IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Petitioner,

v.

HON. GUS ARAGÓN, JUDGE OF THE SUPERIOR COURT
OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF PIMA,
Respondent,

and

MAX FONTES,
Real Party in Interest.

No. 2 CA-SA 2020-0031
Filed August 14, 2020

Special Action Proceeding
Pima County Cause No. CR20182815001

JURISDICTION ACCEPTED; RELIEF GRANTED

COUNSEL

Mark Brnovich, Arizona Attorney General
By Joshua Moser, Assistant Attorney General, Tucson
Counsel for Petitioner

John D. Kaufmann, Tucson
Counsel for Real Party in Interest

OPINION

Judge Eckerstrom authored the opinion of the Court, in which Presiding Judge Eppich and Judge Espinosa concurred.

E C K E R S T R O M, Judge:

¶1 In this special-action proceeding, the state seeks review of the respondent judge's order concluding the real party in interest, Max Fontes, is entitled to a jury instruction on superseding cause and to present evidence that the victims had not been properly restrained when Fontes struck their vehicle at high speed. Because the state has no remedy by appeal and this case presents a purely legal and potentially dispositive issue, we accept special-action jurisdiction. *See State v. Godoy*, 244 Ariz. 327, ¶ 6 (App. 2017); *see also* Ariz. R. P. Spec. Act. 1(a). And because a superseding-cause instruction is inappropriate as a matter of law, we grant relief.

Background

¶2 The facts are straightforward and, for the purpose of this special action, essentially undisputed. In April 2018, Fontes, while driving between seventy and ninety-five miles per hour—well over the posted speed limit of forty-five miles per hour—struck Angel Shelby's vehicle as Shelby attempted a left-hand turn. Neither Shelby nor his seven-month-old son were properly restrained, and both were ejected. Shelby was seriously injured, and his son died. Shelby had THC and a related metabolite in his blood at the time of the crash and later pled guilty to DUI and endangerment. Fontes has been charged with manslaughter, two counts of aggravated assault, and criminal damage.[1]

¶3 The state sought to preclude Fontes from presenting a superseding-cause defense and from presenting evidence of the lack of restraints, Shelby's possible marijuana impairment, and the presence of a

[1] Fontes sought and was denied dismissal on collateral-estoppel grounds based on Shelby's plea. He sought special-action relief, and we declined jurisdiction without ordering a response. *Fontes v. Aragon*, No. 2 CA-SA 2020-0004 (Ariz. App. Jan. 21, 2020) (order). He has requested that we reconsider that denial. We deny his request.

marijuana pipe in Shelby's vehicle. The state agreed that evidence of Shelby's failure to yield while making the turn was relevant and admissible, but argued it was not a superseding cause. The respondent judge denied the state's motions,[2] concluding the jury could determine Shelby's conduct was a superseding cause if it concluded he had been impaired, failed to yield, or failed to properly restrain himself and his son.[3] This special action followed. The state seeks review of the respondent's ruling allowing the superseding-cause instruction and allowing evidence that Shelby and his child were unrestrained.

Discussion

¶4 "A defendant is entitled to a jury instruction 'on any theory reasonably supported by the evidence.'" *State v. Lopez*, 209 Ariz. 58, ¶ 10 (App. 2004) (quoting *State v. Johnson*, 205 Ariz. 413, ¶ 10 (App. 2003)). We review for an abuse of discretion a trial court's decision whether to give an instruction. *See State v. Dann*, 220 Ariz. 351, ¶ 51 (2009). A court abuses that discretion, however, by giving an instruction contrary to law or unsupported by the record. *See State v. Linares*, 241 Ariz. 416, ¶ 6 (App. 2017).

¶5 In criminal cases, the state must establish that the defendant's actions were both a but-for and proximate cause. *State v. Marty*, 166 Ariz. 233, 236 (App. 1990). However, "[a] defendant's actions need not be the sole cause of [harm] for the defendant to be held criminally liable," even if there is some intervening event. *State v. Pesqueira*, 235 Ariz. 470, ¶ 23 (App. 2014). "An intervening event must be unforeseeable and abnormal or extraordinary to qualify as a superseding cause that can excuse a defendant

[2]The respondent denied the motions, then vacated that order to allow for oral argument. After argument, the respondent affirmed his ruling without further comment.

[3]Fontes argues the respondent's ruling was preliminary and could change based on the evidence presented at trial and, thus, we should decline special-action jurisdiction. The state is correct that this is an unrealistic view of the respondent's order, which concludes as a matter of law that the facts, as described, could constitute superseding cause. As we explain, even if those facts are viewed in the light most favorable to Fontes, *see State v. Almeida*, 238 Ariz. 77, ¶ 2 (App. 2015), the instruction is inappropriate as a matter of law.

from liability for a criminal act." *State v. Slover*, 220 Ariz. 239, ¶ 11 (App. 2009).

¶6 The respondent judge's ruling identifies three purported superseding causes: (1) Shelby's possible impairment; (2) Shelby's failure to yield; and (3) Shelby's failure to restrain himself and his son. The state argues that, because the risk of harm Fontes foreseeably created was the same risk that injured Shelby and his son, Shelby's conduct cannot be a superseding cause. The state's position is amply supported by Arizona law.

¶7 For example, in *Slover*, we affirmed the trial court's denial of a superseding-cause instruction, quoting our supreme court for the proposition that an intervening cause cannot "be considered a superseding cause when the defendant's conduct 'increases the foreseeable risk of a particular harm occurring through . . . a second actor.'" *Id.* ¶ 11 (alteration in *Slover*) (quoting *Ontiveros v. Borak*, 136 Ariz. 500, 506 (1983)); *see also Young v. Envtl. Air Prods., Inc.*, 136 Ariz. 206, 212 (App. 1982) ("An intervening force is not a superseding cause if the original actor's negligence creates the very risk of harm that causes the injury."), *modified on other grounds and aff'd*, 136 Ariz. 158 (1983).

¶8 In *Slover*, the intoxicated defendant drove his truck off the road and down an embankment, landing in a shallow creek. 220 Ariz. 239, ¶ 2. The victim, the defendant's passenger, was found "lying [dead] in the creek with his head submerged in the water." *Id.* There was some evidence that the (also inebriated) victim might not have been rendered unconscious in the crash and instead may have crawled into the water and drowned due to his intoxication. *Id.* ¶¶ 2, 10, 13. We agreed with the trial court that no superseding-cause instruction was warranted, concluding the defendant's "conduct of driving while intoxicated was the very reason the victim had ended up near or in a creek, intoxicated, with head injuries, and, at the very least, increased the foreseeable risk that the victim would die in the accident." *Id.* ¶ 14; *see also Duncan v. State*, 157 Ariz. 56, 58-59, 61 (App. 1988) (risk created by bringing loaded weapon to training exercise encompasses risk caused by failure of instructor to inspect firearm, barring superseding-cause defense).

¶9 That reasoning precludes a superseding-cause instruction here. Fontes's speeding created the foreseeable risk that a fatal accident could occur. That Shelby's conduct increased that risk does not entitle Fontes to a superseding-cause instruction.

¶10 This court has already determined that a victim's failure to wear a seatbelt is not a superseding cause. *See State v. Freeland*, 176 Ariz. 544, 546 (App. 1993). There, we noted, "One who drinks and drives should reasonably foresee that some among the potential victims of drunken driving will not wear seat belts and that such victims, among others, might be seriously injured in an alcohol-induced collision." *Id.* at 548. We further observed that "just as the victim's failure to wear a seat belt does not supersede the defendant's causal responsibility for the victim's enhanced injuries in tort law, it does not supersede the defendant's causal responsibility in criminal law." *Id.* Fontes's position, below and on review, is that *Freeland* is outdated because seatbelt use is not only much more common,[4] it is legally mandated,[5] and the non-use of seatbelts is now extraordinary. Even if we agreed with Fontes's criticisms of *Freeland*, however, we need not address them because the rule applied in *Slover* bars a superseding-cause instruction here.[6]

¶11 Fontes suggests that Shelby's conduct was the sole proximate cause of Shelby's injuries and his son's death, reasoning the jury could conclude he is therefore not liable. He grounds this argument in Revised Arizona Jury Instructions (RAJI) Standard Criminal § 2.03.03 (5th ed. 2019), addressing causation by multiple actors. Although Fontes raised this argument below, it is not clear whether or to what extent the respondent judge relied on it. The respondent did not suggest he would give an instruction pursuant to RAJI Stand. Crim. § 2.03.03. But, in any event, the instruction is inapplicable; it is appropriate only when "another cause 'with which the defendant was in no way connected intervenes, and but for which death would not have occurred.'" *Marty*, 166 Ariz. at 237 (quoting

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[4]Fontes submitted a report stating that, in 1991, only a third of vehicle occupants regularly used seatbelts but by 2018, approximately eighty-six percent of Arizona drivers used seatbelts. He also submitted an offer of proof stating that the use of child restraints in the United States is "nearly 100% when available."

[5]Section 28-909(A), A.R.S., requires "front seat occupant[s]" to wear seatbelts. Section 28-907(A), A.R.S., requires a child-restraint system for children under five. Notably, § 28-907(G) states: "The requirements of this section or evidence of a violation of this section are not admissible as evidence in a judicial proceeding except in a judicial proceeding for a violation of this section."

[6]Nor need we address Fontes's argument that illegal conduct by the victim is always unforeseeable.

State v. Cocio, 147 Ariz. 277, 281 (1985)). Shelby and his child would not have been ejected from their vehicle had Fontes not crashed into it—without his conduct, no injury would have occurred.

¶12 Fontes also asserts the foreseeability of an intervening cause should be a jury question, citing *Gipson v. Kasey*, 214 Ariz. 141 (2007), and *Dupray v. JAI Dining Services (Phoenix), Inc.*, 245 Ariz. 578 (App. 2018). He further contends his position is grounded in the United States and Arizona Constitutions. We need not reach these arguments because a superseding-cause instruction—and any concomitant evaluation of foreseeability—is inappropriate here because Shelby's conduct only increased the risk caused by Fontes's conduct.

¶13 The state requests that we reverse the respondent's order denying its motion to preclude evidence that Shelby and his son had been unrestrained. The only basis for admission of this evidence discussed by the parties was to support the superseding-cause instruction. Because that instruction is not appropriate, the evidence is not admissible on that ground.

Disposition

¶14 We accept special-action jurisdiction and grant relief. We vacate the respondent judge's order concluding that Fontes is entitled to a superseding-cause instruction based on Shelby's possible impairment, failure to yield, or failure to properly use restraints. We additionally reverse the trial court's ruling denying the state's request to preclude evidence that Shelby and his son had been unrestrained.