IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JEAN PIERRE VILLENA-CELIS,
Appellant.

No. 2 CA-CR 2016-0071
Filed July 11, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20142362001
The Honorable Christopher Browning, Judge

AFFIRMED AS CORRECTED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By Jonathan Bass, Assistant Attorney General, Tucson
Counsel for Appellee

Dean Brault, Pima County Legal Defender
By Robb P. Holmes, Assistant Legal Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Staring and Judge Kelly[1] concurred.

V Á S Q U E Z, Presiding Judge:

¶1 After an eight-day jury trial, Jean Pierre Villena-Celis was convicted of second-degree murder, a dangerous nature offense, driving under the influence of an intoxicant (DUI), and extreme DUI. The trial court sentenced him to a partially mitigated prison term of twelve-years for murder.[2] For Villena-Celis's DUI convictions, the court suspended the imposition of sentence and placed him on concurrent five-year terms of probation to commence after his prison term. On appeal, Villena-Celis argues the court should not have imposed probation terms consecutive to his prison term, should have granted his motion for a mistrial, should have permitted him to present character evidence, and should have granted his motion for a

[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

[2]The sentencing transcript and signed minute entry both reflect a twelve-year term of imprisonment for second-degree murder. The transcript, however, states the trial court imposed a "somewhat mitigated" term of twelve-years, while the minute entry reflects a "slightly aggravated" term of twelve years. When a conflict exists between the oral pronouncement of sentence and the minute entry, and the conflict may be clearly resolved by reviewing the record, as here, the oral pronouncement controls. *State v. Ovante*, 231 Ariz. 180, ¶ 38, 291 P.3d 974, 982 (2013). We thus correct the sentencing minute entry to reflect the partially mitigated sentence imposed. *See State v. Jonas*, 164 Ariz. 242, 245 n.1, 792 P.2d 705, 708 n.1 (1990).

judgment of acquittal made pursuant to Rule 20, Ariz. R. Crim. P. For the following reasons, we affirm his convictions, his sentence as corrected, and the imposition of probation consecutive to that sentence.

Factual Background

¶2 On appeal, we view the facts in the light most favorable to sustaining Villena-Celis's convictions and sentences. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). Some time after 2:00 a.m. on May 17, 2014, Villena-Celis drove his vehicle between seventy-three and ninety-three miles per hour into the rear of the victim's car, causing the victim to die of "[m]ultiple blunt force injuries." The accident occurred at the intersection of Roger Road and Mountain Avenue in Tucson, where there is a stop sign and the speed limit was thirty-five miles per hour. Sometime after 10:00 p.m. the night before the accident, Villena-Celis consumed vodka at a friend's apartment located at Park Avenue and Adams Street, which he acknowledged is "more than a mile" from the site of the accident; he did not recall what happened between the time he consumed his first drink and when he found himself sitting on a curb at the scene of the accident.

¶3 The investigating officer, who received a dispatch call at 2:37 a.m., observed that Villena-Celis had "watery, bloodshot eyes, slurred speech, [and a] flushed face," that he "was swaying, staggering when he walked," and "there was a strong odor [of alcohol] coming from his breath." Officers also observed six out of six total cues on the horizontal gaze nystagmus (HGN) test, and when they informed Villena-Celis he was going to be charged with second-degree murder, "he laughed and stated 'okay.'" Based on the three blood samples taken from Villena-Celis at 4:53 a.m., 5:55 a.m. and 6:57 a.m., his alcohol level within two hours of driving averaged .223.

Consecutive Probation Terms

¶4 Villena-Celis argues the imposition of probation terms for his DUI convictions consecutive to his prison term for second-degree murder violates the constitutional prohibition against double

jeopardy[3] and A.R.S. § 13-116, the statutory prohibition against double punishment. *See* A.R.S. § 13-116 ("An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent."). A trial court cannot impose consecutive sentences "when the defendant's conduct is a 'single act.'" *State v. Hampton*, 213 Ariz. 167, ¶ 64, 140 P.3d 950, 965 (2006), *quoting State v. Gordon*, 161 Ariz. 308, 315, 778 P.2d 1204, 1211 (1989).

¶5 We review a trial court's decision to impose consecutive sentences under § 13-116 using the test set forth in *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. *See State v. Cornish*, 192 Ariz. 533, ¶¶ 19-20, 968 P.2d 606, 611 (App. 1998) (consecutive term of probation upheld applying *Gordon* analysis). Under *Gordon,* the court first considers "the facts of each crime separately, subtracting from the factual transaction the evidence necessary to convict on the ultimate charge." 161 Ariz. at 315, 778 P.2d at 1211. If, after doing so, there is enough remaining evidence to satisfy each element of the secondary crime, consecutive sentences are appropriate. *Id.* The court next considers the entire "transaction," determining whether it was factually impossible to commit the ultimate crime without also committing the secondary crime. *Id.* Finally, the court will consider "whether the defendant's conduct in committing the lesser crime caused the victim to suffer an additional risk of harm beyond that inherent in the ultimate crime." *Id.* "If so, then ordinarily the court should find that the defendant committed multiple acts and should receive consecutive sentences." *Id.*

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[3] Villena-Celis's argument seems to conflate the double jeopardy clause of the Arizona and United States constitutions with § 13-116. Although he argues, in passing, that his sentences violated his constitutional right against double jeopardy, the substance of his argument on appeal concerns only the application of § 13-116. Because Villena-Celis does not properly develop a constitutional argument, we do not address it. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Burdick*, 211 Ariz. 583, n.4, 125 P.3d 1039, 1042 n.4 (App. 2005).

¶6 Here, the second-degree murder conviction is the ultimate offense. *See id.* (ultimate charge "is at the essence of the factual nexus and . . . will often be the most serious of the charges"). Villena-Celis maintains his intoxication was necessary to prove the extreme recklessness required for the murder conviction. He also argues that, because the state never alleged he drove while impaired at any time other than the accident, "any claim that consecutive sentences are supported by some act committed before the accident should be rejected." We disagree.

¶7 A person commits second-degree murder if, "[u]nder circumstances manifesting extreme indifference to human life, [he] recklessly engages in conduct that creates a grave risk of death and thereby causes the death of another person." A.R.S. § 13-1104(A)(3). "Recklessly" means the person was "aware of and consciously disregard[ed] a substantial and unjustifiable risk" of death 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). As we explain in more detail below, because the fact of alcohol in Villena-Celis's body was unnecessary to convict him of second-degree murder, we do not disregard it when determining whether sufficient facts remained to support his DUI convictions. *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211.

¶8 Villena-Celis's first DUI conviction required proof that, while driving or in actual physical control of his vehicle, he was under the influence of alcohol and was impaired to the slightest degree. *See* A.R.S. § 28-1381(A)(1). His extreme DUI conviction required proof that, within two hours of driving or being in physical control of his vehicle, he had an alcohol concentration of .20 or more. *See* A.R.S. § 28-1382(A)(2). Actual physical control of a vehicle is established by consideration of "the totality of the circumstances." *State v. Zaragoza*, 221 Ariz. 49, ¶ 20, 209 P.3d 629, 634 (2009). Here, Villena-Celis took actual physical control of his vehicle once he entered the vehicle, having consumed an unknown amount of alcohol sufficient to produce an alcohol concentration of .223 within two hours of driving, thereby "pos[ing] a threat to the public by the exercise of present or imminent control of the vehicle while impaired." *See id.* ¶ 21; *see also*

State v. Rivera, 207 Ariz. 69, ¶ 9, 83 P.3d 69, 72 (App. 2004) ("[B]y including 'actual physical control,' the legislature intended to extend the DUI statutes to encompass those situations in which a person who is not actually driving nonetheless poses an equivalent risk."). Subtracting the evidence necessary to support Villena-Celis's murder conviction leaves sufficient facts remaining to support his conviction on the DUI charges. *Cf. State v. Cruz*, 127 Ariz. 33, 36, 617 P.2d 1149, 1152 (1980) (consecutive sentences permissible for possession of deadly weapon and deadly assault by prisoner where possession completed before assault committed). As the state correctly asserts, the DUI offenses were complete when Villena-Celis took control of the vehicle while intoxicated, a separate act from the murder.

¶9 Regarding the second step of the *Gordon* analysis, Villena-Celis asserts it was factually impossible to commit the ultimate crime of second-degree murder without also committing the less serious DUI offenses, reasoning he would not have driven as he did if he had not been impaired by alcohol. But his having recklessly caused the victim's death, thereby committing second-degree murder, could have been supported solely by his driving at an excessive speed through a stop sign, manifesting extreme indifference to human life, without his having been intoxicated. Based on that theory of the evidence, it was possible for Villena-Celis to have committed murder without having committed the DUI offenses. *See Gordon*, 161 Ariz. at 315, 778 P.2d at 1211.

¶10 Finally, if our analysis of *Gordon's* first two factors indicates the defendant committed separate acts, as here, we need not consider the third factor, whether his conduct in committing the DUI offenses caused the victim to suffer a harm different from or additional to the risk of harm inherent in the murder. *State v. Boldrey*, 176 Ariz. 378, 382-83, 861 P.2d 663, 667-68 (App. 1993). Nor does Villena-Celis address this factor. We therefore conclude Villena-Celis's conduct did not constitute a single act and thus the trial court's imposition of consecutive probation terms for the DUI offenses did not violate § 13-116. *See Gordon*, 161 Ariz. at 315, 778 P.2d at 1211.

Motion for a Mistrial

¶11 Villena-Celis next argues the trial court should have granted his motion for a mistrial based on the testimony of the officer who conducted the DUI investigation that Villena-Celis had told him "he wished to speak to an attorney." Defense counsel immediately moved for a mistrial, reminding the court it had precluded any reference to Villena-Celis's request for an attorney in a pretrial motion in limine; the prosecutor avowed he had informed the witness of the court's ruling not to "mention [any] reference to an attorney." The court denied defense counsel's motion, noting "it was a single answer, and there wasn't any expounding on it. I don't think it anywhere near approaches the remedy of mistrial." *See State v. Dann*, 205 Ariz. 557, ¶ 43, 74 P.3d 231, 244 (2003) (declaration of mistrial is "most dramatic remedy for trial error"). Although the court offered to instruct the jury to disregard the offending testimony, defense counsel rejected the court's offer, concluding the proposed remedy would "call more attention to it."

¶12 When questioned about his testimony outside the presence of the jury, the officer stated, although he did not "recall" having been told he was not supposed to mention Villena-Celis's request for an attorney, that did not mean it did not happen; he had been present when the judge had ruled on many of the pretrial motions; and, no one had reminded him immediately before testifying he should not mention Villena-Celis's request for an attorney. Counsel renewed his motion for a mistrial, arguing he had noticed a juror "react" to the offending testimony by exhibiting "almost a grimace, [he] shook his head a little bit." Although the trial court determined the state had not "intentionally tried to elicit" the offending testimony and noted the state could not "see it coming," it nonetheless admonished the prosecutor and reminded him that he had an affirmative obligation to ensure the state's witnesses understood the court's rulings. The court then reaffirmed its denial of the request for a mistrial, concluding it did not think, "by any stretch of the imagination, that the defendant's rights have been prejudiced."

¶13 When a witness unexpectedly offers improper testimony and a mistrial is requested, the trial court should consider: "(1) whether the remarks called to the attention of the jurors matters that they would not be justified in considering in determining their verdict, and (2) the probability that the jurors, under the circumstances of the particular case, were influenced by the remarks." *State v. Stuard*, 176 Ariz. 589, 601, 863 P.2d 881, 893 (1993). We review the denial of a motion for mistrial for an abuse of discretion, giving deference to the trial judge, who "is in the best position to determine whether the evidence will actually affect the outcome of the trial." *State v. Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d 345, 359 (2000).

¶14 In its answering brief, the state acknowledges Villena-Celis's due process rights were "arguably violated" when the officer testified he had requested an attorney, but argues this single reference, which the prosecutor did not use to infer guilt, resulted in, at most, harmless error. *See State v. Krone*, 182 Ariz. 319, 321, 897 P.2d 621, 623 (1995) (error harmless when it can be said beyond a reasonable doubt it did not contribute to or affect the verdict). We agree.

¶15 Even assuming, as defense counsel asserted, that a juror took note of the officer's statement, it is highly improbable that the single, brief reference to Villena-Celis's request for counsel suggested to the jury he was guilty, much less influenced the verdicts in light of the other evidence presented. *See State v. Gilfillan*, 196 Ariz. 396, ¶ 38, 998 P.2d 1069, 1079 (App. 2000) (no abuse of discretion in denying mistrial where "testimony consisted of no more than a brief reference to the defendant's request for counsel"). Nor was there any evidence the statement was elicited based on the prosecutor's willful misconduct. *Cf. State v. Palenkas*, 188 Ariz. 201, 213, 933 P.2d 1269, 1281 (App. 1996) (deliberate and repeated attempts by prosecutor to establish defendant's guilt by reference to invocation of defendant's constitutional rights required new trial); *United States v. Kallin,* 50 F.3d 689, 693-94 (9th Cir. 1995) (government repeatedly and improperly commented on defendant's retention of counsel). We thus decline Villena-Celis's request that we find error because the prosecutor's conduct was deliberate or willful, a suggestion the record does not support and which the trial court properly rejected.

¶16 Moreover, it is within the trial court's discretion to deny a mistrial when a violation occurs unless there is a "reasonable probability" that such testimony "materially affected the outcome of the trial." *See Gilfillan*, 196 Ariz. 396, ¶¶ 35, 38, 998 P.2d at 1078-79. In light of the ample evidence in the record, which includes Villena-Celis's admission he had been drinking before the accident, his driving at a high rate of speed, his condition when officers arrived at the scene, the results of the HGN test, and his blood alcohol level, Villena-Celis has not established a reasonable probability the outcome at trial was affected by the officer's testimony. We thus affirm the court's denial of the motion for a mistrial.

Character Evidence

¶17 Villena-Celis argues the trial court improperly prohibited him from testifying about his character traits of being prudent and responsible, asserting this evidence was relevant to show whether he had been "extremely reckless, reckless, or criminally negligent." He points out that the court had ruled in a pretrial motion that such evidence was admissible.[4] At trial, Villena-Celis was permitted to testify about certain character evidence, summarized below. The court ultimately sustained the prosecutor's repeated objections based on relevance, finding it had given defense counsel "latitude in this introductory stuff in introducing [Villena-Celis] to the jury," but explaining that counsel was "now stretching the bounds of

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[4]The state filed a pretrial motion in limine to limit evidence of Villena-Celis's good character and related biographical information "to an appropriate minimum if he elects to testify." Although Villena-Celis did not file a response to the state's motion, the trial court denied it "with the understanding that said evidence is not absolutely forbidden from being admitted but should not be a significant portion of the examination of the defendant if he chooses to testify." The court stated it did not want to hear about "every time [Villena-Celis] helped an elderly person across the street," and explained that although it was not "completely foreclosing or precluding" topics like school and community organizations, "it's a matter of degree . . . And I will know when I have heard enough."

what's relevant." The court told defense counsel, "I've sustained about four objections on [character evidence]. And you should know better than to get into this."

¶18 We review rulings by the trial court regarding admission of evidence for an abuse of discretion. *State v. Tucker*, 215 Ariz. 298, ¶ 58, 160 P.3d 177, 193 (2007). Notably, Villena-Celis did not make an offer of proof, thereby making it impossible for us to determine whether the additional character evidence would have been admissible, or whether any error was harmful to his defense. *See* Ariz. R. Evid. 103(a)(2); *State v. Hernandez*, 232 Ariz. 313, ¶ 42, 305 P.3d 378, 387 (2013) (offer of proof "critical" because it allows trial court to reevaluate decision and appellate court to determine effect of exclusion). Villena-Celis acknowledges he made no offer of proof, asserting it was "unnecessary and would have been redundant," and maintains "it was reasonably probable that additional evidence about his character would have influenced how the jury weighed the contested evidence."

¶19 As we previously mentioned, the trial court permitted then twenty-two-year-old Villena-Celis to testify extensively about his background, including the following information: his age; place of birth and where he was raised; his parents' birthplace and occupations; his sibling and her status in school; that he is bilingual; the names and locations of his elementary and high schools, and that they were parochial institutions; volunteer work he did in high school and clubs to which he belonged; and, his course load as a student at the University of Arizona. However, Villena-Celis fails to describe the additional evidence he claims should have been admitted or explain how it would have helped him, but instead suggests the court could have "inferred" that evidence from his sentencing memorandum and the presentence report, documents that were prepared *after* the trial had concluded. In the absence of any specific evidence to review, we find Villena-Celis's argument unavailing and thus affirm the court's ruling.

Rule 20 Motion

¶20 Finally, Villena-Celis argues the trial court erred in denying his motion for a judgment of acquittal on the second-degree murder charge. We review de novo a trial court's denial of a Rule 20 motion. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* ¶ 16, *quoting State v. Mathers,* 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990). "Substantial evidence," as required under Rule 20, may be both direct and circumstantial. *Id.*

¶21 Villena-Celis moved for acquittal of the second-degree murder charge, arguing the evidence did not prove extreme recklessness. He maintains evidence of his driving speed was invalid in light of possible post-impact driver input and contends that the analysis of his blood alcohol level was related back to within two hours of driving, but not to the time of the accident.[5] He thus contends there was no evidence of extreme recklessness, and asserts his conviction for second-degree murder should be reduced to manslaughter.

¶22 As previously noted, a defendant commits second-degree murder when, "[u]nder circumstances manifesting extreme indifference to human life, [he] recklessly engages in conduct that creates a grave risk of death and thereby causes the death of another person." A.R.S. § 13-1104(A)(3). Alternatively, he commits manslaughter when he "[r]ecklessly caus[es] the death of another person." A.R.S. § 13-1103(A)(1). As relevant here, "'[r]ecklessly' means the person was "aware of and consciously disregard[ed] a substantial and unjustifiable risk" of death. A.R.S. § 13-105(10)(c). As also previously noted, the evidence established that Villena-Celis

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[5]Conversely, in a different portion of his opening brief, Villena-Celis argues "[t]he state related [his] BAC [blood alcohol content] back to within two hours of the moment of the accident and did not attempt to prove his BAC at any time before the accident."

drove a vehicle at a speed well above the legal speed limit with an extreme amount of alcohol in his body,[6] exhibiting an extreme indifference to human life by recklessly engaging in conduct that created a grave risk of death and caused such a death. The jury was required to resolve the arguably conflicting inferences that could be drawn from the evidence regarding the speed of Villena-Celis's vehicle and alcohol level, which it did. *See West*, 226 Ariz. 559, ¶ 18, 250 P.3d at 1192 (case must be submitted to jury when reasonable minds may differ on inferences drawn from facts). Based on the evidence presented at trial, a rational trier of fact could have found the essential elements of second-degree murder beyond a reasonable doubt. *See id.* ¶ 16. We thus affirm the trial court's denial of the motion for judgment of acquittal.

Disposition

¶23 We affirm Villena-Celis's convictions, his sentence as corrected, and the imposition of probation.

[6]We do not suggest, however, that evidence of Villena-Celis's intoxication was necessary for the jury to find him guilty of second-degree murder.