IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MIKE ALLEN SCHOMISCH,
Appellant.

No. 2 CA-CR 2020-0147
Filed March 4, 2022

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NOT FOR PUBLICATION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. CR20074570001
The Honorable Michael J. Butler, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
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Counsel for Appellee

James Fullin, Pima County Legal Defender
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MEMORANDUM DECISION

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

S T A R I N G, Vice Chief Judge:

¶1 Mike Schomisch appeals from his convictions and sentences for negligent homicide, endangerment, criminal damage, and three counts of aggravated assault. 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 and resolve all reasonable inferences against Schomisch. *See State v. Felix*, 237 Ariz. 280, ¶ 30 (App. 2015). In November 2007, while J.D. and his passenger were making a U-turn in Tucson, Schomisch's truck collided with J.D.'s truck, causing it to launch into the air and land on another car. Schomisch's passenger later died of injuries sustained in the crash.

¶3 Following a jury trial, Schomisch was initially convicted of manslaughter, endangerment, criminal damage, three counts of aggravated assault, aggravated driving under the influence of an intoxicant (DUI) while his license was restricted, and aggravated driving with a blood alcohol concentration of .08 or more while his license was restricted. The trial court imposed concurrent and consecutive sentences totaling nineteen years. On appeal, Schomisch argued the court had erred by refusing to instruct the jury on superseding cause and laws governing left turns and providing a misleading instruction on the presumption of intoxication. *State v. Schomisch*, No. 2 CA-CR 2009-0096, ¶¶ 3, 13 (Ariz. App. Feb. 11, 2011) (mem. decision). We affirmed. *Id.* ¶ 1.

¶4 Schomisch subsequently petitioned for post-conviction relief. After an evidentiary hearing, the trial court denied the petition and affirmed his convictions and sentences. On review in this court, Schomisch reasserted his argument that his trial counsel had been "ineffective for failing to investigate the possibility of brake failure." *State v. Schomisch*, No. 2 CA-CR 2014-0153-PR, ¶ 13 (Ariz. App. Oct. 24, 2014) (mem. decision). We granted relief on this claim but denied relief with respect to his claims related to his DUI convictions. *Id.* ¶¶ 13, 14-16. Schomisch was retried and

convicted of negligent homicide, endangerment, criminal damage, and three counts of aggravated assault. *See id.* ¶ 17. He was sentenced to consecutive and concurrent prison terms totaling 13.5 years. This appeal followed.

Jurisdiction

¶5 As a preliminary matter, we note that Schomisch was not present when the jury returned its verdicts following his second trial in April 2019. A year later, an arrest warrant was served, and Schomisch was present in custody for his sentencing in June 2020. Although the parties agree Schomisch did not waive his right to appeal under A.R.S. § 13-4033(C), which provides that a "defendant may not appeal . . . if [his] absence prevents sentencing from occurring within ninety days after conviction," we "have an independent duty to determine whether we have jurisdiction on appeal." *State v. Nunn*, 250 Ariz. 366, ¶ 4 (App. 2020). Nonetheless, upon review of the record, it appears Schomisch is correct that he was not given an admonition pursuant to *State v. Bolding*, 227 Ariz. 82, ¶ 20 (App. 2011) (for waiver of right to appeal under § 13-4033(C), defendant must have been warned of its potential application). Thus, we have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).[1]

Motion to Suppress

¶6 Schomisch argues the trial court erred in failing to suppress the results of his first blood draw. We review a denial of a motion to suppress for an abuse of discretion, but we review accompanying constitutional and legal issues de novo. *State v. Blakley*, 226 Ariz. 25, ¶ 5 (App. 2010). To that end, "we consider only the evidence presented at the suppression hearing and view it in the light most favorable to upholding the court's ruling." *Id.* (citation omitted). If an objection to an alleged error was properly preserved, we consider it under the harmless error standard.

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[1]Additionally, Schomisch asserts § 13-4033(C) does not apply because "[t]he trial court also failed to make findings at sentencing as to whether [he] had knowingly, voluntarily, and intelligently waived his right to appeal by failing to make a timely appearance for sentencing." *See State v. Raffaele*, 249 Ariz. 474, ¶ 13 (App. 2020) ("superior court must find a knowing, voluntary, and intelligent waiver" of a defendant's right to appeal under § 13-4033(C)). The state, while suggesting *Raffaele* was wrongly decided, nonetheless urges us to decline to address his arguments based on that case. Because *Bolding* alone forecloses any possibility of waiver under § 13-4033(C), we so decline.

State v. Henderson, 210 Ariz. 561, ¶ 18 (2005). "Harmless error review places the burden on the state to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence." *Id.*

¶7 "The Fourth Amendment protects individuals against unreasonable searches and seizures by the government and its agents, and a warrantless search is per se unreasonable unless a recognized exception, like the medical blood draw exception, applies." *State v. Nissley*, 241 Ariz. 327, ¶ 13 (2017). This exception, codified as A.R.S. § 28-1388(E), states:

> [I]f a law enforcement officer has probable cause to believe that a person [drove under the influence] and a sample of blood, urine or other bodily substance is taken from that person for any reason, a portion of that sample sufficient for analysis shall be provided to a law enforcement officer if requested for law enforcement purposes.

See also Nissley, 241 Ariz. 327, ¶ 10. A warrantless blood draw is constitutional under this exception if: (1) there was probable cause the suspect was driving under the influence; (2) exigent circumstances made obtaining a warrant impractical; (3) medical personnel drew the blood for a medical reason; and (4) "the provision of medical services did not violate the suspect's right to direct his or her own medical treatment." *Id.* ¶ 24. Moreover, pursuant to the good-faith exception to the exclusionary rule, evidence collected in violation of the Fourth Amendment need not be suppressed where the search was conducted in reasonable reliance on binding appellate precedent or statutes that are not clearly unconstitutional. *Illinois v. Krull*, 480 U.S. 340, 346-47, 348, 349-50 (1987); *Davis v. United States*, 564 U.S. 229, 232, 249 (2011).

¶8 Below, relying on *State v. Cocio*, 147 Ariz. 277, 286 (1985), *abrogated on other grounds by Nissley*, 241 Ariz. 327, ¶ 11, Schomisch argued the warrantless blood draw taken by medical personnel and collected by law enforcement the day of the collision was unconstitutional "because it was unsupported by probable cause, conducted solely for purposes of law enforcement, and lacked any medical purpose." Further, claiming no exigent circumstances existed to justify the blood draw, Schomisch asserted "the blood obtained . . . must be suppressed." The trial court denied the motion.

¶9 On appeal, Schomisch renews his argument that "the officer did not have case-specific exigent circumstances that would have prevented him from obtaining a search warrant." Specifically, he claims the officer

relied on two circumstances to justify the warrantless collection—the "dissipation of alcohol" and the possibility that Schomisch would need to be taken to an operating room, thereby preventing a blood draw—neither of which were sufficient. And, contending his defense was that "impairment was not the cause of the collision," Schomisch argues failing to suppress the results of the blood draw was not harmless error. Finally, he asserts that based on the controlling law at the time, the good-faith exception to the exclusionary rule does not apply.

¶10 The state, however, responds that "the dissipation of alcohol and the possibility that Schomisch might be taken away for medical treatment" were sufficient exigent circumstances. And, it argues the good-faith exception nonetheless applied based on the officer's reliance on § 28-1388(E) and *Cocio*, which concluded the "highly evanescent nature of alcohol in [a] defendant's blood stream" creates an exigent circumstance. 147 Ariz. at 286. *But see Nissley*, 241 Ariz. 327, ¶ 11 (natural dissipation of alcohol in bloodstream does not, by itself, establish exigency authorizing warrantless blood draw). In any event, the state contends any error here would have been harmless because other evidence was presented pointing to Schomisch's intoxication, including the results of subsequent blood draws taken pursuant to a warrant.

¶11 In this instance, assuming without deciding the trial court erred in admitting the blood draw results, the error would have been harmless. Schomisch was retried for manslaughter, aggravated assault, criminal damage, and endangerment. To prove the manslaughter, criminal damage, and endangerment charges, the state was required to establish Schomisch had acted with a reckless state of mind. *See* A.R.S. §§ 13-1103(A)(1), 13-1201(A), 13-1602(A)(1). This would require that Schomisch had been "aware of and consciously disregard[ed] a . . . risk" that the criminal result would occur where, based on the "nature and degree" of the risk, disregarding it would have been "a gross deviation from the standard of conduct that a reasonable person would observe in the situation," or that he had created but was "unaware of such risk solely by reason of voluntary intoxication." A.R.S. § 13-105(10)(c). The conviction on the lesser-included offense of negligent homicide required a finding that Schomisch had failed "to perceive a substantial and unjustifiable risk" that is of "such nature and degree that the failure to perceive it constitute[d] a gross deviation from the standard of care that a reasonable person would observe in the situation." § 13-105(10)(d).

¶12 In its closing argument, the state argued Schomisch had acted recklessly based on his intoxication and speed at the time of the collision. To that end, it introduced into evidence the results of three blood draws

from the day of the collision—the initial draw at issue here, as well as two draws collected pursuant to a search warrant. While the second and third draws occurred approximately one and a half and two and a half hours after the first, respectively, each showed blood alcohol levels over .118.

¶13 Further, a former member of the Tucson Police Department's toxicology blood alcohol unit testified that a ".08 alcohol concentration" is recognized by the scientific community as the level "at which all people are impaired to some degree in their ability to drive regardless of experience." And, a police officer testified that when he had observed Schomisch at the hospital, he smelled of intoxicants and had slurred speech and bloodshot eyes. The state also presented testimony from a detective with extensive experience in investigating vehicle collisions indicating the crash would not have occurred had Schomisch been traveling at the posted speed limit of forty miles per hour rather than his actual speed, which was over seventy miles per hour.

¶14 Based on the foregoing, we are convinced, beyond a reasonable doubt, that including evidence of the first blood draw did not affect Schomisch's convictions or sentences. *See Henderson*, 210 Ariz. 561, ¶ 18.

Jury Instructions

¶15 Schomisch also argues the jury instruction on endangerment erroneously allowed the trial court to designate the offense a felony. We generally review a court's decision to give a jury instruction for an abuse of discretion, and we reverse only "if the instructions, taken as a whole, misled the jurors." *State v. Petrak*, 198 Ariz. 260, ¶ 9 (App. 2000). "[W]e review de novo whether [a] given instruction correctly states the law," viewing the jury instructions in their entirety. *State v. Solis*, 236 Ariz. 285, ¶ 6 (App. 2014); *see State v. Rutledge*, 197 Ariz. 389, ¶ 15 (App. 2000).

¶16 Schomisch did not object to the instruction at issue; we therefore review his claim solely for fundamental error. *See State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018). "[T]he first step in fundamental error review is determining whether trial error exists." *Id.* ¶ 21. A defendant who establishes error must then show "the error went to the foundation of the case," took from him a right essential to his defense, or "was so egregious that he could not possibly have received a fair trial." *Id.* If a defendant only shows an error went to the foundation of the case or deprived him of a right essential to his defense, he must also separately show prejudice resulted from the error. *Id.* If a defendant shows the error was so egregious he could not have received a fair trial, however, he has necessarily shown prejudice and must receive a new trial. *Id.*

¶17 Section 13-1201(A), A.R.S., provides that "[a] person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury," while subsection (B) provides that "[e]ndangerment involving a substantial risk of imminent death is a class 6 felony," and "[i]n all other cases, it is a class 1 misdemeanor." Schomisch argues the trial court's instruction on the elements of endangerment requiring that "the defendant's conduct did in fact create a substantial risk of imminent death *and/or physical injury*" allowed a felony conviction absent a specific finding that the offense involved a risk of imminent death. (Emphasis added.) Thus, he asserts, his endangerment conviction "should either be designated a misdemeanor or reversed and remanded for a new trial." The state, however, responds that "the instruction was not erroneous and . . . the verdict form incorporated by reference the indictment," which, along with its closing argument, "clarified any potential ambiguity." Accordingly, it claims that "reckless endangerment . . . is a single unified offense that may be punished as a felony if an imminent-death finding is made."

¶18 We find instructive our opinion in *State v. Barnes*, 251 Ariz. 331 (App. 2021).[2] There, the trial court instructed the jury "that the crime of endangerment as alleged in the indictment . . . required proof that Barnes 'disregarded a substantial risk that his conduct would cause imminent death *or physical injury*, *and* . . . did in fact create a substantial risk of imminent death *or physical injury*.'" *Id.* ¶ 8 (alteration in *Barnes*). Concluding that "[f]ailure to properly instruct a jury on an essential element of an offense is fundamental error" and noting that "[t]his court has repeatedly held similar iterations of this instruction to be fundamental error," we found fundamental error with respect to the instruction. *Id.* ¶¶ 9, 10, 11. Given this, we conclude the instruction here also constitutes fundamental error. *See State v. Soliz*, 223 Ariz. 116, ¶¶ 11-12 (2009) (prerequisite for fundamental error is that error occurred).

¶19 We next addressed whether the verdict form and state's closing argument cured the error. *Barnes*, 251 Ariz. 331, ¶ 11 ("We view jury instructions in context."). As in this case, the verdict form incorporated the indictment, which referred solely to "a substantial risk of imminent death," but did not itself "properly instruct[] the jury on the required findings." *Id.* ¶¶ 12-13 & 15 (alteration in *Barnes*) (quoting *State v. Payne*,

[2]The state petitioned our supreme court for review of this decision in June 2021, but the court has not yet granted or denied review.

233 Ariz. 484, ¶ 92 (2013)). Thus, as in *Barnes*, we conclude the verdict form did not cure the erroneous instruction. *See id.* ¶ 16.

¶20 We similarly conclude the state's closing argument was not curative. *See id.* ¶¶ 18-19. Here, while explaining the endangerment charge, the prosecutor stated J.D.'s passenger "was endangered by th[e] crash, and we know that this crash was capable of causing death, because it did, in fact, cause death." Again, like in *Barnes*, the prosecutor did not clearly focus "on the meaning of substantial risk of imminent death so as to obviate any question of whether the jury could apply substantial risk of physical injury as provided for in the instruction" or explain how Schomisch's actions specifically created a substantial risk of imminent death as to J.D.'s passenger. *Id.* ¶ 19. In any event, the trial court instructed the jury to "consider all of the[] instructions" and "not pick out one instruction, or part of one, and disregard the others." *See Felix*, 237 Ariz. 280, ¶ 18 ("[A]rguments of counsel generally carry less weight with a jury than do instructions from the court." (quoting *Boyde v. California*, 494 U.S. 370, 384 (1990))).

¶21 The error here "went to the foundation of the case." *Escalante*, 245 Ariz. 135, ¶¶ 18, 21 (such error occurs where prosecution is "relieve[d] . . . of its burden to prove a crime's elements"); *see Barnes*, 251 Ariz. 331, ¶ 21 & n.8. However, Schomisch must still demonstrate prejudice, which requires a fact-intensive and case-specific analysis showing that absent the error, a reasonable jury could have reached a different verdict. *See Escalante*, 245 Ariz. 135, ¶¶ 21, 29. We conclude that even if the jury had been specifically instructed to find a substantial risk of imminent death, no reasonable jury could have found Schomisch not guilty of felony endangerment. *See Barnes*, 251 Ariz. 331, ¶ 27.

¶22 Schomisch's pre-impact speed was over thirty miles per hour over the posted speed limit. The collision launched J.D.'s truck into the air, repeatedly flipping it and causing it to land on another car. No reasonable jury could determine J.D.'s passenger was not endangered "with a substantial risk of imminent death." § 13-1201(A). Thus, while the instruction constituted fundamental error, it was not prejudicial, and Schomisch's conviction for endangerment stands.

Motion for Mistrial

¶23 Finally, Schomisch argues "[t]he trial court erred in denying [his] motion for mistrial after a state's witness mentioned [his] previous trial." We review this order for an abuse of discretion. *State v. Jones*, 197 Ariz. 290, ¶ 32 (2000). "A declaration of a mistrial . . . is 'the most dramatic remedy for trial error and should be granted only when it appears

that justice will be thwarted unless the jury is discharged and a new trial granted.'" *State v. Dann*, 205 Ariz. 557, ¶ 43 (2003) (quoting *State v. Adamson*, 136 Ariz. 250, 262 (1983)). To determine whether a mistrial should have been granted, we look to "(1) whether the jury . . . heard what it should not hear, and (2) the probability that what it heard influenced [it]." *State v. Laird*, 186 Ariz. 203, 207 (1996). We will reverse a court's denial of a mistrial only if there is a reasonable probability the jury's verdict would have been different if the allegedly improper testimony had not been presented. *State v. Welch*, 236 Ariz. 308, ¶ 21 (App. 2014).

At trial, a police officer testified as follows:

> Q. When you completed your [traffic report] diagram, was it based largely on what you were initially told by [J.D.] in [a] very hurried conversation?
>
> A. Yes, ma'am.
>
> Q. Did you later find out that your diagram was inaccurate?
>
> A. Yes, I did.
>
> Q. How did you find that out?
>
> A. Through a previous or an interview [sic] that occurred from the previous trial.

Pointing out that the witness "testified there was a previous trial," Schomisch moved for a mistrial. The trial court ultimately denied the motion.

¶24 On appeal, Schomisch argues "the disclosure of a prior trial to the jury was tantamount to telling the jury that [he] had been found guilty by a previous jury." And, while acknowledging "that Arizona courts have not previously considered that such a disclosure requires a mistrial," he nonetheless points to case law from other jurisdictions to support his position. The state counters that "the mere mention of a previous trial" does not warrant a mistrial. We agree.

¶25 Our conclusion is consistent with our supreme court's decision in *State v. Lawrence*, 123 Ariz. 301 (1979), which also involved a statement by a witness alluding to a previous trial in the same case. Our supreme court stated, "We are aware of no authority in this jurisdiction supportive of the contention that mere mention of a previous trial mandates reversal on appeal." *Id.* at 305. Indeed, we cannot say the jury heard what

it should not have heard. *See Laird*, 186 Ariz. at 207. And, in any event, even if the statement was improper, we cannot say there is any reasonable probability the jury would have reached different verdicts in its absence. *See Welch*, 236 Ariz. 308, ¶ 21. We find no error.

Disposition

¶26 For the foregoing reasons, we affirm Schomisch's convictions and sentences.

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

¶27 I fully concur in the judgment and decision, except for its conclusion that the endangerment jury instruction was erroneous.

¶28 For the same reasons I found no error as to the endangerment instruction given in *State v. Barnes*, I find no error, let alone fundamental error, in the identical instruction given here. 251 Ariz. 331, 34-54 (App. 2021) (Brearcliffe, J., dissenting). As in *Barnes*, the instruction here correctly stated the law. But if that were not enough, the jury's guilty verdict expressly incorporated the indictment's felony imminent-death charge when it found him "guilty of ENDANGERING [S.S.] as alleged in Count Six of the Indictment."[3] Moreover, the state urged the jury to only find that the victim had been subjected to a risk of death, not mere injury, and the facts fit a felony verdict. There is no reasonable doubt that Schomisch received a fair trial and received the conviction the jury intended.

[3]The endangerment charge was found in count nine of the original indictment, but was count six in the version of the indictment presented to the jury.