FILED BY CLERK
OCT 12 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. SARAH MELISSA RHINEHART, Appellant.	)	2 CA-CR 2009-0379 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF GRAHAM COUNTY

Cause No. CR2009182

Honorable Monica L. Stauffer, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Alan L. Amann
Tucson
Attorneys for Appellee

Jeffrey S. Siirtola, P.C.
By Jeffrey S. Siirtola
Sierra Vista
Attorney for Appellant

V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, Sarah Rhinehart was convicted of driving under the influence (DUI) of any drug while impaired to the slightest degree, felony endangerment, and reckless driving. The trial court suspended the imposition of sentence and placed Rhinehart on three years' probation. As conditions of probation, the court ordered her to serve a mandatory thirty-day jail term and a concurrent 365-day jail term which would be suspended if Rhinehart successfully completed inpatient treatment.

¶2 On appeal, Rhinehart contends the trial court erred in 1) denying her motion to dismiss the charges and suppress evidence, 2) allowing the state to amend the indictment with an allegation of a prior conviction, 3) convicting her of felony endangerment when the jury was not instructed on that charge, 4) admitting prior act evidence, 5) admitting blood evidence without proper foundation, 6) denying her Rule 20, Ariz. R. Crim. P., motion for judgment of acquittal, and 7) convicting her of both endangerment and reckless driving because reckless driving is a lesser-included offense of endangerment. For the reasons set forth below, we affirm.

Facts and Procedure

¶3 On August 18, 2008, Thatcher Police Department Officer Larson was dispatched to the scene of a single-vehicle accident on Highway 70, near Thatcher. When he arrived, he noticed a white truck "quite a ways off the roadway in a[n] irrigation ditch" and several other vehicles parked nearby. Bystanders directed Larson to the driver of the white truck, Rhinehart, whom he knew personally. He noticed Rhinehart was "different than what she usually was"; she appeared "kind of slow and lethargic. . . . She was slurring her speech as she was speaking," and her responses to his questions were

delayed. Larson relayed this information to Arizona Department of Public Safety (DPS) Officer Shupe, who was dispatched to the scene about fifteen minutes later. Shupe approached Rhinehart and observed essentially the same signs of impairment. Rhinehart told Shupe that she had been driving to the hospital and somehow had lost control of her vehicle. She also admitted that she had taken one Xanax pill that morning. At Shupe's request, she agreed to go to the Thatcher police station to undergo sobriety tests.

¶4 At the police station, DPS Officer Ellison administered a drug recognition evaluation (DRE), and he concluded Rhinehart was "under the influence of a depressant drug." After Officer Shupe placed her under arrest, she consented to a blood test which revealed the presence of the drugs Soma, Xanax, and Valium, all central nervous system depressants. Rhinehart was charged with DUI, endangerment, and reckless driving. The jury found her guilty of all charges, and the trial court placed her on probation as noted above. This timely appeal followed.

Discussion

I. Motion to Suppress

¶5 Rhinehart first contends the trial court erred in denying her "motion to suppress evidence and dismiss charges" because the officers had lacked probable cause to arrest her and her blood was obtained without her consent or a warrant. We will not reverse a trial court's denial of a motion to dismiss or suppress in the absence of a clear abuse of discretion. *State v. Chavez*, 208 Ariz. 606, ¶ 2, 96 P.3d 1093, 1094 (App. 2004) (motion to dismiss); *State v. Stuart*, 168 Ariz. 83, 86, 811 P.2d 335, 338 (App. 1990) (motion to suppress). In reviewing the court's rulings, we consider "only the evidence

presented at the hearing on the motion," which we view "in the light most favorable to sustaining the trial court[]." *State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007). Although we defer to the trial court's factual findings, we review its legal conclusions de novo. *State v. Sanchez*, 200 Ariz. 163, ¶ 5, 24 P.3d 610, 612 (App. 2001).

A. Arrest

¶6 Rhinehart appears to argue that a "de facto arrest" without probable cause occurred when the officer transported her to the police station.[1] "Whether a defendant has been arrested 'turns upon an evaluation of all the surrounding circumstances to determine whether a reasonable person, innocent of any crime, would reasonably believe [s]he was being arrested.'" *State v. Acinelli*, 191 Ariz. 66, 69, 952 P.2d 304, 307 (App. 1997), *quoting State v. Winegar*, 147 Ariz. 440, 448, 711 P.2d 579, 587 (1985). And, probable cause to arrest exists "if the collective knowledge of the officers establishes that they had 'reasonably trustworthy information of facts and circumstances which are sufficient in themselves to lead a reasonable [person] to believe an offense . . . has been committed and that the person to be arrested . . . did commit it.'" *State v. Aleman*, 210

[1]Although Rhinehart cites substantial case law on the general issue of what constitutes an arrest, she does not specifically address whether there was probable cause to arrest her when she was transported to the police station. On this basis we could find she has waived this argument. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) (failure to sufficiently argue claim may result in abandonment and waiver of claim). The state's response is equally unsatisfactory, however. It suggests this court "summar[ily] reject[]" Rhinehart's claim and concludes probable cause existed to arrest her without citing any case law on the issue of probable cause or addressing Rhinehart's argument that she was under arrest when she was transported to the police station. *See* Ariz. R. Crim. P. 31.13(c)(2). Nonetheless, due to our general preference to decide cases on their merits, in our discretion, we consider this issue. *See Carver*, 160 Ariz. at 175, 771 P.2d at 1390.

Ariz. 232, ¶ 15, 109 P.3d 571, 576 (App. 2005), *quoting State v. Richards*, 110 Ariz. 290, 291, 518 P.2d 113, 114 (1974).

¶7 In her motion below, Rhinehart argued "[t]he mere fact of a single lane violation to go off-road driving, by a pick-up truck, does not create reasonable suspicion to detain [or probable cause to] arrest a driver without a warrant." Conceding on appeal the possibility that "an initial detention . . . was warranted," Rhinehart argues "the police did not [subsequently] find anything to support [her] arrest." We disagree.

¶8 At the suppression hearing, Shupe testified that when he transported Rhinehart to the police station, he knew she had been the driver in a single-vehicle rollover accident, and both Larson and he had observed signs of impairment. When he first made contact with Rhinehart, Shupe noticed "she had red eyes. Her speech was extremely slurred . . . . Her movements were really slow and methodic and her responses to questions took a long time." When Rhinehart tried to walk, "she was swaying front and back and side to side. And she put her . . . right hand against the vehicle . . . to keep her balance. [He] noticed when she started to walk she was pretty unsteady on her feet." He also stated he had chosen not to administer field sobriety tests at that time because Rhinehart "couldn't stand up."

¶9 Shupe also had excluded other potential causes of the accident. *See State v. Quinn*, 218 Ariz. 66, ¶ 10, 178 P.3d 1190, 1193-94 (App. 2008) (depending on circumstances, unexplained erratic driving may give rise to probable cause for DUI). He confirmed it had not been raining when the accident occurred. Rhinehart also told him that she did not know how or why she had lost control of the vehicle. Given the

unexplained cause of the accident, together with Rhinehart's inability to perform any field sobriety tests and the numerous and obvious signs of impairment, the information available to Shupe was sufficient for a reasonable person to conclude that Rhinehart had been driving while impaired to the slightest degree. *State v. White*, 155 Ariz. 452, 453, 747 P.2d 613, 614 (App. 1987) (approving without comment arrest of defendant based on erratic driving and inadequate performance on field sobriety tests). *Cf. State ex rel. McDougall v. Albrecht*, 168 Ariz. 128, 132, 811 P.2d 791, 795 (App. 1991) (defendant's "failure to stop at a red light and speeding coupled with his poor performance of the field sobriety tests and physical signs of impairment constituted" sufficient evidence to support jury's finding of guilt beyond reasonable doubt on DUI charge). Therefore, even assuming Rhinehart was under arrest when the officer transported her to the police station, that arrest was supported by probable cause.

B. Blood Draw

¶10 Rhinehart next argues the trial court erred in denying her motion to dismiss because she did not give valid consent to the blood draw and no warrant was obtained to authorize the draw. Rhinehart relies on *Carillo v. Houser*, 222 Ariz. 463, ¶ 19, 232 P.3d 1245, 1248-49 (2010), in which our supreme court held that to obtain a suspect's blood in the absence of a warrant, "the arrestee must unequivocally manifest assent to the testing by words or conduct." And she contends that she did not unequivocally consent, despite having signed a form consenting to the blood draw, because evidence at the suppression hearing suggested she was unaware of the nature of the form when she had signed it.

¶11 In *Carillo*, the defendant was arrested for DUI and other related offenses. *Id*. ¶ 3. The officers then informed Carillo they were going to draw his blood, and he apparently consented to the draw. *Id*. ¶ 4. Carillo later filed a motion to suppress the blood evidence, arguing he had not consented to the draw, but merely had acquiesced to the officers' authority. *Id*. At the hearing, there was conflicting evidence concerning whether Carillo, who spoke only Spanish, had understood the officers' intentions. *Id.* The officers testified that Carillo had held his arm out when they told him they were going to draw his blood; he testified he had not consented but also had not resisted the blood draw out of fear. *Id.* The municipal court denied Carillo's motion, concluding his conduct did not suggest he had refused to consent to the test, and the superior court affirmed that ruling. *Id*. ¶ 5. The court of appeals accepted special action jurisdiction, granted relief, holding that a suspect's blood may not be drawn without a warrant unless he or she has expressly consented to the blood draw, and remanded for the trial court to determine whether he had, in fact, consented to the draw. *See Carillo v. Houser*, 222 Ariz. 356, 214 P.3d 444 (App. 2009). The supreme court agreed, although it vacated the opinion of the court of appeals. 224 Ariz. 463, ¶ 22, 232 P.3d at 1249.

¶12 Here, Rhinehart admits she signed a form giving consent for her blood to be drawn, but she contends her mere signing of the form, without any evidence she had understood its contents, was insufficient to establish her consent had been knowing and voluntary. But contrary to her argument on appeal, Rhinehart never testified that she did not understand the documents she had been asked to sign. She variously testified that she did not recall whether there had been enough time for her to read the documents, she

could not remember what she thought the form meant when she signed it, no one pressured her to sign the form, and she "might have skimmed over it" before signing.

¶13 However, Officer Shupe testified that he had read Rhinehart the consent portion of the form, and he stated that based on her subsequent signature he believed she had understood what he had read to her. This is all that is required. Even assuming Rhinehart did not personally read the consent form, Shupe read it to her, and she subsequently signed it. She thus "unequivocally manifest[ed] assent to the testing by her . . . conduct" in signing the consent form after having been verbally informed of its contents. *See Carillo*, 222 Ariz. 463, ¶ 19, 232 P.3d at 1248-49. Because there was evidence that Rhinehart validly consented to the blood draw, a warrant for her blood was not required pursuant to the implied consent law, *see* A.R.S. § 28-1321, and the trial court did not err in denying her motion to suppress the results of the blood test.

II. Amendment of Indictment

¶14 Rhinehart next argues the trial court abused its discretion in permitting the state to amend the indictment before trial to allege a prior DUI conviction. She contends she was prejudiced by the amendment because it affected her ability to prepare for trial and present an effective defense. "The trial court has considerable discretion in resolving motions to amend an indictment." *State v. Delgado*, 174 Ariz. 252, 254, 848 P.2d 337, 339 (App. 1993). Thus, we will not reverse its determination absent an abuse of that discretion. *See State v. Johnson*, 198 Ariz. 245, ¶ 4, 8 P.3d 1159, 1161 (App. 2000).

¶15 The state filed an amended indictment on August 31, 2009, ten days before trial, in which it added an allegation that Rhinehart had a prior DUI conviction in 2008.

Rhinehart moved to strike the amendment because it had been filed less than twenty days before trial and subjected her to an increased range of punishment. At a hearing on the first day of trial, the state clarified that it was not seeking to aggravate Rhinehart's sentence upon conviction, but, rather, its purpose was to allege the separate offense of a second-offense DUI. *See* A.R.S. §§ 28-1381(E), (K). The court denied Rhinehart's motion to strike and permitted the amendment.

¶16 A trial court "shall allow" the state to allege the defendant has a prior DUI conviction or pending DUI charge if the allegation is "filed twenty or more days before the case is actually tried," and the court "*may* allow the allegation . . . filed at any time before the date the case is actually tried if th[e] state makes available to the defendant . . . a copy of any information obtained concerning the prior conviction or other pending charge." A.R.S. § 28-1387(A) (emphasis added). Rhinehart appears to claim that she was not provided "notice[] of the State's attempt to amend the information . . . [until] after the jury had been [i]mpaneled, opening arguments had been made[,] and at least one witness had testified." However, the record demonstrates she received notice of the amendment and responded to it in writing before trial began.

¶17 Rhinehart asserts *State v. Freeney*, 223 Ariz. 110, 219 P.3d 1039 (2009), and *State v. Sanders*, 205 Ariz. 208, 68 P.3d 434 (App. 2003), *overruled in part by Freeney*, 223 Ariz. 110, 219 P.3d 1039, support her argument that the trial court abused its discretion by allowing the amendment. However, both *Freeney* and *Sanders* involved untimely amendments under Rule 13.5, Ariz. R. Crim. P., which explicitly precludes amendment to the indictment within twenty days before trial. In contrast, § 28-1387(A)

expressly authorizes the court to allow an allegation of a prior DUI conviction or pending DUI charge filed at any time before trial begins. *Freeney* and *Sanders* are, therefore, inapplicable. *See State v. Canez*, 118 Ariz. 187, 191, 575 P.2d 817, 821 (App. 1977) (specific law controls over general where specific conflicts with general); *see also State v. Jackson*, 210 Ariz. 466, ¶ 24, 113 P.3d 112, 117 (App. 2005).

¶18 But the fact that the trial court has discretion to allow the state to file an allegation of prior DUI offenses within twenty days of trial does not mean it has the "unlimited power" to do so. *State v. Pierce*, 27 Ariz. App. 403, 407, 555 P.2d 662, 666 (1976). "'[D]iscretion' in its legal context has been held to mean a 'sound discretion.'" *State v. Patton*, 120 Ariz. 386, 388, 586 P.2d 635, 637 (1978). Thus, a trial court abuses its discretion when the court's "decision is characterized by capriciousness or arbitrariness or by a failure to conduct an adequate investigation into the facts necessary for an intelligent exercise thereof." *Id*.

¶19 Rhinehart maintains the amendment was "extremely prejudicial in that it now exposed [her] to increased statutory punishment if convicted" and affected her "litigation strategy, trial preparation, examination of witnesses, and argument." But even though the range of punishment increased as a consequence of the amendment, this does not, itself, constitute prejudice or suggest the trial court did not fully investigate the facts relevant to its decision. And, although Rhinehart contends her ability to prepare for trial and present a defense was impaired by the timing of the amendment, she has provided no specific facts or argument to support this assertion. Nor is it supported by the record. Rhinehart was provided notice of the state's intent to amend the indictment ten days

before trial, and she had a full opportunity to argue the issue at the hearing before trial. On this record, we cannot say the court abused its discretion in permitting the state to amend the indictment to allege a prior DUI conviction under § 28-1387(A).

III. Endangerment

¶20 Rhinehart next challenges her conviction of felony endangerment because "[t]he jury instruction allowed the jury to convict [her] of endangerment based on a substantial risk of either imminent death . . . or physical injury . . . , without specifying on which basis it found [her] guilty." Because she failed to object to the instruction below, we review only for fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984).

¶21 Section 13-1201, A.R.S., provides: "A person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury" and is a class six felony when it "involv[es] a substantial risk of imminent death . . . . In all other cases, it is a class 1 misdemeanor." The statute thus creates two offenses: felony endangerment, endangerment involving a risk of imminent death, and misdemeanor endangerment, endangerment involving a risk less than imminent death. *State v. Carpenter*, 141 Ariz. 29, 31, 684 P.2d 910, 912 (App. 1984) ("The crime of endangerment . . . is a felony "only if it involved a substantial risk of death to another.").

¶22 The jury was instructed it could find Rhinehart guilty of endangerment if it found she had "consciously disregarded a substantial risk that [her] conduct could cause imminent death or physical injury." Based upon the jury's verdict, the court determined Rhinehart had committed a felony. She contends that determination was erroneous under the circumstances. We agree. In order to find Rhinehart guilty of felony endangerment, the jury was required to find her conduct had placed another person at risk of imminent death. *See Carpenter*, 141 Ariz. at 31, 684 P.2d at 912. But by its verdict the jury only found that she had placed another at risk of imminent death *or* bodily injury. This is insufficient. *See State v. Ortega*, 220 Ariz. 320, ¶ 19, 206 P.3d 769, 776 (App. 2008) ("[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."). And because the level of endangerment the victims experienced was disputed at trial, we must conclude it was fundamental error for the trial court to have entered a judgment of conviction on the offense of felony endangerment. *See State v. Averyt*, 179 Ariz. 123, 130, 876 P.2d 1158, 1165 (App. 1994) (An instruction that omits an element of the offense charged is not 'substantially free from error' . . . ."), *quoting State v. Walton*, 159 Ariz. 571, 584, 769 P.2d 1017, 1030 (1989). *Cf. State v. Fullem*, 185 Ariz. 134, 138, 912 P.2d 1363, 1367 (App. 1995) ("[T]he failure to instruct the jury on an essential element of an offense is not fundamental error where there is no issue as to that element.").

¶23 Although error occurred and the error was fundamental, Rhinehart is not entitled to relief unless she establishes she was prejudiced by the error. *See Henderson*,

210 Ariz. 561, ¶ 26, 115 P.3d at 608-09. "Because . . . the error involved here deprived [Rhinehart] of the opportunity to require that a jury find facts sufficient to expose h[er] to [felony endangerment], [she] must show that a reasonable jury, applying the appropriate standard of proof, could have reached a different result than did the trial judge." *See id.* ¶ 27.

¶24 Rhinehart argues "[t]he evidence showed that the other drivers on the roadway . . . took evasive action . . . to permit [her] vehicle to pass them by. There was no indication that [she] was ever close to striking any vehicle or that any person or vehicle was damaged as a result of . . . [her] driving behavior." Thus, she concludes that, had the jury been correctly instructed, it might have convicted her only of misdemeanor endangerment.

¶25 Four witnesses testified at trial about Rhinehart's driving at the time of the accident. C.B. F. testified that he had seen Rhinehart's truck crossing back and forth between traffic lanes and that he had pulled over to the side of the highway "to see what was going to happen" because he believed her driving was "an accident in the making." Wade C. testified that he "had to take evasive action and yank [his] car to the right . . . into the emergency shoulder area, so she wouldn't hit [him]." He also told the jury that Rhinehart's vehicle was traveling at about sixty-five miles per hour and that she was "15 feet behind [him] when [he] noticed that she couldn't [stay in] her lane, so [he] yanked [his] car to the right [but] . . . did not come to a complete stop. [He] was still probably going 50, 55 miles an hour as [he] made the evasive action." He stated he "truly believe[d he] would have been dead" if their cars had collided.

¶26 Another witness, Connie H., testified that she observed Rhinehart's vehicle "cut" between the eastbound lanes before it left the pavement and flipped over. She acknowledged that she had feared for her safety, and that was "why [she] took evasive action[:] because [she] didn't want to be too close to the vehicle as it was swerving from lane to lane." She also stated that when Rhinehart's vehicle left the pavement, it was only one and a half car-lengths in front of her.

¶27 Finally, Frances C. testified that Rhinehart passed her vehicle "at a very high rate of speed" and then crossed into her lane before "drift[ing]" into the center dividing lane in the middle of the highway. She stated, "I felt okay, but concerned because [Rhinehart] had crossed three lanes already. When she came in [the center] lane, it terrified me. I was really concerned that if there was anyone [coming westbound] there was going to be a head-on collision and I didn't know how to avoid it." Frances said she did not take any evasive action "because [she] didn't know where to go . . . because the vehicle was going across all these lanes [and she] didn't know if [additional cars] hit [each other] where they would wind up. So [she] was just slowing down as much as possible and making sure nobody was behind [her] to hit [her]." She testified she had been "terrified," "just trying to . . . figure out where [Rhinehart's] car might go and how [she] could avoid being killed in this accident."

¶28 In order to establish Rhinehart had committed felony endangerment, the state was required to prove her conduct had placed the victim "in *actual* substantial risk of imminent death." *State v. Doss*, 192 Ariz. 408, ¶ 7, 966 P.2d 1012, 1015 (App. 1998). And here, the witnesses' testimony established that Rhinehart had approached numerous

vehicles at a high rate of speed, while weaving across multiple lanes of traffic within fifteen feet of the other vehicles and requiring the other vehicles to take immediate evasive action to avoid a collision. Although the other drivers successfully avoided collisions, Rhinehart's driving unquestionably put their lives at risk. Therefore, based on the evidence presented, no reasonable juror could have failed to find beyond a reasonable doubt that Rhinehart's driving had created an actual risk of imminent death to the other drivers in her path. *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. Thus, although the trial court fundamentally erred in not separately instructing the jury on felony and misdemeanor endangerment, Rhinehart has not established she suffered prejudice as a result of that error.

IV. Prior Bad Act Evidence

¶29 Rhinehart next contends the trial court abused its discretion in permitting the state to introduce evidence that, in the preceding eight to ten years, she had been in six other car accidents. She contends the evidence was unfairly prejudicial and the court should have granted her request for a mistrial.[2] "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. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983); *see also State v. Herrera*, 203 Ariz. 131, ¶ 4, 51 P.3d 353, 356 (App. 2002). "Absent an abuse of discretion, we will not overturn

[2]Rhinehart also argues the trial court should have stricken the testimony from the record, given a curative instruction, and granted a motion for new trial. However, the bulk of her argument focuses on the motion for mistrial, and because our consideration of that motion will dispose of the remaining grounds for reversal, we confine our analysis to the mistrial.

the trial court's denial of a motion for mistrial." *State v. Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d 345, 359 (2000).

¶30 During her case-in-chief, Rhinehart presented expert testimony suggesting that factors other than the use of prescription medication could have caused the collision and Rhinehart's appearance and behavior afterwards. Based on that testimony, the state asked the expert whether she was "aware of [Rhinehart's] prior vehicle accidents" in order to determine whether they could have been the possible causes of "her head injuries . . . or any mental issues or problems she may be having." The court permitted the witness to respond, over Rhinehart's objection, concluding the state had "a right to clear up if this was a . . . head injury that occurred on the date of the incident or something that occurred before."

¶31 The state then asked the expert whether Rhinehart had disclosed to her the basis of the head injury, and the expert testified Rhinehart had stated it was in connection with a motorcycle accident in 2001. The state asked about an additional accident, which the trial court permitted, again over Rhinehart's objection, on the ground that the state had "a right to elicit testimony of other possible head injuries that she suffered." The court also denied Rhinehart's request for a mistrial based on the admission of this evidence. The state then asked the witness about an additional five accidents, of which she testified she had no knowledge.

¶32 After the witness finished testifying, Rhinehart again requested a mistrial. She argued that the state's "continuing references to other criminal cases in [Rhinehart's] past . . . [and] other incidents that involved going off road or property damage" in front of

the jury created "a danger of unfair prejudice . . . that [the jury was] going to convict her because they know she's been in accidents or charged with criminal offenses before and not because of the evidence presented in court." The trial court affirmed its earlier ruling and denied Rhinehart's subsequent request for a limiting instruction and motion for new trial.

¶33 We question the purpose for which this testimony was admitted. *See* Ariz. R. Evid. 404(b) ("other crimes, wrongs, or acts . . . not admissible to prove the character of a person [or] conformity therewith," although such evidence may be admissible for other, proper purposes). However, even assuming it was admitted in error, the error was harmless. *See State v. Bass*, 198 Ariz. 571, ¶ 39, 12 P.3d 796, 805 (2000) (erroneously admitted evidence reviewed for harmless error); *State v. Aleman*, 210 Ariz. 232, n.15, 109 P.3d 571, 582 n.15 (App. 2005) (refusing to address merits of issue because even if error had occurred, was harmless under circumstances). "Error is harmless if we can conclude, beyond a reasonable doubt, that the error did not contribute to or affect the jury's verdict." *State v. Davolt*, 207 Ariz. 191, ¶ 64, 84 P.3d 456, 474 (2004). "'The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.'" *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993), *quoting Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

¶34 Here, the trial court's instructions to the jury and defense counsel's clarification in closing were sufficient to negate any potential prejudicial effect of the prosecutor's questions. In response to the jurors' questions seeking the court's guidance

as to how they may consider the prosecutor's questions about Rhinehart's previous car accidents, the trial court specifically told the jurors the questions would not be answered

> because you are to consider the testimony and exhibits as the evidence to form the basis of your decision. . . . Questions alone are not evidence. And you're not to speculate or guess as to what any answers to these questions might have been. Your deliberations and your verdict have to be based solely upon the testimony of witnesses and exhibits.

It then repeated these admonitions as part of the jury instructions. We presume the jurors followed the court's instructions. *State v. Saiers*, 196 Ariz. 20, ¶ 9, 992 P.2d 612, 615 (App. 1999).

¶35 Furthermore, in his closing argument, defense counsel specifically addressed the state's questions about Rhinehart's previous accidents. He stated he was focusing on two jury instructions. "The first is the one that says lawyers' comments are not evidence. And it says that if a lawyer says something or if a lawyer asks a question and there's absolutely no evidence [about it] before the question[i]s asked or after . . . , then you are to disregard the question." He then stated:

> The next one that I'd ask you to consider is a three-line instruction in the law where the Judge told you all specifically, questions from or by a lawyer. Questions. Questions to [the defense expert]. Did she . . . know? She never heard . . . anything [about the accidents]. Maybe nothing like that ever happened because there was no other evidence. . . . And the judge has told you the questions themselves, ["]Oh, well, did you know about [the accidents]?["] . . . are not evidence. So you can't even consider those questions.
>
> So I'm starting with what you all told me was on your mind in those questions, and I'm pointing you to the Judge's answers to those questions which are in these first two jury

> instructions. And it's your sworn obligation to follow the law that the Judge gives you in this case during your deliberations.

Thus, counsel's closing remarks clarified the meaning and purpose of the trial court's instructions and put them in the specific context as they applied to the very issue Rhinehart is raising on appeal. *See State v. Milke*, 177 Ariz. 118, 123, 865 P.2d 779, 784 (1993) (closing arguments may clarify or cure deficient jury instructions).

¶36 Moreover, the evidence of Rhinehart's guilt was overwhelming. Her erratic driving was unrefuted, officers observed multiple signs of impairment, and drug tests revealed the presence of various prescription drugs which could cause impairment. Therefore, given the explicit instruction provided to the jury, counsel's statements during closing, and the overwhelming evidence of Rhinehart's guilt, any error and prejudice resulting from the prosecutor's questions could not have affected the jurors' verdicts and was harmless beyond a reasonable doubt. *See Bass*, 198 Ariz. 571, ¶ 39, 12 P.3d at 805; *Bible*, 175 Ariz. at 588, 858 P.2d at 1191.

V. Chain of Custody

¶37 Rhinehart contends the trial court erred in admitting the blood evidence because it was not authenticated through a chain of custody. "A trial court's conclusion that evidence has an adequate foundation is reviewed for an abuse of discretion." *State v. McCray*, 218 Ariz. 252, ¶ 8, 183 P.3d 503, 507 (2008).

¶38 At trial, when the state's criminalist was asked about the chain of custody for Rhinehart's blood sample, he testified that the chain of custody was incomplete because a document detailing the storage of the sample between October 9, 2008, and

December 3, 2008, was missing. However, he also testified that the sample was in a secure location during that time. The prosecutor then retrieved the criminalist's laboratory notes, which had been sent to him by electronic mail nine days before trial and which included the missing page of documentation. Rhinehart objected to the state's attempt to introduce the missing page, arguing that it had not been timely disclosed. The trial court overruled the objection, noting that the criminalist and his notes specifically had been disclosed before trial and that Rhinehart had not asked to view the document previously.

¶39 On appeal, Rhinehart asserts in the heading for this argument that the trial court "erred in admitting documents to establish [the] chain of custody for blood evidence." However, other than referring to the court's overruling her disclosure objection and admitting the document, she provides no argument or citation to authority challenging the court's admission of these documents. Instead her argument and the citations in it are devoted exclusively to whether the chain-of-custody evidence was sufficient to authenticate the results of the blood test. Because Rhinehart has not even minimally supported her contention that the court erred in admitting the chain-of-custody documents, it is waived. *See State v. Barraza*, 209 Ariz. 441, ¶ 20, 104 P.3d 172, 178 (App. 2005) (mere reference to counsel's argument and record made to trial court insufficient to raise issue on appeal); Ariz. R. Crim. P. 31.13(c)(1)(vi) (argument shall contain "contentions of the appellant . . . and the reasons therefor, with citations to the authorities [and] statutes . . . relied on"). We therefore consider only her argument that

the chain of custody established at trial was insufficient to properly authenticate the blood evidence.

¶40 Evidence must be authenticated or identified before it is admissible; this requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Ariz. R. Evid. 901(a). This "[f]oundation . . . can be established by either chain of custody or identification testimony." *State v. Emery*, 141 Ariz. 549, 551, 688 P.2d 175, 177 (1984). "To establish a chain of custody, the state must show continuity of possession, but it need not disprove 'every remote possibility of tampering.'" *State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996).

¶41 Here, the state's criminalist testified that documentation showed the sample had been inspected for integrity upon its arrival at the laboratory; that preliminary testing had been documented appropriately and the sample subsequently had been returned to the storage refrigerator; and that he had appropriately documented his own retrieval, testing, and return of the blood sample to the refrigerator. He also testified that the blood sample was secure at all times it was in the laboratory's custody. Because this testimony demonstrates the laboratory's continuity of possession and Rhinehart did not present any evidence of tampering, the trial court did not abuse its discretion in admitting the blood evidence. *See McCray*, 218 Ariz. 252, ¶ 8, 183 P.3d at 507.

VI. Sufficiency of Evidence

¶42 Rhinehart also contends the trial court erred in denying her Rule 20, Ariz. R. Crim. P., motion for judgment of acquittal because insufficient evidence supported her

convictions.[3] "A judgment of acquittal under Rule 20 is appropriate only where there is 'no substantial evidence to warrant a conviction.'" *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993), *quoting State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). "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 defendant's guilt beyond a reasonable doubt.'" *Mathers*, 165 Ariz. at 67, 796 P.2d at 869, *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). When reasonable minds could differ as to the inferences that may be drawn from the evidence, the evidence is substantial, and the case must be submitted to the jury. *State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004); *Landrigan*, 176 Ariz. at 4, 859 P.2d at 114. We review the court's ruling on a Rule 20 motion for an abuse of discretion. *State v. Hollenback*, 212 Ariz. 12, ¶ 3, 126 P.3d 159, 161 (App. 2005).

¶43 To prove Rhinehart committed DUI, the state needed to prove that "[w]hile under the influence of . . . any drug," Rhinehart was "driv[ing] or in actual physical control of a vehicle" while "impaired to the slightest degree." *See* A.R.S. § 28-

[3]Rhinehart's counsel has not cited to the record in support of her argument that the trial court erred in denying the Rule 20 motion. Furthermore, counsel's summary of the trial testimony of Officer Ellison and the state's criminalist is wholly unsupported by the record below. Indeed, the brief contains misstatements and misrepresentations of these witnesses' conclusions, apparently in order to present the argument in a more favorable light. In particular, counsel states that, based on their training, Ellison and the criminalist concluded that Rhinehart's vertical nystagmus "established that . . . [she] was suffering a neurological condition[] caused by something other than alcohol or drugs." The record establishes, however, that although both witnesses testified a neurological condition was a *possible* cause of the vertical nystagmus, neither testified her condition was not caused by drugs, and, in fact, both explicitly opined the nystagmus was drug-related. We disapprove of this practice, and we remind counsel of his duties of forthrightness and candor to this court. *See* ER 3.3, Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42.

1381(A)(1). At trial, Rhinehart did not contest that there were drugs in her system or that she had been driving or in physical control of the vehicle. She argued only that she had not been impaired while driving. But, as noted above, the evidence was more than sufficient to support a jury finding of guilt as to the DUI.

¶44 To find Rhinehart guilty of felony endangerment, the state had to prove that she recklessly had endangered another person with substantial risk of imminent death. § 13-1201(A). The jury was presented with the testimony of multiple witnesses who described how Rhinehart's erratic driving at a high rate of speed forced them to take evasive maneuvers to avoid a collision. This is sufficient evidence from which a jury could find Rhinehart guilty of felony endangerment. And this same testimony that Rhinehart was uncontrollably swerving through traffic at a high rate of speed before driving her car off the road and into a ditch was sufficient to support her conviction for reckless driving. *See* A.R.S. § 28-693(A) (elements of reckless driving include driving with "reckless disregard for the safety of persons or property").

¶45 We acknowledge Rhinehart presented testimony that arguably permitted the inference that a neurological condition or other psychological event was a possible cause of the traffic accident. However, this does not negate the substantial evidence of Rhinehart's guilt as to these offenses. It simply created an alternative inference to that which the state posed, and reasonable minds could differ as to which inference to draw. *Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d at 477. Thus the trial court did not abuse its discretion in denying the Rule 20 motion for judgment of acquittal. *See Hollenback*, 212 Ariz. 12, ¶ 3, 126 P.3d at 161.

VII. Lesser-Included Offense

¶46 Finally, Rhinehart contends her convictions for reckless driving and endangerment are multiplicitous because reckless driving is a lesser-included offense of endangerment. Because Rhinehart failed to raise this issue below, we review only for fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. An illegal sentence constitutes fundamental error. *State v. Joyner*, 215 Ariz. 134, ¶ 5, 158 P.3d 263, 266 (App. 2007).

¶47 A greater offense and its lesser-included offenses are considered a single offense for purposes of the Double Jeopardy Clause. *Lemke v. Rayes*, 213 Ariz. 232, ¶¶ 16-18, 141 P.3d 407, 413-14 (App. 2006). Therefore, a defendant cannot be convicted of both a greater offense and a lesser-included offense because it would result in multiple punishments for the same offense, a result prohibited by the Constitution. *State v. Welch*, 198 Ariz. 554, ¶ 6, 12 P.3d 229, 230 (App. 2000). To determine whether one offense is the lesser-included of another, we determine "whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *see also State v. Eagle*, 196 Ariz. 188, ¶ 6, 994 P.2d 395, 397 (2000). In making this determination, "we look to the elements of the offenses and not to the particular facts that will be used to prove them." *State v. Ortega*, 220 Ariz. 320, ¶ 9, 206 P.3d 769, 773 (App. 2008); *see State v. Price*, 218 Ariz. 311, ¶ 5, 183 P.3d 1279, 1281 (App. 2008); *Lemke*, 213 Ariz. 232, ¶ 16, 141 P.3d at 413.

¶48 Looking at the two offenses at issue here, "[a] person commits endangerment by recklessly endangering another person with a substantial risk of

imminent death," § 13-1201(A), and "[a] person who drives a vehicle in reckless disregard for the safety of persons or property is guilty of reckless driving." A.R.S. § 28-693(A). Endangerment requires proof the victim was placed in substantial risk of imminent death, while reckless driving does not; and reckless driving requires the use of a vehicle, which endangerment does not. Because each offense contains an element the other does not, they are not the same offense, and there was no error, let alone fundamental error, in the separate convictions and punishments for the offenses.

Disposition

¶49 For the reasons set forth above, we affirm Rhinehart's convictions and sentences.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge