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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. LINDA DARLENE GILES, Appellant.	)	2 CA-CR 2009-0159 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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-20064485

Honorable Michael J. Cruikshank, Judge

AFFIRMED

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B R A M M E R, Judge.

¶1 Linda Darlene Giles appeals her conviction and sentence for manslaughter, asserting the trial court committed structural and fundamental error by failing sua sponte to instruct the jury on the offense of reckless driving. Finding no error, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding Giles's conviction and sentence. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In the evening of November 23, 2006, Giles and her living companion, C., were involved in a domestic dispute. Despite C.'s protestations, Giles left their residence and got in C.'s truck to leave. While driving the truck out of their residence's driveway, Giles ran over C., killing him.

¶3 Giles maintained C.'s death was accidental, that she had not seen C. in the dark driveway, and did not know she had hit him with the truck. Analysis of Giles's blood drawn approximately one hour after C.'s death showed she had a blood alcohol concentration of .151, and Giles testified she had taken medication that night that had made her "extremely sleepy . . . like a blackout, I guess."

¶4 A grand jury indicted Giles and charged her with second-degree murder. The state additionally alleged that any lesser included offenses were dangerous offenses pursuant to former A.R.S. § 13-604[1] because Giles had "use[d] and/or discharge[d] and/or threaten[ed] exhibition of a deadly weapon or dangerous instrument, to wit: a

[1]The Arizona criminal sentencing code has been renumbered, effective "from and after December 31, 2008." 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. We refer in this decision to the statutes as numbered at the time of the offense in this case. *See* 2005 Ariz. Sess. Laws, ch. 188, § 1 (former § 13-604).

motor vehicle." Before trial, the state reduced the charge from second-degree murder to the lesser included offense of reckless manslaughter. After a four-day trial, the jury found Giles guilty of manslaughter and additionally found the offense was of a dangerous nature. The trial court sentenced Giles to a presumptive, 10.5-year prison term. This appeal followed.

Discussion

¶5 Giles contends the trial court committed fundamental and structural error by failing to instruct the jury sua sponte on reckless driving, which she asserts is a lesser included offense of reckless manslaughter and second-degree murder. Pursuant to Rule 23.3, Ariz. R. Crim. P, "[f]orms of verdict shall be submitted to the jury for all offenses necessarily included in the offense charged." Although the terms are frequently used interchangeably, a "necessarily included" offense is a lesser included offense of the charged offense that is supported by the evidence. *See State v. Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d 148, 150 (2006).

¶6 In a non-capital case, a trial court is not required to instruct on a lesser included offense when the defendant fails to request such an instruction, unless the court's failure to so instruct would constitute fundamental error. *State v. Whittle*, 156 Ariz. 405, 406-07, 752 P.2d 494, 495-96 (1988). Because Giles neither objected to the absence of a jury instruction on reckless driving, nor offered one of her own, she correctly asserts that we review only for fundamental, prejudicial error. *See id.*; *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). To prevail under this standard of review, a defendant must first show error, and then demonstrate that the error

is fundamental and caused her prejudice. *State v. Edminsten*, 220 Ariz. 517, ¶ 11, 207 P.3d 770, 775 (App. 2009). But the trial court committed no error here. And even assuming, arguendo, that the court did err, such error could not have been prejudicial.

¶7 "An offense is considered a lesser-included of a greater offense 'if (1) the included offense is always a constituent part of the greater offense or (2) if the charging document described the lesser offense even though it would not always form a constituent part of the greater offense.'" *State v. Sucharew*, 205 Ariz. 16, ¶ 34, 66 P.3d 59, 69 (App. 2003), *quoting State v. Corona*, 188 Ariz. 85, 88, 932 P.2d 1356, 1359 (App. 1997). We address these tests in turn.

¶8 Under the elements test, an offense is a lesser included offense if it is "'by its very nature, always a constituent part of the greater offense.'" *State v. Brown*, 195 Ariz. 206, ¶ 5, 986 P.2d 239, 240 (App. 1999), *quoting State v. Chabolla-Hinojosa*, 192 Ariz. 360, 363, 965 P.2d 94, 97 (App. 1998). Thus, "the offense must be composed solely of some but not all of the elements of the greater crime so that it is impossible to have committed the crime charged without having committed the lesser one." *State v. Celaya*, 135 Ariz. 248, 251, 660 P.2d 849, 852 (1983). A person commits reckless driving by "driv[ing] a vehicle in reckless disregard for the safety of persons or property." A.R.S. § 28-693(A). This offense does not require the offender to have caused the death of another person. *See id*. Conversely, a person commits reckless manslaughter by "recklessly causing the death of another person." A.R.S. § 13-1103(A)(1). Reckless manslaughter requires that the offender have caused the death of another person, but not necessarily by using a vehicle to do so. *See id*.

¶9 Similarly, a person commits second-degree murder by, among other things, acting "[u]nder circumstances manifesting extreme indifference to human life . . . recklessly engag[ing] in conduct that creates a grave risk of death and thereby caus[ing] the death of another person." A.R.S. § 13-1104(A)(3). As with reckless manslaughter, to commit second-degree murder the offender is required to have caused the death of another person, but not necessarily while driving a vehicle. *See id*. It therefore is clear that reckless driving is not a lesser included offense of second-degree murder, the charged offense, or reckless manslaughter, the offense of which the jury found Giles guilty, because it requires proof of an element—driving a vehicle—that second-degree murder and reckless manslaughter do not. *See Sucharew*, 205 Ariz. 16, ¶ 35, 66 P.3d at 69; §§ 13-1103 (manslaughter); 13-1104 (second-degree murder); 28-693 (reckless driving).

¶10 Under the charging documents test, an offense is lesser included if "'the charging document describes the lesser offense even though it does not always make up a constituent part of the greater offense.'" *Brown*, 195 Ariz. 206, ¶ 5, 986 P.2d at 240, *quoting Chabolla-Hinojosa*, 192 Ariz. at 363, 965 P.2d at 97. Put another way, "'a court may inquire as to whether the greater offense . . . as charged . . . can be committed without necessarily committing the lesser offense.'" *Id*., *quoting Chabolla-Hinojosa*, 192 Ariz. at 363, 965 P.2d at 97.

¶11 Giles argues the charging document here includes the use of a vehicle in the commission of the offense because it is included within the state's dangerous nature allegation. The state suggests the charging document, which consists of the indictment

only, did not charge Giles with having used a vehicle to commit the offense. The state relies on *Sucharew*, 205 Ariz. 16, ¶ 35, 66 P.3d at 69, wherein Division One of this court held that reckless driving was not a lesser included offense of second-degree murder under the charging documents test because the indictment did not allude to the use of a vehicle. Nothing in *Sucharew*, however, tells us whether the state in that case had filed a dangerous nature allegation, as it did here, alleging a vehicle had been used during the commission of the offense. *See id*. Consequently, *Sucharew* does not address the precise issue before us—whether such an allegation is part of the charging document, and if so, whether it describes reckless driving such that it constitutes a lesser included offense of second-degree murder.

¶12 Rules 13.1 and 13.2, Ariz. R. Crim. P, suggest that a dangerous nature allegation is not part of the charging document. "We interpret court rules according to the principles of statutory construction." *State v. Aguilar*, 209 Ariz. 40, ¶ 23, 97 P.3d 865, 872 (2004). Applying these principles, we may examine "'the rule's context, the language used, the subject matter, the historical background, the effects and consequences, and its spirit and purpose.'" *Id.*, *quoting State ex. rel. Romley v. Superior Court*, 168 Ariz. 167, 169, 812 P.2d 985, 987 (1991). Rule 13.1 describes the two kinds of documents that may be used to charge defendants, either an indictment or information. The comment to Rule 13.2 describes those documents as "charging documents." Rule 13.1(a) further defines an indictment as a "written statement charging the commission of a public offense, presented to the court by a grand jury, endorsed a 'true bill' and signed by the foreman." Although the state filed its dangerous nature allegation

here with the indictment, it need not have, and could have filed it as late as twenty days before trial. *See* § 13-604(P). Because such allegations are not a part of the grand jury presentation, the dangerous nature allegation here was not signed by the grand jury foreman, and was not a part of the indictment. However, the term "charging document," as it is used in assessing lesser included offenses, arguably is broader than the Rules of Criminal Procedure would seem to suggest.

¶13 Here, the state's dangerous nature allegation described the use of a vehicle. It alleged that "in the event [Giles] is convicted of any lesser [included] offense" such offense is of a dangerous nature "involving the intentional or knowing infliction of serious physical injury upon [C.] and/or the use and/or discharge and/or threatening exhibition of a deadly weapon or dangerous instrument, to wit: a motor vehicle." If this allegation is a part of the charging document, Giles could not have committed second-degree murder without also committing reckless driving. Nor could she have committed reckless manslaughter without also committing reckless driving. Reckless driving would be, therefore, a lesser included offense in this instance.

¶14 Even assuming, without deciding, that the dangerous nature allegation satisfied the charging documents test, Giles still would not have been entitled to an instruction on reckless driving. Jury instructions must be supported by sufficient evidence. *State v. Bearup*, 221 Ariz. 163, ¶ 23, 211 P.3d 684, 689 (2009). Evidence is sufficient to warrant an instruction if "'the jury could rationally fail to find the distinguishing element of the greater offense.'" *Id.*, *quoting State v. Detrich*, 178 Ariz. 380,383, 873 P.2d 1302, 1305 (1994); *see also Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d at 150

(offense only necessarily included if lesser included and evidence supports instruction). If there is insufficient evidence to warrant an instruction, to give it is error. *See State v. Felix*, 153 Ariz. 417, 419, 737 P.2d 393, 395 (App. 1996), *citing State v. Lamb*, 142 Ariz. 463, 472, 690 P.2d 764, 773 (1984).

¶15 Here, the factual element distinguishing reckless manslaughter and second-degree murder from reckless driving is that the defendant's actions caused the victim's death. *See* §§ 13-1103 (manslaughter); 13-1104 (second-degree murder); 28-693 (reckless driving). Giles did not dispute at trial that she had run over C. and killed him; rather, her defense was that she had not seen C. and that his death had been an accident. In view of Giles's concession, no reasonable jury could fail to find that Giles had caused C.'s death. Thus, the jury could not reasonably have concluded Giles was guilty of only reckless driving. Accordingly, there was not sufficient evidence to support an instruction on reckless driving and the trial court did not err in failing sua sponte to give an instruction thereon.

¶16 We further observe that, even if it had been error for the trial court to fail sua sponte to instruct on reckless driving, Giles cannot demonstrate prejudice. When a jury rejects any lesser included offenses by finding the defendant guilty of a greater offense, any error in failing to instruct on a lesser included is necessarily harmless and not prejudicial. *See, e.g.*, *State v. Amaya-Ruiz*, 166 Ariz. 152, 174, 800 P.2d 1260, 1282 (1990) ("[W]hen a defendant is convicted of first degree murder rather than second degree murder, any error as to instructions on lesser included offenses is necessarily harmless, because the jury has necessarily rejected all lesser-included crimes."); *State v.*

Tucker, 157 Ariz. 433, 447, 759 P.2d 579, 593 (1988) ("Where the jury is instructed on both first- and second-degree murder and returns a first-degree murder conviction, there is no prejudice for failure to instruct on manslaughter."); *State v. White*, 144 Ariz. 245, 247, 697 P.2d 328, 330 (1985) (jury necessarily rejects all lesser included offenses by convicting of greatest offense).

¶17 Here, the jury had been instructed on the offenses of manslaughter and the lesser included offense of negligent homicide, but found Giles guilty of manslaughter—the greater offense. In so finding, the jury necessarily rejected any lesser included offenses, including reckless driving. Thus, any conceivable error in failing to instruct on reckless driving could not have resulted in prejudice.

Disposition

¶18 For the foregoing reasons, we affirm Giles's conviction and sentence.

J. WILLIAM BRAMMER, JR, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge