DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 09-0886
	)	DEPARTMENT D
v.	)	**MEMORANDUM DECISION**
JAN SHARON VENTRESCA, Appellant.	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Mohave County

Cause No. CR 2008-0795

The Honorable Lee F. Jantzen, Judge

AFFIRMED AS CORRECTED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

Jill L. Evans, Mohave County Appellate Defender — Kingman
Attorney for Appellant

N O R R I S, Judge

¶1 Jan Sharon Ventresca appeals from her convictions and sentence for four different charges of aggravated DUI that the superior court found were "alternative theories of the same offense." After searching the record on appeal and finding no

arguable question of law that was not frivolous, Ventresca's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), asking this court to search the record for fundamental error. This court granted counsel's motion to allow Ventresca to file a supplemental brief *in propria persona*, but she chose not to do so. After reviewing the entire record, we find no fundamental error and, therefore, affirm Ventresca's convictions and, as corrected, sentence.

FACTS AND PROCEDURAL BACKGROUND[1]

¶2 On July 20, 2008, a Mohave County Sheriff's deputy saw Ventresca driving a vehicle in Kingman. The deputy was aware[2] Ventresca's driver's license was suspended, so he stopped the vehicle. After speaking to Ventresca, the deputy noticed alcohol on her breath. Ventresca performed "poorly" on field

[1]We view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Ventresca. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

[2]In his initial report, the deputy stated he "had prior knowledge" Ventresca's driver's license was suspended when he stopped her and at trial he said he "knew that her license was suspended." Following a suppression hearing, the superior court ruled the deputy had reasonable suspicion Ventresca's license was suspended because of two prior interactions with her. The deputy stopped Ventresca on November 18, 2007, for a DUI investigation and completed paperwork suspending her license for 90 days. On May 25, 2008, the deputy investigated an incident Ventresca reported and obtained a report showing her license was still suspended, even though she could have had it reinstated by then.

sobriety tests and was arrested. At the sheriff's office, the deputy administered two breath tests to Ventresca with results of .122 and .119.

¶3 On July 24, 2008, a grand jury indicted Ventresca for aggravated driving while under the influence of intoxicating liquor, a class four felony in violation of Arizona Revised Statutes ("A.R.S.") sections 28-1383(A)(1), -1381(A)(1) (Supp. 2009),[3] and aggravated driving with a blood alcohol concentration of .08% or more, a class four felony in violation of A.R.S. §§ 28-1383(A)(1), -1381(A)(2). Ventresca pled not guilty. On October 2, 2008, a grand jury indicted Ventresca with two more offenses from the same incident: aggravated driving under the influence while required to equip vehicle with an ignition interlock device, a class four felony in violation of A.R.S. §§ 28-1383(A)(4)(b), -1381(A)(1), and aggravated driving with a blood alcohol concentration of .08% or more while required to equip vehicle with an ignition interlock device, a class four felony in violation of A.R.S. §§ 28-1383(A)(4)(b), -1381(A)(2). Ventresca pled not guilty to the new charges, and all four offenses were consolidated into one case.

¶4 Before trial, the State and Ventresca stipulated that, at the time of the stop, her driver's license was suspended, and

[3]We cite the current version of the applicable statutes because no revisions material to this appeal have occurred.

she "was required by law to have any vehicle driven by her equipped with an ignition interlock device and did not have her vehicle so equipped."

¶5 On September 14, 2009, a jury found Ventresca guilty of all four offenses. The court sentenced Ventresca to four years of probation and, as a condition of probation, ordered her to serve four months in prison, with two days of presentence incarceration credit, in addition to 100 hours of community service. The court also imposed a fine of $750 plus 84% surcharge –- for a total fine of $1380 -– plus $250 for the DUI abatement fund, $1500 for the prison construction fund, and $1500 for DUI assessment.[4]

DISCUSSION

¶6 We have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. The judge erroneously instructed the jury regarding the stipulations in the case, but the improper instruction does not constitute fundamental error and thus does not require reversal.

¶7 The judge instructed the jury to treat the two agreed-upon stipulations as "facts in this case." In a criminal trial, however, a stipulation is not binding on the jury. *State v. Virgo*, 190 Ariz. 349, 353, 947 P.2d 923, 927 (App. 1997).

[4]The court also ordered Ventresca to pay $700 in attorneys' fees and a monthly probation fee of $65.

Ventresca testified her license was suspended when the deputy stopped her, so there was evidence before the jury to support this stipulation. The record contains no evidence, however, to support the ignition interlock device stipulation.

¶8 Because Ventresca never objected to the instruction, she must prove fundamental error existed and it caused her prejudice. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 20, 115 P.3d 601, 607 (2005). Fundamental error "goes to the foundation of [the] case, takes away a right that is essential to [the] defense, and is of such magnitude that [the defendant] could not have received a fair trial." *Id.* at 568, ¶ 24, 115 P.3d at 608. The showing required to establish prejudice "differs from case to case." *Id.* at ¶ 26. Because Ventresca never disputed –- either at trial or on appeal –- that she was required to have an ignition interlock device on any vehicle she drove, the error did not go to "the foundation" of Ventresca's case, did not cause her prejudice, and thus was not fundamental error requiring reversal.

¶9 Ventresca received a fair trial. She was represented by counsel at all stages of the proceedings and was present at all critical stages. The evidence presented at trial was substantial and supports the verdicts. The jury was properly composed of eight members, and the court properly instructed the jury on the elements of the charges, Ventresca's presumption of

innocence, the State's burden of proof, and the necessity of a unanimous verdict. The superior court received and considered a presentence report, Ventresca was given an opportunity to speak at sentencing, and her sentence was within the range of acceptable sentences for her offenses.

¶10 In our review of the record, we discovered an error in the sentencing minute entry. At the sentencing hearing, the court ordered Ventresca to pay a minimum probation fee of $65 per month and to pay $100 per month on all other fines and fees. The signed sentencing minute entry, however, recites Ventresca must pay $100 per month for probation fees and $65 per month for all other fines and fees. We hereby correct the sentencing minute entry to reflect Ventresca must pay $65 per month for probation fees and $100 per month for all other fines and fees.

CONCLUSION

¶11 We decline to order briefing and affirm Ventresca's convictions and sentence as corrected.

¶12 After the filing of this decision, defense counsel's obligations pertaining to Ventresca's representation in this appeal have ended. Defense counsel need do no more than inform Ventresca of the outcome of this appeal and her future options, unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review.

State v. Shattuck, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984).

¶13 Ventresca has 30 days from the date of this decision to proceed, if she wishes, with an *in propria persona* petition for review. On the court's own motion, we also grant Ventresca 30 days from the date of this decision to file an *in propria persona* motion for reconsideration.

/s/
_____
PATRICIA K. NORRIS, Judge

CONCURRING:

/s/
_____
LAWRENCE F. WINTHROP, Presiding Judge

/s/
_____
PATRICK IRVINE, Judge