

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

BLANCA RENEIS MONTANO,
Appellant.

No. 2 CA-CR 2013-0367
Filed April 29, 2015

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NOT FOR PUBLICATION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. CR20111269001
The Honorable Scott Rash, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Joseph L. Parkhurst, Assistant Attorney General, Tucson
Counsel for Appellee

The Carrillo Law Firm, PLLC, Tucson
By F. Michael Carrillo
Counsel for Appellant

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MEMORANDUM DECISION

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

ESPINOSA, Judge:

¶1 After a jury trial, Blanca Montano was convicted of intentional abuse of a child under the age of fifteen with death or serious physical injury likely, a class two felony. The trial court sentenced Montano to a slightly mitigated term of thirteen years' imprisonment. On appeal, she argues the evidence was insufficient to support her conviction, the trial court erred in precluding proffered medical records, and the state committed prosecutorial misconduct during cross-examination. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict. See *State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 2, 312 P.3d 123, 126 (App. 2013). Montano gave birth to D. in August 2010. In late February 2011, D. was hospitalized due to bloody diarrhea and fever. Two days later, she was moved to the Intensive Care Unit (I.C.U.) to obtain treatment for multiple blood infections, which caused her to enter a state of "septic shock." D. remained in the I.C.U. until early April 2011. Over the course of her two-month stay, D. contracted several additional life-threatening infections that required different courses of antibiotics. She acquired the infections "sequentially" – she would become infected, receive treatment, and then a new infection would arise. While D. was in I.C.U., Montano rarely left her hospital room.

¶3 D.'s infections were of particular concern to her doctors because most were found in her blood, and were either fecal- or

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water-borne.¹ The medical team sought to determine their cause by process of elimination. Several tests were conducted to ascertain whether the source of the infections was an internal issue, such as a preexisting medical condition.² The test results, however, revealed no indications of an underlying condition that could have caused multiple infections.

¶4 D.'s medical team also considered whether her infections were introduced externally, as a result of deviation from hospital hygiene protocols, or from patient-to-patient transfer. Ultimately, they concluded that was not the case because "[t]he type[,] . . . pattern and . . . frequency [of the infections] w[ere] not consistent with typical hospital-acquired infections." In individual cases, infections like D.'s are "relatively uncommon" in the pediatric I.C.U.; it is exceptionally rare, however, for a patient to acquire serial blood infections involving different organisms from patient-to-patient, or staff-to-patient transfer.³

¶5 Having found no "medical explanation for the number and type of [D.'s] infections," the hospital staff began to suspect someone was intentionally infecting D. by introducing bacteria into her central intravenous line (I.V.). They reached this conclusion because the I.V. offered a "direct route" by which fecal- or water-

¹D. was infected with Rotavirus, Salmonella, and Serratia, all fecal-borne, Pseudomonas Aeruginosa, water-borne, and Staphylococcus Aureus, skin-borne. Medical experts testified it is "very unusual" or "very uncommon" to find most of these organisms in a blood culture.

² During her stay at the hospital, D. underwent an echocardiogram, a diagnostic laparoscopy, a bone marrow biopsy, computerized axial tomography scans, magnetic resonance imaging, and immune deficiency tests, among others.

³D.'s infectious disease doctor testified that, prior to treating D., he had never seen a patient on the pediatric I.C.U. present with "all these kind[s] of infections."

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borne bacteria could enter the bloodstream,⁴ and it offered a plausible explanation as to how D. contracted repeated infections with “multiple[,] different bacteria” without any preexisting or underlying condition. Based on this suspicion, the hospital installed a video camera in D.’s hospital room.

¶6 Three days after the camera was installed, Montano attempted to obstruct its view by placing an alcohol wipe in front of the lens. Later that day, the camera revealed Montano emerging from the hospital bathroom and approaching D.’s crib with one hand hidden in a sweatshirt. While beside the crib, Montano “grab[bed] D[.]’s IV tubes,” triggering the I.V. alarm.⁵

¶7 The following day, a “patient care conference” was held to address concerns that Montano had been “intentionally putting things” into D.’s I.V. When confronted at the conference, Montano’s demeanor remained “generally flat,” and she was described as having no “emotional response” or “reaction” to the accusation that she was responsible for harming D. During the meeting, Montano admitted obstructing the camera lens, but stated it was because she was concerned about the infant’s “privacy.” After learning the hospital intended to notify Child Protective Services (CPS) of their suspicions, Montano responded, “I’m surprised that you haven’t called CPS before now.” As a result of the conference, Montano was prohibited from visiting D. and not allowed back in her room. D. did not acquire any new infections, all her existing infections resolved, and she was discharged from the hospital a few weeks later.

⁴Two doctors testified that it was highly unlikely that D.’s infections were being introduced through the mouth or nose because the mouth contains enzymes that are effective at killing bacteria.

⁵D.’s I.V.’s were connected to electronic pumps equipped with an alarm system. The alarm could be triggered, for instance, by “kinking” or “introducing air into the IV tubing,” or by “push[ing] a medication through the line” too quickly.

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¶8 On April 15, 2011, Montano was indicted for attempted first-degree murder of a minor, and child abuse with death or serious injury likely. The state also filed an allegation of dangerous crimes against children. Following a jury trial, Montano was convicted of the child abuse charge⁶ and sentenced to a slightly mitigated term of thirteen years imprisonment, after which she brought this appeal.

Insufficient Evidence

¶9 Montano first contends the trial court erred in denying her motion for acquittal pursuant to Rule 20, Ariz. R. Crim. P., arguing there “was insufficient evidence to support the jury’s guilty verdict.” She asserts the state failed to prove “any of the elements of child abuse pursuant to A.R.S. § 13-3623(A)(1).” We review the denial of a Rule 20 motion de novo, *State v. Parker*, 231 Ariz. 391, ¶ 69, 296 P.3d 54, 70 (2013), viewing the evidence and reasonable inferences in the light most favorable to sustaining the verdict, *State v. Borquez*, 232 Ariz. 484, ¶ 9, 307 P.3d 51, 54 (App. 2013).

¶10 A judgment of acquittal is appropriate only when there is no substantial evidence to support the conviction. Ariz. R. Crim. P. 20(a); *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). “Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant’s guilt beyond a reasonable doubt.” *Id.*; see also *State v. McCurdy*, 216 Ariz. 567, ¶ 14, 169 P.3d 931, 937 (App. 2007) (if reasonable minds could differ as to whether evidence establishes fact in issue, evidence is substantial). Both direct and circumstantial evidence are considered in determining whether substantial evidence supports a conviction, and if “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,” the case must be submitted to the jury. *State v. West*, 226 Ariz. 559, ¶¶ 16, 18, 250 P.3d 1188, 1191-92 (2011) (emphasis omitted), quoting *State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990).

⁶The attempted murder charge was withdrawn by the state and dismissed shortly before trial.

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¶11 To convict a defendant of child abuse under A.R.S. § 13-3623(A)(1), the state must prove that under circumstances likely to produce death or serious physical injury, the defendant intentionally or knowingly: (1) caused a child to suffer physical injury; (2) caused or permitted the person or health of the child to be injured while having care or custody of the child; or (3) caused or permitted the child to be placed in a situation where the child's person or health was endangered. *Cf. State v. Pena*, 209 Ariz. 503, 505, 104 P.3d 873, 875 (App. 2005) (sufficiency of evidence tested against statutorily required elements of offense).

¶12 Viewing the evidence in the light most favorable to the verdict, there was substantial evidence presented at trial from which reasonable jurors could have found Montano guilty of violating § 13-3621(A) beyond a reasonable doubt. *See West*, 226 Ariz. 559, ¶ 16, 250 P.3d at 1191. Several witnesses testified that D. suffered from numerous life-threatening infections, satisfying the "[u]nder circumstances likely to produce death or serious physical injury" element of the offense. § 13-3623(A). Montano does not dispute that D.'s injuries were life-threatening, but contends the state failed to prove a crime had been committed by failing to present any "actual evidence" as to the cause, timing, or manner in which D. contracted the infections. The record, however, refutes that claim.

¶13 The jury received evidence that D., an otherwise healthy infant, contracted a number of life-threatening blood infections while in the hospital. Several doctors testified this was extremely unusual, and after ruling out essentially every plausible medical cause and external source of the infections, D.'s medical team began to suspect that D. was being intentionally infected because that was the only logical conclusion remaining. They also determined that the infections were most likely introduced via D.'s central I.V. A reasonable juror could conclude that this evidence showed D.'s infections were acquired during her hospital stay and were caused by purposeful introduction of bacteria into her bloodstream via her I.V. *See West*, 226 Ariz. 559, ¶ 16, 250 P.3d at 1191. Thus, the jury received substantial evidence as to the timing, cause, and manner in which D.'s infections were contracted.

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¶14 Finally, there was substantial evidence that Montano was the source of the infections introduced through the I.V. line, causing life-threatening injury to D.'s person and health. The jury heard testimony that Montano was in D.'s room constantly, and that she often exhibited strange behavior and asked "bizarre" questions. She had to be repeatedly requested to stop putting blankets over the side of D.'s crib and closing the blinds, which interfered with staff observation of D. She was also described as detached, emotionless, and "not participating in D[.]'s care," which staff found unusual. Montano also shared with one nurse that she had not been "excited" about being pregnant with D.

¶15 Another nurse testified she had on one occasion seen Montano doing "something to the I.V. lines," and had "quickly got up out of [her] nursing chair, . . . opened the door[,] and [Montano] quickly sat back down." Then, a few days after the camera was set up, Montano was observed emerging from the hospital room bathroom, walking over to D.'s crib, and handling the I.V. lines. Finally, Montano admitted she deliberately covered the camera lens, and when confronted by hospital staff regarding their suspicions about her actions, her response was, "I'm surprised that you haven't called CPS before now."

¶16 Once Montano was barred from the room, D.'s existing infections cleared, she did not contract any new infections, and she was thereafter released from the hospital. In light of the evidence presented, a reasonable jury could find Montano intentionally caused D. to suffer from serious, life-threatening infections. Accordingly, the trial court properly denied Montano's motion for acquittal.

¶17 Montano also argues the trial court abused its discretion in denying her motion for new trial because "the verdict [was] against the weight of the evidence." See Ariz. R. Crim. P. 24.1(c)(1) (trial court may grant new trial if verdict contrary to law or weight of evidence). "A motion for new trial should be granted 'only if the evidence was insufficient to support a finding beyond a reasonable doubt that the defendant committed the crime.'" *Parker*, 231 Ariz. 391, ¶ 74, 296 P.3d at 71, quoting *State v. Landrigan*, 176 Ariz. 1, 4, 859

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P.2d 111, 114 (1993). We review the trial court's decision for abuse of discretion. *Id.* As explained above, sufficient evidence supported the jury's verdict; therefore, the trial court did not abuse its discretion in denying Montano's motion for new trial.

Preclusion of Medical Records

¶18 Montano next contends that the trial court committed fundamental error by precluding the use of two hospital admission documents to show she had told medical staff that she and her children "had just returned from Mexico" when the children became ill.⁷ Under fundamental error review, a defendant is not entitled to appellate relief except in rare cases involving error "'going to the foundation of the case,'" which takes away "'a right essential to [the defendant's] defense,'" and is "of such magnitude that the defendant could not possibly have received a fair trial.'" *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005), quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984).

¶19 At trial, Montano proffered the hospital admission documents at the start of her re-direct examination on the subject of having previously advised hospital staff that D. had been in Mexico shortly before being hospitalized. In response to the state's objection, Montano's counsel stated she was "not asking to admit [the documents] into evidence," but only "using them to refresh [Montano's] memory," to which the prosecutor replied, "we don't even know if her memory needs refreshing."

¶20 To prevail under fundamental error review, a defendant must establish that fundamental error exists and that the error caused him or her prejudice. *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. Montano has failed to prove any error, much less

⁷Montano acknowledges this issue was not raised below and concedes she is limited to fundamental error review. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) (fundamental error review applies when defendant fails to object to alleged trial error below).

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fundamental error. *See id.* ¶ 24. Though Montano argues that the records would have “refute[d] the State’s insinuation that [she] was fabricating, and refresh[ed her] memory about having told the hospital officials her children were in Mexico,” Montano testified to that effect, without the use of the documents. *See State v. Ortega*, 220 Ariz. 320, ¶ 33, 206 P.3d 769, 779 (App. 2008) (writing may be used to refresh witness’s memory when witness does not remember making statement). She now offers no relevant authority to support her contention that the trial court erred in precluding the documents when her memory needed no refreshing. *See Ariz. R. Crim. P.* 31.13(c)(1)(vi). Further, any insinuation by the state that Montano was fabricating was challenged by her testimony on re-direct, as well as refuted by D.’s infectious disease doctor’s earlier during trial. Montano has thus failed to demonstrate that fundamental, prejudicial error occurred during her trial in relation to the hospital documents. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 16, 185 P.3d 135, 140 (App. 2008).

Prosecutorial Misconduct

¶21 Montano last argues the prosecutor committed misconduct by “insinuating . . . Montano recently fabricated travel to Mexico with her children.” She contends “[t]he state knew full well” that she reported to hospital admissions personnel that she and her children had recently returned from Mexico, but still chose to “insinuat[e that] she had just made up an excuse for her child’s illness.”

¶22 At trial, D.’s infectious disease doctor testified that his “recollection” was that Montano had mentioned being in Mexico with her children the week before D. was hospitalized. Later, Montano testified she initially brought D. to the hospital because the child was not feeling well after returning from Mexico. During cross-examination, the prosecutor asked Montano why “[t]his is the first time anybody is hearing about [Mexico]” and why she had not mentioned it when interviewed by a police investigator, to which Montano responded, “no one asked before.” Though Montano promptly objected at trial to the state’s line of questioning, she did not object on the grounds of prosecutorial misconduct; we therefore

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review the claim only for fundamental error. *See State v. Rutledge*, 205 Ariz. 7, ¶¶ 29-30, 66 P.3d 50, 56 (2003) (objection on different ground at trial does not preserve prosecutorial misconduct claim on appeal); *see also State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008) (improper objection reviewed solely for fundamental error). Prosecutorial misconduct is fundamental error if it is “so egregious as to deprive the defendant of a fair trial.” *State v. Hernandez*, 170 Ariz. 301, 307, 823 P.2d 1309, 1315 (App. 1991).

¶23 Montano has failed to demonstrate how the prosecutor’s questions constituted misconduct, much less fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607 (burden on defendant to establish fundamental error and resulting prejudice). Nothing in the record suggests the state intentionally mischaracterized the evidence, and Montano offers no clarification or evidence to support her claim that “[t]he state knew full well” she reported her Mexico trip to D.’s medical staff. Aside from Montano’s testimony, the only other time the Mexico trip was mentioned over the course of the seven-day trial was during cross-examination of D.’s infectious disease doctor, and he was asked only one question on the subject. And Montano points to no evidence that the documentation she referred to at trial was in the state’s possession. Thus, it is entirely possible, if not likely, that the state’s alleged “mischaracterization” of the evidence was merely the result of oversight or lack of knowledge, *see Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984), and Montano has failed to demonstrate otherwise, *see Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. Accordingly, we find no fundamental error.⁸

⁸Montano also “requests to preserve the issue of a possible *Brady* violation” regarding the recent departure from the Tucson Police Department of “the lead detective” involved in her case. *Brady v. Maryland*, 373 U.S. 83 (1963). She argues the state violated Rule 15.1(f), Ariz. R. Crim. P., by failing to disclose “the reasons and circumstances surrounding her departure.” Because Montano’s requested relief is unclear and her potential claim was not presented below, we decline to address it. *See Ruesga v. Kindred Nursing Ctrs.*,

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Disposition

¶24 For the foregoing reasons, Montano's conviction and sentence are affirmed.

L.L.C., 215 Ariz. 589, ¶ 39, 161 P.3d 1253, 1264 (App. 2007) (appellate review ordinarily limited to theories raised below).