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JUL 19 2013
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA,<br><br>Appellee,<br><br>v.<br><br>DAMASO ALAVEZ,<br><br>Appellant. | ) | 2 CA-CR 2012-0441<br>DEPARTMENT B<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 111, Rules of<br>the Supreme Court |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20113655001

Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART

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K E L L Y, Presiding Judge.

**¶1** Damaso Alavez appeals from his convictions and sentences for one count each of second-degree murder, criminal damage, endangerment, driving under the influence of an intoxicant, driving with an alcohol concentration of .08 or more, and driving while under the extreme influence of liquor. He argues the trial court erred in seating less than twelve jurors, and in denying two of his requested jury instructions. We affirm.

## Background

**¶2** "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). In October 2011, while "racing" with another car, Alavez drove through a red light and collided with a vehicle, killing the driver, S.L. At the time of the collision, Alavez was traveling over ninety miles per hour. A test of his blood showed trace amounts of marijuana and a metabolite of cocaine, and established his alcohol concentration had been approximately .198 an hour after the collision. Alavez was arrested and convicted as above and sentenced to a combination of concurrent and consecutive, presumptive terms totaling 18.25 years' imprisonment.

## Discussion

### Twelve-Person Jury

**¶3** Alavez argues the trial court erred in seating a jury of only eight persons because, based upon article II, § 23 of the Arizona Constitution, he was entitled to a

twelve-person jury.[1] Article II, § 23 provides that, "Juries in criminal cases in which a sentence of . . . imprisonment for thirty years or more is authorized by law shall consist of twelve persons." *See also* A.R.S. § 21-102(A).

**¶4** As the parties agree, at the time the jury began deliberating Alavez faced a maximum sentence of thirty years.[2] *See State v. Kuck*, 212 Ariz. 232, ¶ 11, 129 P.3d 954, 955 (App. 2006) (whether defendant faced potential sentence of thirty or more years determined at beginning of jury deliberations). However, the state argues that even though Alavez faced a maximum sentence of thirty years, his right to a twelve-person jury "was not violated" because the court imposed a total sentence of less than thirty years.

**¶5** Our supreme court resolved this issue in *State v. Soliz*, 223 Ariz. 116, 219 P.3d 1045 (2009). In that case, Soliz faced a maximum sentence of thirty-five years' imprisonment. *Id.* ¶ 2. The trial court empanelled an eight-person jury and neither party objected. *Id.* ¶ 3. At sentencing the state requested, and the court imposed, a presumptive, ten-year sentence. *Id.* On review, the supreme court noted that "[b]y failing to request a jury of twelve, the State effectively waived its ability to obtain a sentence of thirty years or more [and] [t]he trial judge affirmed this by failing to empanel a jury of twelve." *Id.* ¶ 16. The court held that "[i]n such a circumstance, as long as a lesser

[1]Alavez did not request a twelve-person jury or raise this objection below. Because we find no error, fundamental or otherwise, we need not determine whether our review is limited to fundamental, prejudicial error. *See State v. Soliz*, 223 Ariz. 116, ¶¶ 5, 10-12, 219 P.3d 1045, 1046, 1048 (2009).

[2]Alavez also was charged with, and found not guilty of, possession of drug paraphernalia.

sentence may legally be imposed . . . a sentence of thirty years or more is no longer permitted and . . . the twelve-person guarantee of Article [II], Section 23 is not triggered." *Id*. ¶ 16. Therefore, even if the defendant faces a maximum sentence of thirty or more years, there is no error, structural or otherwise, when "the case proceeds to verdict with a jury of less than twelve people without objection, and the resulting sentence is less than thirty years." *Id*. ¶¶ 1, 18.

**¶6** Alavez argues *Soliz* is distinguishable from his case. He claims that, "[u]nlike the defendant in *Soliz*, [he] did not have any prior convictions" and therefore "a sentence in excess of thirty years would be based on the jury's finding of guilt on multiple charges, not the State's additional allegations of prior convictions." But Alavez does not explain the significance of this distinction, and he has not established that the method by which a sentence is obtained is relevant. Instead, our supreme court has made clear that if a jury of less than twelve persons is empaneled, a sentence of thirty years or more simply is not permitted. *Id*. ¶ 16; *see also* Ariz. Const. art. II, § 23.

**¶7** Alavez also claims that "unlike *Soliz*, there was a victim in the instant case" and "[a]llowing the State to waive its ability to obtain a sentence over thirty years without any victim input would violate the Arizona Constitution." In support, he cites the Arizona Victims' Bill of Rights, which provides victims of a crime the right to be heard at "any proceeding involving . . . sentencing." Ariz. Const. art. II, § 2.1(4).[3]

[3]In *Soliz*, the court noted that because there was no victim, it "need not determine whether the State's decision to waive a particular sentence implicates a crime victim's

**¶8** Although, as Alavez asserts, there are victims in his case,[4] he has not established he has standing to assert their rights. *See* A.R.S. § 13-4437(A), (C) (victim, and prosecutor at request of victim, have standing to seek enforcement of rights guaranteed in Victims' Bill of Rights). Further, even if Alavez could assert a claim on behalf of the victims, the Victims' Bill of Rights provides that the exercise of any right granted by it "shall not be grounds for dismissing any criminal proceeding or setting aside any conviction or sentence." Ariz. Const. art. II, § 2.1(B).

**¶9** For these reasons, Alavez has not demonstrated *Soliz* is distinguishable. Even though Alavez initially faced a potential sentence of thirty years, because the case proceeded "to verdict with a jury of less than twelve people without objection, and the resulting sentence [was] less than thirty years," no error occurred. *Soliz*, 223 Ariz. 116, ¶¶ 1, 18, 219 P.3d at 1046, 1049.

**Jury Instructions**

**¶10** Alavez argues the trial court erred by refusing to give his requested jury instructions on the lesser-included offenses of negligent homicide and manslaughter. We review a court's ruling denying a jury instruction for an abuse of discretion. *State v. Wall*, 212 Ariz. 1, ¶ 12, 126 P.3d 148, 150 (2006). A defendant is entitled to a jury instruction

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right '[t]o be heard at any proceeding involving . . . sentencing.'" 223 Ariz. 116, n.3, 219 P.3d at 1049 n.3, *quoting* Ariz. Const. art. II, § 2.1(4).

[4]Members of S.L.'s family addressed the court at sentencing. *See* A.R.S. § 13-4401(19) (if defendant causes death of victim, family members of decedent are also victims).

"on any theory reasonably supported by the evidence." *State v. Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d 1006, 1009 (1998). But, "[w]here the law is adequately covered by [the] instructions as a whole, no reversible error has occurred." *State v. Doerr*, 193 Ariz. 56, ¶ 35, 969 P.2d 1168, 1177 (1998). Jury instructions are viewed as a whole to determine if they "adequately reflect the law." *State v. Gallegos*, 178 Ariz. 1, 10, 870 P.2d 1097, 1106 (1994). In determining whether the evidence warranted a particular instruction, we view the evidence in the light most favorable to the instruction's proponent. *State v. King*, 225 Ariz. 87, ¶ 13, 235 P.3d 240, 243 (2010).

*Manslaughter Instruction*

**¶11** Alavez argues the trial court erred "by refusing to provide [his] requested manslaughter jury instruction because the instruction given by the court did not adequately cover the offense." Alavez did not raise this objection before the jury began deliberating, and we therefore review for fundamental, prejudicial error.[5] *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005).

**¶12** Alavez requested a jury instruction that manslaughter required proof the defendant "caused the death of another person" and "was aware of and showed a conscious disregard of a substantial and unjustifiable risk of death." The requested instruction also provided that "[s]econd degree murder and manslaughter may both result

[5]Although Alavez objected to the trial court's manslaughter instruction in his motion for a new trial, in order to avoid waiver, an objection must be made before the jury begins deliberating. *See* Ariz. R. Crim. P. 21.3(c); *State v. Gatliff*, 209 Ariz. 362, ¶ 9, 102 P.3d 981, 983 (App. 2004).

from recklessness. The difference is that the culpable recklessness involved in manslaughter is less than the culpable recklessness involved in second degree murder."

**¶13** The trial court gave the following instruction on both second-degree murder and manslaughter:

> The crime of second degree murder requires proof of the following:
>
> Under circumstances manifesting extreme indifference to human life, the defendant recklessly engaged in conduct that created a grave risk of death and thereby caused the death of another person.
>
> The crime of second degree murder includes the less serious offense of manslaughter. You may consider the less serious offense if you find the defendant not guilty of the more serious offense or if after reasonable efforts you fail to reach a decision on the more serious offense.
>
> A person commits manslaughter by recklessly causing the death of another person.
>
> . . . .
>
> "Recklessly" means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists.

Alavez made no timely objection to the instruction.

**¶14** On appeal Alavez argues the trial court erred in giving the instruction because it "did not adequately distinguish manslaughter from second degree murder." He asserts the court should have given his requested instruction because it "was far more substantial and explained that the difference between the two offenses is that second

degree murder requires proof of a more culpable recklessness than manslaughter." But Alavez has not established that the court's instructions, taken as a whole, did not adequately explain the law. *See Gallegos*, 178 Ariz. at 10, 870 P.2d at 1106. And, although he asserts his requested instruction was "more substantial" and "most precisely fit his defense," "[w]hen a jury is properly instructed on the applicable law, the trial court is not required to provide additional instructions that do nothing more than reiterate or enlarge the instructions in defendant's language." *State v. Salazar*, 173 Ariz. 399, 409, 844 P.2d 566, 576 (1992). Accordingly we find no error, much less fundamental, prejudicial error.[6]

*Negligent Homicide*

**¶15** Alavez next argues the trial court erred "by refusing to instruct the jury on negligent homicide because there was sufficient evidence to support the instruction." Negligent homicide is generally a lesser-included offense of manslaughter; the only difference between the two is the applicable mental state. *See State v. Nieto*, 186 Ariz. 449, 456, 924 P.2d 453, 460 (App. 1996). A person commits negligent homicide by causing the death of another person with criminal negligence. A.R.S. § 13-1102(A). Criminal negligence is defined as failure to "perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists." A.R.S. § 13-105(10)(d).

[6]To the extent Alavez argues the trial court's instruction on second-degree murder was erroneous because it did not "require a showing of 'malice aforethought'" we reject this argument. *See* A.R.S. § 13-1104 (defining second-degree murder).

**¶16** Here, although the jury was instructed on the lesser-included offense of manslaughter, it rejected this theory, instead finding Alavez guilty of the greater offense of second-degree murder. "Because the jury had the option of th[is] immediately-lesser included offense[], but nonetheless found [Alavez] guilty of the highest offense, it 'necessarily rejected all other lesser-included offenses.'" *State v. Anderson*, 210 Ariz. 327, ¶ 65, 111 P.3d 369, 386 (2005), *quoting State v. Vickers*, 159 Ariz. 532, 542, 768 P.2d 1177, 1187 (1989). Therefore, even if Alavez could demonstrate the evidence reasonably supported a negligent homicide instruction, *see Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d at 1009, he has not established resulting prejudice and relief is not appropriate, *see Anderson*, 210 Ariz. 327, ¶ 65, 111 P.3d at 386; *see also State v. Cota*, 229 Ariz. 136, ¶ 66, 272 P.3d 1027, 1041 (2012).

**Driving with an Alcohol Concentration of .08 or More**

**¶17** As the state observes, Alavez's conviction for driving with an alcohol concentration of .08 or more is a lesser-included offense of his conviction for driving while under the extreme influence of liquor. *See Merlina v. Jejna*, 208 Ariz. 1, n.1, 90 P.3d 202, 204 n.1 (App. 2004). The state concedes a conviction for both offenses violates the prohibition against double jeopardy. *See State v. Brown*, 217 Ariz. 617, ¶ 13, 177 P.3d 878, 882 (App. 2008) (double jeopardy rights violated by multiple convictions for same offense). We agree.

## Disposition

**¶18** We vacate Alavez's conviction and sentence for driving with an alcohol concentration of .08 or more. In all other respects his convictions and sentences are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

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