**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES**
**See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24**

DIVISION ONE
FILED: 09/27/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

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

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| STATE OF ARIZONA, Appellee, v. OLIVER O MALDONADO, Appellant. | ) | 1 CA-CR 10-0829<br>DEPARTMENT C<br>**MEMORANDUM DECISION**<br>(Not for Publication – Rule 111, Rules of the Arizona Supreme Court) |

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-005943-001DT

The Honorable James T. Blomo, Judge Pro Tempore

**AFFIRMED AS MODIFIED**

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Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
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Attorneys for Appellant

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**K E S S L E R**, Judge

**¶1** Oliver Maldonado ("Appellant") filed this appeal in accordance with *Anders v. California*, 386 U.S. 738 (1967), and

*State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), following his conviction of one count of negligent homicide, a class 4 dangerous felony under Arizona Revised Statutes ("A.R.S.") section 13-1102(A) (2010),[1] and one count of endangerment, a class 1 misdemeanor under A.R.S. § 13-1201 (2010).[2]

**¶2** Finding no arguable issues to raise, Appellant's counsel requested that this Court search the record for fundamental error. Appellant was given the opportunity to, but did not submit a *pro per* supplemental brief. For the reasons that follow, we affirm Appellant's convictions and modify his sentence to reflect one additional day of presentence incarceration credit.

**FACTUAL AND PROCEDURAL HISTORY**

**¶3** Appellant was charged with manslaughter and endangerment in connection with events that took place in May 2007. He pled not guilty to the charges.

**¶4** Appellant was employed by a mobile pressure washing

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[1] We cite the current version of the applicable statute when no revisions material to this decision have since occurred.

[2] Although the sentencing minute entry lists the offense of endangerment as a class 6 felony, discussions on the record indicate that the trial court intended the offense to be a class 1 misdemeanor under A.R.S. § 13-1201(B). "When we are able to ascertain the trial court's intention by reference to the record, remand for clarification is unnecessary. We therefore clarify this discrepancy on appeal pursuant to [A.R.S. § 13-4037]." *State v. Contreras*, 180 Ariz. 450, 453 n.2, 885 P.2d 138, 141 n.2 (App. 1994) (citation omitted).

company responsible for fleet washing and concrete cleaning. While he typically worked weeknights, Appellant agreed in advance to cover a Saturday morning shift.

**¶5** On the evening of May 11, 2007, Appellant returned to Mesa after completing a job in Tucson. He smoked marijuana at midnight, and when he was unable to sleep, smoked again at 6:00 a.m. Later that morning Appellant awoke around 8:45 a.m., and reported for work at 9:30 a.m. Although Appellant testified that he felt tired, he claimed he no longer felt the effects of the drugs he smoked earlier that morning.

**¶6** Appellant was scheduled to work at three separate job sites along with his friend N.S. and his girlfriend A.Y. While driving on the freeway to the third and final location, Appellant began to doze off, and was awakened by a vibration from the road's rumble strips. Only a block from their destination, Appellant fell asleep, and crashed into two concrete block walls. N.S. died as a result of the collision.

**¶7** Officer W., a certified drug recognition expert, was called to the scene to investigate. After administering a variety of tests both at the scene and at the station, Officer W. concluded that Appellant was under the influence of marijuana and unable to safely operate a motor vehicle.

**¶8** At trial, the State's forensic criminalist testified that three nanograms of tetrahydrocannabinol ("T.H.C.") were

found in Appellant's system, indicating recent use of marijuana. He further testified that the drug can affect a person's ability to drive, and that such impairment can last anywhere between four and twenty-four hours. In contrast, the forensic toxicologist for the defense testified that after reviewing the case he could not say with any scientific certainty that Appellant was in fact impaired. He also testified that such an impairment would not have any significant effect on driving, as multiple studies show that drivers under the influence of marijuana are actually five percent less likely to be involved in an accident.

**¶9** In July 2009, an eight-person jury convicted Appellant of negligent homicide, a dangerous offense, and endangerment. He was sentenced to a four-year term of imprisonment for the charge of negligent homicide, a concurrent six-month term for the charge of endangerment, and was awarded 197 days of presentence incarceration credit.

**¶10** Appellant appealed. *See* Ariz. R. Crim. P. Rule 31.3(b). We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, as well as A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and -4033(A)(1) (2010).

**STANDARD OF REVIEW**

**¶11** In an *Anders* appeal, this Court must review the entire record for fundamental error. *State v. Richardson*, 175 Ariz.

336, 339, 857 P.2d 388, 391 (App. 1993). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)). To obtain a reversal, the defendant must also demonstrate that the error caused prejudice. *Id.* at ¶ 20.

**DISCUSSION**

**¶12** After careful review of the record, we find no grounds for reversal of Appellant's conviction. The record reflects Appellant had a fair trial and all proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. Appellant was present and represented at all critical stages of trial, was given the opportunity to speak at sentencing, and the sentence imposed was within the range for Appellant's offenses.

**I. SUFFICIENCY OF THE EVIDENCE**

**¶13** In reviewing the sufficiency of evidence at trial, "[w]e construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998). "Reversible error based on insufficiency of the evidence occurs only where there is a

complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (quoting *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976)).

*A. Negligent Homicide*

**¶14** For the jury to find Appellant guilty of negligent homicide, it had to find that Appellant (1) caused the death of a person and (2) failed to recognize a substantial and unjustifiable risk that the result would occur. A.R.S. §§ 13-105(10)(d) (2010), -1102(A).

**¶15** In this case, Appellant admitted to driving and crashing his vehicle, and the parties stipulated that the victim died as a result of the collision. He also admitted to smoking marijuana at 12:00 and 6:00 that morning. While Appellant testified that he no longer felt the drug's effects at the time of the accident, the State's expert witness testified that the amount of active T.H.C. in his system was consistent with recent cannabis use, and Officer W. testified that in his opinion Appellant was under the influence and unable to safely operate a motor vehicle. Appellant further testified that he was tired and had already begun to doze off on the freeway prior to the crash. Based on this testimony, there was substantial evidence to support Appellant's conviction of negligent homicide.

*B. Endangerment*

**¶16** For the jury to find Appellant guilty of endangerment under A.R.S. § 13-1201, it had to find that Appellant recklessly endangered another person with a substantial risk of imminent death or physical injury. A person who acts recklessly "is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur," and "[t]he risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." A.R.S. § 13-105(10)(c). Recklessness "requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man." *Williams v. Wise*, 106 Ariz. 335, 341, 476 P.2d 145, 151 (1970).

**¶17** Here, Appellant was cognizant of the real risk of falling asleep while driving. He testified that prior to the accident, he began to doze off, and was awakened by a vibration from the road's rumble strips. Despite this warning, Appellant continued to drive to his third assignment. Based on this testimony, the jury could reasonably conclude that Appellant was aware of the danger he posed in continuing to operate the vehicle, and as a result, recklessly endangered the life of the

surviving passenger.[3]

**II. PRESENTENCE INCARCERATION CREDIT**

**¶18** Presentence incarceration credit is given for time spent in custody beginning on the day of booking and ending on the day before sentencing. *See State v. Carnegie*, 174 Ariz. 452, 454, 850 P.2d 690, 692 (App. 1993); *State v. Hamilton*, 153 Ariz. 244, 246, 735 P.2d 854, 856 (App. 1987). Appellant was in custody from his arrest on February 4, 2009, until his sentencing on August 21, 2009. While Appellant's total time incarcerated prior to sentencing was 198 days, he only received a credit of 197 days. We, therefore, modify the sentence to reflect this correction.

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[3] *See Clancy v. State*, 829 N.E.2d 203, 209 (Ind. Ct. App. 2005) (finding "that merely falling asleep while driving is insufficient evidence of recklessness. Instead, there must be some proof that the driver consciously ignored, for a period of time, substantial warnings that he or she might fall asleep, and continued to drive despite warnings, before actually falling asleep and causing an accident"); *State v. Valyou*, 910 A.2d 922, 924 (Vt. 2006) ("[F]alling asleep at the wheel does not, in and of itself, constitute gross negligence. On the other hand, when a driver is on sufficient notice as to the danger of falling asleep but nevertheless continues to drive, the driver's subsequent failure to stay awake may be grossly negligent."); *Boos v. Sauer*, 253 N.W. 278, 279 (Mich. 1934) ("To constitute gross negligence in falling asleep while driving there must have been such prior warning of the likelihood of sleep that continuing to drive constitutes reckless disregard of consequences. . . . It has been held that prior warning may be by way of having before gone to sleep or dozed off.").

**CONCLUSION**

**¶19** For the foregoing reasons, we affirm Appellant's conviction but modify his sentence to grant him 198 days of presentence incarceration credit, and modify the conviction of endangerment to a class 1 misdemeanor. Upon the filing of this decision, defense counsel shall inform Appellant of the status of his appeal and his future appellate options. Defense counsel has no further obligations, unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Upon the Court's own motion, Appellant shall have thirty days from the date of this decision to proceed, if he so desires, with a *pro per* motion for reconsideration or petition for review.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
PATRICIA A. OROZCO, Presiding Judge

/s/
MICHAEL J. BROWN, Judge