

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

VIRGILIO F. JIMENEZ,
Appellant.

No. 2 CA-CR 2019-0273
Filed March 12, 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NOT FOR PUBLICATION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. CR20191703001
The Honorable James E. Marner, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal
Appeals
By Diane Leigh Hunt, Assistant Attorney General, Tucson
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Michael J. Miller, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

ESPINOSA, Presiding Judge:

¶1 Following his convictions and sentences for negligent homicide and criminal damage, Virgilio Jimenez appeals, arguing the trial court erred by giving a civil jury instruction, requiring reversal of his homicide conviction. He also challenges the sufficiency of the evidence supporting the criminal damage conviction. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding Jimenez's convictions. *See State v. Mangum*, 214 Ariz. 165, ¶ 3 (App. 2007). One night in April 2018, Jimenez was driving south on a main Tucson thoroughfare, travelling around 104 miles per hour, despite the forty-mile-per-hour speed limit. Passing through an intersection with a green light, Jimenez crashed into a Mustang sedan making a westbound left turn in front of him. The Mustang "was basically cut in half," and its driver was immediately killed.

¶3 Jimenez was charged with and tried for second-degree murder and criminal damage. The jury acquitted him of the murder charge but found him guilty of the lesser-included offense of negligent homicide and the criminal damage charge. We have jurisdiction over Jimenez's appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Civil Jury Instruction

¶4 Although he failed to raise the issue at trial, Jimenez contends the trial court fundamentally erred by giving the jury the state's requested instruction based on a civil traffic statute. Jimenez had requested a superseding cause instruction and an instruction concerning a driver's duty to yield when making a left turn, and the state requested an instruction

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concerning a driver's duty not to exceed a reasonable and prudent speed and to control one's speed to avoid a collision. The trial court gave all three instructions. Because Jimenez did not object to the state's speeding instruction, our review is limited to fundamental error.¹ See *State v. Riley*, 248 Ariz. 154, ¶ 79 (2020). The first step in the analysis is determining whether trial error exists. *State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018). Then, the defendant has the burden of showing "(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.* If the defendant establishes fundamental error under either of the first two prongs, he must make a separate showing of prejudice. *Id.*

¶5 We first reject Jimenez's argument that instructing the jury on civil speeding amounted to "a comment on the evidence." "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Ariz. Const. art. VI, § 27. An instruction violates this prohibition if it "'express[es] an opinion as to what the evidence proves' or 'interfere[s] with the jury's independent evaluation of that evidence.'" *State v. Roque*, 213 Ariz. 193, ¶ 66 (2006) (quoting *State v. Rodriguez*, 192 Ariz. 58, ¶ 29 (1998)). The language of the instruction given here mirrored the statute from which it is derived and was therefore not a comment on the evidence but rather a correct statement of law. See A.R.S. § 28-701(A). The instruction neither referred to specific evidence nor "express[ed] an opinion as to what the evidence proves." *State v. Barnes*, 124 Ariz. 586, 590 (1980).

¶6 Jimenez also contends it was error for the trial court to "give the civil standard for speed" because "[t]he statutory requirements in Title 28 have nothing to do with the standards to apply in a criminal trial." But an instruction based on civil traffic statutes is not per se erroneous. See *State v. Shumway*, 137 Ariz. 585, 588 (1983). Indeed, Jimenez himself requested and received an instruction based on the traffic code, A.R.S. § 28-772.

¶7 In *Shumway*, our supreme court reversed the defendant's conviction for negligent homicide because the jury should have been instructed on a driver's duty to yield the right of way when making a left turn, which might have relieved Shumway of criminal responsibility. *Id.* at 588-89. Jimenez argues "the considerations in *Shumway* do not apply to the state" because the state received its requested instruction on criminal

¹The settling of jury instructions in this case occurred off the record, but the parties' positions were summarized on the record.

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negligence and “did not need further instruction as Shumway, and [Jimenez], did.” *Shumway*, however, is not so limited, stating, “[a] party is entitled to an instruction on any theory of the case reasonably supported by the evidence.” *Id.* at 588. The state was entitled to have the jury consider the requirement that a person drive a “reasonable and prudent” speed, along with the intervening cause and left-turn instructions, to determine whether Jimenez – driving sixty miles per hour over the speed limit – had the requisite criminal mens rea to commit negligent homicide. See A.R.S. §§ 13-105(10)(d) (criminal negligence means defendant’s failure to perceive substantial and unjustifiable risk is gross deviation from standard of care of reasonable person); 13-1102(A); 28-701(A).

¶8 But even were we to assume the trial court erred by giving the state’s requested instruction, Jimenez has failed to show prejudice as required under the first two prongs of *Escalante*. 245 Ariz. 135, ¶ 21. He contends he was prejudiced because the instruction lowered the standard of what was required to prove negligent homicide, allowing the jury to convict him solely because he had been speeding. And he suggests that without the instruction, the jury would have credited “evidence that the risk was not a gross deviation of the standard of care” and acquitted him. But Jimenez has pointed to no evidence demonstrating the jury disregarded the homicide instructions in favor of the speeding instruction. Indeed, the jury was instructed,

You must consider all these instructions. Do not pick out one instruction or part of one and ignore the others. As you determine the facts, however, you may find that some instructions no longer apply. You must then . . . consider the instructions that do apply together with the facts as you have determined them.

We must presume the jury followed these instructions. See *State v. Manuel*, 229 Ariz. 1, ¶ 24 (2011). We cannot speculate, as Jimenez’s argument requires, that the jurors “g[ave] precedence” to the “lower civil standard that specifically applied to driving” over the homicide instructions. See *State v. Broughton*, 156 Ariz. 394, 397-98 (1988) (prejudice requires a showing of more than mere speculation); *State v. Munninger*, 213 Ariz. 393, ¶ 14 (App. 2006) (defendant cannot show prejudice through speculation).

¶9 Further, the state did not invoke the speeding statute or instruction in its closing arguments to the jury, nor did it argue Jimenez could be guilty of homicide if the jury found he was travelling at an

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unreasonable speed. Instead, the state explained that it was required to prove Jimenez recklessly caused the victim's death with extreme indifference to human life, emphasizing the language of the second-degree murder statute. See A.R.S. § 13-1104(A)(3); *State v. Johnson*, 205 Ariz. 413, ¶ 11 (App. 2003) (jury instructions evaluated in context and in conjunction with closing arguments of counsel). Accordingly, Jimenez has not established fundamental and prejudicial error, and we therefore affirm his negligent homicide conviction.

Sufficiency of the Evidence

¶10 Jimenez also argues the state presented insufficient evidence regarding the value of damage to the victim's car to support the criminal damage conviction. He maintains that because "[n]either the value of the Mustang before the crash nor the salvage value was established," there was "no basis for the jury's determination of the value of the loss."

¶11 We review de novo the sufficiency of the evidence supporting a conviction. *State v. West*, 226 Ariz. 559, ¶ 15 (2011). We will reverse "only if no substantial evidence" supports it. *State v. Pena*, 209 Ariz. 503, ¶ 7 (App. 2005). "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of [the] defendant's guilt beyond a reasonable doubt.'" *State v. Mathers*, 165 Ariz. 64, 67 (1990). "Evidence sufficient to support a conviction can be direct or circumstantial." *State v. Denson*, 241 Ariz. 6, ¶ 17 (App. 2016). On appeal, we "must consider the evidence and possible inferences therefrom in a manner most favorable to upholding the verdict." *State v. Quatsling*, 24 Ariz. App. 105, 108 (1975).

¶12 Criminal damage is a class six felony if the defendant "recklessly damages property of another in an amount of one thousand dollars or more." A.R.S. § 13-1602(B)(4). The burden of proving damage amounts rests with the state, but no particular method of calculation is required; rather, "the amount is determined by applying a rule of reasonableness to the particular fact situation presented." *State v. Brockell*, 187 Ariz. 226, 228 (App. 1996). Viewed in the appropriate light, there was substantial evidence presented at trial that Jimenez caused at least \$1,000 in damage to the victim's vehicle.

¶13 Although no particular dollar amount of damage was asserted, one witness to the collision noted the Mustang was "completely totaled," and an officer described the car as "basically cut in half." Photographs admitted into evidence showed considerable damage, with

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the front bumper detached, and the car split into almost unrecognizable pieces. From this evidence, the jury could reasonably find that Jimenez caused damages that exceeded the \$1,000 necessary to satisfy the statutory threshold for a class six felony under § 13-1602(B)(4). See *State v. Printz*, 125 Ariz. 300, 304 (1980) (“when determining value, the jury should be permitted to utilize its common sense”); see also *State v. Gill*, 234 Ariz. 186, ¶ 8 (App. 2014) (“criminal damage was established, at least circumstantially, by the damage that was caused to the victim’s boat as a result of the DUI offense”). Accordingly, we find the criminal damage verdict supported by sufficient evidence and reject Jimenez’s argument that the trial court should have sentenced him on a lesser offense.

Disposition

¶14 For all the foregoing reasons, Jimenez’s convictions and sentences are affirmed.