IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

RUBEN RENE ROJAS,
Appellant.

No. 2 CA-CR 2018-0308
Filed January 31, 2020

Appeal from the Superior Court in Graham County
No. CR201700375
The Honorable Michael D. Peterson, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Staring and Chief Judge Vásquez concurred.

B R E A R C L I F F E, Judge:

¶1 Ruben Rojas appeals from his convictions after a jury trial of driving a vehicle with a blood-alcohol concentration (BAC) of .20 or more (extreme DUI), *see* A.R.S. § 28-1382(A)(2), and two counts of aggravated driving while his driver license was suspended or revoked based on his BAC of .08 or more, and based on his being impaired by the influence of intoxicating liquor, *see* A.R.S. §§ 28-1381(A), 28-1383(A)—one misdemeanor count and two felony counts, respectively. The trial court sentenced Rojas to concurrent sentences, the longest two of which are fifteen years. We affirm.

Issues

¶2 Rojas contends the officer who initiated the traffic stop had no basis to do so and that the trial court therefore abused its discretion in denying his motion to suppress evidence obtained as a result. He also contends his extreme DUI conviction violates double-jeopardy principles because it is a lesser-included offense of one of his felony aggravated DUI convictions. The issues are whether the traffic stop was supported by reasonable suspicion and whether two of the DUI charges of which Rojas was convicted amount to the same offense under *Blockburger v. United States*, 284 U.S. 299 (1932).

Factual and Procedural Background

¶3 We view the facts in the light most favorable to upholding the jury's verdicts. *State v. Payne*, 233 Ariz. 484, n.1 (2013). In January 2017, Safford police officer Brooks Knight saw a car with a non-working license plate light weaving within its lane. Knight pulled the car over, and approached Rojas, the driver. He asked Rojas for his driver license, Rojas said he did not have it, and Knight asked him to step out of the car. Knight smelled the odor of alcohol coming from Rojas, his eyes were bloodshot and watery, and his speech was slurred. Knight then arrested Rojas after a field

sobriety test indicated he was impaired. Following his arrest, Rojas consented to a blood draw, and testing of his blood sample indicated a BAC of .294. A jury found Rojas guilty on all counts, and the trial court sentenced him as described above. We have jurisdiction pursuant to A.R.S. §§ 12-120.21, 13-4031, and 13-4033.

Analysis

Reasonable Suspicion

¶4 In reviewing a motion to suppress, this court considers only the evidence presented at the suppression hearing and we view the facts "in the light most favorable to sustaining the trial court's ruling." *State v. Gay*, 214 Ariz. 214, ¶ 4 (App. 2007). Whether there was sufficient basis to justify a traffic stop is a mixed question of fact and law. *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118 (1996). We defer to the trial court's findings of fact, including any determinations of witness credibility, but review its ultimate legal conclusions *de novo*. *Id*. "A trial court's denial of a motion to suppress will not be disturbed on appeal absent an abuse of discretion." *State v. Organ*, 225 Ariz. 43, ¶ 10 (App. 2010). "We will uphold the court's ruling if legally correct for any reason supported by the record." *State v. Moreno*, 236 Ariz. 347, ¶ 5 (App. 2014).

¶5 At the suppression hearing, Knight testified that he stopped Rojas's vehicle because of an "equipment violation," specifically for a non-working license plate lamp. He testified that, under A.R.S. § 28-925(C), vehicles must "have a white light illuminating the rear license plate . . . that is visible from at least [fifty] feet away." Knight stated he "didn't see that [Rojas's] license plate was illuminated at all, much less [fifty] feet away." Knight's body camera video was presented, showing Rojas's plate to be illuminated during the stop. Knight testified, however, that the plate was illuminated in the body camera footage because the spotlight and the headlights of his patrol car were shining on it.

¶6 Following the presentation of evidence, the trial court stated that it found Knight's body camera footage to be inconclusive as to whether Rojas's license plate was properly illuminated before the stop. The court acknowledged, however, that Knight's testimony—that he could not see a properly illuminated license plate within fifty feet—was uncontradicted. In its under-advisement ruling denying the motion to suppress, the court stated that it found Knight's testimony about the justification for the stop credible, and thus determined that Knight had legally stopped Rojas.

¶7 A law enforcement officer "need only possess a reasonable suspicion that the driver has committed an offense." *State v. Livingston*, 206 Ariz. 145, ¶ 9 (App. 2003). "Reasonable suspicion" is a lesser showing than probable cause. *State v. O'Meara*, 198 Ariz. 294, ¶ 10 (2000). Reasonable suspicion requires only that an officer possess "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Livingston*, 206 Ariz. 145, ¶ 9 (quoting *Gonzalez-Gutierrez*, 187 Ariz. at 118). "[A]n officer who has witnessed a traffic violation may initiate a stop," *State v. Kjolsrud*, 239 Ariz. 319, ¶ 9 (App. 2016), but "is not required to determine if an actual violation has occurred prior to stopping a vehicle for further investigation." *State v. Nevarez*, 235 Ariz. 129, ¶ 7 (App. 2014). Because the trial court found Knight's uncontradicted testimony that he witnessed a traffic violation before the stop credible, and because such would constitute reasonable suspicion, the traffic stop was proper and the court did not err when it denied Rojas's motion to suppress.

Double Jeopardy

¶8 Rojas argues for the first time on appeal that his misdemeanor conviction for extreme DUI under A.R.S. § 28-1382(A)(2), violates double-jeopardy principles because it is a lesser-included offense of his conviction for aggravated DUI with a BAC of .08, under A.R.S. § 28-1383(A)(1). He argues that a double-jeopardy violation is fundamental error.

¶9 When a defendant fails to object to an alleged error, his claim is subject to review for only fundamental error. *State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005). Fundamental error occurs when the error goes to the foundation of the case, takes away an essential right, or is so egregious that the defendant could not have possibly received a fair trial. *State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018). If the error is such that it goes to the foundation of the case or takes away an essential right, the defendant must additionally show such error was prejudicial. *Id*. If the error is so egregious that the defendant could not have received a fair trial, prejudice is inherent. *Id*. If the defendant fails to carry his burden of persuasion as to any element of fundamental error, then his claim fails. *Id*. Consequently, in our review, we first must determine if error occurred at all. *Id*. A violation of double-jeopardy principles is fundamental error, and this court reviews *de novo* whether such a violation occurred. *State v. Price*, 218 Ariz. 311, ¶ 4 (App. 2008).

¶10 Under what is commonly referred to as the "Double Jeopardy Clause" of the Fifth Amendment to the United States Constitution, "[n]o

person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." Similarly, under Article II, § 10 of the Arizona Constitution, "[n]o person shall . . . be twice put in jeopardy for the same offense." "The Double Jeopardy Clauses in the United States and Arizona Constitutions prohibit: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense." *Lemke v. Rayes*, 213 Ariz. 232, ¶ 10 (App. 2006) (footnote omitted).

¶11 In this case, Rojas argues that two of his DUI convictions are, constitutionally, the "same offense" such that he could not permissibly have been convicted of both. The double-jeopardy bar applies if the two offenses of which the defendant is convicted cannot survive the "same elements test" established in *Blockburger v. United States*, 284 U.S. 299, 304 (1932). The test "to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *State v. Jurden*, 239 Ariz. 526, ¶ 10 (2016) (quoting *Blockburger,* 284 U.S. at 304). "If 'each provision requires proof of an additional fact that the other does not,' they are not the same offense." *State v. Siddle*, 202 Ariz. 512, ¶ 10 (App. 2002) (quoting *Blockburger*, 284 U.S. at 304). If the elements of one charge are all found among the elements of another charge (which typically has yet additional elements to be proven), then the former is a "lesser-included" offense of the latter "greater" offense.[1] *State v. Celaya*, 135 Ariz. 248, 251 (1983). In such a case, "it is impossible to have committed the [greater] crime charged without having committed the lesser one." *Id*. Even where there is "a substantial overlap of the proof required to establish the crimes," we look to the elements of the offenses—not the facts used to prove them—to determine whether offenses are the same for double-jeopardy purposes. *State v. Seats*, 131 Ariz. 89, 92 (1981); *see also State v. Ortega*, 220 Ariz. 320, ¶ 9 (App. 2008).

¶12 Where the elements of the two offenses are the same, the defendant cannot be convicted and punished for both the greater and lesser-included offense, and any conviction and sentence for a lesser-included offense is typically vacated. *See, e.g.*, *State v. Jones*, 185 Ariz. 403, 407 (App. 1995); *see also State v. Scarborough*, 110 Ariz. 1, 6 (1973). However, if the two charges are not the same offense, multiple convictions and

[1]A "greater" offense need not be the more serious offense or offer a greater punishment than the lesser-included offense; it simply must have more elements. *State v. Carter*, 245 Ariz. 382, ¶ 21 (App. 2018).

sentences will not be disturbed. *See, e.g.*, *Merlina v. Jejna*, 208 Ariz. 1, ¶ 17 (App. 2004).

¶13 Here, Rojas was convicted in counts one and two of aggravated DUI under A.R.S. § 28-1383(A)(1), which provides:

> A. A person is guilty of aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs if the person does any of the following:
>
> 1. Commits a violation of § 28-1381, § 28-1382 or this section while the person's driver license or privilege to drive is suspended, canceled, revoked or refused or while a restriction is placed on the person's driver license or privilege to drive as a result of violating § 28-1381 or 28-1382 or under § 28-1385.

The offenses in counts one and two incorporate the elements of A.R.S. §§ 28-1381(A)(2) and 28-1381(A)(1), respectively, adding only the lone element of an invalid driver license. Under § 28-1381(A)(2):

> A. It is unlawful for a person to drive or be in actual physical control of a vehicle in this state under any of the following circumstances:
>
> . . . .
>
> 2. If the person has an alcohol concentration of 0.08 or more within two hours of driving or being in actual physical control of the vehicle and the alcohol concentration results from alcohol consumed either before or while driving or being in actual physical control of the vehicle.

And under § 28-1381(A)(1):

> A. It is unlawful for a person to drive or be in actual physical control of a vehicle in this state under any of the following circumstances:
>
> 1. While under the influence of intoxicating liquor, any drug, a vapor releasing substance

> containing a toxic substance or any combination of liquor, drugs or vapor releasing substances if the person is impaired to the slightest degree.

¶14 Rojas was also convicted in count three of a misdemeanor under A.R.S. § 28-1382(A)(2), which states:

> A. It is unlawful for a person to drive or be in actual physical control of a vehicle in this state if the person has an alcohol concentration as follows within two hours of driving or being in actual physical control of the vehicle and the alcohol concentration results from alcohol consumed either before or while driving or being in actual physical control of the vehicle:
>
> 1. 0.15 or more but less than 0.20.
>
> 2. 0.20 or more.

¶15 Facially the elements of § 28-1381(A)(2), incorporated into the offense of § 28-1383(A)(1) in count one, and those of § 28-1382(A)(2) in count three, differ because the former requires a BAC of .08 and the latter of .20. Additionally, the former offense includes the element of driving with an invalid driver license while the latter does not. Notwithstanding these distinctions, Rojas cites *State v. Becerra*, 231 Ariz. 200 (App. 2013), *State v. Nereim*, 234 Ariz. 105 (App. 2014), and *State v. Solis*, 236 Ariz. 242 (App. 2014) arguing that, in conducting the same-elements test, we are not to consider the differing BAC levels in the given charges or the invalid driver-license element.

¶16 In *Becerra*, the defendant was convicted of driving with a prohibited drug in the body under A.R.S. § 28-1381(A)(3), and also of driving with a prohibited drug in the body (incorporating the elements of § 28-1381(A)(3)) as an aggravated DUI offense under § 28-1383(A)(1) because his driver license was suspended. 231 Ariz. 200, ¶¶ 19-20. He asserted that the two offenses were the same but for the additional element of the suspended license and that his conviction for both the lesser and greater offense was a statutory and constitutional double-jeopardy violation. *Id.* ¶ 19. Although Becerra's convictions were vacated on other grounds, this court agreed that the only difference between the two charges was the element of his suspended license. *Id*. ¶ 20. Then, without expressly concluding that § 28-1381(A)(3) was a lesser-included offense of § 28-1383(A)(1) in this circumstance, but after reciting recognized double-

jeopardy principles, we stated Becerra "may not be convicted and sentenced on both counts" upon any retrial. *Id*. ¶ 20.

¶17 In *Nereim*, the defendant was convicted of three DUI offenses: count three, driving with a BAC of .20 or more, under A.R.S. § 28-1382(A)(2); count five, with a BAC of .08 or more as an aggravated DUI due to a minor in the car, under § 28-1383(A)(3); and count seven, with a BAC of .20 or more, also as an aggravated DUI due to a minor in the car, under § 28-1383(A)(3). 234 Ariz. 105, ¶ 4. As charged, each of the latter two offenses incorporated the statutory elements of § 28-1381(A)(2). This court examined whether the convictions for counts three and five were permissible in light of the conviction for count seven. *Id*. ¶ 25. We noted that our supreme court allows convictions for both DUI (while impaired) under § 28-1381(A)(1) and for DUI with "elevated BAC" under § 28-1381(A)(2). *Id.* ¶ 24. However, we noted, "when the only difference between two DUI charges is the BAC threshold,"—in that case, the .08 and .20 thresholds—"a conviction on the lesser charge" cannot stand. *Id*. And additionally that "a conviction for misdemeanor DUI violates principles of double jeopardy if the defendant has also been convicted of the same form" of DUI but as an "aggravated DUI." *Id*.

¶18 As to the defendant Nereim, but for the varying BAC levels required for counts five (.08) and seven (.20), those charges were otherwise the same offense. *Id.* ¶ 25. Consequently, the offense in count five was a lesser-included offense of that in count seven. *Id*. Similarly, but for the element of a minor in the vehicle, which rendered the offense an aggravated DUI, the charge in count seven was the same as that in count three, and the latter thus a lesser-included offense of the former. *Id.* Because Nereim was impermissibly convicted of those two lesser-included offenses, we vacated them. *Id.*

¶19 We applied *Nereim* in *Solis*, concluding a defendant convicted of three DUI offenses with varying BAC levels (.08, .15, and .20) could only be convicted of DUI while having a BAC of .20 or more. 236 Ariz. 242, ¶¶ 23-24; *see also* §§ 28-1381(A)(2), 28-1382(A)(1)-(2). We concluded that a charge of DUI with a BAC of .08 and one with .15, is each a lesser-included offense of DUI with a BAC of .20 because "'the only difference'" between them is the "'BAC threshold.'" *Solis*, 236 Ariz. 242, ¶ 24 (quoting *Nereim*, 234 Ariz. 105, ¶ 24).

¶20 Rojas asserts that the offense of DUI with a BAC of .20 is a lesser-included offense of DUI with a BAC of .08, albeit as an aggravated DUI offense under § 28-1383(A)(1), because the only difference, apart from

the license element, is the BAC threshold. This is, he asserts, precisely what *Becerra*, *Nereim*, and *Solis* forbid, and thus he should not have been convicted of both.

¶21 Contrary to Rojas's assertion, *Becerra* does not require that a court ignore the presence of an "aggravating factor" in a same-elements evaluation. Rather, it is simply one element of the offense to be considered with all others. Inherent in the *Becerra* opinion was that double-jeopardy principles were violated because Becerra could not have committed the offense of DUI with a prohibited drug in his body without a valid driver license, without also having simply committed a DUI with a prohibited drug in his body. Similarly, with regard to the BAC levels, neither *Nereim* nor *Solis* tells us to disregard them. Rather, the import of each is that, if meeting the higher-stated BAC threshold in the greater offense also necessarily meets the lower-stated BAC threshold in the lesser—even though the levels are indeed "different"—the offenses can be the same offense. In *Nereim* and *Solis*, those defendants could not have committed a greater offense with the higher BAC level without necessarily committing a lesser offense or lesser offenses with the lower BAC.

¶22 *Becerra*, *Nereim,* and *Solis* present classic *Blockburger* scenarios. But here, Rojas could have committed the greater offense of which he was convicted—DUI with a BAC of .08, whether or not aggravated because of his suspended license—without also having necessarily committed the lesser offense—DUI with a higher BAC of .20. Had Rojas only had a BAC of .08, he could have violated § 28-1381(A)(2) but would not, under any circumstance, have violated § 28-1382(A)(2), which requires a BAC of .20. And, similarly, Rojas could have committed the misdemeanor offense of DUI with a BAC of .20—which did not depend upon the status of his driver license—without having committed an aggravated DUI with a BAC of .08 on a suspended license. Had Rojas had a valid driver license, even with a BAC of .20, he could have committed a violation of § 28-1382(A)(2) but would not, under any circumstance, have committed a felony offense under § 28-1383(A)(1), which required that his driver license be invalid. Because that is so, neither charge is the lesser of the other, and double-jeopardy principles are not offended by the multiple convictions and sentences.

¶23 It is true that, under the facts of the case, the state could have charged Rojas with DUI with a BAC of .20 as an aggravated DUI due to his suspended license. Had it done so, and had Rojas been convicted of both, under *Blockburger*, *Becerra*, *Nereim*, and *Solis*, such would have indeed been a double-jeopardy violation. But the state elected to charge count three as a misdemeanor DUI offense, without the driver-license element, and thus,

constitutionally, it preserved all three convictions. Nowhere are we commanded in a double-jeopardy analysis to look at how a defendant factually *could have been* charged; we are only constitutionally required to examine the elements of the crimes of which the defendant was convicted. *State v. Ortega*, 220 Ariz. 320, ¶ 9 (App. 2008).

Disposition

¶24 For the foregoing reasons, we affirm Rojas's convictions and sentences.