

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000074-001 DT

07/09/2012

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
K. Waldner
Deputy

STATE OF ARIZONA

KENNETH M FLINT

v.

MICHAEL JOSEPH MALEK (001)

THOMAS M HOIDAL

REMAND DESK-LCA-CCC
SCOTTSDALE MUNICIPAL COURT

RECORD APPEAL RULING / REMAND

Lower Court Case Number M-751-CR-2011-008728.

Defendant-Appellant Michael Joseph Malek (Defendant) was convicted in Scottsdale Municipal Court of assault. Defendant contends the evidence was not sufficient to support the conviction and the trial court abused its discretion in admitting hearsay. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On March 19, 2011, Defendant was cited for assault, A.R.S. § 13-1203(A)(3) and disorderly conduct, A.R.S. § 13-2904(A)(1). At trial, Alexis Mae Weber testified she was 14 years old when the events took place on March 19, 2011. (R.T. of Oct. 26, 2011, at 17.) The house belonged to Lisa Weber (Alexis' mother), and Lisa, Alexis, Weston Jr. (Alexis' younger brother), and Corey Felter (Alexis' older half-brother) lived there. (*Id.* at 17, 30, 31.) Lisa and Weston Weber, Sr., were divorced, and Defendant was her mother's boyfriend for a number of years, but he did not live there. (*Id.* at 17-18, 20, 29, 31, 59.) Alexis, her boyfriend Ryan Miller, and Weston Jr. arrived home about 2:30 p.m., and her mother and Defendant arrived about 10 minutes later. (*Id.* at 18-19, 30.) After a while, Alexis heard her mother screaming in her bedroom, which made Alexis think her mother was getting hurt, so she and Weston Jr. went there to see what was happening. (*Id.* at 18, 21, 35-36, 60-61, 65.) When she got to the bedroom, she found the door was locked, so she said something to the effect of "let me in" or "unlock the door." (*Id.* at 22-23, 36-37, 61.) Defendant unlocked the door, put his two hands on Alexis' shoulders, and pushed her back so that she hit the wall behind. (*Id.* at 23-25, 38, 56-57, 61-63.) While doing this, Defendant appeared to be angry. (*Id.* at 24.) This made Alexis feel scared. (*Id.* at 25, 27, 38, 45.) Defendant then slammed the door and locked it again. (*Id.* at 26.)

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On cross-examination, Alexis acknowledged both her parents told her not to have anything to do with Defendant, and that Defendant was not supposed to be in that house. (R.T. of Oct. 26, 2011, at 30, 46.) Pursuant to the custody arrangement from the domestic relations proceedings, Alexis split her time between her mother and her father. (*Id.* at 51–52.)

During redirect by the prosecutor, the following exchange took place:

Q. [Mr. Hoidal] also brought out that you have been told by both your mother and your father not to have anything to do with Michael Malek.

A. Yes.

Q. Is it also true that Michael Malek had been ordered to have not contact with you.

A. Yes.

MR. HOIDAL: Objection; lack of foundation.

THE COURT: Okay. Do you want to lay more foundation?

Q. BY MS. THOMSEN: Are you aware of any documents that restrict Michael Malek's contact with you?

MR. HOIDAL: Objection; hearsay.

THE COURT: And overruled.

THE WITNESS: Yes. From—

Q. BY MS. THOMSEN: And what documents are those that prevents [*sic*] Michael Malek from having contact with you?

MR. HOIDAL: Objection; hearsay.

THE COURT: Overruled.

THE WITNESS: Can you explain?

Q. BY MS. THOMSEN: What paperwork, or . . . what are you aware that exists that says Michael Malek cannot have contact with you?

A. Yes.

MR. HOIDAL: Objection; hearsay.

THE COURT: Overruled. You may answer.

THE WITNESS: Yes.

Q. BY MS. THOMSEN: What is it that says Michael Malek can't have contact with you?

MR. HOIDAL: Objection; hearsay; confrontation.

THE COURT: Okay. Overruled.

THE WITNESS: I, like, I know about it, but I don't know what it's called.

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Q. BY MS. THOMSEN: All right. Is it a—is it a paper, or is it just somebody's told you?

A. Oh, no, it's a paper with—within the court.

Q. Okay.

A. The family court.

Q. Okay. All right. Thank you.

MR. HOIDAL: Objection; hearsay.

THE COURT: Okay. Overruled.

MS. THOMSEN: All right.

THE COURT: Move on.

MS. THOMSEN: Thank you.

Q. BY MS. THOMSEN: Okay. And you've also testified that Michael Malek's not supposed to be at you mother's house?

A. Yes.

Q. All right. And did that—was that one of your concerns with Mr. Malek being there when you were there?

A. Yes.

(R.T. of Oct. 26, 2011, at 54–55.)

Weston Jr. and Officer Joseph Rohr testified, and then the State rested. (R.T. of Oct. 26, 2011, at 58, 67, 74.) Lisa Weber, Defendant, and Officer Kevin Reynolds testified, and then Defendant rested. (*Id.* at 75, 99, 113, 114.) After hearing arguments of the attorneys, the trial court found Defendant guilty of assault and not guilty of disorderly conduct. (*Id.* at 137.) The trial court then imposed sentence. (*Id.* at 142–43.) On November 3, 2011, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES.

A. *Was the evidence sufficient to support the verdict.*

Defendant contends the evidence was not sufficient to support the guilty verdict for assault. In addressing the issue of the sufficiency of the evidence, the Arizona Supreme Court has said:

We review a sufficiency of the evidence claim by determining “whether substantial evidence supports the jury’s finding, viewing the facts in the light most favorable to sustaining the jury verdict.” Substantial evidence is proof that “reasonable persons could accept as adequate . . . to support a conclusion of defendant’s guilt beyond a reasonable doubt.” We resolve any conflicting evidence “in favor of sustaining the verdict.” “Criminal intent, being a state of mind, is shown by circumstantial evidence. Defendant’s conduct and comments are evidence of his state of mind.”

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State v. Bearup, 221 Ariz. 163, 211 P.3d 684, ¶ 16 (2009) (citations omitted). When considering whether a verdict is contrary to the evidence, this court does not consider whether it would reach the same conclusion as the trier-of-fact, but whether there is a complete absence of probative facts to support its conclusion. *State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988).

Defendant was convicted of assault, which is defined as follows:

A person commits assault by . . . [k]nowingly touching another person with the intent to injure, insult or provoke such person.

A.R.S. § 13-1203(A)(3). Defendant admitted touching Alexis. (R.T. of Oct. 26, 2011, at 104.) The only issue then was whether Defendant did so with the intent to injure, insult, or provoke her. Alexis testified she was concerned her mother was being injured. From Defendant's actions, it appeared he had no interest in determining why Alexis was there or why she was so concerned, and instead shoved Alexis across the hall, slammed the door, and locked it, which was insulting behavior on Defendant's part. This evidence would support the trial court's finding that Defendant intended to insult Alexis, thus the evidence was sufficient to support the verdict.

B. *Did the trial court abuse its discretion in admitting evidence about Defendant's having no contact with Alexis.*

Defendant contends the trial court abuse its discretion in admitting evidence about his having no contact with Alexis, claiming that evidence was hearsay. For several reasons, this Court concludes the trial court did not abuse its discretion.

First, Defendant's attorney opened the door to this testimony. On cross-examination, Defendant's attorney got Alexis to acknowledge that both her parents had told her not to have anything to do with Defendant. (R.T. of Oct. 26, 2011, at 30.) Alexis testified Defendant was not supposed to be in the house, but her mother nonetheless had brought him to the house that day. (*Id.* at 46.) Finally, in response to Defendant's attorney's questions, Alexis testified she split her time between her mother's home and her father's home pursuant to a custody arrangement in the domestic relations proceedings. (*Id.* at 51-52.) This raised the question: If Defendant was not supposed to be in Lisa's house but Lisa had brought him to the house, what was it that ordered Defendant not to be in that house? The inference produced by the questions asked by Defendant's attorney and answered by Alexis was there was some order from the domestic relations court stating Defendant was not to have contact with Alexis.

Second, it appears the testimony does not fit the definition of hearsay, and that Defendant's attorney did not make the proper objections. Hearsay means an assertion, provided the witness intended it to be an assertion, that is offered in evidence to prove the truth of the matter asserted. Rule 801, ARIZ. R. EVID. The questions and answers were as follows:

(1) Q. Is it also true that Michael Malek had been ordered to have not contact with you.

A. Yes.

MR. HOIDAL: Objection; lack of foundation.

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- (2) Q. BY MS. THOMSEN: Are you aware of any documents that restrict Michael Malek's contact with you?
MR. HOIDAL: Objection; hearsay.
THE COURT: And overruled.
THE WITNESS: Yes. From—
- (3) Q. BY MS. THOMSEN: And what documents are those that prevents [sic] Michael Malek from having contact with you?
MR. HOIDAL: Objection; hearsay.
THE COURT: Overruled.
THE WITNESS: Can you explain?
- (4) Q. BY MS. THOMSEN: What paperwork, or . . . what are you aware that exists that says Michael Malek cannot have contact with you?
A. Yes.
MR. HOIDAL: Objection; hearsay.
THE COURT: Overruled. You may answer.
THE WITNESS: Yes.
- (5) Q. BY MS. THOMSEN: What is it that says Michael Malek can't have contact with you?
MR. HOIDAL: Objection; hearsay; confrontation.
THE COURT: Okay. Overruled.
THE WITNESS: I, like, I know about it, but I don't know what it's called.
Q. BY MS. THOMSEN: All right. Is it a—is it a paper, or is it just somebody's told you?
A. Oh, no, it's a paper with—within the court—the family court.

(R.T. of Oct. 26, 2011, at 54–55.) For number (1), Defendant's attorney objected on the basis of "foundation," which is not a proper objection. An objection of "no foundation" is insufficient to preserve an issue for appeal; the objecting party must indicate how the foundation is lacking so the other party can overcome the shortcoming, if possible. *State v. Rodriguez*, 186 Ariz. 240, 250, 921 P.2d 643, 653 (1996) (defendant objected to improper foundation for admission of earring; because defendant did not identify what foundation was lacking, trial court did not abuse discretion in admitting exhibit); *State v. Guerrero*, 173 Ariz. 169, 171, 840 P.2d 1034, 1036 (Ct. App. 1992) (defendant contended on appeal state failed to provide specifics about times, dates, places, or quantities of prior acts; court held claim of insufficient foundation may not be raised on appeal unless appellant specifically points out to trial court alleged defects in foundation so that opponent may cure any defects); *Packard v. Reidhead*, 22 Ariz. App. 420, 423, 528 P.2d 171, 174 (1974) (court noted appellee laid tenuous foundation for admission of traffic signal installation report, but held appellant's "no foundation" objection was inadequate to preserve issue for review on appeal).

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For number (2), Alexis was not making any assertion, she instead merely stated whether she knew something. For number (3), Alexis never gave an answer. For number (4), Alexis again merely stated whether she knew something existed.

For number (5), Alexis finally states there is some family court paper that says Defendant may not have contact with her. Although that statement might be considered an assertion, it appears from Alexis' testimony she did not intend it to be an assertion. If verbal or nonverbal conduct is not intended to be an assertion, by definition it is not hearsay, even if it is offered as evidence of the declarant's implicit belief of a fact. *State v. Ellison*, 213 Ariz. 116, 140 P.3d 899, ¶¶ 54–56 (2006) (trial court allowed detective to testify that, when co-defendant spoke about defendant, his hands shook, his voice broke, and his eyes welled up as if about to cry; defendant contended this was inadmissible hearsay and violated confrontation clause; court stated there was no evidence showing co-defendant intended these actions to be assertions, thus they were not hearsay); *State v. Chavez*, 225 Ariz. 442, 239 P.3d 761, ¶¶ 6–10 (Ct. App. 2010) (in inventory search of defendant's vehicle, officers found drugs and two cell phones; on cell phones were text messages in which unidentified senders apparently sought to buy drugs from defendant; defendant contended these messages were hearsay; court held these messages were not assertions that defendant had drugs for sale; rather they were offered as circumstantial evidence that defendant had drugs for sale, and fact that they showed declarants thought defendant had drugs for sale did not make them assertions). Because Alexis was not making an assertion that there was a court order prohibiting Defendant from contacting her, her answers did not fit the definition of hearsay.

Finally, to the extent these answers could be considered assertions, they were not offered to prove the truth of the matters asserted. Alexis testified Defendant was not supposed to be in the house and Defendant was not supposed to have contact with her, thus Defendant's presence there caused her to be concerned. This testimony was not offered to prove some court document existed but was instead offered to prove what Alexis thought was the situation. Because this testimony was offered to explain why Alexis was concerned for her mother's safety and thus why she ran to the bedroom and tried to get into that room, it was not hearsay.

And third, even if it had been error to admit that testimony, any error was harmless. As discussed in Section A above, Defendant admitted touching Alexis, thus the only issue for the trial court to resolve was Defendant's intent in so doing. The fact that there may or may not have been some court document about Defendant's contact with Alexis had nothing to do with Defendant's intent, which the trial court determined instead by Defendant's actions toward Alexis at the doorway to the bedroom. Because Defendant's actions there showed what his intent was, admission of testimony about some court document was harmless.

III. CONCLUSION.

Based on the foregoing, this Court concludes the evidence was sufficient to support the verdict, and the trial court did not abuse its discretion in admitting Alexis' testimony.

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IT IS THEREFORE ORDERED affirming the judgment and sentence of the Scottsdale Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Scottsdale Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen

THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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