IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JOSE ANGEL JAVALERA-MARTINEZ,
Appellant.

No. 2 CA-CR 2016-0343
Filed November 20, 2017

Appeal from the Superior Court in Pima County
No. CR20104387001
The Honorable Richard D. Nichols, Judge

AFFIRMED

COUNSEL

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

Joel Feinman, Pima County Public Defender
By Sarah L. Mayhew, Assistant Public Defender, and
Slade E. Smith, a student certified pursuant to
Rule 38(d), Ariz. R. Sup. Ct., Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Eppich concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Following a jury trial, Jose Javalera-Martinez was convicted of negligent child abuse under circumstances likely to produce death or serious physical injury. On appeal, he argues that the trial court erred by instructing the jury on negligent child abuse as a lesser-included offense of intentional child abuse and that insufficient evidence supported the jury's verdict. 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. *See State v. Tamplin*, 195 Ariz. 246, ¶ 2 (App. 1999). On December 9, 2010, Javalera-Martinez cared for his seven-week-old son, D.R., at home, while D.R.'s mother, J.R., was at work. That evening, Javalera-Martinez and J.R. took D.R. to a nearby emergency room because he was having seizures. At the hospital, doctors determined that D.R. had a bilateral subdural hematoma, a spinal hematoma, and bilateral retinal hemorrhages. The severity and combination of injuries, lack of visible external injuries, and lack of any history of major accidents, such as a significant fall or car accident, led doctors to conclude the cause was abusive head trauma, formerly referred to as "shaken baby syndrome." D.R. survived the injuries but, as a result, developed a seizure disorder, cerebral palsy, and developmental delays.

¶3 A grand jury indicted Javalera-Martinez for intentional child abuse under circumstances likely to produce death or serious physical injury. A jury found him guilty of negligent child abuse, as a lesser-included offense of intentional child abuse. The trial court suspended the imposition of his sentence and placed him on probation for four years. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Jury Instructions

¶4 Javalera-Martinez first argues the trial court erred by instructing the jury on negligent child abuse as a lesser-included offense because the evidence did not support that charge. In its answering brief, the state contends this argument is waived because Javalera-Martinez invited any potential error by requesting a jury instruction on negligent child abuse.

¶5 When a party affirmatively invites error into the trial court proceedings and later challenges that error on appeal, he is precluded from any review of the issue, "even under the exacting standard of fundamental error." *State v. Lucero*, 223 Ariz. 129, ¶ 17 (App. 2009). "The purpose of the doctrine is to prevent a party from 'inject[ing] error in the record and then profit[ing] from it on appeal.'" *State v. Logan*, 200 Ariz. 564, ¶ 11 (2001), *quoting State v. Tassler*, 159 Ariz. 183, 185 (App. 1988) (alterations in *Logan*).

¶6 Our courts "have long held that when a party requests an erroneous instruction, any resulting error is invited." *Id.* ¶ 8; *see Lucero*, 223 Ariz. 129, ¶ 20. In *State v. Yegan*, for example, the state's requested jury instructions included an erroneous definition of sexual conduct. 223 Ariz. 213, ¶ 21 (App. 2009). The defendant's proposed instructions did not repeat the text of the erroneous definition but did refer to the statute from which the erroneous definition originated. *Id.* Despite the state having committed the same error, this court concluded that the defendant "was still responsible for submitting an erroneous instruction" and was thus "precluded from complaining of its use at trial." *Id.* ¶¶ 21, 23.

¶7 Here, the state's proposed instructions included all of the mental states under which child abuse pursuant to A.R.S. § 13-3623(A) can be committed: intentionally or knowingly, recklessly, or with criminal negligence. Javalera-Martinez's proposed instructions similarly provided that child abuse could be committed "[i]ntentionally, knowingly, recklessly, or with criminal negligence." Consequently, because he requested the precise instruction he now claims was erroneous, Javalera-Martinez is precluded from arguing the trial court erred by giving the instruction. *See Yegan*, 223 Ariz. 213, ¶ 23; *see also State v. Roseberry*, 210 Ariz. 360, ¶ 53 (2005) (defendant waived review under invited-error doctrine by including same language he complained of on appeal in proposed penalty-phase jury instructions); *Logan*, 200 Ariz. 564, ¶ 15 (finding that "because the defendant requested the challenged instruction, we will not consider it as a ground of error").

¶8 Javalera-Martinez argues, however, that he merely submitted a "counter-proposal" to the state's proposal and did in fact object to the proposed instruction on negligent child abuse. But this argument relies on a mischaracterization of the proceedings below. Although Javalera-Martinez did object to the state's proposed instruction below, his objection was to the inclusion of the three *means* by which child abuse may be committed. *See* § 13-3623(A); *State v. West*, 238 Ariz. 482, ¶ 21 (App. 2015). He argued the state had only introduced evidence that he had "cause[d] a child . . . to suffer physical injury," § 13-3623(A), and therefore the jury should not be instructed on the other two means provided in § 13-3623(A)—having the care or custody of a child: 1) causing or permitting the person or health of the child to be injured; and 2) causing or permitting the child to be placed in a situation where the person or health of the child is endangered. Javalera-Martinez's objection to a jury instruction on the various means by which child abuse can be committed is not the same as an objection to a jury instruction on the various mental states, which only affect the classification of the offense. *See West*, 238 Ariz. 482, ¶¶ 21-22; *see also State v. Lopez*, 217 Ariz. 433, ¶ 4 (App. 2008) ("And an objection on one ground does not preserve the issue [for appeal] on another ground.").

¶9 Javalera-Martinez additionally argues that he "revoked" any request for the lesser-included instruction by arguing to the trial court during his Rule 20, Ariz. R. Crim. P., motion that there was no evidence of reckless or negligent conduct.[1] *See State v. Fish*, 222 Ariz. 109, ¶¶ 80-81 (App. 2009). That motion, however, was made nearly a week before his proposed jury instruction on negligent child abuse. Moreover, his Rule 20 motion focused solely on whether there was "substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). He did not provide any argument on "whether the jury could rationally fail to find the distinguishing element of the greater offense." *State v. Sprang*, 227 Ariz. 10, ¶ 7 (App. 2011), *quoting State v. Jackson*, 186 Ariz. 20, 27 (1996). We therefore reject Javalera-Martinez's contention that a Rule 20 motion made mid-trial would "revoke" his own request for an instruction on negligent child abuse as a lesser-included offense made nearly a week later.

---

[1] Javalera-Martinez also points to his argument made in his post-verdict motion for a new trial. Although he did raise the same argument he now raises on appeal in that motion, we do not consider arguments raised for the first time in a post-verdict motion. *See State v. Davis*, 226 Ariz. 97, ¶ 12 (App. 2010).

¶10 Furthermore, although the issue of instructing the jurors on all three mental states came up numerous times when the trial court and parties were discussing both the proposed and final jury instructions and verdict forms, Javalera-Martinez never objected to the inclusion of negligent child abuse. For example, the state objected to the trial court's proposed instructions on the ground that the jury was not being instructed to consider the various mental states in order, from most serious—intentional and knowing—to least serious—negligent. Javalera-Martinez responded, "They don't have to go in order. They can consider these in any order in any mix that they choose to and how they choose to decide to prioritize or not and eliminate or not." And during a later discussion about the form of verdict, both parties expressed their views on the most appropriate way for the jury to choose from the various mental states under both § 13-3623(A) and (B).

¶11 In sum, Javalera-Martinez failed on multiple occasions to voice his objection to the jury being instructed on negligent child abuse as a lesser-included offense, actively participated in discussions on how best to instruct the jurors to consider the various mental states, and proposed an instruction on negligent child abuse. Those actions constitute more than "mere acquiescence" to the state's proposal and instead constitute "independent, affirmative action requesting the error." *Lucero*, 223 Ariz. 129, ¶¶ 25-26. And, contrary to his suggestion, it makes no difference that the trial court ultimately adopted the state's, and not Javalera-Martinez's, proposed instruction on negligent child abuse. *See Logan*, 200 Ariz. 564, ¶ 11 (when considering whether error invited, we consider whether the "party urg[ed] the error" and not "the source of the challenged instruction"). Ultimately, Javalera-Martinez sought, and received, a jury instruction on negligent child abuse as a lesser-included offense of intentional child abuse. He cannot now complain it should never have been given and profit from that error on appeal. *See Yegan*, 223 Ariz. 213, ¶¶ 22-23.

Sufficiency of the Evidence

¶12 Javalera-Martinez also argues that the trial court erred in denying his motion for a judgment of acquittal made pursuant to Rule 20 because the state did not present sufficient evidence of negligent child abuse. He made this motion both during trial and after the jury reached its verdicts. *See State v. West*, 226 Ariz. 559, ¶ 14 (2011) ("The standards for ruling on pre- and post-verdict motions for judgment of acquittal under Rule 20 are the same."). Javalera-Martinez contends the state failed to show that he committed any negligent act that resulted in D.R.'s injuries. We review de novo whether sufficient evidence supports a conviction. *Id.* ¶ 15.

¶13 When determining whether the record contains "substantial evidence to warrant a conviction," Ariz. R. Crim. P. 20(a), "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *West*, 226 Ariz. 559, ¶ 16, *quoting State v. Mathers*, 165 Ariz. 64, 66 (1990). "Substantial evidence, which may be either circumstantial or direct, is evidence that a reasonable jury can accept as sufficient to infer guilt beyond a reasonable doubt." *State v. Henry*, 205 Ariz. 229, ¶ 11 (App. 2003). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Williams*, 209 Ariz. 228, ¶ 6 (App. 2004), *quoting State v. Arredondo*, 155 Ariz. 314, 316 (1987).

¶14 As relevant here, the state had to prove that Javalera-Martinez, "[u]nder circumstances likely to produce death or serious physical injury" and "with criminal negligence," (1) caused D.R. to suffer a physical injury; (2) having the care or custody of D.R., caused or permitted the person or health of D.R. to be injured; or (3) having the care or custody of D.R., caused or permitted D.R. to be placed in a situation where the person or health of D.R. was endangered. § 13-3623(A). "'Criminal negligence' means . . . that a person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists." A.R.S. § 13-105(10)(d); *see State v. Payne*, 233 Ariz. 484, ¶ 71 (2013) (mens rea in child-abuse statute "refers to the act that the defendant 'does,' and not to the background circumstances").

¶15 Javalera-Martinez concedes this court "must assume that the jury . . . believe[d] the State's doctors, who opined that the medical findings were the result of nonaccidental trauma." He argues, however, that the state's sole theory of the case, and the evidence it produced, only demonstrated that D.R.'s injuries had been "caused by intentional acts of abuse" and that it failed to produce substantial evidence those injuries had been caused by any *negligent* act by Javalera-Martinez. But he fails to appreciate that "if a person acts intentionally, knowingly or recklessly," then the element of criminal negligence has been established. A.R.S. § 13-202(C); *see also State v. Nunez*, 167 Ariz. 272, 278 (1991).

¶16 The evidence produced at trial established that, sometime on December 9, D.R. had been shaken or hit with enough force to cause a bilateral subdural hematoma, a spinal hematoma, and bilateral retinal hemorrhages. D.R. did not have any external signs of trauma that would suggest an accidental cause—such as a car accident or significant fall—and,

at just seven weeks old, he would not have been capable of causing the injuries himself. That day, Javalera-Martinez was D.R.'s sole caregiver while J.R. was at work. Consequently, because substantial evidence exists that demonstrates Javalera-Martinez intentionally harmed D.R., *see Henry*, 205 Ariz. 229, ¶ 11, the evidence necessarily supports the conclusion he negligently harmed D.R., *see* § 13-202(C); *Nunez*, 167 Ariz. at 278; *cf. State v. Valentini*, 231 Ariz. 579, ¶ 12 (App. 2013) ("[I]f the State proves a defendant acted intentionally, by definition, it has proved the defendant acted knowingly and recklessly.").

¶17 Javalera-Martinez also argues "there were multiple caretakers during the period preceding the onset of D.R.'s symptoms" and thus a possibility that "D.R.'s injury occurred during [J.R.'s] care." He relies on a portion of the radiologist's testimony that the initial December 9 scan of D.R.'s brain showed the injury occurred anywhere during the preceding three hours to two weeks. However, the radiologist clarified that, based on changes seen in an early morning December 10 scan of D.R.'s brain, the injury must have occurred within the previous twenty-four hours. Javalera-Martinez was the sole caretaker for D.R. for most of that day, and J.R. denied causing any of D.R.'s injuries. The jury, tasked with weighing the evidence and witness credibility, could thus reasonably infer he, and not J.R., caused the injuries. *See Williams*, 209 Ariz. 228, ¶ 6; *see also Henry*, 205 Ariz. 229, ¶ 11. The trial court therefore did not err in denying Javalera-Martinez's Rule 20 motions. *See West*, 226 Ariz. 559, ¶¶ 14-15.

Disposition

¶18 For the foregoing reasons, we affirm Javalera-Martinez's conviction and sentence.