P.3d at 1126. When reviewing a claim of insufficient evidence, we "reverse only if no substantial evidence supports the conviction." *State v. Fimbres*, 222 Ariz. 293, ¶ 4, 213 P.3d 1020, 1024 (App. 2009), *quoting State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005). "Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's

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[2]Mohl does not address on appeal his convictions and sentences for sexual conduct with a minor and molestation of a child, and this decision does not disturb them.

[3]The resolution of this appeal does not require discussion of the specific acts or time-frame underlying Mohl's convictions for sexual conduct with a minor and molestation of a child.

guilt beyond a reasonable doubt." *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996).[4]

¶6 Mohl contends the painful mark that "was red for a while," and caused by Mohl striking A.M., was insufficient to satisfy the requirement of "physical injury" under § 13-3623(B)(3). At trial, however, he failed to raise specifically the issue of whether sufficient evidence supported the child abuse count.[5] Thus, he has forfeited review of his claim for all but fundamental, prejudicial error.[6] *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). However, "[a] conviction based on insufficient evidence is fundamental error." *State v. Hamblin*, 217 Ariz. 481, n.2, 176 P.3d 49, 51 n.2 (App. 2008).

¶7 We review questions of statutory interpretation de novo, beginning first with the text of the statute. *State v. Christian*, 205 Ariz. 64, ¶ 6, 66 P.3d 1241, 1243 (2003); *see also In re Casey G.*, 223 Ariz. 519, ¶ 2, 224 P.3d 1016, 1017 (App. 2010) (court shall "ascertain and give effect to" legislature's intent, with "language of the statute" as "best indicator"). "We give words their usual and commonly understood meaning unless the legislature clearly intended a different meaning." *State v. Korzep*, 165 Ariz. 490, 493, 799 P.2d 831, 834 (1990). "When the plain text of a statute is clear and unambiguous there is no need to

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[4]"If reasonable persons could differ on whether the evidence establishes a fact at issue, that evidence is substantial." *State v. Garfield*, 208 Ariz. 275, ¶ 6, 92 P.3d 905, 907 (App. 2004).

[5]Mohl's trial counsel made an oral motion for judgment of acquittal pursuant to Rule 20(a), Ariz. R. Crim. P., stating, "I'm not going to make an argument on it."

[6]Mohl notes the court only instructed the jury that physical injury meant, "the impairment of physical condition." He did not object to the instruction below; neither does he argue the court instructed the jury erroneously, much less that the instruction amounted to fundamental error. Accordingly, any argument related to that instruction has also been waived. *State v. Moreno-Medrano*, 218 Ariz. 349, ¶¶ 16-17, 185 P.3d 135, 140 (App. 2008); *State v. Belyeu*, 164 Ariz. 586, 588, 795 P.2d 229, 231 (App. 1990).

resort to other methods of statutory interpretation to determine the legislature's intent because its intent is readily discernible from the face of the statute." *Christian*, 205 Ariz. 64, ¶ 6, 66 P.3d at 1243. And, if a word is undefined in any statute, "we generally 'refer to a widely used dictionary to determine its meaning.'" *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, ¶ 33, 181 P.3d 219, 230 (App. 2008), *quoting Files v. Bernal*, 200 Ariz. 64, ¶ 5, 22 P.3d 57, 59 (App. 2001).

¶8 Under § 13-3623(B)(3), a person commits child abuse if, "[u]nder circumstances other than those likely to produce death or serious physical injury," they cause a child "to suffer physical injury." "Physical injury" is defined as:

> [T]he impairment of physical condition and includes *any skin bruising*, pressure sores, bleeding, failure to thrive, malnutrition, dehydration, burns, fracture of any bone, subdural hematoma, soft tissue swelling, injury to any internal organ or any physical condition that imperils health or welfare.

§ 13-3623(F)(4) (emphasis added). A bruise is "[a]n injury to underlying tissues or bone in which the skin is not broken, often characterized by ruptured blood vessels and discolorations." *The American Heritage Dictionary* 238 (5th ed. 2011); *see also Bruise*, 1 J.E. Schmidt, *Attorneys' Dictionary of Medicine and Word Finder* B-218 (28th ed. Supp. 1999) ("[a] light, superficial injury produced by mild collision or impact, without a tearing or laceration of the tissue").

¶9 As noted, A.M. testified at trial that Mohl had hit her in the face, leaving a mark that was painful and "red for a while." Viewing the evidence in the light most favorable to sustaining the jury's verdict and resolving all inferences against Mohl, *Felix*, 237 Ariz. 280, ¶ 30, 349 P.3d at 1126, A.M.'s testimony was sufficient evidence to support the jury's conclusion he had caused A.M. to suffer a physical injury by hitting her, resulting in bruising. Further, the list of injuries "include[d]" within § 13-3623(F)(4) is neither exclusive nor exhaustive. *See State v. Witwer*, 175 Ariz. 305, 308, 856 P.2d 1183, 1186 (App. 1993) ("The word 'includes' is a term of

enlargement which conveys the idea that conduct which does not fall within the listed behavior may also violate the statute.").

¶10 Moreover, § 13-3623(F)(4) defines "physical injury" as "the impairment of physical condition," which, as noted, was the language used in the trial court's instruction to the jury. To impair is "[t]o cause to weaken, be damaged, or diminish, as in quality"; "physical" is "[o]f or relating to the body"; and "condition" is "[a] mode or state of being," or "[a] state of health." *The American Heritage Dictionary* 383, 880, 1331 (5th ed. 2011). A.M.'s testimony that Mohl had caused her to suffer a painful red mark that lasted "for a while" was sufficient evidence for a jury to conclude Mohl had impaired her physical condition as contemplated in § 13-3623(F)(4) by causing the quality of her bodily state of health, or being, to diminish.

¶11 Mohl relies on *State v. Cain*, 152 Ariz. 479, 733 P.2d 676 (App. 1987), and *State v. Garcia*, 138 Ariz. 211, 673 P.2d 955 (App. 1983), to argue pain, by itself, does not constitute physical injury. But, unlike this case, both *Cain*, 152 Ariz. at 481, 733 P.2d at 678, and *Garcia*, 138 Ariz. at 214, 673 P.2d at 958, involved interpretations of the phrase "serious physical injury," which "includes physical injury that creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb," A.R.S. § 13-105(39). In neither case did we discuss the altogether separate definition of "physical injury" in § 13-3623(F)(4). Nor did those cases involve pain tied to a visible mark produced by the defendant, as was the case here. *See Cain*, 152 Ariz. at 481, 733 P.2d at 678; *Garcia*, 138 Ariz. at 214, 673 P.2d at 958.

¶12 Mohl also points to several out-of-state cases, placing particularly heavy reliance on *State v. Higgins*, 998 P.2d 222 (Or. Ct. App. 2000). In *Higgins*, the court determined "scratches and scrapes that go unnoticed by the victim, that are *not* accompanied by pain and that do not result in the reduction of one's ability to use the body or a bodily organ for any period of time, do not constitute an impairment of physical condition." *Id.* at 224-25 (emphasis added). When Mohl struck A.M., however, he inflicted pain and left a mark that did not "go unnoticed." Indeed, A.M. testified she had believed Mohl's threats that he would kill her if she reported his sexual conduct to

anyone because she had "been hit by him before so [she] knew that he could hurt [her]."[7]

Sentencing

¶13 Mohl contends the court erroneously sentenced him for a class four felony, § 13-3623(A)(3), instead of the class six felony of child abuse for which he was convicted, § 13-3623(B)(3). Mohl did not object to the erroneous designation of his offense below and, therefore, we review only for fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. However, the state concedes error on this limited point, and the "[i]mposition of an illegal sentence constitutes fundamental error." *State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002).

¶14 The text of the indictment tracks the language of § 13-3623(A)(3), alleging Mohl had "committed child abuse by criminally negligently causing physical injury to A.M. . . . under circumstances likely to produce death or serious physical injury." The indictment cited § 13-3623(B)(1), however, which concerns "circumstances other than those likely to produce death or serious injury." At trial, the charge, as read by the court and as described in the final instructions, alleged the crime to have occurred "under

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[7]Mohl also cites *Commonwealth v. Kirkwood*, 520 A.2d 451, 454 (Pa. Super. Ct. 1987), which concluded "the assault section of the Crimes Code was intended to protect and preserve one's physical well being and was not intended to prevent temporary hurts resulting from trivial contacts which are a customary part of modern day living." The injury and resulting pain A.M. suffered at Mohl's hand were not the result of a trivial contact customary to modern day living. And none of the remaining out-of-state cases Mohl cites involved an injury accompanied by noticeable pain. *See Harris v. State*, 965 A.2d 691, 694 (Del. 2009) (defendant elbowed victim's forehead, which left red mark but did not cause any pain); *State v. Gordon*, 560 N.W.2d 4, 6 (Iowa 1997) (victim did not testify to any pain or illness resulting from the blow); *People v. Prosser*, 516 N.Y.S.2d 559, 559 (N.Y. App. Div. 1987) (victim suffered slight pain, "not much . . . 'to worry about'").

circumstances other than those likely to produce death or serious injury." At sentencing, the court entered a judgment of guilt and sentenced Mohl according to § 13-3623(A)(3), under conditions in which "death or serious physical injury [was] likely."

¶15 In light of its instructions to the jury, the court had no basis to enter a judgment of guilt and sentence based on § 13-3623(A)(3). *See State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006) (we presume the jury followed the court's instructions); *cf. State v. Virgo*, 190 Ariz. 349, 352, 947 P.2d 923, 926 (App. 1997) (court may not sentence "for a higher-level offense than the jury instructions and verdict forms permitted").

Disposition

¶16 We vacate the trial court's entry of guilt and imposition of sentence for child abuse under circumstances likely to cause death or serious physical injury. We remand the case with instructions to enter a judgment of guilt for child abuse under circumstances other than those likely to produce death or serious physical injury as found by the jury, and to resentence Mohl accordingly. *See State v. Rushing*, 156 Ariz. 1, 5, 749 P.2d 910, 914 (1988).