IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DANIEL BENJAMIN LUQUE,
Appellant.

No. 2 CA-CR 2020-0111
Filed December 15, 2020

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NOT FOR PUBLICATION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. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20175703001
The Honorable James E. Marner, Judge

AFFIRMED IN PART; VACATED AND REMANDED IN PART

COUNSEL

Mark Brnovich, Arizona Attorney General
By Michael T. O'Toole, Acting Chief Counsel, Phoenix
Counsel for Appellee

James Fullin, Pima County Legal Defender
By Robb P. Holmes, Assistant Legal Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Judge Espinosa and Judge Staring concurred.

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

¶1 Daniel Luque was convicted after a jury trial of two counts of aggravated driving under the influence (DUI), two counts of endangerment, and one count of criminal damage. He was sentenced to concurrent prison terms of seven years for his DUI and criminal damage convictions and 2.5 years for his endangerment counts, which the trial court designated as class six felonies. Luque argues on appeal that his endangerment convictions must be designated as misdemeanors rather than felonies because the jury did not find his conduct "involv[ed] a substantial risk of imminent death." A.R.S. § 13-1201(B). The state concedes error, and we agree. Thus, we affirm Luque's convictions and sentences for DUI and criminal damage, designate his convictions for endangerment as class one misdemeanors, vacate the sentences imposed for those counts, and remand the case for resentencing.

¶2 In December 2017, Luque was arrested after he ran a stop sign and was struck by another vehicle with two occupants. His blood alcohol concentration was .237. At a jury trial held in his absence, the jury was directed that, to find Luque guilty of endangerment, it had to find that his conduct created "a substantial risk of imminent death or physical injury." It was not asked, however, to distinguish whether his conduct had created a risk of death or merely a risk of physical injury. Luque was convicted and sentenced as described above. This appeal followed.[1]

[1]Luque absconded before trial and delayed his sentencing more than ninety days after conviction. Luque argues and the state concedes that he did not knowingly, voluntarily, and intelligently waive his right to appeal under A.R.S. § 13-4033(C). *See State v. Bolding*, 227 Ariz. 82, ¶ 20 (App. 2011). Luque was informed he could lose his right to appeal by failing to appear at trial, but he did not sign any written advisement, nor does the record show whether he stated that he understood the trial court's oral advisement. In light of the state's concession that Luque did not waive his appeal rights, we address the issues he raises on appeal. *Cf. State v. Raffaele*, 249 Ariz. 474, ¶ 15 (App. 2020) (state has burden to show waiver).

¶3 Luque contends on appeal that, because the jury was not asked to determine the degree of risk his conduct caused, the trial court erred by designating his endangerment convictions as felonies. Luque did not object to the jury instructions nor to the trial court's designation of the offenses as felonies; accordingly, our review is limited to fundamental, prejudicial error. *See State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018); *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20 (2005). But a jury instruction that omits an element of an offense is fundamental error if that element is an issue in the case. *See Leon v. Marner*, 244 Ariz. 465, ¶ 12 (App. 2018).

¶4 "A person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury." § 13-1201(A). Endangerment is a felony, however, only if the defendant's conduct "involv[ed] a substantial risk of imminent death"; otherwise, the offense is a class one misdemeanor. § 13-1201(B); *see State v. Carpenter*, 141 Ariz. 29, 31 (App. 1984) (endangerment a felony "only if it involved a substantial risk of death to another"). "[A]ny factor that is essential to proving an offense was committed and establishing a particular sentencing range is an element that must be submitted to a jury and proven beyond a reasonable doubt." *State v. Ortega*, 220 Ariz. 320, ¶ 19 (App. 2008).

¶5 The degree of risk Luque created was at issue in this case because the jury could have reasonably determined that his conduct had not created a substantial risk of death. Despite the extensive damage the collision caused the victims' vehicle, it was traveling only about twenty-five miles per hour when it collided with Luque's vehicle. And there is no evidence either victim sought medical treatment at a hospital—one victim complained of pain and difficulty breathing caused by the seat belt and air bag inflating, and the other had a scraped leg. Thus, the trial court erred in designating Luque's endangerment convictions as class six felonies and sentencing him accordingly. *See Carpenter*, 141 Ariz. at 31; *Ortega*, 220 Ariz. 320, ¶ 19.

¶6 We affirm Luque's convictions and sentences for DUI and criminal damage. We affirm his convictions for endangerment but modify the record to designate those convictions as class one misdemeanors, vacate the attendant sentences, and remand his case for resentencing on those counts.[2]

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[2]We therefore need not address Luque's argument that the lack of a jury instruction under § 13-1201(B) created duplicitous endangerment charges.