IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ANGELA RENE LEEMAN,
Petitioner.

No. 2 CA-CR 2021-0100-PR
Filed April 7, 2022

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NOT FOR PUBLICATION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. 31.19(e).

Petition for Review from the Superior Court in Pima County
No. CR042678001
The Honorable James E. Marner, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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Counsel for Respondent

Joel Feinman, Pima County Public Defender
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and

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Counsel for Petitioner

MEMORANDUM DECISION

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

E C K E R S T R O M, Presiding Judge:

¶1 This proceeding for post-conviction relief returns to us after remand to the trial court by our supreme court. Petitioner Angela Leeman seeks review of the trial court's order again summarily dismissing her successive petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P.[1] We review a court's denial of post-conviction relief for an abuse of discretion. *State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Although the state concedes error, we conclude Leeman has not shown any such abuse here. *See State v. Sanchez*, 174 Ariz. 44, 45 (App. 1993) (appellate court not required to accept state's confession of error).

¶2 Following a jury trial, Leeman was convicted of thirteen counts of child abuse and one count each of methamphetamine possession and possession of drug paraphernalia. The trial court sentenced her to concurrent and consecutive prison terms totaling sixty-one years. We affirmed Leeman's convictions on appeal, but ordered she be resentenced on one count. *State v. Leeman*, No. 2 CA-CR 94-0364 (Ariz. App. Mar. 14, 1996) (mem. decision). Leeman has since sought and been denied post-conviction relief multiple times, and this court granted review but denied relief on her petitions for review in four of these proceedings. *See State v. Leeman*, No. 2 CA-CR 97-0286-PR (Ariz. App. May 21, 1998) (mem. decision); *State v. Leeman*, No. 2 CA-CR 2017-0419-PR (Ariz. App. Mar. 9, 2018) (mem. decision); *State v. Leeman*, No. 2 CA-CR 2019-0197-PR (Ariz. App. Feb. 12, 2020) (mem. decision).

[1] Effective January 1, 2020, our supreme court amended the post-conviction relief rules. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). In its order adopting the amended rules, the court stated, in relevant part, that the amendments apply to "all actions filed on or after January 1, 2020." *Id.* Leeman was convicted and sentenced in 1994, but the instant proceeding was initiated in January 2020; therefore, the amended rules apply.

¶3 In the most recent of those proceedings, initiated in January 2020, Leeman argued she had been illegally sentenced because her convictions were multiplicitous and because the trial court had "misapplied the law of '*Hannah* priors.'"[2] She argued that under Rules 32.1(c) and 32.2(b), as amended in 2020, her claims were not precluded and could be raised in a successive and untimely petition. This court again granted review but denied relief. *State v. Leeman*, 250 Ariz. 251 (App. 2020), *vacated by State v. Leeman*, No. CR-20-0436-PR (Ariz. July 30, 2021) (decision order).

¶4 On review to our supreme court, however, the state for the first time conceded error in regard to whether Leeman's convictions are multiplicitous. The court vacated our decision and remanded the matter to the trial court on the question of multiplicity, noting the state's concession.[3]

¶5 In supplemental briefing to the trial court, Leeman again argued her convictions were multiplicitous, asserting that "not a scintilla of evidence was presented at the trial showing that [she] was responsible for inflicting any of the injuries that the baby suffered." She contended her only culpability arose from her permitting S. to be injured and argued, "It is axiomatic that a crime of omission must be a continuing offense which terminates either with the person taking the required action or with the person's arrest." The state essentially agreed, positing that "while [it had] not disclaim[ed] the possibility that . . . Leeman inflicted injury personally, it offered no evidence, and made no argument, that that was what happened." Thus it asserted that counts five through thirteen were multiplicitous.

¶6 The trial court, however, again dismissed the petition. It pointed to evidence in the record relating to S.'s multiple, discrete injuries, which had been inflicted over "weeks or months" to "shortly before the baby was seen in the emergency room." It also noted testimony from a

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[2]*State v. Hannah*, 126 Ariz. 575 (1980).

[3]In its response to Leeman's petition for review to our supreme court, the state suggested it "could proceed in the Superior Court under a motion under Ariz. R. Crim. P. 24.2(e) after this Petition is resolved" or the court "could find it 'necessary and appropriate' to vacate the sentence and remand" pursuant to Rule 31.19(c), Ariz. R. Crim. P. and Rule 31.21(l)(3), Ariz. R. Crim. P. Our supreme court did not designate the rule basis for its remand, but in view of its reference to the state's concession we presume it remanded based on Rule 32.16(l), and therefore do not address whether Leeman's claim would otherwise be exempt from the preclusion and timeliness provisions of Rule 32.

doctor that a woman could have caused S.'s broken bones. It further explained that to have convicted Leeman on counts five through thirteen, the jury was required to have found that Leeman's "intentional actions resulted" in the various injuries. The court therefore concluded the "narrative" presented by Leeman and the state—that her "only crime was failing to get help for her infant son"—was "contrary to the evidence . . . that supported the jury's verdicts on each count." Rather, S. had "suffered many different injuries, at different times, caused by different mechanisms, while in the continuous and often sole custody of [Leeman] while she was abusing methamphetamine."

¶7 On review, Leeman argues the trial court abused its discretion in rejecting her multiplicity claim because it "misinterpreted [the] jury['s] findings." She contends the court wrongfully focused on Leeman having caused the injuries, but because the jury was instructed that she "caused or permitted" the injuries, nothing required the jury to have found she caused them. Likewise, she argues "the State's evidence and theory of the case never illustrated [her] as the physical abuser." She maintains "that multiplicity occurs when multiple child abuse convictions are predicated upon a permitting theory and the defendant continuously fails to seek medical attention." The state again agrees generally with Leeman's multiplicity argument. "Whether charges are multiplicitous is an issue of statutory interpretation, which we review de novo." *State v. Brown*, 217 Ariz. 617, ¶ 7 (App. 2008).

¶8 Leeman was arrested after her eight-month-old son, S., was found to be critically ill when she brought him to an emergency room in 1993. He had widespread bacterial infection, with Herpes lesions inside and outside his mouth and around his rectum. S. also had recently inflicted bruises on his head and shoulder, and later was found to have at least ten broken bones in both arms and legs and lax rectal tone most probably caused by repeated insertion of some object into his anus.

¶9 From sometime in March 1993, Leeman and S. had lived with Greg Hatton. The state could not establish who had caused S.'s extensive injuries, but contended that both Leeman and Hatton were responsible for S.'s care and that in each instance of abuse, one of them had caused the injury and the other had permitted it to occur. Numerous witnesses testified that both Leeman and Hatton were consumed with using drugs and frequently ignored S. and his needs. Those witnesses also testified to S.'s declining physical condition and to his obvious need for medical attention, which several of them called to Leeman's attention. Indeed, one reported the situation to Child Protective Services. In the last week before Leeman took S. to the hospital, a period when many of the injuries were

inflicted, Leeman and Hatton became reclusive and would not allow their friends to visit, allowing the inference we noted on appeal that one of them had caused the injuries and the other had permitted them to happen.

¶10 As noted above, Leeman was convicted of thirteen counts of child abuse under A.R.S. § 13-3623. Counts 1 and 8 entailed abuse likely to cause death or serious physical injury. Count 1 specified that the abuse was based on failure to seek medical attention for S. Count 2 alleged that Leeman had failed to protect the child from sexual maltreatment and Count 14 that she had permitted him to suffer from malnutrition. The remaining counts alleged she had caused or permitted various discrete physical injuries.

¶11 "Multiplicity occurs when an indictment charges a single offense in multiple counts . . . [and] raises the potential for multiple punishments, which implicates double jeopardy." *State v. Powers*, 200 Ariz. 123, ¶ 5 (App. 2001). When convictions are based on multiple violations of the same statute, we must determine whether the convictions are based on separate and distinct acts; if so, such separate acts may be punished separately. *See Blockburger v. United States*, 284 U.S. 299, 301-03 (1932) (separate drug sales made to same person but at different times could be punished separately); *see also State v. Via*, 146 Ariz. 108, 116 (1985) (separate transactions with stolen credit card can be punished separately). "[T]he statutory definition of the crime determines the scope of conduct for which a discrete charge can be brought, which the United States Supreme Court has referred to as the 'allowable unit of prosecution.'" *State v. Jurden*, 239 Ariz. 526, ¶ 11 (2016) (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952)).

¶12 Section 13-3623 provides that a person is guilty of child abuse if he or she

> causes a child . . . to suffer physical injury or, having the care or custody of a child . . . causes or permits the person or health of the child . . . to be injured or . . . causes or permits a child . . . to be placed in a situation where the person or health of the child . . . is endangered.

Our supreme court has determined that this statute creates "a single crime . . . that could be committed in multiple ways." *State v. Payne*, 233 Ariz. 484, ¶ 83 (2013). Thus, a jury is "not required to unanimously agree on the manner of committing child abuse." *Id.* ¶ 85.

¶13 Relying on this court's decision in *State v. West*, 238 Ariz. 482, ¶ 19 (App. 2015), Leeman argued in her petition for post-conviction relief that because child abuse is a "single unified offense," "when child abuse constitutes 'a single criminal transaction,' the legally correct way to charge the crime is through a single offense, not multiple offenses." This is correct, but in advancing her argument Leeman confuses two separate matters—the means by which the crime may be committed and the unit of prosecution, which is the act that has been charged. Indeed, in *West* we explained that "alternative means" and "multiple acts" "may overlap where the state charges the defendant with one offense under an alternative-means statute and then alleges multiple, distinct acts as to the separate means." *Id.* ¶ 40. In that case the child victim sustained severe head trauma and was not immediately taken for medical care. *Id.* ¶¶ 3, 9-10. Based on the facts before us, we concluded there was no reasonable distinction between the acts, because they led to a single result—the child's death by head injury. *Id.* ¶ 40.

¶14 In her petition for post-conviction relief, Leeman argued that in this case there was likewise just one act—"her failure to take proper care of her baby." She maintained "no evidence . . . was adduced at trial establishing that [she] caused injuries and all evidence pointed to the contrary." In her instant petition for review she challenges the trial court's determination that this characterization of the facts at trial was "contrary to the evidence, both direct and circumstantial, that supported the jury's verdicts on each count." We have reviewed the trial transcripts and agree with the court's assessment.

¶15 In arguing that the state presented no evidence that she caused the injuries, Leeman overlooks that the jury was instructed on accomplice liability pursuant to A.R.S. § 13-301. That instruction allowed the jury to find Leeman guilty if it found she had, inter alia, aided or counseled Hatton to commit the offenses or had "provide[d] means or opportunity" to the other in committing the offense. A.R.S. § 13-301. In short, the state did not need to prove beyond a doubt that Leeman herself inflicted each injury to render her legally culpable for causing them.

¶16 As the trial court pointed out, a doctor testified that a woman would have the strength to break a baby's bones and agreed that either Leeman or Hatton "could be just as probable as the other" to have caused the injuries. There was also evidence that Leeman was alone with S. while Hatton worked. Further, a witness testified that Leeman would get angry when S. cried and curse at him. Another witness testified that she had seen Leeman scream at S. and "yank" him out of his car seat "by his arm." Furthermore, when viewed as a whole, the state's argument was that

Leeman and Hatton had been the only people in a position to injure the child and that one of them had caused the injuries and the other had permitted them. Because they both denied any abuse, it was impossible to say which defendant had caused any particular injury, but under the statute, each could be found liable whether they had caused or permitted a particular injury.

¶17 In closing the state expressly argued,

> One thing that needs to be very clear is the State does not need to prove who caused and who permitted. For obvious reasons it would be impossible to do that in most of the cases where you have a young child who can't talk, where you have injuries, where you have two caretakers who, as in this case, are lying about what happened.
>
> The State is not required to prove who caused or who permitted, just that the defendants being [S.]'s only caretakers between themselves, either together caused the injuries or one caused and the other knew about them and permitted the injuries.
>
> There is no requirement to show who actually threw the blows.

It made several other arguments to similar effect in both opening and closing statements. Likewise, particularly in his opening statement, Hatton argued that Leeman had caused S.'s injuries.

¶18 In view of this presentation of the evidence, and because the jurors were not required to unanimously agree as to the manner in which Leeman committed the offense, we cannot know if any particular juror accepted that Leeman had injured S. herself or had permitted Hatton to injure him. But the state has now also adopted the view that Leeman permitted the injuries, and was therefore guilty of committing child abuse in "the second way," as Leeman describes the offense—by permitting S. to be injured. We will therefore accept that characterization for purposes of considering Leeman's arguments relating to the unit of prosecution.

¶19 As our supreme court set forth in *Jurden*, when considering whether a defendant may be subject to multiple convictions, "the statutory definition of the crime determines the scope of conduct for which a discrete

charge can be brought." 239 Ariz. 526, ¶ 11. Although not cited by either of the parties, this court has previously addressed the unit of prosecution in § 13-3623 in the context of vulnerable-adult abuse. In *State v. Rodriguez*, we distinguished the crime of vulnerable-adult abuse under § 13-3623 from cases, like *Jurden*, which "involved statutes that had the primary purpose of protecting a broad societal interest." 251 Ariz. 90, n.4 (App. 2021). We determined that § 13-3623 was instead "directed at individualized protection" and concluded the unit of prosecution was "each separate harm inflicted." *Id.* n.4, ¶ 11. We explained that "Section 13-3623(A), (B) is unambiguous because the language indicates the unit of prosecution is each harm; therefore, each separate harm inflicted can be separately charged, notwithstanding that multiple harms are serially inflicted over the course of a single event." *Id.* ¶ 11.

¶20 Leeman argues, however, that a different rule should apply when a defendant has permitted an injury and not caused it. She asserts, "It is axiomatic that a crime of omission must be a continuing offense which terminates either with the person taking the required action or with the person's arrest." She compares the situation here to various crimes of a continuous nature, primarily luring a minor for sexual exploitation and failure to register as a sex offender. Each of these offenses, however, are distinguishable.

¶21 In determining that a defendant could only be charged with one count of luring a minor for sexual exploitation, the court in *State v. Moninger* determined that the term "soliciting" could be read to refer to either a course of conduct or to discrete text messages. 251 Ariz. 487, ¶ 14 (App. 2021). The court noted that the criminal code did not define "solicit," and it therefore looked to its "ordinary meaning." *Id.* ¶ 13. It also considered the legislative history and purpose of the statute. *Id.* ¶¶ 15-20. It concluded that "the legislature did not intend 'solicit' to refer to singular acts or statements because that interpretation would result in the unintended outcome of subjecting defendants who lure to harsher penalties than would apply had they accomplished the object of the luring." *Id.* ¶ 20.

¶22 Section 13-3623, however, defines the term "physical injury." Under the statute the term "means the 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). This definition focuses on discrete injuries, including "any" "fracture of any bone" or "soft tissue swelling." *Id.* When viewed in light of this definition, the clear language of the statute demonstrates that the legislature intended the terms

"injury" and "to be injured" in § 13-3623(A) to refer to discrete harms to the child or vulnerable adult, including individual fractured bones or instances of swelling. Thus, the unit of prosecution must focus on those harms, regardless of whether they are sustained as part of a course of conduct.

¶23 Likewise, the language of A.R.S. § 13-3821, which sets forth the registration requirements for sex offenders, demonstrates the legislature intended violation of the statute to be a "continuing offense," *State v. Helmer*, 203 Ariz. 309, ¶ 9 (App. 2002), in ways that differ from the child abuse statute. The registration statute "imposes continuing, lifetime duties on those required to register and not subject to an exception." *Id.* These "requirements serve a regulatory purpose by giving law enforcement a current record of the identity and location of registrants." *Id.* ¶ 11. Thus, violation of § 13-3821 constitutes a continuing failure to take the requisite affirmative steps necessary to comply with the statute. In contrast, § 13-3623 does not require affirmative conduct such as annually obtaining an identification or providing proof of address. Rather, it prohibits causing or permitting a child to sustain discrete physical injuries. *See Rodriguez*, 251 Ariz. 90, ¶ 11, n.4.

¶24 Leeman characterizes her culpable conduct as an ongoing "failure to take proper care of her baby" or to seek medical attention for S. Thus, she compares it to a continuous offense like failure to register, arguing that the crime "began when she first discovered a problem and ended only when she eventually brought the baby to the emergency room." But in view of the statutory language, the crime of child abuse is instead permitting the child to be injured. Thus, the crime begins and is completed when the defendant permits the injury to occur. If one injury is permitted and the defendant continues not to seek medical attention for that injury, a new offense is not necessarily created.[4] But when multiple injuries are permitted, each is a separate harm under the statute and "can be separately charged, notwithstanding that multiple harms are serially inflicted over the course of a single event." *Id.*

¶25 For these reasons, we cannot accept Leeman's argument that her convictions are multiplicitous. Evidence at trial clearly established that S. had sustained multiple injuries. Furthermore, experts testified that the injuries "suggest[ed] repeated severe injury" over a period of time. One doctor testified that the injuries "were multiple in nature and had to be inflicted upon [S.]. They were not the result of a single accident or two or

[4]Because it is not at issue here, we do not address the circumstance in which evidence is presented that the failure to seek medical attention created additional, separate injuries to the child.

three accidents." Another testified that some of the injuries might have happened on the same day, but "over a somewhat prolonged period of time," at least "some period of hours." In view of this evidence we cannot say that Leeman's conduct amounted to the same act, and the evidence clearly establishes separate harms to S. Because the convictions are not multiplicitous, the trial court did not abuse its discretion in denying Leeman's claim for relief on the ground of multiplicity. Likewise, the court was within its discretion to deny the state's motion pursuant to Rule 24.2(e), Ariz. R. Crim. P. *Cf. State v. Johnson*, 122 Ariz. 260, 265 (1979) (prosecutor may recommend dismissal of criminal charges, "but actual dismissal is solely within the court's discretion" (quoting *In re Parham*, 6 Ariz. App. 191, 193 (1967))).

¶26 We grant the petition for review, but deny relief.