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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. GABRIEL CORDOVA BALTIERREZ, Appellant.	2 CA-CR 2008-0033 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20064354

Honorable John S. Leonardo, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Amy M. Thorson
Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Michael J. Miller
Tucson
Attorneys for Appellant

V Á S Q U E Z, Judge.

¶1 After a jury trial, appellant Gabriel Baltierrez was convicted of sexual conduct with a minor under twelve, kidnapping, and two counts of child abuse committed under circumstances likely to cause death or serious physical injury. The trial court sentenced him to consecutive prison terms, including a life sentence for the sexual conduct conviction. On appeal, he contends the court abused its discretion by denying his motion for judgment of acquittal, admitting evidence of domestic violence, precluding evidence of the nature of a witness's prior felony conviction, and incorrectly instructing the jury about circumstantial evidence and how it should consider witness testimony. For the reasons that follow, we affirm.

I. Facts and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the jury's verdicts. *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). On November 10, 2006, Rebecca H. went to a Tucson Police Department substation and requested officer assistance in getting her children from an apartment she shared with Baltierrez, the children's father. Two officers accompanied her back to the apartment where they found Baltierrez and the children, G.B. and E.B., inside. E.B., then four months old, appeared "very thin and emaciated"; her arms and legs were "about the diameter of a nickel"; and she had bruises on her arms, legs, abdomen, and back. One of the officers called for emergency medical assistance based upon E.B.'s appearance, and she was taken to a hospital. At the hospital, E.B. was determined to have a "mild to moderate amount of dehydration,"

malnutrition, diffuse bruising and scratching on her body, and a deformity on her rib that was "most probably a rib fracture." E.B. also had suffered trauma to her genital area, particularly her anus.

¶3 Baltierrez was charged with (1) child abuse, under circumstances likely to cause death or physical injury, by causing E.B. to become malnourished; (2) child abuse, under circumstances likely to cause death or serious physical injury, by fracturing E.B.'s rib; (3) sexual conduct with a minor under fifteen; and (4) kidnapping with intent to inflict death or physical injury or commit a sexual offense. Each count was alleged to be a dangerous crime against children pursuant to A.R.S. § 13-604.01(N). The jury found Baltierrez guilty of all charges, and the trial court sentenced him to life imprisonment for sexual conduct with a minor and to consecutive terms totaling 37.5 years for the other three convictions. This appeal followed.

II. Discussion

A. Sufficiency of the Evidence: Kidnapping

¶4 At the close of the state's case, Baltierrez moved for judgment of acquittal on all counts, pursuant to Rule 20, Ariz. R. Crim. P. The trial court denied the motion, finding "substantial evidence upon which the jury could find the defendant guilty." On appeal, Baltierrez challenges the denial of his motion only on the kidnapping charge. His argument is twofold: first, he asserts there was insufficient evidence that he had restrained E.B. within the meaning of the kidnapping statute, A.R.S. § 13-1304; second, even assuming there was

sufficient evidence of restraint, he contends, there was insufficient evidence to prove he had restrained E.B. for the purpose of committing a felony, as required by § 13-1304(A)(3).

¶5 We review the trial court's denial of a Rule 20 motion for an abuse of discretion, *State v. Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d 455, 458 (App. 2003), viewing the facts in the light most favorable to sustaining the jury's verdict, *State v. Roque*, 213 Ariz. 193, ¶ 93, 141 P.3d 368, 393 (2006). We will reverse only if there is no substantial evidence to support the conviction. *Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d at 458. "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990), *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980).

¶6 At trial, the state presented evidence that E.B. had sustained bruising in a "linear pattern" that "extended all the way around her [left] ankle." The state's expert testified these were "restraint bruises," caused by having "something around the ankle to hold the leg in place." E.B. also had more faded bruises on her right ankle and wrists. Baltierrez does not challenge the sufficiency of this evidence to show that E.B.'s limbs had been bound. He contends only that the binding of her limbs was insufficient to prove restraint, as the term is used in the kidnapping statute.

¶7 Section 13-1304 provides, in pertinent part: "A person commits kidnapping by knowingly restraining another person with the intent to . . . [i]nflict death, physical injury

or a sexual offense on the victim . . . ." Section § 13-1301(2), A.R.S., defines the verb restrain as

> to restrict a person's movements without consent, without legal authority, and in a manner which interferes substantially with such person's liberty, by either moving such person from one place to another or by confining such person. Restraint is without consent if it is accomplished by:
>
> (a) Physical force, intimidation, or deception; or
>
> (b) Any means including acquiescence of the victim if the victim is a child less than eighteen years old or an incompetent person and the victim's lawful custodian has not acquiesced in the movement or confinement.

Because there was no evidence that E.B. was moved to another location, Baltierrez focuses on the restraint-by-confinement language in the statute. Relying on selected dictionary definitions of "confine," Baltierrez argues "'confine' means restriction of the movement of a person in space[,] not the restriction of movement of a person's limbs." Thus, he concludes, because E.B. was four months old and incapable of moving herself from one location to another, the binding of her limbs could not have acted as a restraint upon her.

¶8 But, under the plain language of the statute, the definition of restraint includes "restrict[ing] a person's movements . . . in a manner which interferes substantially with such person's liberty." § 13-1301(2). Nothing in the statute's wording suggests restriction of movement applies only to persons who have the ability to move themselves from one location to another. *See State v. Mahaney*, 193 Ariz. 566, ¶ 12, 975 P.2d 156, 158 (App. 1999) (when interpreting statutes, courts look first to language, which is given plain and ordinary meaning

unless legislature clearly indicates otherwise). Binding the limbs of a four-month-old child is undoubtedly a restriction of the child's liberty. Furthermore, even one of the definitions of "confine" cited by Baltierrez— "to keep in narrow cramped quarters: imprison . . . to keep to a certain place or to a limited area"—applies in this case, where the binding of E.B.'s limbs would have kept them from extending beyond a finite area.

¶9 Finally, we cannot conceive that the legislature, in enacting the kidnapping statute and its attendant definitions, intended to exclude from liability a kidnapper who binds the limbs of a nonambulatory child, provided the victim is not moved to a separate location during the commission of the crime. *Cf. State v. Bernal*, 148 Ariz. 149, 150, 713 P.2d 811, 812 (App. 1985) ("It would ill-serve the purposes of the law to exclude from liability those kidnappers who prey on the unconscious.").

¶10 We next turn to Baltierrez's argument that, even assuming there was sufficient evidence of both restraint and intent to commit sexual conduct, the state did not produce sufficient evidence to prove the purpose of the restraint was to commit the offense of sexual conduct. At trial, E.B.'s treating physician testified that the injuries to her anus were "recent"; they could have been days old and repeatedly aggravated or could have been inflicted as recently as the day she was brought to the hospital. The physician also testified that some of her bruises were in various stages of healing and some could also have occurred on the day she was brought to the hospital. In particular, the state's expert testified that, four days after E.B. was taken to the hospital, the restraint bruise on her ankle was still

"dramatic." Baltierrez argues this evidence only established the injuries had occurred during the "same several days" and does not support a conclusion they occurred at the same time or for the same purpose. We disagree.

¶11 We find instructive the reasoning in *State v. Bible*, 175 Ariz. 549, 595-96, 858 P.2d 1152, 1198-99 (1993). There, the defendant argued the evidence was insufficient to support his conviction for child molestation because there was no physical evidence he had molested the victim before killing her. However, there was evidence linking the defendant to the crime scene, the victim was found naked with her hands bound, a "pubic-type hair" similar to the defendant's was found near the body, and the defendant was not wearing underwear when he was arrested. *Id.* Reviewing this evidence, our supreme court stated it was a "common sense conclusion that the evidence permit[ted] an inference of molestation." *Id.* It further observed that, "[a]lthough contrary inferences [we]re possible, a reasonable jury could have concluded beyond a reasonable doubt that Defendant molested the victim. Indeed, this is the most logical explanation for the crime." *Id.* at 596, 858 P.2d at 1199. A similar set of inferences and conclusions can be drawn in this case.

¶12 In addition to evidence of the nature and timing of E.B.'s injuries, the jury heard evidence that children E.B.'s age are not yet able to move themselves from place to place, and the state presented extensive evidence that Baltierrez exercised exclusive control

over E.B.[1] Given the totality of the evidence, the jury could have inferred that E.B.'s restraint and the injuries she sustained as the result of sexual conduct had occurred within the same period of time. Having drawn that inference, it could also reasonably have concluded that the only purpose for the restraint was to commit the sexual offense. *See id.* at 595-96, 858 P.2d at 1198-99 (finding pathologist's arguably inadmissible testimony—that discovering victim naked and bound indicative of sexual molestation— merely "state[d] the common sense conclusion that the evidence permit[ted] an inference of molestation"). That other inferences may also have been possible but were ultimately rejected by the jury is irrelevant because substantial evidence supported the jury's finding beyond a reasonable doubt that Baltierrez had kidnapped E.B. for the purpose of committing a sexual offense. *See id.* at 596, 858 P.2d at 1199; *see also Mathers*, 165 Ariz. at 67, 796 P.2d at 869. The trial court did not abuse its discretion in denying Baltierrez's Rule 20 motion on the kidnapping charge. *Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d at 458.

B. Admission of Domestic Violence Evidence

¶13 Baltierrez next argues the trial court abused its discretion by permitting the state to introduce evidence of incidents of domestic violence he had committed against Rebecca around the same time he had abused E.B. Before trial, the state moved for leave to introduce this evidence, and Baltierrez opposed the motion, arguing it constituted other-act

[1]Baltierrez challenges the admissibility of some of this evidence in his next argument. However, as we discuss, this evidence was properly admitted and considered by the jury.

evidence and was not admissible for any of the purposes contained in Rule 404(b), Ariz. R. Evid. Initially, the trial court ordered the evidence excluded.[2] However, the state filed a motion for clarification of the court's ruling, effectively a motion for reconsideration, arguing that the evidence was probative of guilt and that its exclusion would mislead the jury and permit it to draw inferences that were unsupported by the evidence. Baltierrez responded that the evidence was irrelevant and more prejudicial than probative. Ultimately the court found the evidence was "an intrinsic part of the charges" and therefore admissible.

¶14 We review a trial court's admission of evidence for an abuse of discretion. *State v. Fillmore*, 187 Ariz. 174, 179, 927 P.2d 1303, 1308 (App. 1996). At trial, Rebecca testified Baltierrez would hit her to prevent her from picking up or feeding E.B. A detective also testified Baltierrez had stated during questioning that he had thrown things at Rebecca when he was angry. Baltierrez contends this evidence was not intrinsic to the offenses charged and the fact he prevented Rebecca from caring for E.B. was severable from the specific manner in which he did so. Again, we disagree.

¶15 "Other act evidence is intrinsic when 'evidence of the other act and evidence of the crime charged are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged.'" *State v.*

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[2]The trial court's ruling is somewhat unclear. When this motion was argued, this case had been consolidated with another charging Baltierrez for acts of domestic violence against Rebecca. It appears the court found the evidence of domestic violence related to taking care of E.B. admissible for limited purposes in the domestic violence case but excluded it in this case. Apparently for this reason, the court then severed the cases.

Nordstrom, 200 Ariz. 229, ¶ 56, 25 P.3d 717, 736 (2001), *quoting State v. Dickens*, 187 Ariz. 1, 18 n.7, 926 P.2d 468, 485 n.7 (1996). When necessary "to prove the complete story of the crime," such evidence is admissible "even though . . . [it] reveal[s] other prejudicial facts, such a[s] the defendant has committed other criminal offenses or misconduct." *State v. Collins*, 111 Ariz. 303, 305, 528 P.2d 829, 831 (1974); *see State v. Myers*, 117 Ariz. 79, 85, 570 P.2d 1252, 1258 (1977) (other-act evidence admissible when "so interrelated with the crime with which the defendant is presently charged that the jury cannot have a full understanding of the circumstances without such evidence"); *see also United States v. Johnson*, 463 F.3d 803, 808 (8th Cir. 2006) (intrinsic evidence "provid[es] the context in which the charged crime occurred); *United States v. Forcelle*, 86 F.3d 838, 842 (8th Cir. 1996) (intrinsic evidence completes story or provides full picture of charged offense).

¶16 Baltierrez's crimes involved systematically starving E.B., breaking one of her ribs, and binding her extremeties for the purpose of committing sexual acts. The evidence of his use of physical force to prevent Rebecca from interacting with E.B. demonstrates that those acts were in furtherance of his abuse of E.B. and suggests an ongoing desire to ensure that the extent of E.B.'s injuries went undiscovered. The evidence provides further context for the crimes by demonstrating Baltierrez was the only person with sufficient access to E.B. to have caused her injuries, and it provides the jury with a context for Rebecca's behavior during this time. Limiting the evidence to a sanitized statement that Baltierrez had merely "denied [Rebecca] contact" with E.B. would have deprived the jury of essential evidence

showing his exclusive control over the circumstances surrounding these crimes. *See Myers*, 117 Ariz. at 86, 570 P.2d at 1259 (evidence of other acts admissible where it constituted "vital evidence necessary to decide the case," without which jury would have "incomplete story of the crime"). The evidence was thus intrinsic and, therefore, admissible. *Nordstrom*, 200 Ariz. 229, ¶ 56, 25 P.3d at 736.

¶17 Furthermore, the evidence was not unfairly prejudicial, as Baltierrez suggests. *See* Ariz. R. Evid. 403. Relevant evidence may be excluded under Rule 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Unfair prejudice means "an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror." *State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997); *see also State v. Mills*, 196 Ariz. 269, ¶ 28, 995 P.2d 705, 711 (App. 1999). As noted above, the evidence of domestic violence was probative and necessary to complete the story of the alleged crimes. And, any potential for prejudice did not substantially outweigh its probative value, particularly in light of the nature of this case and the evidence presented about E.B.'s injuries. *See State v. Harrison*, 195 Ariz. 28, ¶ 22, 985 P.2d 513, 518 (App. 1998) (considering totality of evidence, defendant's statement he would have shot victims if he had a gun "c[ould]not have had much additional impact"). Thus, the trial court did not abuse its discretion in admitting it.

C. Evidence of Third-Party Culpability

¶18 Baltierrez next argues the trial court erred in precluding evidence of the specific nature of a witness's prior felony conviction. He contends such evidence would have supported his defense of third-party culpability. The witness, Rebecca's stepfather, Ramon, had an eight-year-old conviction for attempted sexual conduct with a minor. Baltierrez sought to introduce the nature of that conviction as evidence of Ramon's motive to commit some of the offenses. The state objected, and the court precluded the evidence, finding its probative value outweighed by the danger of unfair prejudice and "confusing and misleading the jury." However, the court ruled the fact of Ramon's prior conviction, without reference to the nature of the offense, admissible for impeachment purposes. We review a trial court's admission or preclusion of third-party culpability evidence for an abuse of discretion. *State v. Prion*, 203 Ariz. 157, ¶ 21, 52 P.3d 189, 193 (2002).

¶19 A defendant is permitted to introduce evidence to show that someone else committed the offense with which he has been charged. *State v. Tankersley*, 191 Ariz. 359, ¶ 38, 956 P.2d 486, 496 (1998). However, "in determining the admissibility of third-party culpability evidence, a trial court should apply Rules 401, 402, and 403 of the Arizona Rules of Evidence." *State v. Dann*, 205 Ariz. 557, ¶ 33, 74 P.3d 231, 242 (2003). Applying Rule 401, the court first must determine whether the evidence is relevant. The "proper focus in determining relevancy is the effect the evidence has upon the *defendant's* culpability. To be relevant, the evidence need only *tend* to create reasonable doubt as to the defendant's guilt."

State v. Gibson, 202 Ariz. 321, ¶ 16, 44 P.3d 1001, 1004 (2002). If the evidence is relevant, then it is admissible pursuant to Rule 402 "unless 'its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" *Id.* ¶ 13, *quoting* Rule 403.

¶20 Baltierrez acknowledges third-party culpability evidence "is not relevant when the third party suspect did not have opportunity to commit the offense." *See State v. Tucker*, 205 Ariz. 157, ¶ 32, 68 P.3d 110, 117 (2003). However, he cites three instances of Ramon's "continuing contacts with the family that would allow him access to [the child]." But, as the state correctly points out, none of the instances involved Ramon's ever being alone with E.B, or otherwise showed he had the opportunity to commit the crimes. The evidence was therefore irrelevant. Although the trial court did not decide the issue of admissibility on the basis of relevance, we are nonetheless able to conclude the court did not abuse its discretion in ruling the evidence inadmissible under Rule 403. Even assuming the evidence was relevant, it "was so tenuously and speculatively connected to the case that it would have

caused undue confusion of the issues or misled the jury."[3] *Dann*, 205 Ariz. 557, ¶ 35, 74 P.3d at 243.

D. Jury Instructions

¶21 Finally, Baltierrez challenges two jury instructions. He argues the instruction on circumstantial evidence lowered the state's burden of proof and contends the trial court improperly instructed the jury to consider the number of witnesses called by each side in determining the witnesses' credibility and the weight to be given to the evidence. We review a trial court's decision to give a particular instruction for an abuse of discretion, *State v. Johnson*, 205 Ariz. 413, ¶ 10, 72 P.3d 343, 347 (App. 2003), but we review de novo whether jury instructions properly state the law, *State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997). In making the latter determination, we review the instructions as a whole. *State v. Cox*, 217 Ariz. 353, ¶ 15, 174 P.3d 265, 268 (2007).

1. Circumstantial Evidence

¶22 Over Baltierrez's objection, the trial court instructed the jury as follows:

> Evidence may be direct or circumstantial. . . . Circumstantial evidence is the proof of a fact or facts from which you may find

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[3]For the first time in his reply brief, Baltierrez argues the nature of the prior offense was admissible to prove that Ramon's motive for committing the offenses was that of "every child molester—the gratification of a deviant sexual desire." Citing Rule 404(c), Baltierrez contends: "Ramon's prior conviction demonstrated a propensity for such behavior." Rule 404(c) permits evidence of an aberrant sexual propensity to commit the offense charged. But, because Baltierrez neither raised this argument below or in his opening brief, he has waived it. *See State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) (failure to argue claim in opening brief constitutes abandonment and waiver of claim).

> another fact. For example, if you observed a puddle of water in the street in the morning, that would be circumstantial evidence that it had rained overnight, even though you did not see it rain. The law makes no distinction between direct and circumstantial evidence. It is for you to determine the importance to be given to the evidence regardless of whether it is direct or circumstantial.

Baltierrez contends this instruction lessened the state's burden of proof because the jury was not instructed that the inferences it drew had to be reasonable in light of all the evidence presented or that it was free to draw "rival inferences" from the evidence.

¶23 Baltierrez relies on our supreme court's language in *Orendain* to support his argument that "circumstantial evidence instructions can interfere with the jury's understanding of the burden of proof." In *Orendain*, the jury was instructed that both direct and circumstantial evidence could be used to prove possession of marijuana and that the evidence had to connect the defendant to the marijuana in a manner that permitted a *reasonable inference* that he had knowledge, dominion, and control over it. 188 Ariz. at 55, 923 P.2d at 1326. On appeal, Orendain argued the instruction lessened the state's burden of proof. *Id.* Although the court noted a jury could misinterpret the "reasonable inference" language in a way that lessened the state's burden, it concluded any error in the instruction was "entirely harmless" in light of the sound reasonable doubt instruction and the evidence presented at trial. *Id.* at 56, 923 P.2d at 1327.

¶24 The same reasoning applies in this case. Although Baltierrez contends the trial court's circumstantial evidence instruction provided the jury with an overly simplistic

example of circumstantial evidence, the instruction stated that any inferences drawn must be based on the facts presented at trial and that it was up to the jury to determine the weight to be given the evidence. The jury was further instructed on the meaning of reasonable doubt, and the state had to prove every element of the charges by that standard. Considered as a whole, these instructions clearly conveyed to the jury that any inferences it drew had to be based on the evidence presented and that the evidence and inferences together must support guilt beyond a reasonable doubt. *See id.*; *Cox*, 217 Ariz. 353, ¶ 15, 174 P.3d at 268. We cannot say this instruction reduced the state's burden or misled the jury, and the court therefore did not abuse its discretion in giving it.[4]

2. Number of Witnesses

¶25 Baltierrez also argues the trial court erroneously instructed the jury that it could consider the number of witnesses who testified for each side both as a gauge of witness credibility and to determine guilt or innocence. The court gave the following instruction:

> The number of witnesses testifying on one side or the other is not alone the test of a witness's credibility or the weight of the evidence. If warranted by the evidence you may believe one witness against a number of witnesses testifying differently. The tests are how truthful is a witness, how convincing is his or her evidence and which evidence and which witness appears to you to be most accurate and trustworthy in light of all the evidence and circumstances shown.

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[4]In closing argument, defense counsel provided the jury with alternative inferences and conclusions it could draw from the evidence. Thus any error created by the limited example provided in the jury instruction was harmless. *State v. Milke*, 177 Ariz. 118, 123, 865 P.2d 779, 784 (1993) (defects in jury instructions may be cured by closing argument).

Baltierrez contends the addition of the word "alone" in the first sentence improperly instructed the jury that it could consider the total number of witnesses presented by each side in determining guilt and consequently "diluted the presumption of innocence and shift[ed] the burden of proof."

¶26 We reject Baltierrez's contention that the instruction shifted the burden of proof. It informed the jury that it could believe one witness over many and that, in assessing witness credibility, it should focus on the truthfulness of each witness and believe only those whose testimony seemed the "most accurate and trustworthy in light of all the evidence and circumstances shown." And, even assuming the addition of the word "alone" was improper, we can say beyond a reasonable doubt that any error was harmless. *See Dann*, 205 Ariz. 557, ¶ 18, 74 P.3d at 239 (jury instructions subject to harmless error review).

¶27 The instruction was given along with a legally sound reasonable doubt instruction. *Cf. Orendain*, 188 Ariz. at 56, 932 P.2d at 1327 (circumstantial evidence instruction not fundamental error when given with appropriate reasonable doubt instruction). The court also instructed the jury to "consider all of the[] instructions," to "start with the presumption that the defendant is innocent," and not to "conclude that the defendant is likely to be guilty because of his choices" in testifying or calling witnesses. Viewed in their entirety, the jury instructions adequately reflected the law and made clear that the state was required to prove Baltierrez guilty beyond a reasonable doubt. *See Cox*, 217 Ariz. 353, ¶ 15, 174 P.3d at 268. Thus, any error in this instruction was clearly harmless. *See Dann*, 205

Ariz. 557, ¶ 18, 74 P.3d at 239 (error harmless if reviewing court can say, beyond reasonable doubt, it did not contribute to or affect verdict).

Disposition

¶28 For the reasons stated above, we affirm.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge