DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1-CA-CR 09-0371
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
GEORGE ALLEN AGUILERA,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2007-008373-001 DT

The Honorable Michael W. Kemp, Judge

REVERSED AND REMANDED

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By Kent E. Cattani, Chief Counsel
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N O R R I S, Judge

¶1 George Allen Aguilera timely appeals from his conviction and sentence for aggravated assault stemming from his involvement in a motor vehicle accident. Aguilera argues the superior court should not have excluded evidence of the victim's blood-alcohol level, and should have instructed the jury on causation, superseding cause, and endangerment as a lesser included offense of aggravated assault. On the record before us, we agree with Aguilera the court should have admitted the blood-alcohol evidence but reject his jury instruction arguments. We therefore reverse Aguilera's conviction and remand for further proceedings consistent with this decision.

FACTS AND PROCEDURAL BACKGROUND

¶2 On May 4, 2007, at approximately 1:21 a.m., Aguilera, driving his own car, entered the southbound frontage road of Interstate 17 from Northern Avenue in Phoenix. He merged left onto the on-ramp, continuing in the freeway's southbound entrance/exit lane. As he accelerated to move into the through-traffic lane, he turned his head to the left to check for oncoming traffic. He saw a large semitrailer approaching from behind, and accelerated to avoid it and merge into the through-traffic lane. As he did so, his car collided with the back of the victim's motorcycle. Aguilera's car's air bags deployed; the motorcycle became lodged in the front-end of Aguilera's car;

the victim was thrown from his motorcycle, struck by the semitrailer, and seriously injured. Because Aguilera exhibited signs and symptoms of alcohol impairment, an Arizona Department of Public Safety ("DPS") officer took him into custody. After obtaining a search warrant, a DPS officer first drew Aguilera's blood for testing at 5:45 a.m.[1]

¶3 At trial, the State presented substantial evidence Aguilera was impaired at the time of the collision. The State's criminalist testified that at the time of the first blood draw at 5:45 a.m., Aguilera had a blood-alcohol concentration ("BAC") of .057, and through a retrograde extrapolation, had a BAC ranging from .081 to .129 two hours before that blood draw. Although the criminalist did not do a retrograde analysis to the time of the collision because of the "risk of overestimating the potential blood alcohol," he also testified "we know [Aguilera's BAC at the time of the collision is] most likely higher" than the estimated BAC at 3:45 a.m. Aguilera disputed the State's evidence. Although he admitted to drinking slightly more than three alcoholic drinks before the collision -- beginning with a drink at dinner between 9:00 and 10:00 p.m., with two more drinks and a few sips of a third between 11:00 p.m. and 1:00 a.m. at a local bar -- he testified he was not impaired and his

[1]DPS performed a second blood draw at 6:50 a.m.

forensic toxicologist expert calculated Aguilera's BAC to be in the range of zero to .04 at the time of the collision using the "subtractive retrograde" method.

DISCUSSION

I. Evidence of Victim's BAC

¶4 Aguilera first argues the superior court should not have excluded evidence the victim had a BAC of .10.[2] We review a superior court's ruling on the admissibility of evidence for abuse of discretion. *State v. Tucker*, 215 Ariz. 298, 314, ¶ 58, 160 P.3d 177, 193 (2007). "An abuse of discretion occurs when the reasons given by the court for its decision are clearly untenable, legally incorrect, or amount to a denial of justice." *State v. Childress*, 222 Ariz. 334, 338, ¶ 9, 214 P.3d 422, 426 (App. 2009).

¶5 To be admissible, evidence must be relevant, and all relevant evidence is admissible except as otherwise provided by law. Ariz. R. Evid. 402. Evidence is relevant "if it has any tendency to make the existence of any fact that is of consequence more or less probable than it would be without the evidence." *State v. Oliver*, 158 Ariz. 22, 28, 760 P.2d 1071, 1077 (1988); *see* Ariz. R. Evid. 401. "This standard of relevance is not particularly high." *Oliver*, 158 Ariz. at 28,

[2]As part of his medical treatment following the collision, the victim's BAC was tested.

760 P.2d at 1077. The evidence need not support a finding of an ultimate fact; "it is enough if the evidence, if admitted, would render the desired inference more probable." *State v. Paxson*, 203 Ariz. 38, 41-42, ¶ 17, 49 P.3d 310, 313-14 (App. 2002) (quoting *Reader v. Gen. Motors Corp.*, 107 Ariz. 149, 155, 483 P.2d 1388, 1394 (1971)); *see also Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 496, 733 P.2d 1073, 1079 (1987) (to be relevant, evidence need only alter the probability, not prove or disprove the existence of a consequential fact).

¶6 At trial, the State argued Aguilera had committed aggravated assault by recklessly causing physical injury to the victim with his car. *See* Ariz. Rev. Stat. ("A.R.S.") §§ 13-1203(A)(1), -1204(A)(2) (2010).[3] In defense, Aguilera argued he had not recklessly caused the collision. Not only did Aguilera present evidence -- disputed by the State -- he had not been driving while impaired, *see supra* ¶ 3, but he also presented evidence that at the time of the collision, the victim's motorcycle was effectively invisible, its tail light was not functioning,[4] and the victim was driving substantially below the freeway's posted speed limit. Because the State also contested

[3]Although certain statutes cited in this decision were amended after the date of Aguilera's offense, the revisions are immaterial. Thus, we cite to the current versions of these statutes.

[4]Aguilera also presented evidence the lights on "that" part of the freeway were out at the time of the collision.

Aguilera's evidence regarding the taillight and the victim's speed, the evidence of the victim's BAC over the legal limit would have tended to make Aguilera's evidence concerning these two points more probable. Indeed, in an offer of proof, defense counsel informed the court Aguilera's accident reconstruction expert would testify that traveling below the speed limit and failing to maintain "your motorcycle" are signs of impairment.

¶7 Despite this offer of proof, the superior court affirmed its earlier ruling precluding the evidence,[5] stating "I find that the victim did not contribute to this accident or I have seen no evidence whatsoever that he contributed to this accident." But, because evidence of the victim's BAC made Aguilera's evidence regarding the visibility of the motorcycle and its speed at the time of the collision more probable, the admissibility of the victim's BAC did not turn on whether the victim contributed to the accident. Thus, Aguilera was entitled to have this evidence admitted to prove his version of how the accident occurred in order to establish his defense. *See State v. Shumway*, 137 Ariz. 585, 588, 672 P.2d 929, 932 (1983) (although victim's contributory negligence is not a defense to criminal liability, "the trier of fact may still consider the

[5]Before trial, the superior court had granted the State's motion to preclude evidence of the victim's BAC because it believed it was irrelevant. Its ruling was without prejudice to reconsidering its admissibility at trial depending on the evidence.

[victim's] conduct when determining whether the defendant's act" was criminal); *Gensler v. State*, 868 So. 2d 557, 559 (Fla. Dist. Ct. App. 2004) (error to exclude pedestrian-victim's alcohol and cocaine intoxication because this evidence was relevant to show "defendant's version of the events and explanation of the accident, and tends to demonstrate that the defendant may not be at fault for causing the accident").[6]

¶8 Despite the relevance of this evidence, the State argues the superior court acted within its discretion in precluding evidence of the victim's BAC as unduly prejudicial under Arizona Rule of Evidence 403. The State, however, never argued in the superior court the victim's BAC evidence should be precluded as unduly prejudicial,[7] and the court's rulings

[6]In *State v. Krantz*, 174 Ariz. 211, 212, 848 P.2d 296, 297 (App. 1992), this court affirmed the exclusion of evidence a motorcyclist had methamphetamine in his system when he was hit by the defendant's vehicle. There, the alcohol-impaired defendant "struck the victim's stationary motorcycle, which was in the center turn lane and had its rear light on." *Id.* at 213, 848 P.2d at 298. Because the victim was stopped at an intersection, any effect the drugs may have had on the victim's driving was irrelevant in that particular scenario. Here, in contrast, the victim was driving the motorcycle when the accident occurred and his operation of his motorcycle -- speed and condition -- at the time of the collision were factors the jury could properly consider in deciding whether Aguilera recklessly caused the collision. *Shumway*, 137 Ariz. at 588, 672 P.2d at 932.

[7]The State included a reference to Rule 403 in a string cite of evidentiary rules in its motion to preclude. At no point, however, in either the motion or in oral argument at trial did the State argue the BAC evidence should be precluded as unduly prejudicial.

excluding the evidence were based solely on a finding the evidence was irrelevant.

¶9 Further, the weighing of factors under Rule 403 in determining whether evidence should be precluded by the danger of undue prejudice is peculiarly a function of the superior court, not an appellate court. *Yauch v. S. Pac. Transp. Co.*, 198 Ariz. 394, 403, ¶ 26, 10 P.3d 1181, 1190 (App. 2000). We cannot assume on this record the superior court would have excluded evidence of the victim's BAC under Rule 403 as unduly prejudicial. Indeed, to the contrary -- after jury selection and before the opening statements -- the court reiterated its decision not to admit evidence of the victim's BAC, but also stated it would admit the evidence if there were some showing of relevance.

¶10 Finally, we disagree with the State's assertion any error in the exclusion of the evidence of the victim's BAC was harmless. "Error . . . is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict." *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). "The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Id.*

¶11 Here, there was essentially no evidence about the manner of operation of the victim's motorcycle before the collision. Aguilera testified he did not see the motorcycle before the collision and the victim testified he had no memory of the night of the accident. The parties disputed the operation and condition of the motorcycle at trial and evidence of the victim's impairment may have resulted in the jury accepting Aguilera's defense he had not recklessly caused the collision. Accordingly, we reverse and remand for a new trial.

II. Instructions

¶12 Aguilera also argues the superior court should have instructed the jury on causation, superseding cause, and endangerment as a lesser included offense of aggravated assault. Although on remand the record before the superior court may be different and the court will need to instruct the jury on any theory reasonably supported by the evidence, *State v. Rodriguez*, 192 Ariz. 58, 61, ¶ 16, 961 P.2d 1006, 1009 (1998), on the record presented in this appeal we must reject these arguments.

A. Causation

¶13 Without objection from Aguilera, the court did not instruct the jury on causation, and there is no indication in the record the superior court considered the issue in settling the instructions with counsel. Because we are reversing for evidentiary error, we need not determine whether the absence of

a causation instruction would constitute fundamental error under the circumstances of this case. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).

B. Superseding Causation

¶14 The superior court ruled on the record before it Aguilera was not entitled to a superseding cause instruction.[8] We agree. In *State v. Bass*, our supreme court held the criminal standard for superseding cause is the same as the tort standard. 198 Ariz. 571, 576, ¶ 13, 12 P.3d 796, 801 (2000). Accordingly, to qualify as a superseding cause that can excuse a defendant from liability for a criminal act, an intervening event must be unforeseeable and, with the benefit of hindsight, abnormal and extraordinary. *Id.* The evidence Aguilera relied on in requesting such an instruction -- the unusually darkened freeway, the fast-approaching semitrailer, the victim's below-the-posted speed, and his motorcycle running out of fuel[9] -- are

[8]We review the superior court's decision to give or refuse a jury instruction for abuse of discretion. *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995).

[9]The motorcycle's lights only worked if the engine was running; to run the engine the mororcycle drew fuel from either a main fuel supply or a reserve fuel supply. If the main supply ran out of gas, the operator would have to manually switch a lever to the reserve fuel supply. Photographs taken at the scene of the collision show the motorcycle was set to draw fuel from the main fuel supply. When DPS agents later tested the motorcycle's engine and power system, the lever was on the reserve setting. Aguilera's accident reconstruction expert testified, in his opinion, the motorcycle ran out of fuel,

not unforeseeable and cannot be considered such abnormal or extraordinary events that will relieve a defendant of criminal liability if he recklessly injures the driver of the other vehicle by colliding with it. *See Paxson*, 203 Ariz. at 40-41 & n.1, ¶ 12, 49 P.3d at 312-13 & n.1 (citing *State v. Jansing*, 186 Ariz. 63, 67, 918 P.2d 1081, 1085 (App. 1996), *overruled on other grounds by Bass*, 198 Ariz. at 576, ¶ 13, 12 P.3d at 801) (superseding cause must be both unforeseeable and either abnormal or extraordinary; not unforeseeable in *Jansing* that a person who runs a stop sign at 40 miles per hour would collide with another vehicle and cause it to burst into flames); *cf. State v. Vandever*, 211 Ariz. 206, 208, ¶ 8, 119 P.3d 473, 475 (App. 2005) (victim exceeding speed limit not superseding cause of accident).

C. Lesser Included Offense

¶15 An instruction on a lesser included offense is proper only if (1) the offense in question is composed of some, but not all, of the elements of the greater charged offense, so that it is impossible to commit the greater without also committing the lesser, and (2) the evidence permits the jury to rationally find the State failed to prove the element that distinguishes the greater offense from the lesser offense. *State v. Celaya*, 135

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causing an engine failure that "turned out all of the lights" making the motorcycle "not visible."

Ariz. 248, 251-52, 660 P.2d 849, 852-53 (1983). With respect to the second part of this test, "[i]t is not enough that, as a theoretical matter, 'the jury might simply disbelieve the state's evidence on one element of the crime because this would require instructions on all offenses theoretically included' in every charged offense." *State v. Wall*, 212 Ariz. 1, 4, ¶ 18, 126 P.3d 148, 151 (2006) (quoting *State v. Caldera*, 141 Ariz. 634, 636-37, 688 P.2d 642, 644-45 (1984)). "Instead, the evidence must be such that a rational juror could conclude that the defendant committed only the lesser offense." *Id.*

¶16 Although the mental state of "recklessly" for purposes of both assault in violation of A.R.S. § 13-1203(A)(1) and endangerment in violation of A.R.S. § 13-1201(A) (2010) is the same, *see* A.R.S. § 13-105(10)(c) (2010), and even if we were to agree with Aguilera a person cannot recklessly cause injury to a victim without also "recklessly endangering [the victim] with a substantial risk of . . . physical injury," as required by the endangerment statute, on this record it was not possible for the jury to conclude Aguilera committed only endangerment and not aggravated assault as charged.

¶17 The distinguishing element between the two offenses is that assault requires the reckless conduct to actually result in physical injury to the victim. Under Arizona law, conduct is the cause of a result when (1) but for the conduct, the result

in question would not have occurred; and (2) the relationship between the conduct and result satisfies any additional causal requirements imposed by the statute defining the offense. A.R.S. § 13-203(A)(1), (2) (2010). Because the statutes defining aggravated assault do not impose any additional causal requirement, the State was only required to prove "but for" Aguilera's conduct, the victim would not have been injured.

¶18 The evidence presented at trial unquestionably demonstrated Aguilera's conduct was a "cause in fact" of the victim's injuries, i.e., "but for" Aguilera colliding with the victim's motorcycle, the victim would not have been injured by being thrown off his motorcycle and then struck by the semitrailer. *See State v. Marty*, 166 Ariz. 233, 236, 801 P.2d 468, 471 (App. 1990) ("To establish legal cause, or cause-in-fact, there must be some evidence that but for defendant's conduct, the accident and resulting [injury] would not have occurred."). The jury could not rationally conclude Aguilera recklessly endangered the victim with his car without also committing reckless assault. Thus, on this record, Aguilera was not entitled to an instruction on endangerment as a lesser included offense of aggravated assault. *See State v. Lara*, 183 Ariz. 233, 235, 902 P.2d 1337, 1339 (1995).

CONCLUSION

¶19 For the foregoing reasons, we reverse Aguilera's conviction and remand for further proceedings consistent with this decision.

/s/
_____
PATRICIA K. NORRIS, Judge

CONCURRING:

/s/
_____
JON W. THOMPSON, Presiding Judge

/s/
_____
PETER B. SWANN, Judge