IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ERIN ELIZABETH EMAN,
Appellant.

No. 2 CA-CR 2019-0255
Filed May 26, 2021

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NOT FOR PUBLICATION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. CR20173658001
The Honorable Jeffrey T. Bergin, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
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MEMORANDUM DECISION

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

V Á S Q U E Z, Chief Judge:

¶1 After a jury trial, Erin Eman was convicted of possession of a dangerous drug; possession of drug paraphernalia; ten counts of endangerment; five counts of leaving the scene of an accident resulting in vehicle damage; one count of leaving the scene of an accident resulting in physical injury; criminal damage in the amount of $10,000 or more; aggravated driving under the influence of an intoxicant (DUI) while her license was suspended, revoked, or restricted; and one count of second-degree murder. The trial court sentenced her to concurrent prison terms, the longest of which is twenty years. On appeal, she argues that there was insufficient evidence to support the four endangerment convictions relating to the collisions near Valencia and Kolb, all ten convictions relating to the collisions on Houghton, the criminal damage conviction, and the possession of a dangerous drug conviction. She also contends the court erred by improperly limiting the scope of her closing argument; four of the convictions for leaving the scene of an accident must be vacated as multiplicitous; and the admission of a photograph of a victim "inflamed the jury," constituting fundamental error. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Pena*, 235 Ariz. 277, ¶ 5 (2014). In July 2017, Eman was under the influence of several intoxicants when she drove her vehicle around Tucson, causing numerous collisions from around 1:30 p.m. to 1:55 p.m. The collisions caused damage to seven vehicles, injuries to one victim, and the death of another.

¶3 While driving southbound on Houghton near the intersection of Irvington, Eman "glanced off the back left side" of a vehicle, causing damage. Rather than stopping, she continued driving down Houghton, where she "clipped the side" of another vehicle as she passed, despite the other driver veering to the far right side of the road to avoid her. Eman then drove into the right-turn-only lane but continued straight "at a pretty

good clip" and collided with two more vehicles over the next couple of minutes. Again, Eman did not stop.

¶4 Minutes later, Eman, now driving eastbound on Valencia, approached Kolb where her path was blocked by a line of cars stopped in the left turn lane. Eman crashed into a stopped white vehicle pushing it into a sedan directly in front and moving the white vehicle off to the side. This impact apparently did not cause damage to either vehicle. Eman then rear-ended the sedan, pushing it into the next vehicle in the line, damaging both vehicles. The impact also caused the driver of the sedan to hit her head on the steering wheel resulting in a "permanent indentation" and knocking out a tooth. Eman "jumped" the raised median, made a U-turn on Valencia, followed by a "sharp right turn" into a gas station, then onto Kolb where she crossed southbound traffic before driving over another median, ultimately continuing north on Kolb. Near the intersection of Kolb and Escalante, Eman "jump[ed] the curb, bouncing," and "the front left tire came off." Now "[r]iding on the rims [and] making sparks," Eman turned right on Escalante, then left on Pantano.

¶5 Traveling northbound on Pantano, Eman ran a red light at Stella and collided with the driver's side of H.P.'s vehicle in the intersection. The impact pushed H.P.'s vehicle sideways about ten feet and partway onto the median. Eman's vehicle spun to the left where it finally stopped after striking a traffic light pole, knocking it over.

¶6 Emergency personnel responded to the scene and found H.P. in her vehicle, unresponsive. They extracted her using "Jaws of Life" equipment because of the "heavy damage on the driver's side" of H.P.'s vehicle. She was rushed to the hospital, where she was placed on life support. Her injuries included bleeding and swelling of her brain, a pelvic fracture, lacerations to her liver and spleen, a urinary bladder rupture, and internal bleeding. On August 9, H.P. died after being taken off life support "due to her extreme injuries[] that she would not ever survive." The medical examiner concluded that H.P.'s death was caused by "[c]omplications of multiple blunt-force injuries" that she had sustained in the collision.

¶7 An officer who had arrived at the scene came to Eman's aid; he reported that Eman "appeared to be confused," "agitated," and had a "glassy look in her eyes." When Eman mentioned her lower back hurt, the officer cautioned her not to move, but she "kept moving around, as if she was searching for something." This behavior prompted the officer to ask Eman if she was on any medications or had consumed alcohol that day. She

answered that she had taken her prescription anxiety medicine and that she had "hardly any" alcohol. Eman was transported to the hospital, where officers conducted a DUI investigation, including taking blood samples pursuant to a search warrant. Eman's blood tested positive for alcohol, Lorazepam, Alprazolam, methamphetamine, and amphetamine.

¶8 On August 4, officers executed a search warrant of Eman's vehicle. This search revealed a "Powder Puff Girls metal tin" that contained a lighter, a pair of green tweezers, an orange syringe cap, some "soiled fiber types of little cotton filters," a "pink and white" baggie containing a crystalline substance, and a glass pipe. The crystalline substance and glass pipe tested positive for methamphetamine.

¶9 Eman was convicted of all charges and sentenced as outlined above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Closing Argument

¶10 Eman contends the trial court erred by precluding her from arguing in closing that the state had failed to prove she was reckless. She maintains that she could not "consciously disregard the known risk" due to her voluntary intoxication. We review the court's ruling limiting the scope of closing argument for an abuse of discretion, *State v. Johnson*, 247 Ariz. 166, ¶ 22 (2019), but review issues of statutory interpretation and constitutional questions de novo, *State v. Boyston*, 231 Ariz. 539, ¶ 48 (2013).

¶11 Before closing arguments, the state asked the trial court to preclude Eman from arguing that "ingestion of . . . drugs somehow constitutes some sort of defense" because it is "not only an inaccurate statement of the law, but inappropriate argument." Eman responded that she had the right to challenge the state's proof of a "core element" of a charged offense and "focus specifically on [her contention that] she did not consciously disregard a risk." The court responded, "Help me understand how that is consistent with the jury instruction that says that voluntary intoxication is not a defense even to a mental state argument." Eman explained that her closing argument would not conflict with the jury instructions:

> [T]he instruction says it is not a defense to say that the risk was not known because of voluntary intoxication, but certainly whether it was consciously disregarded outside of that, and whether it was consciously disregarded

> requires some evidence of consciousness. . . . It can't be the case that the law gives with one hand and takes away with the other; that they have to prove that she consciously disregarded something, but also we can't argue that she didn't consciously disregard it because of the circumstances on the ground, because of even her own intoxication. But the fact that it is a known risk that [Eman] did not know about because of her own intoxication, that won't be part of my argument, so I won't be coming in conflict with that instruction by the Court.

The court found "[Eman's] proposed argument [was] inconsistent with the jury instructions and improper," noting "voluntary intoxication includes states of mind, which the Court also includes as having conscious disregard falling within the state of mind."

¶12 After Eman requested that the trial court reconsider its ruling, the court took the matter under advisement and invited the parties to brief the issue. The court ultimately denied the motion, "finding that its previous ruling [was] consistent with the law as it exists at this time." Eman asked whether she could "argue to the jury that she did not consciously disregard the known risk, without mentioning voluntary intoxication or intoxication of any kind or any linkage between those two." The court replied, "[Eman is] entitled to make an argument that is a reasonable inference from the evidence presented and that is consistent with the law" and it further stated that "[f]rom what you have shared . . . it sounds like there may be a valid argument, but again, [the court is] not sure until [it] hear[s] it."

¶13 During closing, Eman made the following argument without objection from the state:

> Now, there are some of the elements of homicide that I think they have sufficiently proven. Certainly [H.P.'s] death. But beyond that, did [Eman] cause that accident? Yes, I think [Eman] caused the accident. And I see no reason to disbelieve any of the witnesses who say the light was red at the time. She caused the accident by running a red light. But to say she caused it because she was intoxicated, they haven't proved that to you. But intoxicated or

> not, because she caused the accident, because she created a risk that was a substantial and unjustifiable risk, and failed to recognize that risk, she is guilty of negligent homicide.
>
> I think the evidence is clear in this case she has to be found guilty of negligent homicide. The State is asking you to go higher than that, and the Court is instructing you that the difference between negligent homicide and manslaughter, and the difference between manslaughter and second degree murder is about the culpable act, it's about the culpability of the act. And of course, in this emotional environment, they want you to believe that what she did was extremely indifferent to human life, but they simply haven't shown that to you. They're asking you to assume it. They're asking you to assume it based on nothing more than [H.P.] died, and she was gorgeous, and she was going to take care of some kids, and her family is grieving for her, and how could that not have been extremely indifferent to human life. The fact is the evidence shows there was no indifference to human life there.

¶14 The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant's right to present a complete defense, including the right to make a "proper [closing] argument on the evidence and the applicable law in [the defendant's] favor." *Herring v. New York*, 422 U.S. 853, 856-63 (1975) (quoting *Yopps v. State*, 178 A.2d 879, 881 (Md. 1962)). During closing arguments, the parties may present to the jury their theories of the case based on the evidence and draw attention to any weaknesses of the other parties' position, *id.* at 862, but they may not misstate the law, *see State v. Tims*, 143 Ariz. 196, 199 (1985). "A trial court has broad discretion to limit the duration and scope of closing arguments" so long as the limitations do not "deprive counsel of a meaningful exercise of that procedural entitlement." *State v. Davis*, 226 Ariz. 97, ¶ 18 (App. 2010).

¶15 The trial court did not abuse its discretion by precluding Eman from arguing that her voluntary intoxication rendered her unable to

consciously disregard a risk because such argument is expressly prohibited by Arizona law. Under A.R.S. § 13-503, voluntary intoxication "is not a defense for any criminal act or requisite state of mind." Section 13-105(10)(c), A.R.S., provides that a person acts with the culpable mental state of "recklessly" when she is "aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists." This section further provides that "[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" and that "[a] person who creates such a risk but who is unaware of such risk solely by reason of voluntary intoxication also acts recklessly with respect to such risk." *Id.*

¶16 Eman nevertheless contends that § 13-503 and § 13-105(10)(c) conflict and that the "more specific" provisions of § 13-105(10)(c) should control over the "more general" provisions of § 13-503. *See State v. Jones*, 235 Ariz. 501, ¶ 8 (2014) (when two statutes conflict, more recent, specific one controls over older, general one). We disagree that these statutes conflict. Section 13-503 unambiguously prohibits the use of voluntary intoxication as a defense to "any . . . requisite state of mind" and § 13-105(10)(c) bolsters this prohibition, stating that a person "acts recklessly" even if the risk is unknowingly created "solely by reason of voluntary intoxication." *See State v. Jackson*, 210 Ariz. 466, ¶ 26 (App. 2005) (we construe statutes in harmony whenever possible).

¶17 We find Eman's interpretation of § 13-105(10)(c) unpersuasive. She contends that § 13-105(10)(c) divides recklessness into two elements, the "awareness of the risk" and the "conscious disregard of the risk," and that only the former precludes the use of voluntary intoxication to negate it. Relying on a proposition in *State v. Holle*, 240 Ariz. 300, ¶ 21 (2016), that "[a] defendant in a criminal case can defend a charge by claiming that the state failed to prove all elements beyond a reasonable doubt," she argues she is able to use voluntary intoxication to "negate an element of an offense, in this case[, the] mental state." But, as the state points out, using voluntary intoxication to negate a mental state is precisely what § 13-503 prohibits. *See, e.g.*, *Boyston*, 231 Ariz. 539, ¶¶ 50, 56 (although premeditation is not defined by statute as culpable mental state, it is "required element" that is "part of the requisite *mens rea*" and voluntary intoxication is not defense); *State v. Ramos*, 133 Ariz. 4, 6 (1982) ("[E]ven though intoxication might be relevant to . . . culpable mental state, the legislature has chosen not to allow evidence of intoxication to negate such mental state."); *State v. Bravo*, 131 Ariz. 168, 171 (App. 1981) ("Where the necessary culpable mental state is 'recklessly,' [the defendant's] voluntary

intoxication is not to be considered by the jury."). Such argument is therefore improper.

¶18 Eman also argues the trial court improperly limited the scope of her closing argument by "barring [her] from arguing that the state did not meet its burden in demonstrating recklessness because observations showed that she was not in a condition to be aware of or disregard a known risk." But the court only precluded her from arguing an "unawareness due to voluntary intoxication," and it later clarified that she was "entitled to make an argument that is a reasonable inference from the evidence presented and that is consistent with the law." As noted above, Eman asked whether, in light of the court's ruling, she could "argue that she was not consciously disregarding anything because the evidence at the scene indicates that her state of mind was such that she wasn't conscious." Although the court struggled to "recogniz[e] what the argument would be if it doesn't encompass voluntary intoxication," it confirmed that she could "argue reasonable inferences from the evidence and consistent with the law as instructed by the Court."

¶19 Moreover, Eman was permitted to refer to witnesses' observations at the scene to argue that her symptoms were not consistent with methamphetamine use:

> [The effects of methamphetamine are] not anything like the symptoms that were observed in . . . Eman at that final scene. The testimony that [the witnesses] gave you about those symptoms was that she looked like she was moving in slow motion. Extreme confusion. Unable to pay attention to what the officer said. Unable even to recognize what was happening or what had just happened. These are not the symptoms or effects of methamphetamine on the body.

She also rebutted the state's argument that she had showed "extreme indifference to human life," referring to one witness who testified that after the final collision Eman said she "was just trying to just kill [herself]" and another who testified that she said she "wish[ed she] was dead." She argued that because officers described her as exhibiting "extreme confusion [and] profuse sweating" she was not "thinking about the words she was saying sufficiently that we can be sure she was trying to kill herself."

¶20 In sum, the trial court properly instructed the jury, consistent with Arizona law, that voluntary intoxication cannot negate recklessness.[1] The court therefore did not abuse its discretion by limiting the scope of Eman's closing argument by precluding her from arguing she could not consciously disregard risk due to her voluntary intoxication.

Sufficiency of the Evidence

¶21 Eman argues that there was insufficient evidence to support a number of her convictions. We review the sufficiency of the evidence de novo. *State v. Harm*, 236 Ariz. 402, ¶ 11 (App. 2015). "[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." *State v. West*, 226 Ariz. 559, ¶ 16 (2011) (quoting *State v. Mathers*, 165 Ariz. 64, 66 (1990)). We will reverse only if no substantial evidence supports the conviction. *Pena*, 209 Ariz. 503, ¶ 7. Substantial evidence may include both circumstantial and direct evidence, *see West*, 226 Ariz. 559, ¶ 16, and is "such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Sharma*, 216 Ariz. 292, ¶ 7 (App. 2007) (quoting *Mathers*, 165 Ariz. at 67).

***Mens Rea* and Actual Risk**

¶22 Substantial evidence supported Eman's felony-endangerment convictions for the accidents on Houghton (Counts 3, 5, 6, 8, 10, and 11) and near Valencia and Kolb (Counts 13, 14, 16, and 17). "A person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury." A.R.S. § 13-1201(A). Endangerment is a felony if there is a "substantial risk of imminent death." § 13-1201(B). Thus, for these convictions, the state needed to prove (1) Eman had "disregarded a substantial risk that [her] conduct would cause imminent death" and (2) her "conduct did in fact create a substantial risk of imminent death." *State v. Doss*, 192 Ariz. 408, ¶ 9 (App. 1998) (emphasis omitted).

¶23 Eman asserts that there was "no evidence that there was a risk of imminent death to any of the victims" because the accidents, vehicle damage, and physical injuries, if any, were minor, and "none of the drivers

[1]The jury instructions accurately reflected the language of A.R.S. §§ 13-105(10)(c) and 13-503. *See State v. Bocharski*, 218 Ariz. 476, ¶ 47 (2008) (we review de novo whether jury instructions accurately state law).

used words that would indicate they faced imminent death." But the state was not required to present evidence of substantial vehicle damage or injuries, much less serious injuries, to meet its burden. *See State v. Carreon*, 210 Ariz. 54, ¶¶ 42-43 (2005) (sufficient evidence for endangerment where victims suffered no injury but were in "close proximity" to where another victim was shot); *State v. Rivera*, 226 Ariz. 325, ¶ 11 (App. 2011) (sufficient evidence for endangerment where, although no victims were injured, they were "exposed to a substantial risk of imminent death from the bullets coming through the walls"). Furthermore, the victims did not need to be aware of the risk created by Eman's conduct. *See State v. Morgan*, 128 Ariz. 362, 367 (App. 1981) ("There is no requirement [for endangerment] that the victim be aware of the conduct of the actor.").

¶24 The state presented evidence that although Eman's blood-alcohol concentration from around three hours after the fatal crash was below the legal limit, she also had four other intoxicants in her system that interact with alcohol and lead to "impaired judgment." The jury could infer from the amount of intoxicants in her system, combined with her erratic driving behavior, that her actions "constitute[d] a gross deviation from the standard of conduct that a reasonable person would observe." § 13-105(10)(c). And the jury could have found beyond a reasonable doubt that Eman did in fact place the other drivers in "substantial risk of imminent death" based on her conduct in colliding with multiple cars without stopping, swerving between lanes, jumping a median, and improperly using a turn lane, *see* § 13-1201(B); *Doss,* 192 Ariz. 408, ¶ 9.

¶25 The state also elicited testimony that, when asked by a witness, "[W]hy were you trying to be reckless and kill someone? You could have killed somebody," Eman responded, "I was trying to just kill myself." Even though Eman disputes the credibility of this testimony, that was an issue for the jury to resolve. *See State v. Clemons,* 110 Ariz. 555, 556-57 (1974) ("No rule is better established than that the credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury."). A reasonable juror could infer that Eman "disregarded a substantial risk that [her] conduct would cause imminent death" by driving in a manner that she believed would cause her own death. *See Doss,* 192 Ariz. 408, ¶ 9. Therefore, the state presented sufficient evidence to support the felony-endangerment convictions.

Identity

¶26 Eman contends that her convictions for endangerment and leaving the scene of the "accidents at Houghton and Rita" (Counts 4, 7, 9,

and 12) "must be vacated" because there is insufficient evidence she was the driver.

¶27 Each driver involved in the collisions on Houghton testified that they were struck by an SUV resulting in vehicle damage and that the SUV failed to "[i]mmediately stop" or "immediately return to the accident scene," as required by A.R.S. § 28-662. It was reasonable for the jury to conclude from the location and timing of the other accidents and the victims' descriptions of the SUV, including one victim who positively identified Eman's vehicle from a photograph at the final accident scene, that Eman was the hit-and-run driver on Houghton. That same victim, who was hit on Houghton, later went to the fatal accident scene after reading a police report and testified that Eman's vehicle looked like the same one that had hit him. Although Eman contends the witnesses' descriptions of the vehicle were not consistent, the jury was entitled to weigh the evidence and resolve any inconsistencies in the testimony. *See State v. Lee*, 151 Ariz. 428, 429 (App. 1986) (jury resolves inconsistencies in evidence); *Clemons*, 110 Ariz. at 556-57.

¶28 Eman also contends that her "aggregated criminal damage conviction must be reduced from a class 4 to class 5 felony" because without convictions for Counts 4, 7, 9, and 12, the aggregate amount of the vehicle damages is less than $10,000. Because we find sufficient evidence supports all the convictions relating to the collisions on Houghton, we find no basis to reduce the criminal-damage conviction (Count 19) to a class five felony.

Possession Conviction

¶29 Eman argues that there was "no evidence" to support her possession of a dangerous drug conviction because (1) there was no testimony that the glass pipe that tested positive for methamphetamine residue was the same glass pipe found in her vehicle and (2) the item number and description of "pink crystals or powder" were not mentioned by anyone other than the analyst.[2] For a possession of dangerous drugs conviction, the state must prove that Eman "possess[ed] or use[d] a dangerous drug." A.R.S. § 13-3407(A)(1). "'Possession' means a voluntary act if the defendant knowingly exercised dominion or control over property." A.R.S. § 13-105(35).

[2]Although Eman mentions the glass pipe, she only challenges her conviction for possession of methamphetamine.

¶30 After the collisions, law enforcement took photos of the contents of Eman's vehicle, which had been towed to the Tucson Police Department's evidence impound lot. As relevant here, the state introduced photos that showed the contents of a "Powder Puff Girls metal tin" found in the back of Eman's vehicle, including a "glass, clear pipe" and a pink and white bag containing a crystalline substance. A detective testified that these items were collected and submitted into evidence under the item number "NMP." The drug analyst testified that she tested evidence under the item numbers "1 NMP" and "1.2 NMP" that were "associated with . . . Eman." The analyst's description of item 1 NMP was consistent with the photographs depicting the contents of the Powder Puff Girls tin and included the glass pipe that tested positive for methamphetamine residue. Item 1.2 NMP "contained a sealed, clear plastic evidence bag holding a small, clear plastic zip-lock bag containing a light pink-tinted crystalline substance," which was determined to be a "usable amount" of methamphetamine. We conclude there was sufficient evidence linking Eman with the drug-related evidence to support her conviction for possession of a dangerous drug.

Double Jeopardy

¶31 Eman argues that four of the six convictions for leaving the scene of an accident are multiplicitous, violate double jeopardy, and must be vacated because "there were only three accident scenes, the last of which [Eman] did not leave."[3] Citing *State v. Powers*, 200 Ariz. 363, ¶ 9 (2001), Eman contends that she could only be charged with two counts of leaving the scene of an accident because our supreme court has determined that the "primary purpose" of A.R.S. § 28-661, which is to establish the identity of drivers involved in accidents so they can be held liable, "is scene-related, not victim-related." Whether charges are multiplicitous and whether double jeopardy applies are both issues we review de novo. *State v. Brown*, 217 Ariz. 617, ¶¶ 7, 12 (App. 2008). "Multiplicity occurs when an indictment charges a single offense in multiple counts." *State v. Powers*, 200 Ariz. 123, ¶ 5 (App. 2001), *approved*, 200 Ariz. 363. The Double Jeopardy Clause of both the United States and Arizona Constitutions bars multiple

[3]In her opening brief, Eman argues that four counts of leaving the scene of an accident are multiplicitous. However, she concedes in her reply brief that Counts 15 and 18 are not multiplicitous, and thus she argues only three of the convictions should be vacated.

punishments for the same offense. U.S. Const. amend. V; Ariz. Const. art. II, § 10.

¶32 In *Powers*, the defendant continued driving after striking a pedestrian and her infant and was charged with two counts of leaving the scene of an accident. 200 Ariz. 363, ¶¶ 2-3. The supreme court affirmed our decision to vacate one of the charges as multiplicitous. *Id.* ¶¶ 8-10. This case is distinguishable from *Powers*, which involved a single collision with two victims, because this case involves several, separate collisions. Although four of the counts involved multiple-victim accidents, Eman was only charged with one count for leaving the scene of an accident for each. And while Eman says all of the accidents on Houghton occurred "at Houghton and Rita," the victims' testimony showed the accidents were spatially separated: the first occurred just before Irvington, the second just before Rita, the third at a lane merge a short distance after Rita, and the fourth about 2,000 feet beyond Rita. The evidence thus established that Eman left four accident scenes on Houghton.

¶33 Eman also contends that Counts 15 and 18 are "one accident." At this accident scene, Eman collided with one victim's vehicle, causing it to collide with another victim's vehicle. Eman was charged with violating both § 28-661, leaving the scene of an accident involving a physical injury, and § 28-662, leaving the scene of an accident involving vehicle damage. However, as the state argues and Eman concedes, these charges are not multiplicitous because they are "two distinct statutory provisions" that require the state to prove different elements: physical injury and vehicle damage. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932); *see also State v. Barber*, 133 Ariz. 572, 576 (App. 1982) ("In determining multiplicity the court must consider whether each count of the indictment requires proof of a fact that the other counts do not."). Eman argues, however, that "the state only argued [in closing] that vehicular damage had occurred." But it is clear from the evidence that the charge for violating § 28-661 (leaving the scene of an injury accident) relates to the accident in Count 15, and the victim testified to sustaining physical injuries. Therefore, the charges for Counts 15 and 18 are not multiplicitous and her convictions do not implicate double jeopardy.

"In Life" Photograph

¶34 Eman contends the trial court abused its discretion by admitting a photograph taken of H.P. when she was alive, unrelated to the collision, because it was irrelevant and "undoubtedly inflamed the jury." Because she did not object below, our review is limited to fundamental,

prejudicial error. *See State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018). "A defendant establishes fundamental error by showing that (1) the error went to the foundation of the case, (2) the error took from the defendant a right essential to his defense, *or* (3) the error was so egregious that he could not possibly have received a fair trial." *Id.* ¶ 21. Because Eman seeks to establish fundamental error under the second prong, she must also make a separate showing of prejudice. *See id.* (citing *State v. Henderson*, 210 Ariz. 561, ¶ 26 (2005)).

¶35 Eman contends that the admission of the photograph "inflamed the jury," causing it to convict her of a greater offense and thereby depriving her of the "essential right . . . to have the jury decide on [her] guilt based solely on the facts." But "[a]n error takes away an 'essential right' if it deprives the defendant of a constitutional or statutory right necessary to establish a viable defense or rebut the prosecution's case." *Id.* ¶ 19. We disagree that the trial court committed any error, much less fundamental error, by admitting the photograph. Eman has not met her burden to show how the photograph prevented her from presenting a viable defense or rebutting the prosecution's case. She cites no authority showing how a single photograph of a deceased victim taken prior to and unrelated to the incident would "inflame the jury" and cause it to convict her of a greater offense, especially given the overwhelming evidence of guilt in this case. *See State v. Gallegos,* 178 Ariz. 1, 11 (1994) (no prejudice from error where "[o]verwhelming evidence" of defendant's guilt existed). Moreover, the trial court instructed the jury that it "must not be influenced by sympathy or prejudice," which we presume it followed. *See State v. Prince*, 226 Ariz. 516, ¶ 80 (2011). In sum, Eman has not established error, much less fundamental, prejudicial error.

Disposition

¶36 For the foregoing reasons, we affirm Eman's convictions and sentences.