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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. RACHEL HENDRICKS, Appellant.	2 CA-CR 2011-0206 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20090921001

Honorable Christopher C. Browning, Judge

AFFIRMED IN PART; VACATED IN PART AND REMANDED

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H O W A R D, Chief Judge.

¶1 After a jury trial in absentia, Rachel Hendricks was convicted and sentenced to terms of imprisonment and probation for eleven offenses arising out of an accident she caused while driving under the influence of alcohol. On appeal she argues the trial court erred by imposing consecutive sentences on some of the counts and permitting the jury find some of the offenses to be of a dangerous nature. For the following reasons, we affirm in part, vacate in part, and remand for resentencing.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the verdicts. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). Hendricks had been drinking prior to driving a van with three passengers in it. When she drove through an intersection while the traffic light was red, the van was hit by an "18-wheeler" truck, injuring Hendricks and the other passengers of the van. A blood draw performed after Hendricks was taken to the hospital showed she had a blood alcohol concentration ("AC") of .274.

¶3 Hendricks was charged with three counts of aggravated assault with a deadly weapon/dangerous instrument, three counts of aggravated assault causing serious physical injury, criminal damage, endangerment, driving under the influence of alcohol, driving with an AC of .08 or higher, and driving with an AC of .15 or higher. The jury found her guilty on all counts. The trial court sentenced Hendricks to concurrent terms of imprisonment, the greatest of which was six years, on her convictions for aggravated assault with a deadly weapon/dangerous instrument and endangerment. The court imposed concurrent and consecutive terms of probation, totaling ten years, consecutive to

the prison terms on Hendricks's convictions for aggravated assault causing serious physical injury, criminal damage, driving under the influence of alcohol, driving with an AC of .08 or higher, and driving with an AC of .15 or higher. This appeal followed.

Consecutive Sentences

¶4 Hendricks first argues the trial court erred by ordering her probationary terms for aggravated assault causing serious physical injury be served consecutively to her sentences for aggravated assault with a deadly weapon/dangerous instrument against the same victims. The state agrees that the court should not have imposed consecutive sentences. We review de novo whether a trial court correctly imposed consecutive sentences pursuant to A.R.S. § 13-116. *State v. Urquidez*, 213 Ariz. 50, ¶ 6, 138 P.3d 1177, 1179 (App. 2006).

¶5 Section 13-116 prohibits the imposition of consecutive sentences for offenses arising out of a single "act or omission." To determine whether conduct constitutes one act, we apply the three-part test from *State v. Gordon*, 161 Ariz. 308, 315, 778 P.2d 1204, 1211 (1989). First, we consider the facts of each crime and subtract from the factual transaction the evidence necessary to convict on the ultimate crime, the crime "that is at the essence of the factual nexus and that will often be the most serious of the charges." *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. If the remaining evidence is sufficient to satisfy the elements of the other crime, then consecutive sentences may be imposed. *Id.* We then consider whether it was factually impossible to commit the more serious offense without also committing the less serious offense. *Id.* If that is the case, then it is more likely that the defendant committed a single act. *Id.* We last consider

whether the defendant's conduct in committing the lesser offense "caused the victim to suffer an additional risk of harm beyond [the harm ordinarily] inherent in the ultimate crime." *Id.* If so, consecutive sentences may be imposed. *Id.*

¶6 Aggravated assault with a deadly weapon/dangerous instrument and aggravated assault causing serious physical injury differ only in that the first requires the use of a deadly weapon or dangerous instrument and the latter requires serious physical injury be caused. 2007 Ariz. Sess. Laws, ch. 47, § 1. We need not decide which is the ultimate crime, because if we subtract the evidence necessary to commit either offense, the remaining evidence is insufficient to satisfy the elements of the other offense with regard to the same victims. *See Gordon*, 161 Ariz. at 312 n.4, 315, 778 P.2d at 1208 n.4, 1211. Hendricks assaulted her passengers with a deadly weapon/dangerous instrument and caused them serious physical injury as a consequence of a single action of driving through an intersection against a red light. The trial court erred by sentencing her to consecutive terms on those counts. *See Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. An improper consecutive sentence is an illegal sentence and fundamental error. *See State v. Martinez*, 226 Ariz. 221, ¶¶ 16-17, 245 P.3d 906, 909 (App. 2011). Therefore, we remand for resentencing in accordance with this decision. *See State v. Viramontes*, 163 Ariz. 334, 340, 788 P.2d 67, 73 (1990).

¶7 We note that the prohibition against double jeopardy "protect[s] criminal defendants from multiple convictions and punishments for the same offense," *State v. Ortega*, 220 Ariz. 320, ¶ 9, 206 P.3d 769, 772 (App. 2008), and that statutes consisting of the same elements "constitute the same offense," *State v. Siddle*, 202 Ariz. 512, ¶ 10,

47 P.3d 1150, 1154 (App. 2002). A conviction for driving with an AC of .08 or above does not require evidence of an additional element not required for a conviction for driving with an AC of .15 or above. *Merlina v. Jejna*, 208 Ariz. 1, ¶¶ 11-12, 90 P.3d 202, 205 (App. 2004). Although Hendricks did not raise this issue here or below, a violation of double jeopardy is fundamental error. *State v. Musgrove*, 223 Ariz. 164, ¶ 10, 221 P.3d 43, 46 (App. 2009). And we will not ignore fundamental error when we find it. *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007). Therefore we vacate the conviction for the lesser-included offense, driving with an AC of .08 or more. *See Merlina*, 208 Ariz. 1, n.1, 90 P.3d at 204 n.1 (driving with AC of .08 lesser-included offense of driving with AC of .15).

Dangerous-Nature Sentence Enhancement

¶8 Hendricks next contends the trial court erred in allowing the jury to find that the aggravated assault and endangerment offenses were committed with a dangerous instrument, her vehicle, and for applying dangerous-nature enhancements to her sentences for these offenses. Hendricks claims that the plain language of former A.R.S. § 13-604(F) and (I)[1] requires knowing or intentional conduct and her conduct was reckless because the offenses resulted from an accident. Although we vacate all of Hendricks's sentences, because the same issue will arise on remand we address this argument.

[1]We rely on the statutes in effect at the time the offenses were committed. *See O'Brien v. Escher*, 204 Ariz. 459, ¶ 16, 65 P.3d 107, 111 (App. 2003) (version of statute in effect at time defendants committed offenses determines appropriate sanctions).

¶9 Hendricks did not raise these arguments below, and she therefore has forfeited the right to seek relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object to alleged error in trial court results in forfeiture of review for all but fundamental error). Fundamental error requires the defendant to establish that: 1) an error occurred; 2) the error was fundamental; and 3) the error resulted in prejudice. *See id.* "Before we may engage in a fundamental error analysis, however, we must first find that the trial court committed some error." *State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342 (1991); *see also Henderson*, 210 Ariz. 561, ¶ 23, 115 P.3d at 608.

¶10 Pursuant to the version of § 13-604(I) in effect at the time of the offenses, a sentencing enhancement could be imposed "upon a first conviction of a class 2 or 3 felony involving discharge, use or threatening exhibition of a deadly weapon or dangerous instrument." 2007 Ariz. Sess. Laws, ch. 287, § 1. Section 13-604(F) provided a sentencing enhancement for the endangerment offense in this case and required "the intentional or knowing infliction of serious physical injury or the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument." *Id.* A dangerous instrument is "anything that under the circumstances in which it is used . . . is readily capable of causing death or serious physical injury." A.R.S. § 13-105(12); *see* 2006 Ariz. Sess. Laws, ch. 73, § 1. Hendricks does not dispute that a motor vehicle may be a dangerous instrument, *see State v. Orduno*, 159 Ariz. 564, 566, 769 P.2d 1010, 1012 (1989), but argues we should interpret § 13-604(F) and (I) to require the knowing or

intentional—as opposed to the negligent or reckless—use of a motor vehicle as a dangerous instrument in order to support sentence enhancement.

¶11 Hendricks recognizes that we repeatedly have rejected that interpretation but asserts those cases are wrongly decided. *See, e.g.*, *State v. Garcia*, 165 Ariz. 547, 552-53, 799 P.2d 888, 893-94 (App. 1990); *State v. Tamplin*, 146 Ariz. 377, 378, 380, 706 P.2d 389, 390, 392 (App. 1985) (use of dangerous instrument need not be intentional or knowing under § 13-604 in analogous circumstance of child abuse by negligence); *State v. Venegas*, 137 Ariz. 171, 175, 669 P.2d 604, 608 (App. 1983). We will depart from our prior decisions only if they were "'based upon clearly erroneous principles, or conditions have changed so as to render these prior decisions inapplicable.'" *Scappaticci v. Sw. Sav. & Loan Ass'n*, 135 Ariz. 456, 461, 662 P.2d 131, 136 (1983), *quoting Castillo v. Indus. Comm'n*, 21 Ariz. App. 465, 471, 520 P.2d 1142, 1148 (1974).

¶12 Hendricks contends that the word "use" in § 13-604(F) and (I), requires a showing of intent because "one cannot 'use' an object without intentionally employing it for a particular purpose." She primarily relies on *United States v. Dayea*, 32 F.3d 1377, 1380 (9th Cir. 1994).[2] However, we have concluded that "use" does not "carry [a] concept of intentionality." *Tamplin*, 146 Ariz. at 380, 706 P.2d at 392; *see also State v. Garcia*, 219 Ariz. 104, ¶ 14, 193 P.3d 798, 801 (App. 2008) ("'intentional or knowing' does not apply to the phrase 'the use . . . of a dangerous instrument'") (alteration added);

[2]To the extent Hendricks relies on the *Dayea* court's definition of "use" based on *Black's Law Dictionary*, we note that the two most recent versions of *Black's Law Dictionary* do not contain a definition of "use" as a verb and define the noun "use" as "[t]he application or employment of something." *See Black's Law Dictionary* 1681 (9th ed. 2009); *Black's Law Dictionary* 1577 (8th ed. 2004).

Venegas, 137 Ariz. at 175, 669 P.2d at 608 (no requirement under sentence-enhancement statute that "dangerous instrument be used intentionally"). Further, decisions by the Ninth Circuit Court of Appeals are "not controlling on Arizona courts." *State v. Swoopes*, 216 Ariz. 390, ¶ 35, 166 P.3d 945, 956 (App. 2007).

¶13 Hendricks additionally asserts that interpreting § 13-604(F) and (I) to encompass the negligent or reckless use of a dangerous instrument leads to "absurd result[s]." Hendricks reasons that "[i]t makes no sense for the Legislature to increase the punishment for a person who recklessly or negligently uses a dangerous instrument, but not punish a person more severely for the reckless or negligent infliction of serious physical injury."

¶14 An absurd result is a result "'so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of persons with ordinary intelligence and discretion.'" *State v. Estrada*, 201 Ariz. 247, ¶ 17, 34 P.3d 356, 360 (2001), *quoting Perini Land Dev. Co. v. Pima County*, 170 Ariz. 380, 383, 825 P.2d 1, 4 (1992). Our legislature simply has made a policy decision to punish more severely crimes in which a dangerous instrument is used than crimes not involving a dangerous instrument—even if both, or neither, of the crimes result in serious injury or death. *See Tamplin*, 146 Ariz. at 380, 706 P.2d at 392 ("The legislature has determined that one who uses a dangerous instrument is more culpable than one who causes injury without intention or knowledge."). Even were we to disagree with that policy choice, we cannot fairly say that it is irrational. *See Estrada*, 201 Ariz. 247, ¶¶ 17-18, 34 P.3d at 360. Thus, to the extent Hendricks asks us to look beyond the unambiguous language of § 13-604(F)

and (I) to reach a different interpretation of it than the one currently established by our jurisprudence, we conclude it is improper for us to do so. *See Bilke v. State*, 206 Ariz. 462, ¶ 11, 80 P.3d 269, 271 (2003).

¶15 Hendricks also argues that we must "look at how the statute actually applies to a motor vehicle accident in order to determine whether the application of the dangerous nature enhancement is rational," citing *Orduno*, 159 Ariz. 564, 769 P.2d 1010. In *Orduno*, our supreme court found that the sentencing enhancements under § 13-604(F) could not apply to the offense of driving under the influence of an intoxicant where the dangerous instrument is a motor vehicle because the motor vehicle is an essential element of the crime. 159 Ariz. at 566-67, 769 P.2d at 1012-13. *Orduno* is limited to the context of driving under the influence. *Id.*

¶16 Here, the sentencing enhancements were applied to the crimes of aggravated assault and endangerment. Aggravated assault required the state to prove that Hendricks committed assault by "intentionally, knowingly or recklessly causing any physical injury to another person," A.R.S. § 13-1203(A)(1), while using a dangerous instrument, 2008 Ariz. Sess. Laws, ch. 179, § 1. To prove endangerment, the state was required to show that Hendricks "recklessly endanger[ed] another person with a substantial risk of imminent death or physical injury." A.R.S. § 13-1201. Because Hendricks's use of a motor vehicle was not a necessary element of aggravated assault or endangerment, the rationale of *Orduno* is inapplicable to this case. Thus, the trial court did not err by enhancing Hendricks's sentences for aggravated assault and endangerment.

Conclusion

¶17 For the foregoing reasons, we vacate Hendricks's conviction for driving with an AC of .08, and affirm her other convictions. Because we do not know how vacating the consecutive sentences will affect the trial court's discretion in imposing sentences on other convictions, we vacate all of Hendricks's sentences and remand for resentencing. *See State v. Viramontes*, 163 Ariz. 334, 340, 788 P.2d 67, 73 (1990).

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge