FILED BY CLERK
DEC 22 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. CHARLES WILLIAM CLINGER, Appellant.	2 CA-CR 2010-0038 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20084651

Honorable Edgar B. Acuña, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Alan L. Amann
Tucson
Attorneys for Appellee

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

E C K E R S T R O M, Judge.

¶1 After a jury trial held in his absence, appellant Charles Clinger was convicted of four counts of felony child abuse. The trial court determined he had one historical prior felony conviction and sentenced him to a combination of concurrent and consecutive terms of imprisonment totaling nine years. On appeal, Clinger argues there was insufficient evidence to support the guilty verdicts because certain marks on the children's bodies fell outside the definition of a physical injury in the felony child abuse statute. He also contends the trial court erred in excluding a police interview of his absent codefendant and by admitting hearsay evidence of the children's statements. For the following reasons, we affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). In November 2008, Clinger lived with his girlfriend, Anna Norris; his nine-year-old son, M.C.; and Norris's three younger children. Clinger owned two airsoft guns. He repeatedly shot each of the children with hard plastic BBs during the time they lived together. Clinger and Norris each were indicted on four counts of child abuse. After they fled, the trial court issued bench warrants for their arrest. Clinger was tried in absentia and convicted as noted above.[1] He was sentenced several months after his arrest, and this appeal followed.

[1]Norris later accepted a plea agreement and is not a party to this appeal.

Jurisdiction

¶3 Although neither party has addressed whether Clinger has forfeited or waived his right to appeal by absconding, it is incumbent upon this court to examine whether we have jurisdiction over his appeal in light of A.R.S. § 13-4033(C). *See State v. Bejarano*, 219 Ariz. 518, ¶ 2, 200 P.3d 1015, 1016 (App. 2008) (recognizing appellate court's independent duty to examine its own jurisdiction). The amendment of § 13-4033 to add subsection (C) became effective September 26, 2008. *See* 2008 Ariz. Sess. Laws, ch. 25, § 1; *see also* Ariz. Const. art. IV, pt. 1, § 1(3) (laws effective ninety days after close of legislative session); *State v. Soto*, No. CR-10-0089-PR, ¶ 2, 2010 WL 4570037 (Ariz. Nov. 15, 2010). This was months before Clinger committed the charged offenses and the statute is therefore applicable to him. The statute provides that a criminal defendant may not appeal his final judgment of conviction if his voluntary absence "prevents sentencing from occurring within ninety days after conviction." § 13-4033(C); *see In re Lazcano*, 223 Ariz. 280, ¶ 7, 222 P.3d 896, 898 (2010) (observing definition of "conviction" includes "a determination of guilt by verdict" and "formal entry of judgment is not required").

¶4 The jury found Clinger guilty on August 14, 2009, and he was apprehended fifty days later, on October 3, 2009. Ninety days from the date of his conviction was November 12, 2009. Rather than sentencing Clinger on or before this date, the trial court held a hearing on November 23, 2009, on the state's allegation that Clinger had prior convictions. After the hearing, the court set sentencing for January 2009. The sentencing

hearing was continued on Clinger's motion until January 21, with no objection from the state.

¶5 In sum, although Clinger delayed sentencing by absconding before trial and remaining at large after he was found guilty, his arrest in early October allowed ample time for a presentence report to be prepared pursuant to Rules 26.3(a)(1) and 26.4(a), Ariz. R. Crim. P., and for sentencing to occur within the ninety-day timeframe specified in § 13-4033(C). Thus, as the trial court implicitly determined, Clinger did not prevent sentencing from occurring within ninety days from the rendering of guilty verdicts. *See State v. Henry*, 224 Ariz. 164, n.5, 228 P.3d 900, 902 n.5 (App. 2010) (trial court presumed to know and correctly apply law). The trial court advised Clinger at the sentencing hearing that he had the right to appeal, and we agree with the court that he retained this right even though he absconded and his sentencing ultimately occurred more than ninety days after his conviction.[2]

Sufficiency of the Evidence

¶6 Clinger argues that there was insufficient evidence to support the child abuse convictions because "the red spots on the children in this case did not fall within the definition of physical injury." In reviewing the sufficiency of evidence, we "will not disturb a defendant's conviction unless there is a complete absence of probative facts to

[2]Our supreme court has not yet resolved whether § 13-4033(C) violates a criminal defendant's "right to appeal in all cases" guaranteed by article II, § 24 of the Arizona Constitution. *See State v. Soto*, No. CR-10-0089-PR, ¶¶ 1, 5, 2010 WL 4570037 (Ariz. Nov. 15, 2010). Because we have determined that for other reasons § 13-4033(C) does not apply under the specific facts of this case, we need not address that question here.

support the verdict and unless rational jurors could not have found the defendant guilty beyond a reasonable doubt." *State v. George*, 206 Ariz. 436, ¶ 3, 79 P.3d 1050, 1054 (App. 2003) (citation omitted).

¶7 The jury found Clinger guilty of intentionally or knowingly causing a child to suffer "physical injury or abuse" under circumstances not likely to result in death or serious physical injury, in violation of A.R.S. § 13-3623(B)(1).[3] Section 13-3623(F)(4) defines "[p]hysical injury" as "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."

¶8 Although Clinger argued at trial that the "red marks" did not fall within the statutory definition, he conceded that "clearly the [photographs] of the gouges, those are injuries" and that if the jury "believe[d] that an air soft caused those injuries, [its] work . . . [would be] very limited." A police officer testified that it would be possible for an airsoft weapon to break the skin at close range. Photographs of three of the children show places where their skin was broken and scabbed, and a reasonable jury could have concluded these were bleeding injuries. *See* § 13-3623(F)(4); *State v. deBoucher*, 135 Ariz. 220, 224, 660 P.2d 471, 475 (App. 1982) (child's cracked and bleeding lip within definition of physical injury). Pictures of the fourth child show a discolored mark where the skin may have been broken. A reasonable jury could have concluded that this mark

[3]Because the material provisions of this law have not changed since the November 2008 offense dates, we cite the current version of the statute. *See* 2006 Ariz. Sess. Laws, ch. 252, § 1.

was either a bruise or a bleeding injury. *See* § 13-3623(F)(4). Therefore, we need not decide whether the additional "red marks" on the children's skin fall within the definition of physical injury. A reasonable jury could have found there was sufficient evidence to find Clinger guilty of child abuse based on the other injuries.

Statement Against Interest

¶9 Clinger next contends the trial court erred by not admitting a police interview of his codefendant, Norris, as a statement against interest. We review for an abuse of discretion a trial court's rulings on the admissibility of evidence. *State v. Rutledge*, 205 Ariz. 7, ¶ 15, 66 P.3d 50, 53 (2003).

¶10 Under Rule 804(b)(3), Ariz. R. Evid., a statement against interest is admissible as a hearsay exception under specific circumstances. A statement against penal interest is admissible if the declarant is unavailable, the statement tended to subject the declarant to criminal liability such "that a reasonable person in the declarant's position would not have made the statement unless believing it to be true," and "corroborating circumstances clearly indicate the trustworthiness of the statement." *Id.* However, only those portions of a statement within a confession "'that are individually self-inculpatory'" may be admitted as statements against interests, not collateral hearsay statements. *See State v. Soto-Fong*, 187 Ariz. 186, 194, 928 P.2d 610, 618 (1996), *quoting Williamson v. United States*, 512 U.S. 594, 599 (1994).

¶11 Clinger contends Norris made statements against her own interest by admitting (1) she had purchased an airsoft gun for the oldest child and (2) she did not stop Clinger from using his airsoft guns to play games with the children. We agree with

the trial court's implicit determination that Norris's statements did not fall within the 804(b)(3) exception. The first statement did not tend to expose Norris to criminal liability, and the second was not a "statement" within the meaning of Rule 804(b)(3) but rather a summary of Norris's individual responses to questions posed during a police interview. At various points in her interview, Norris explained that even though Clinger would play "cops and robbers" and "Army" games with the children using the airsoft gun, he never actually shot any of them, although he did shoot in their direction.

¶12 When determining whether statements are admissible under Rule 804(b)(3), "[c]ourts must analyze each proffered statement separately to determine whether it is truly against penal interest." *State v. Nieto*, 186 Ariz. 449, 455, 924 P.2d 453, 459 (App. 1996). Like its federal counterpart, our rule "'does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory.'" *Id.*, *quoting Williamson*, 512 U.S. at 600-01. "To determine if a statement is truly against interest requires a fact-intensive inquiry of the surrounding circumstances and each declaration must be scrutinized to determine if it is self-inculpatory in light of the totality of the circumstances." *Id.*

¶13 When read in context, Norris's statements diminished her own responsibility for any child abuse because, if believed, they demonstrated that she had not knowingly allowed her children to be harmed by Clinger. *See* A.R.S. § 13-3623(B)(1) (specifying parent who knowingly permits children to be injured or placed in situation where they are endangered commits class four felony). And, although we acknowledge that some of those statements also admit facts that could support a charge of negligent

child abuse, the rationale for determining whether to admit such statements under Rule 804(b)(3) depends on whether the statements were so far against Norris's interests that she would not have uttered them unless she believed them to be true. *See id.* The trial court did not err in concluding that statements such as these, wherein the declarant self-servingly denies her own knowledge of any abuse to her children, were not so far against the declarant's interests as to be especially trustworthy. For this reason, and because Clinger has failed to specify with any particularity which of Norris's several statements he believes to have been inculpatory and admissible, we find the trial court did not abuse its discretion in excluding this evidence.

¶14 Even if the trial court erred in refusing to admit portions of the interview, we would find any such error to be harmless. *See Nieto*, 186 Ariz. at 455, 924 P.2d at 459 (erroneous ruling under Rule 804(b)(3) subject to harmless error analysis). Under the rule, "a statement that includes both incriminating declarations and corollary declarations that, taken alone, are not inculpatory of the declarant, must be separated and only that portion that is actually incriminating of the declarant admitted under the exception." *LaGrand v. Stewart*, 133 F.3d 1253, 1267-68 (9th Cir. 1998); *accord Soto-Fong*, 187 Ariz. at 194, 928 P.2d at 618. The arguably incriminating statements Norris made were that she knew Clinger shot at the children and that they possibly had been hit. Because these statements only corroborated Clinger's guilt, any error the trial court made in refusing to admit them was harmless beyond a reasonable doubt.[4]

[4]To the extent Clinger raises a separate argument that the trial court violated his right to due process by refusing to admit Norris's interview with police, we find the

Forensic Interviewers' Testimony

¶15 Clinger argues the trial court erred when it allowed one forensic interviewer to answer a juror's question about a statement made by Norris's child, N.R., and allowed another interviewer to testify to a statement made by M.C. because both statements were inadmissible hearsay. We review for an abuse of discretion a trial court's ruling on the admissibility of evidence over a hearsay objection. *State v. Chavez*, 225 Ariz. 442, ¶ 5, 239 P.3d 761, 762 (App. 2010).

¶16 A juror submitted a question to the judge for one forensic interviewer, asking whether N.R. had told her that he had been "shot by a BB gun." The trial court permitted her to answer, over Clinger's objection, in the affirmative. Additionally, the court overruled Clinger's hearsay objection regarding another forensic interviewer's testimony that M.C. had told her that his father had also shot the other three children.

¶17 Even assuming, without deciding, that the court erred by admitting these statements, we "'will not reverse a conviction if an error is clearly harmless.'" *State v. Green*, 200 Ariz. 496, ¶ 21, 29 P.3d 271, 276 (2001), *quoting State v. Doerr*, 193 Ariz. 56, ¶ 33, 969 P.2d 1168, 1176 (1998). "Error is harmless if we can say beyond a reasonable doubt that it did not affect or contribute to the verdict." *Doerr*, 193 Ariz. 56, ¶ 33, 969 P.2d at 1176. And the admission of hearsay is harmless when it is cumulative

---

argument waived. Although Clinger refers to a trial motion and transcript in support of this contention, a legal argument may not be incorporated into an appellate brief in this fashion; rather, it must be developed in the body of the opening brief as provided by Rule 31.13(c)(1)(vi), Ariz. R. Crim. P. *See State v. Walden*, 183 Ariz. 595, 605, 905 P.2d 974, 984 (1995) (holding "[a]rgument must be in the body of the brief" and striking text in appendix), *overruled on other grounds by State v. Ives*, 187 Ariz. 102, 927 P.2d 762 (1996).

to other evidence presented at trial. *See State v. Dickens*, 187 Ariz. 1, 19, 926 P.2d 468, 486 (1996).

¶18 All three children who testified at trial stated that Clinger had shot them and each of the other children, including N.R. And photographs of the children's injuries were admitted into evidence. Furthermore, a police officer testified about the kind of injuries that one could sustain after being shot with BBs from an airsoft gun, and the injuries he described are consistent with those documented in the photographs of the children. Therefore, any error in admitting the forensic interviewers' hearsay testimony was harmless beyond a reasonable doubt because it was cumulative to the in-court testimony of three eyewitnesses.

Conclusion

¶19 In light of the foregoing, we affirm Clinger's convictions and sentences.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge