

No. CA-16-001

Pascua Yaqui Court of Appeals

Pascua Yaqui Tribe, Appellee

vs.

Kathy Molina, Appellant

Appeal of a Tribal Court Order in Case No. CR-15-214, the Honorable Cornelia Cruz presiding.

Mathew Hobbins Pascua Yaqui Public Defender, 7474 S. Camino de Oeste, Tucson AZ 85757 for the Appellant.

G. Allen Osburn, Office of the Prosecutor of the Pascua Yaqui Tribe, 7777 Camino Huivisim, Tucson, AZ for the Appellee.

Opinion

Summary

The issue before this Court is whether the Tribal Court erred in determining that the evidence presented to the jury by the Tribe was sufficient to find Defendant guilty of endangerment beyond a reasonable doubt. This Court holds that it did not.

I. Background

Defendant seeks review of the Tribal Court’s denial of her Motion for Judgment of Acquittal Notwithstanding the Jury Verdict and “secondarily appealing” a Motion for New Trial for a Directed Verdict she asserts was “denied by implication”. Defendant was charged by criminal complaint with Endangerment (Count 1), a violation of 4 PYTC § 1-180 and Care of Dependent Persons (Count 2), a violation of 4 PYTC § 1-70. According to the facts adduced at trial, Defendant and her sister, Maria Pilar Molina, had been drinking and were involved in an altercation regarding the use of an EBT card. Defendant went to sleep in a room with her

grandchildren, who were sleeping in a bed, and Defendant's infant (a four-month-old), who was sleeping on the floor with Defendant. The infant began to cry, and Maria's uncle awakened Maria to check on the infant. Maria went into the room where Defendant and the children were sleeping. Maria tried to open the door to the bedroom, and a dresser was behind the door. Defendant was still sleeping when Maria gained entry into the room, but she awakened and became upset with Maria. According to Maria's testimony, Defendant struck Maria and knocked her to the ground. When Maria got up from the floor, Defendant had left the home. Maria fed the infant, and the infant went back to sleep.

Police were notified of a female requesting police and crying in the street. An officer located Defendant walking down the street, who stated Maria assaulted her because she would not give her an EBT card to buy beer. The officer went to the home where Defendant and the children had been sleeping. He observed a blanket and a pillow on the floor near the "foot" of the bed in the room where Defendant had been sleeping with the infant.

After the Tribe rested its case, Defendant requested a directed verdict, which was denied. Defendant was found guilty of Count 1, endangerment, and not guilty of Count 2, care of dependent persons. Defendant filed a Motion for Judgment of Acquittal Notwithstanding the Verdict alleging the Tribe did not present substantial evidence to support a conviction for endangerment at trial, and the jury was persuaded to convict based upon the Tribe's closing argument, which appealed to the jurors' passions or fears. Defendant's motion was denied by the Tribal Court judge.

II. Standard of Review

The standards for ruling on pre-verdict and post-verdict motions for judgment of acquittal are the same; on either motion, the reviewing court must determine whether the record contains substantial evidence to warrant a conviction. See *State v. West*, 226 Ariz. 559, 250P.3d 1188 (2011).

West provides:

This question of sufficiency of the evidence is one of law, subject to de novo review on appeal. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993) (“We conduct a de novo review of the trial court's decision [on a Rule 20 motion], viewing the evidence in a light most favorable to sustaining the verdict.”). *Id.* at 62.

On all motions for acquittal, the Court must determine “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *West*, 226 Ariz. at 562 (citing *State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). “Substantial evidence,’ ... is such proof that ‘reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.’ ” *West*, 226 Ariz. at 562 (citing *Mathers*, 165 Ariz. at 67, 796 P.2d at 869 (quoting *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980)). Both direct and circumstantial evidence should be considered in determining whether substantial evidence supports a conviction. See *West*, 226 Ariz. at 562 (citing *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996)).

III. Endangerment

Endangerment occurs when a person “recklessly endangers another person with a substantial risk of imminent death or physical injury or creates such a risk but is unaware of such risk solely by reason of voluntary intoxication...”. See 4 PYTC § 1-180 (A) & (B). This statute is similar to A.R.S. § 13-1201, which provides, “A person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury.” During the reading of the jury instructions, the Tribal Judge defined endangerment as follows:

A person commits endangerment if they recklessly endanger another person with a substantial risk of imminent death or physical injury. In order to find Miss Molina guilty of the charge of endangerment, you must find beyond a reasonable doubt that she disregarded a substantial risk that her conduct would cause imminent death or physical injury and that her conduct did in fact create a substantial risk of death or physical injury.

The court of appeals has held that a defendant places a person in “substantial risk” if he places the victim “in actual substantial risk of imminent death.” *State v. Doss*, 192 Ariz. 408, 411 ¶ 10, 966 P.2d 1012, 1015 (App. 1998); *State v. Morgan*, 128 Ariz. 362, 367, 625 P.2d 951, 956 (App. 1981).

Defendant asserts that a person commits endangerment when (1) Defendant disregards a substantial risk that her conduct would cause imminent death or physical injury, and (2) her conduct in fact created a substantial risk of imminent death or physical injury. In the motion, defense counsel stated that he made an oral motion on the record for a directed verdict, judgment of acquittal, which was denied. He stated that the “basis for counsel’s motion for directed verdict, renewed here, was that the tribe failed to provide the substantial evidence required under Arizona Rule of Criminal Procedure 20, such that a rational trier of fact could find beyond a reasonable doubt that Kathy Molina committed the crime of Endangerment.”

It is Defendant’s contention that the factual basis for proving Defendant disregarded a substantial risk that her conduct would cause imminent death or physical injury was that she “passed out, rolled over onto E.M. (4-month-old child) while in a barricaded room.” Defendant states that no evidence was presented proving that Defendant had rolled over onto the child. Defendant’s motion notes that her sister, Maria, testified repeatedly that she saw Defendant sleeping next to the child and not on top of her and that she saw no signs of danger or health risk to the children in the room. Defendant further notes that Maria stated she had no cause for concern for the children at any point. Insofar as the barricaded room is concerned, Defendant asserts that Maria and Defendant had been fighting and it was reasonable that the door was barricaded to keep Defendant’s “aggressive sister out of her room, and not to keep her children in.” In addition, there was no evidence presented to prove the danger or risk caused by the behavior alleged.

Defendant is correct that the aforementioned statements were part of the testimony the jurors were privy to, but the jurors were also given other facts or testimony that they undoubtedly considered to come to a conviction. The testimony indicates that Defendant had been drinking “all night” and was intoxicated. Testimony indicates that Defendant fell asleep in

close proximity to an infant on a floor, which the jury apparently believed was bare and contained no mattress for sleeping. Additionally, the record shows that at one point in the night, the infant who was next to Defendant began to cry. The record shows that Defendant did not wake up when the infant next to her began crying and that the infant had to be attended to by Maria, who was in another room and was informed by an uncle that he heard the infant crying. The standard of review in this case requires this Court to determine whether the record contained substantial evidence to warrant a conviction of endangerment. It is reasonable that a trier of fact could have weighed the evidence showing that an intoxicated adult sleeping next to an infant (who at one point began crying loudly enough for adults in another room to hear yet did not disturb the intoxicated Defendant) could succumb to actions that could undoubtedly create a substantial risk of imminent death or physical injury.

II. Closing argument

Defendant further states that the jury was persuaded to convict based upon the Tribe's closing argument, which appealed to the jurors' passions or fears. Defendant asserts that his argument is based on the Tribe making references in closing argument regarding the infant's inability to "speak for herself" or be present to "speak for herself." Defendant provides that the jury could not have convicted Defendant of endangerment based on the evidence; therefore, "the only apparent explanation implicates improper emotional considerations and prejudices involving crimes against children and alcohol."

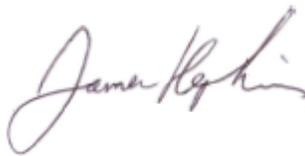
Prosecutors have "wide latitude in their closing arguments to the jury." *State v. Edmisten*, 220 Ariz. 517, 524 (2009) citing *State v. Comer*, 165 Ariz. 413, 426, 799 P.2d 333, 346 (1990). Appellate courts will not reverse a conviction because of a prosecutor's improper comments during closing argument unless there's a "'reasonable likelihood' that the 'misconduct could have affected the jury's verdict.'" *Edmisten*, 220 Ariz. at 525, citing, *State v. Newell*, 212 Ariz. 389, ¶ 67, 132 P.3d 833, 847 (2006).

There is no indication that the prosecutor's comments during closing argument affected the jury's verdict. Testimony was elicited from Maria that conflicted with the testimony of the Pascua Yaqui Police officer, and the jury chose to believe the police officer. This Court will not

second-guess the credibility determinations made by the jury. The deference which appellate courts accord the trier of fact, whether judge or jury, to make determinations based on assessments of the credibility of witnesses is elementary. *In re Pima County Juvenile Action No. 63212-2*, 129 Ariz. 371,631 P.2d 526 (1981). Although Defendant asserts that the evidence was insufficient to convict Defendant, there is nothing that indicates that the jury convicted based upon the Tribe's comments regarding the infant's inability to speak for herself. The possibility that the Tribe's argument influenced the jury's verdict was at best remote.

For the above mentioned reasons, the ruling of the Tribal Court is affirmed.

So ORDERED this 4th day of November, 2016.



Chief Justice Hopkins