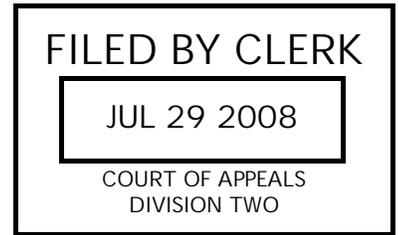


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)
)
 Petitioner,)
)
 v.)
)
 HON. STEPHEN C. VILLARREAL,)
 Judge of the Superior Court of the State)
 of Arizona, in and for the County of)
 Pima,)
)
 Respondent,)
)
 and)
)
 TODD GLICK,)
)
 Real Party in Interest.)

2 CA-SA 2008-0013
DEPARTMENT B

MEMORANDUM DECISION
Not for Publication
Rule 28, Rules of Civil
Appellate Procedure

SPECIAL ACTION PROCEEDING

Pima County Cause No. CR20074070

JURISDICTION ACCEPTED; RELIEF GRANTED

Frank J. Cassidy, Marana Town Attorney
By Jane Fairall

Marana
Attorneys for Petitioner

Leonardo & Roach, L.L.C.
By Nathan Leonardo

Tucson
Attorneys for Real Party in Interest

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

¶1 In this special action, petitioner State of Arizona challenges the respondent judge's ruling of January 17, 2008, vacating on appeal the Marana Municipal Court convictions of real party in interest Todd Glick on two charges of endangering the life of a minor by neglect or abuse in violation of A.R.S. § 13-3619.

¶2 We accept jurisdiction and grant relief. We do so, first, because the issue presented, concerning the meaning and proper interpretation of § 13-3619, is a pure question of law, *see, e.g., Uhlig v. Lindberg*, 189 Ariz. 480, 481, 943 P.2d 840, 841 (App. 1997) (accepting special action jurisdiction appropriate when recurring issue “can be decided on legal principles and statutory interpretation rather than factual resolutions”), *quoting Lee v. Superior Court*, 173 Ariz. 120, 121, 840 P.2d 296, 297 (App. 1992); second, because we conclude the respondent judge applied an incorrect legal standard in overturning Glick's convictions and thus abused his discretion, *see* Rule 3(c), Ariz. R. P. Spec. Actions; *Althaus v. Cornelio*, 203 Ariz. 597, ¶ 4, 58 P.3d 973, 974 (App. 2002) (court abuses discretion by committing error of law); and, finally, because the state lacks an adequate remedy by appeal, *see* Rule 1(a), Ariz. R. P. Spec. Actions, “because the matter originated in [municipal] court and was appealed to the superior court.” *Lee*, 173 Ariz. at 121, 840 P.2d at 297; *accord State v. Hantman*, 204 Ariz. 593, ¶ 2, 65 P.3d 974, 975 (App. 2003); *see also* A.R.S. §§ 22-371(A), 22-375(B).

Facts and Background

¶3 Although we review issues of law de novo, we are “bound by the [trial court's] findings of fact unless the findings are clearly erroneous.” *Mack v. Cruikshank*, 196 Ariz.

541, ¶ 6, 2 P.3d 100, 103 (App. 1999). In December 2006, witnesses observed Todd Glick and a female companion, both in an apparent state of extreme intoxication, having dinner in a Marana restaurant. With the couple were Glick's three-year-old daughter and five-year-old son. Three of the five witnesses who later testified at trial had seen Glick inside the restaurant: Andrew Weissmuller, then a server at the restaurant; and Kelly Cooper and his son Jason, who were eating dinner at the restaurant with their wives.

¶4 Having observed Glick and some "commotion" he created, Kelly Cooper had concluded Glick was drunk. Thus, when Cooper saw Glick and his girlfriend preparing to leave the restaurant with the children, he stepped outside while Glick was disputing then paying his bill. Believing neither Glick nor his girlfriend was in any condition to drive, Kelly Cooper intended "to confront Mr. Glick and at least try and negotiate something other than hi[s] driving away." Kelly Cooper was soon joined by Jason and their wives, and together the Coopers made sustained efforts to dissuade Glick and his companion from attempting to drive in their inebriated state. At some point, either Glick or his girlfriend placed the children in the back seat of Glick's large sport utility vehicle.

¶5 Indignant at the Coopers' intervention, Glick's girlfriend eventually left on foot, "sa[ying] she was going home." For perhaps fifteen minutes or longer, the Coopers continued to talk and negotiate with Glick and suggest alternatives to his driving with his children in his vehicle. Glick not only refused the Coopers' various offers to drive him and his children home or to call a taxi for them but, as they conversed, Glick continued his

efforts to put his children into their car seats, buckling his daughter into hers and attempting to fasten his son's car seat or seat belt.

¶6 When, finally, despite the Coopers' prolonged efforts to deter him, Glick still seemed determined to drive away with his children, Kelly Cooper called 911. Two of the Marana police officers dispatched to the scene testified at trial. Both testified that Glick had exhibited a number of signs and symptoms of intoxication and had appeared to be impaired. Glick was arrested and booked into jail, and the children were released to the custody of their mother.

¶7 Glick was charged with two counts each of contributing to the dependency of a minor, in violation of A.R.S. § 13-3613, and endangering the life of a minor, in violation of A.R.S. § 13-3619. At the conclusion of the evidence, the trial court found him guilty under § 13-3619 but not guilty under § 13-3613, which the court deemed "kind of a lesser included" offense of endangerment under § 13-3619. The court placed Glick on supervised probation for twelve months, ordered him to undergo "an alcohol evaluation," and suspended execution of a sixty-day jail term provided Glick successfully completed his probation.

¶8 The partial record the parties have furnished contains only the trial transcript and the respondent's minute entry ruling of January 17, 2008. In that ruling, the respondent found that the officers had lacked probable cause to arrest Glick for a violation of § 13-3619 and that the evidence at trial was insufficient to support a finding of guilt on that charge.

The respondent therefore ordered Glick’s convictions vacated. The state seeks special action relief from that ruling.

Discussion

¶9 The statute Glick was convicted of violating, § 13-3619, is entitled, “Permitting life, health or morals of minor to be imperiled by neglect, abuse or immoral associations; classification.” It provides:

A person having custody of a minor under sixteen years of age who knowingly causes or permits the life of such minor to be endangered, its health to be injured or its moral welfare to be imperiled, by neglect, abuse or immoral associations, is guilty of a class 1 misdemeanor.

The trial court did not make discrete factual findings but, when asked to explain the basis for its ruling, stated it found that Glick “was so intoxicated that that in itself was what was endangering those kids and based on his conduct inside the restaurant, you know, anything could have happened to a three year old and a five year old.”

¶10 The state argues the evidence at trial showed Glick’s degree of intoxication and resulting inability to provide appropriate supervision “caus[ed] the children’s lives to be endangered *and* their moral welfare to be imperiled by his neglect.” (Emphasis added.) Glick argues “[t]here was no evidence that the children’s lives were in danger and the children were not injured in any way. Thus, the court can only have found that Mr. Glick imperiled the children’s ‘moral welfare’ . . . by neglect or abuse.” But, because the evidence did not show, and the parties have not explained, how the “moral welfare” of these young children was imperiled by their father’s extreme intoxication and because there was no

evidence suggesting the children had been injured, we share the trial court's apparent view that the only offense applicable on these facts was the first of the three alternative ways a person can violate § 13-3619—by knowingly endangering the children's lives.

¶11 Without the parties' memoranda submitted on appeal or any explanation of the respondent judge's reasoning, we are left to surmise that the respondent found Glick's conduct had not in fact "endangered" his children's lives, leading the respondent to find in turn both insufficient evidence to sustain the convictions and a lack of probable cause for the arrest. The legal issue presented on these facts, as we perceive it, is what our legislature intended the term "endangered" to mean. *See State v. Korzep*, 165 Ariz. 490, 493, 799 P.2d 831, 834 (1990) (chief goal of statutory interpretation is determining and implementing legislative intent). On that definition hinges the determination whether Glick's conduct and state of inebriation, as described in the largely undisputed testimony of five witnesses, met the statutory definition of endangerment.

¶12 We have found only two reported decisions involving convictions under § 13-3619. Both were decided in 1965 under A.R.S. § 13-842, which was later renumbered as § 13-3619.¹ *See State v. Hunt*, 2 Ariz. App. 6, 406 P.2d 208 (1965); *State v. Carpenter*, 1 Ariz. App. 522, 405 P.2d 460 (1965). In neither *Hunt* nor *Carpenter* was the definition of "endangered" at issue. The term has been defined, however, in the context of other

¹According to *State v. Carpenter*, 1 Ariz. App. 522, 528 n.7, 405 P.2d 460, 466 n.7 (1965), § 13-842 was first enacted by the Territorial legislature "as § 1, Chapter 12, Laws of 1907." Renumbered as § 13-3619 effective October 1978, *see* 1977 Ariz. Sess. Laws, ch. 142, § 99, the statute has undergone only minor changes since its original enactment.

Arizona statutes in which it appears—notably, A.R.S. §§ 13-1201 (creating crime of endangerment) and 13-3623 (creating crime of child abuse). For example, in *State v. deBoucher*, 135 Ariz. 220, 227, 660 P.2d 471, 478 (App. 1982), which arose from a child-abuse prosecution under § 13-3623, this court rejected a “claim[] that the term ‘endangered’ is unconstitutionally vague.” Instead, we ruled, “[t]he term ‘endangered’ is sufficiently clear to allow members of society to comprehend their legal duty.” *deBoucher*, 135 Ariz. at 227, 660 P.2d at 478. Further, we held, the trial court had not erred in refusing to give a proposed instruction defining the term “endanger” because “it is a term of ordinary significance.” *Id.* at 226, 660 P.2d at 477.

¶13 More recently, in *State v. Mahaney*, 193 Ariz. 566, 975 P.2d 156 (App. 1999), an appeal from a conviction for negligent child abuse, Division One of this court considered the meaning of the term “endangered” as used in § 13-3623(C) (now subsection (B)).² The court first noted the general rule of statutory construction that, unless the legislature clearly intended otherwise, “we give the words used in statutes their plain and ordinary meaning.” *Mahaney*, 193 Ariz. 566, ¶ 12, 975 P.2d at 158. Looking to dictionary definitions for guidance in determining the ordinary meaning of the term “endanger,” the court concluded that to endanger a child means to expose the child merely to the possibility of harm. *Id.* ¶ 15. Had our legislature “intended to prohibit probable harm rather than

²The subsections referred to in *Mahaney* as (B) and (C) of § 13-3623 became current subsections (A) and (B), following a 2000 amendment to the statute. *See* 2000 Ariz. Sess. Laws, ch. 50, § 4.

possible harm,” the court wrote, “it would clearly have said so,” *id.*, as it had done in § 13-3623(B) (current subsection (A)).

¶14 The *Mahaney* court also considered, and contrasted, the legislature’s use of the term in § 13-1201, defining the crime of endangerment. Section 13-1201 provides: “A person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury. . . . Endangerment involving a substantial risk of imminent death is a class 6 felony. In all other cases, it is a class 1 misdemeanor.” The legislature’s addition of the qualifying phrase “with a substantial risk of imminent death or physical injury” in § 13-1201, the court held, “demonstrates that the term ‘endanger,’ standing alone, does not mean that the risk of harm to which one is exposed must be substantial or the potential danger immediate.” *Mahaney*, 193 Ariz. 566, ¶ 16, 975 P.2d at 159. We agree with the *Mahaney* court and thus hold that, under § 13-3619, a person endangers the life of a child by creating a risk or a possibility of harm such that death could potentially result. Actual harm need not have occurred, and the risk of harm need be neither substantial nor imminent. *See Mahaney*, 193 Ariz. 566, ¶ 16, 975 P.2d at 159.

¶15 Here, the evidence supported the trial court’s finding that Glick was so intoxicated and impaired that the lives of his three-year-old daughter and five-year-old son were indeed potentially at risk. Inside the restaurant, Glick and his girlfriend were observed to be “extremely drunk” and generally creating “a commotion.” At one point, Glick attracted the attention of “[e]verybody in the restaurant” by knocking a plate off the table to the floor, where it “[broke] into a thousand pieces.” Server Andrew Weissmuller, who

had seen Glick in the restaurant numerous times before this incident, described Glick's gait on this occasion as unsteady and his eyes as "like halfway closed."

¶16 On a trip to the restroom, Glick was noted to have difficulty standing, walking, and maintaining his balance. At another point, Glick's face actually fell into his plate of food where it remained "planted" for perhaps as long as a minute, during which his children were calling out, "Daddy, Daddy, wake[]up." Their server checked on Glick "[t]o see if he was conscious," then removed the alcohol that had been served to Glick and his girlfriend. Glick's companion, too, "fell on [her] plate" at one point, had her head on the table, and was "grinding her teeth on the plate."

¶17 Later, outside the restaurant, while holding his daughter in his arms and talking to the Coopers, Glick lost his balance, stumbled backwards, "and fell into a glass window." Despite his slurred speech, wobbly balance, stumbling or staggering gait, and obvious impairment, Glick steadfastly resisted all of the Coopers' entreaties and sustained efforts to persuade him not to drive. With his daughter already secured in her car seat, Glick was in the act of trying to buckle his son into his car seat or seat belt when police officers arrived, and he acknowledged to one of the officers that he had indeed been intending to drive away with his children in his vehicle.

¶18 Applying the definition of "endanger" used in *Mahaney*, we hold that Glick's state of extreme intoxication, his clear and repeatedly stated intention to drive himself and his children in that condition, and the steps he was actually taking in preparing to do so, created a potential risk to the lives of those children, endangering them within the meaning

of § 13-3619. The officers thus had probable cause to arrest Glick, and the evidence at trial was sufficient to sustain his convictions.

Disposition

¶19 A person who knowingly permits the life of a minor to be endangered has committed a misdemeanor offense, as described in § 13-3619, even when the risk of death created by his or her conduct was neither substantial nor imminent. Accordingly, we conclude the state presented sufficient evidence to support the trial court's judgment that Glick was guilty of that offense. We therefore grant the relief requested by the state, vacate the respondent's order of January 17, 2008, and reinstate the judgment of convictions and sentences imposed by the Marana Municipal Court.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

PHILIP G. ESPINOSA, Judge

GARYE L. VÁSQUEZ, Judge