DIVISION ONE
FILED: 3/5/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

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

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| STATE OF ARIZONA, | ) | No. 1 CA-CR 11-0320 |
| | ) | |
| Appellee, | ) | DEPARTMENT E |
| | ) | |
| v. | ) | **MEMORANDUM DECISION** |
| | ) | (Not for Publication - |
| FALEH HASSAN ALMALEKI, | ) | Rule 111, Rules of the |
| | ) | Arizona Supreme Court) |
| Appellant. | ) | |
| | ) | |

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-007938-001DT

The Honorable Roland J. Steinle, Judge

**AFFIRMED IN PART; VACATED IN PART**

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**H A L L**, Judge

**¶1** Faleh Hassan Almaleki (defendant) was convicted by a jury of second-degree murder, a class 1 felony and domestic violence offense; aggravated assault, a class 2 felony and dangerous offense; and two counts of leaving the scene of an accident involving serious physical injury, each a class 3 felony. The trial court sentenced defendant to consecutive and concurrent prison terms totaling thirty-four and one-half years.

**¶2** On appeal, defendant contends the trial court erred by denying his motion to dismiss one of the two counts of leaving the scene of an accident and by failing to properly instruct on the aggravating factor of emotional, physical or financial harm to the victims. For reasons that follow, we vacate defendant's conviction and the resulting sentence on one of the counts of leaving the scene of an accident and affirm his three other convictions and sentences.

## DISCUSSION

### A. Motion to Dismiss

**¶3** The convictions stemmed from an incident in which defendant killed his daughter and injured her friend by hitting them with his vehicle. Relying on *State v. Powers*, 200 Ariz. 363, 26 P.3d 1134 (2001), defendant argues that one of the two counts of leaving the scene of an accident should have been dismissed by the trial court as multiplicitous because there was only one accident scene.

**¶4** Charges are multiplicitous when a single offense is charged in multiple counts. *Merlina v. Jejna*, 208 Ariz. 1, 4, ¶ 12, 90 P.3d 202, 205 (App. 2004). The principal danger in multiplicity is that it "raises the potential for multiple punishments, which implicates double jeopardy." *State v. Powers*, 200 Ariz. 123, 125, ¶ 5, 23 P.3d 668, 670 (App. 2001), *approved*, 200 Ariz. 363, 26 P.3d 1134 (2001). When convictions occur on multiplicitous charges, the appropriate remedy is to dismiss all but one of the convictions and impose a single sentence. *State v. Jones*, 185 Ariz. 403, 407-08, 916 P.2d 1119, 1123-24 (App. 1995). We review de novo whether charges are multiplicitous. *State v. Brown*, 217 Ariz. 617, 620, ¶ 7, 177 P.3d 878, 881 (App. 2008).

**¶5** The indictment against defendant included two counts of leaving the scene of an accident in violation of Arizona Revised Statutes (A.R.S.) section 28-661 (Supp. 2013).[1] This statute provides, in pertinent part:

> The driver of a vehicle involved in an accident resulting in injury to or death of a person shall:
>
> 1. Immediately stop the vehicle at the scene of the accident or as close to the accident scene as possible but shall immediately return to the accident scene.

[1] Absent material revisions after the relevant date, we cite a statute's current version.

> 2. Remain at the scene of the accident until the driver has fulfilled the requirements of [A.R.S.] § 28–663.

A.R.S. § 28-661(A). Count Four alleged defendant violated this statute in regards to an accident resulting in serious injury to his daughter; Count Five alleged a violation in regards to an accident resulting in serious injury to the daughter's friend. In addition to convicting defendant of second-degree murder and aggravated assault, the jury returned guilty verdicts on both Counts Four and Five. At sentencing, the trial court imposed concurrent 3.5-year prison terms on the two convictions for leaving the scene of an accident to be served consecutive to the prison terms imposed on defendant's other two convictions.

**¶6** In *Powers*, our supreme court held that a violation of A.R.S. § 28–661, leaving the scene of an accident, only permits conviction for a single offense, even when multiple persons are injured, because the "focus" of the offense is "the scene of the accident." 200 Ariz. at 364, ¶ 8, 20 P.3d at 1134. The court reasoned:

> The primary purpose of A.R.S. § 28-661 is to "prohibit drivers from seeking to evade civil or criminal liability by escaping before their identity can be established." *State v. Rodgers*, 184 Ariz. 378, 380, 909 P.2d 445, 447 (App. 1995). That purpose is scene-related, not victim-related. Of course, the number of victims harmed does matter for the other offenses committed at the same time. Criminal responsibility for offenses apart from the

> driver's failure to stop at the scene can be pursued through separate charges addressing each victim (e.g., assault, manslaughter, endangerment).

*Id.* at ¶ 9.

**¶7** Here, the evidence reflects a single incident in which defendant hit the two victims with his vehicle. The victims were walking together across a parking lot when defendant swerved his vehicle towards them in an apparent deliberate act. Although the victims were not hit simultaneously due to defendant's daughter being a little bit behind her friend when defendant drove at them, the State's accident reconstruction expert opined that the victims may have been hit within "milliseconds" of each other.

**¶8** The State contends there was evidence of two separate distinct accident scenes, with defendant first striking one victim and then turning to hit the second. In support of its argument that a person can be convicted of more than one count of leaving the scene in violation of A.R.S. § 28-661(A), the State cites to the court of appeals' decision in *Powers*. In that decision, which our supreme court approved, Division Two noted that it would be possible for a defendant to be found guilty of multiple violations of the statute "[i]f a defendant pleads guilty to having left multiple accident scenes or if a trier-of-fact *properly finds* that a defendant has done so."

*Powers*, 200 Ariz. at 127 n.3, 23 P.3d at 672 n.3 (emphasis added). Neither of those circumstances exists, however, in the present case. Defendant did not plead guilty to any offense, and the State never sought to have the jury make the requisite finding that defendant engaged in separate acts of fleeing from multiple accident scenes to support multiple convictions. Nor was there any such finding by the trial court. To the contrary, in explaining the imposition of concurrent prison terms on the two convictions for leaving the scene of an accident, the trial court specifically observed that it "was one act."

**¶9** On this record, we hold that defendant's conduct in driving away after hitting the two victims constituted a single violation of A.R.S. § 28-661(A). Defendant cannot be convicted twice for the identical offense. *Id.* at 127, ¶ 16, 23 P.3d at 672. Accordingly, we vacate the conviction and the sentence imposed on Count Five for a second offense of leaving the scene of an accident. *Id.*

**B. Aggravating Factor Instruction**

**¶10** During the aggravation phase, the trial court instructed the jury on various aggravating factors, including physical, emotional or financial harm to the victim. The jury found the factor of physical, emotional or financial harm to the victim to have been proven in regards to the offense of aggravated assault. At sentencing, this factor was considered

by the trial court in imposing an aggravated term of imprisonment on the aggravated assault conviction.

**¶11** Defendant claims the trial court erred in instructing the jury on the aggravating factor of physical, emotional or financial harm to the victim. Citing *State v. Germain*, 150 Ariz. 287, 723 P.2d 105 (App. 1986), defendant argues that the trial court should have instructed that this factor could only be found if it involved "something more" than that inherent in the offense. Because there was no objection to the instruction given, our review is limited to fundamental error. *State v. Valenzuela*, 194 Ariz. 404, 405, ¶ 2, 984 P.2d 12, 13 (1999); *see also* Ariz. R. Crim. P. 21.3(c) ("No party may assign as error on appeal the court's giving or failing to give any instruction or portion thereof . . . unless the party objects thereto before the jury retires to consider its verdict . . . .").

**¶12** The limitation on use of an aggravating factor, absent a finding that the factor increased the guilt or enormity of a crime or added to its injurious consequences, applies only to aggravating factors alleged under the catch-all provision of A.R.S. § 13-701(D) (Supp. 2013) (formerly A.R.S. § 13-702(D)). *Germain*, 150 Ariz. at 290, 723 P.2d at 108. Because physical, emotional or financial harm to the victim is a statutorily mandated aggravating factor, *see* A.R.S. § 13-701(D)(9), it is not subject to the *Germain* limitation. *State v. Lara*, 171 Ariz.

282, 284, 830 P.2d 803, 805 (1992). Thus, there was no error, much less fundamental error, in the trial court not instructing in the manner argued by defendant.

**CONCLUSION**

**¶13** For the foregoing reasons, defendant's convictions and sentences on Count One for second-degree murder, Count Three for aggravated assault, and Count Four for leaving the scene of an accident are affirmed. Defendant's conviction and sentence on Count Five for leaving the scene of an accident are vacated.

_/s/_____
PHILIP HALL, JUDGE

CONCURRING:

_/s/_____
MARGARET H. DOWNIE, Presiding Judge

_/s/_____
MAURICE PORTLEY, Judge