FILED BY CLERK
APR 23 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. FREDERICK LEWIS NICHOLS, Appellant.	2 CA-CR 2007-0409 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20064444

Honorable Gus Aragón, Judge

AFFIRMED

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

Jeffrey Buchella
Tucson
Attorney for Appellant

B R A M M E R, Judge.

¶1 Appellant Frederick Nichols appeals his convictions of second-degree murder and five counts of felony endangerment. He argues the trial court incorrectly instructed the jury on second-degree murder and endangerment, and erred in excluding evidence that the passengers of a vehicle with which he collided, while he drove under the influence of alcohol, were wearing seatbelts. We affirm.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining Nichols's convictions. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In the early morning hours of November 20, 2006, Nichols was driving a large sport-utility vehicle (SUV) on a suspended license while intoxicated. That same morning, T. was driving a compact SUV carrying four passengers. While T.'s vehicle was stopped at a red light at an intersection, Nichols drove up to the intersection, behind T., but failed to stop his vehicle before it struck the rear of T.'s stationary vehicle at approximately thirty-five miles per hour. The collision "destroyed" the rear of T.'s vehicle, crushing it such that "the back door was completely touching the back seat" and the side windows were broken. T. and two passengers "hurt [their] back[s]," and a third passenger suffered injuries requiring two weeks' hospitalization. Nichols immediately drove away from the scene of the accident, but was followed by two off-duty Tucson Police Department (TPD) officers who had witnessed the accident while driving toward the intersection. Nichols, who was driving "extremely fast," then collided with another vehicle, killing its

driver, S. Blood tests taken after the accident revealed Nichols had a blood alcohol concentration of approximately .28 within two hours of driving.

¶3 A grand jury charged Nichols with five counts of felony endangerment and one count each of second-degree murder, aggravated driving under the influence of an intoxicant (DUI) while his license was suspended, aggravated driving with a blood alcohol concentration of .08 or higher while his license was suspended, criminal damage, and leaving the scene of an accident. After a seven-day trial, a jury found Nichols guilty of all counts and found the endangerment counts to be of a dangerous nature. The trial court sentenced Nichols to a combination of presumptive, concurrent and consecutive terms of imprisonment, totaling 19.25 years. This appeal followed.

Discussion

Second-degree murder instruction

¶4 Nichols was charged with the reckless second-degree murder of S., that is, having caused S.'s death by consciously disregarding a substantial and unjustifiable risk that his actions created a grave risk of death, under circumstances manifesting his extreme indifference to human life. *See* A.R.S. §§ 13-1104(A)(3), 13-105(9)(c).[1] At trial, Nichols requested that the trial court instruct the jury that:

> [t]he extreme indifference to human life involved in reckless Second Degree Murder distinguishes [it] from the less culpable recklessness involved in Reckless Manslaughter.

[1]This subsection has since been renumbered. 2008 Ariz. Sess. Laws, ch. 301, § 10.

> Reckless Second Degree murder requires an additional showing of extreme indifference to human life which created a grave risk of death to another in addition to the requirement of recklessness.

The court denied Nichols's request, instead instructing the jury on the crime of reckless second-degree murder by tracking the statutory definitions of second-degree murder, manslaughter and recklessness, and further explaining:

> The phrase "manifesting extreme indifference to human life" does not create an additional culpable mental state. "Extreme indifference to human life" requires an extreme form of recklessness greater than is required for manslaughter. Whether this extreme indifference to human life exists is to be determined from all the facts and circumstances.

See §§ 13-1104(A)(3), 13-105(9)(c). During deliberations, the jurors asked the court to clarify the phrase "manifesting extreme indifference to human life" "without using manslaughter in the definition." Over Nichols's objection, the court instructed the jury that "the words in the phrase '[manifesting] extreme indifference for human life' do not have any specific legal definitions" and to consider all the instructions relating to second-degree murder and manslaughter as a whole.

¶5 Nichols contends the instructions the trial court gave misstated the law and "encouraged the jury to apply a relaxed standard of the law, which prejudiced [him]." We review a trial court's decision to give a particular instruction for an abuse of discretion, *see State v. Johnson*, 205 Ariz. 413, ¶ 10, 72 P.3d 343, 347 (App. 2003), but review de novo whether jury instructions properly state the law. *See State v. Orendain*, 188 Ariz. 54, 56, 932

P.2d 1325, 1327 (1997). In making the latter determination, we review the instructions the court gave as a whole. *See State v. Cox*, 217 Ariz. 353, ¶ 15, 174 P.3d 265, 268 (2007).

¶6 As we noted, the trial court's instructions tracked the statutory language defining reckless second-degree murder, manslaughter, and recklessness. And, consistent with our caselaw, the court instructed the jury that the requirement that a person charged with reckless second-degree murder must have manifested an "extreme indifference to human life which creates a grave risk of danger to another" "merely describes a higher quantum of recklessness [than that required for manslaughter], but does not change the critical fact that the culpable mental state is still that of 'reckless.'" *State v. Curry*, 187 Ariz. 623, 627, 931 P.2d 1133, 1137 (App. 1996) (internal citation omitted). Nonetheless, Nichols asserts the *Curry* decision by Division One of this court is "incorrect[]" and "inconsistent" with its prior discussions of reckless second-degree murder in *State v. Woodall*, 155 Ariz. 1, 744 P.2d 732 (App. 1987), and *State v. Walton*, 133 Ariz. 282, 650 P.2d 1264 (App. 1982).

¶7 In *Walton*, the court noted that, "[w]hile manslaughter requires only a showing of recklessness, reckless second-degree murder requires also a showing of 'extreme indifference to human life' which 'created a grave risk of death' to another in addition to the requirement of recklessness." 133 Ariz. at 291, 650 P.2d at 1273. This requirement, the court concluded, "established a more culpable mental state" for reckless second-degree murder than for manslaughter. *Id.* Similarly, in *Woodall*, the court noted that, in contrast to manslaughter, "'[r]eckless second degree murder requires also a showing of extreme

indifference to human life . . . in addition to the requirement of recklessness.'" 155 Ariz. at 4, 744 P.2d at 735, *quoting Walton*, 133 Ariz. at 291, 650 P.2d at 1273 (internal quotations omitted). This additional showing, it clarified, "does not create an additional culpable mental state [to recklessness] but only requires an extreme form of recklessness greater than is required for manslaughter." *Id.* at 3, 744 P.2d at 734. Contrary to Nichols's assertion, this language in *Walton* and *Woodall* does not contradict either *Curry* or the trial court's instructions here. Because the court's instructions to the jury on second-degree murder are consistent with our caselaw and statutes, we cannot say the court abused its discretion in giving them.

Seatbelt evidence

¶8 At trial, Nichols attempted to introduce evidence that T. and her four passengers were wearing seatbelts at the time of the accident. He argued the evidence was relevant to whether his actions created a risk of death or of physical injury. Nichols reasoned that, "because [the victims were] belted in," the jury could conclude "there was not a risk of serious bodily injury" and, therefore, that "the endangerment statute does[not] apply." The state objected to the seatbelt evidence, arguing that "it's the impact, at this point, that creates the risk" to the victims, and whether the victims "d[id] anything[] to limit that risk" was irrelevant to Nichols's liability. The court sustained the state's objection and instructed the jury that "[a] person's use or non-use of a seat belt is not relevant and is not to be considered by you in any way in this case."

¶9 Nichols contends the trial court's evidentiary ruling and subsequent instruction "improperly removed" "the seatbelt issue from the jury's consideration." We review the trial court's ruling on the admissibility of the seatbelt evidence for an abuse of discretion. *See Haight-Gyuro*, 218 Ariz. 356, ¶ 7, 186 P.3d at 35. And, again, we review the court's decision to give the contested instruction for an abuse of discretion, *see Johnson*, 205 Ariz. 413, ¶ 10, 72 P.3d at 347, but review de novo whether the instruction properly stated the law. *See Orendain*, 188 Ariz. at 56, 932 P.2d at 1327.

¶10 In declining to admit the seatbelt evidence and instructing the jury that such evidence was irrelevant to Nichols's guilt, the trial court relied on *State v. Freeland*, 176 Ariz. 544, 863 P.2d 263 (App. 1993). In *Freeland*, the defendant, who had caused an automobile accident while intoxicated resulting in the victim's injury, was charged with reckless aggravated assault, that is, causing serious injury to another by recklessly disregarding a substantial risk that his actions could result in such injury. *See* 176 Ariz. at 546, 863 P.2d at 265; A.R.S. §§ 13-1204, 13-1203, 13-105(9)(c). Over Freeland's objection, the trial court instructed the jury that the victim's seatbelt use at the time of the accident was "not a defense." *Freeland*, 176 Ariz. at 546, 863 P.2d at 265. Division One of this court affirmed, concluding a victim's seatbelt use, although an intervening event, is not a superseding cause capable of reducing a defendant's liability for his actions, because the fact that some drivers will wear seatbelts and others will not is neither unforeseeable nor extraordinary. *See id.* at 548, 863 P.2d at 267; *see also State v. Slover*, No. 2 CA-CR 2007-0379, ¶ 11, 2009 WL

295027 (Ariz. Ct. App. Feb. 9, 2009) ("An intervening event must be unforeseeable and abnormal or extraordinary to qualify as a superseding cause that can excuse a defendant from liability.").

¶11 Nichols contends *Freeland* is distinguishable because, he claims, he "did not offer the [seatbelt] evidence as an affirmative defense or even as evidence of a victim's intervening conduct, but rather as a material fact relevant to the jury's duty to weigh all the evidence before making its required legal decision." But Nichols's attempt to distinguish *Freeland* is unavailing. Contrary to his assertions, Nichols's intended use of the seatbelt evidence was, as in *Freeland*, to show he was not liable for the charged crime due to a supervening cause—the victims' use or nonuse of a seatbelt. But, as in *Freeland*, evidence of the victims' use or nonuse of a seatbelt, because neither extraordinary nor unforeseeable, cannot constitute a superseding cause capable of reducing or eliminating Nichols's liability. *See Freeland*, 176 Ariz. at 548, 863 P.2d at 267. The trial court, therefore did not abuse its discretion in declining to admit the seatbelt evidence and in instructing the jury such evidence was not relevant to Nichols's liability.

Endangerment instruction

¶12 The trial court instructed the jury on endangerment as follows:

> A person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury.
>
> The crime of endangerment requires proof that the defendant consciously disregarded a substantial risk that conduct

> could cause imminent death or physical injury. The 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.

The court gave the jury two verdict forms for each of the five endangerment counts, one form if the jury found Nichols had endangered his victims with a substantial risk of imminent death, a class six felony, and the other if it found a substantial risk of only physical injury, a class one misdemeanor. *See* A.R.S. § 13-1201. The jury convicted Nichols of five counts of felony endangerment.

¶13 Nichols now argues the trial court's endangerment instruction misstated the law. As previously noted, we review de novo whether jury instructions properly state the law. *See Orendain*, 188 Ariz. at 56, 932 P.2d at 1327. Because Nichols did not object to the court's endangerment instruction below, he has forfeited review of this claim for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Under this standard of review, Nichols bears the burden of establishing that the court erred, that the error was fundamental, and that the error caused him prejudice. *Id.* at ¶ 22, 115 P.3d at 608.

¶14 Relying on *State v. Carreon*, 210 Ariz. 54, 107 P.3d 900 (2005), and *State v. Doss*, 192 Ariz. 408, 966 P.2d 1012 (App. 1998), Nichols asserts the trial court improperly failed to inform the jury that, to constitute endangerment, Nichols's conduct must have "placed the victims in *actual* substantial risk of imminent death" or physical injury. The state concedes the court improperly instructed the jury. Indeed, in *Doss*, Division One of this court

determined that an endangerment instruction nearly identical to that the trial court gave here was erroneous. *See Doss*, 192 Ariz. 408, ¶¶ 8-9, 966 P.2d at 1015. The court in *Doss* reasoned that such an instruction "amount[s] to a comprehensive statement of the culpable mental state," but "fail[s] to describe the act and result that were required to support defendant's criminal liability." *Id.* ¶ 9. The court concluded:

> [A] proper endangerment instruction would inform the jury that the charge required proof that defendant (1) disregarded a substantial risk that his conduct would cause imminent death of a victim (the culpable mental state) *and* (2) that his conduct *did* in fact create such a substantial risk as to each victim (the required act).

Id.; *see also Carreon*, 210 Ariz. 54, ¶ 39, 107 P.3d at 909 (citing *Doss*).

¶15 Assuming, without deciding, that the trial court erroneously instructed the jury here and that the error was fundamental, Nichols has failed to show prejudice. The evidence presented at trial, viewed in the light most favorable to sustaining Nichols's convictions, *see Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d at 34, showed Nichols drove a large SUV despite having a blood alcohol concentration of approximately .28. Nichols drove his SUV at more than twenty miles per hour over the speed limit toward the red light at which T.'s vehicle was stopped and only began to slow when he was less than one hundred feet from T.'s vehicle. Nichols then collided with T.'s vehicle at approximately thirty-five miles per hour, crushing the rear compartment and breaking the side windows of T.'s vehicle. Of the vehicle's five occupants, four were taken to a hospital with injuries. One passenger's injuries were so severe he was required to stay at the hospital for two weeks. Thus, overwhelming evidence

supported the conclusion that (1) Nichols consciously disregarded the substantial risk that, by driving in such an extremely intoxicated state, he could cause an accident resulting in another's imminent death; and (2) by crashing his large SUV at thirty-five miles per hour into a stationary, smaller vehicle, injuring one occupant so badly he required a two-week hospital stay, Nichols in fact did create a substantial risk of death to the vehicle's occupants. *See State v. Gallegos*, 178 Ariz. 1, 11, 870 P.2d 1097, 1107 (1994) (no prejudice when "[o]verwhelming evidence in the record" of defendant's guilt); *see also Doss*, 192 Ariz. 408, ¶¶ 8-9, 966 P.2d at 1015. Because Nichols has failed to show he was prejudiced by the court's endangerment instructions, he is not entitled to relief. *See Henderson*, 210 Ariz. 561, ¶ 22, 115 P.3d at 608.

Disposition

¶16 We affirm Nichols's convictions and sentences.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge