

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

AARON SHAUN AUTREY,
Appellant.

No. 2 CA-CR 2015-0470
Filed November 23, 2016

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NOT FOR PUBLICATION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 Pinal County
No. S1100CR201402698
The Honorable Kevin D. White, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Amy Pignatella Cain, Assistant Attorney General, Tucson
Counsel for Appellee

Salvador Phillips, PLLC, Phoenix
By Matt S. Hilscher, Delano M. Phillips, and Anthony G. Salvador
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MEMORANDUM DECISION

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

ECKERSTROM, Chief Judge:

¶1 Aaron Autrey appeals from his convictions and sentences for three counts of aggravated assault and two counts of child abuse. For the following reasons, we affirm.

Factual and Procedural Background

¶2 In May 2014, K.A. reported to the police that her husband, Autrey, had assaulted her twice within the past week. The police also learned that Autrey had twice assaulted K.A.'s son, T.H., in the preceding years. After a jury trial, Autrey was convicted of three counts of aggravated assault and two counts of child abuse. The court sentenced him to a combination of concurrent and consecutive prison terms totaling 14.5 years. Autrey appealed.

Sufficiency of the Evidence

¶3 Autrey first claims the court erred in finding there was sufficient evidence to convict him of child abuse as alleged in count three of the indictment. We review the sufficiency of the evidence de novo, and in our review we determine only whether a conviction is supported by substantial evidence. *State v. Pena*, 235 Ariz. 277, ¶ 5, 331 P.3d 412, 414 (2014). Substantial evidence is evidence that reasonable jurors could accept as sufficient to find the defendant guilty beyond a reasonable doubt. *State v. Miller*, 234 Ariz. 31, ¶ 33, 316 P.3d 1219, 1229 (2013). In making this determination, we view the facts in the light most favorable to upholding the jury's verdict. *State v. Cox*, 217 Ariz. 353, ¶ 22, 174 P.3d 265, 269 (2007).

¶4 Autrey's stepson, T.H., testified that in December 2013, Autrey came into his room, pushed him onto the bed, sat on top of him, and strangled him for "[a]bout three or four seconds."

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According to T.H., Autrey only released him when his mom entered the room and “got [Autrey] off of [him].” Autrey contends the evidence was insufficient to show he committed child abuse under A.R.S. § 13-3623(A) because the circumstances were not “likely to produce death or serious physical injury.” He contends that he only strangled T.H. for three or four seconds, and the state’s expert testified that a person would only die from a lack of oxygen after four or five minutes.

¶5 The term “likely” in § 13-3623(A) means that death or serious physical injury is “probable,” and not merely “possible.” *State v. Johnson*, 181 Ariz. 346, 350, 890 P.2d 641, 645 (App. 1995). However, while the expert testimony established that death was not likely to occur from three or four seconds of strangulation, the expert also referred to a number of other serious injuries that may result from strangulation. See § 13-3623(F)(5) (including “serious impairment of health” in definition of “[s]erious physical injury”). Furthermore, a reasonable juror could, based on common sense and experience, conclude beyond a reasonable doubt that an adult man strangling an eleven-year-old child was likely to cause a serious physical injury. See *State v. Aguilar*, 169 Ariz. 180, 182, 818 P.2d 165, 167 (App. 1991). The evidence was therefore sufficient to convict Autrey of child abuse.

Other-Act Evidence, Prosecutorial Misconduct

¶6 Autrey next argues the trial court erred in admitting several items of other-act evidence. He also claims the state engaged in a pattern of prosecutorial misconduct. Autrey concedes that he did not raise these issues in the trial court and has therefore forfeited review absent fundamental, prejudicial error. See *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005).

¶7 As to both of these issues, Autrey has not explained how the alleged error was fundamental, nor has he explained how it resulted in prejudice to his case. Accordingly, he has not met his burden of demonstrating fundamental, prejudicial error. See *id.* ¶ 20.

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Comment on Defendant's Silence

¶8 Autrey claims the state improperly commented on his assertion of his right to remain silent. At trial, Autrey testified that his wife had been physically violent toward him. On cross-examination, the state asked if he had reported any of these incidents of violence to the police. Autrey argues these questions constituted commentary on his right to remain silent. But these questions were not commenting on Autrey's assertion of his right to remain silent when questioned by police, but rather a comment on Autrey's decision not to contact law enforcement and report the alleged incidents of violence. "The prosecutor's questioning about why appellant had not told the story at that time was not a comment upon his silence but proper impeachment based upon what he had said." *State v. Robinson*, 127 Ariz. 324, 328, 620 P.2d 703, 707 (App. 1980). The prosecutor's questions, therefore, did not constitute improper comment on Autrey's assertion of his right to remain silent.

Disposition

¶9 For the foregoing reasons, we affirm Autrey's convictions and sentences.