

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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AUG 31 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	2 CA-CR 2009-0041
Appellee,)	DEPARTMENT B
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
GLEND A LORRAINE RUMSEY,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20080258

Honorable Richard S. Fields, Judge

AFFIRMED IN PART; VACATED IN PART

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V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, Glenda Rumsey was convicted of manslaughter, aggravated assault of a minor under fifteen years of age, driving under the influence of an intoxicant (DUI) while impaired to the slightest degree, driving with an alcohol concentration of .08 or more, and driving while under the extreme influence of intoxicating liquor with an alcohol concentration of .15 or more. The trial court imposed concurrent sentences, the longest of which was fourteen years. On appeal, Rumsey argues the court erred in (1) denying her motion to dismiss because she was detained without reasonable suspicion and arrested without probable cause, (2) finding that the blood draw was not conducted in an unreasonable manner in violation of the Fourth Amendment, (3) denying her motion for change of venue, (4) precluding character-witness testimony, (5) precluding lay testimony about observations of other vehicles driving through the intersection where the offenses occurred, (6) not giving a jury instruction on supervening cause, (7) convicting and sentencing her for both driving with an alcohol concentration of .08 or more and driving with an alcohol concentration of .15 or more, and (8) sentencing her to partially aggravated sentences for manslaughter and aggravated assault.¹ For the reasons set forth below, we affirm all but one of Rumsey's convictions and sentences.

¹Rumsey raised an additional issue concerning the court's denial of her motions to dismiss and suppress evidence based upon a violation of her right to counsel. Pursuant to Rule 28(g), Ariz. R. Crim. P., we have addressed that issue in a separately filed opinion. *Northeast Phoenix Holdings, LLC v. Winkleman*, 219 Ariz. 82, n.1, 193 P.3d 776, 777 n.1 (App. 2008).

Facts and Procedure

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). On the evening of January 12, 2008, J. and O. were riding their bicycles in the eastbound bicycle lane on Broadway Boulevard in Tucson. After crossing Vozack Lane, O. felt something hit him and then saw J. "flying in front of [him]." O. got up from the ground and ran to J., who was unresponsive. O. looked around and saw a "small SUV or a car, a few yards maybe, in front of [them.] . . . [I]t was red, [and] driving off." J. died as the result of head injuries, and O. suffered a dislocated tailbone, bruises, and scratches.

¶3 Rumsey, the driver of the vehicle that had struck J., stopped her vehicle and walked back to the accident scene, where she remained until police officers arrived. The officers noticed Rumsey had an odor of alcohol and was unable to walk straight. One officer administered the horizontal gaze nystagmus (HGN) test, and Rumsey displayed six out of six possible cues of impairment. She was arrested and charged with leaving the scene after causing an accident resulting in death or serious physical injury, in addition to the offenses noted above. The jury acquitted her of leaving the scene of an accident, found her guilty of the remaining charges, and found that the manslaughter and aggravated assault charges were dangerous-nature offenses. After an aggravation and mitigation hearing, the trial court sentenced Rumsey to concurrent, enhanced, partially aggravated terms of fourteen and thirteen years for manslaughter and aggravated assault respectively and to 180 days in jail for the DUI offenses. This timely appeal followed.

Discussion

I. Motions to Suppress and to Dismiss

¶4 Before trial, Rumsey moved to suppress all evidence obtained from her, including the results of three blood draws, on the grounds the evidence had been obtained as a result of an illegal detention or, alternatively, an arrest without probable cause. She also requested “dismissal,” presumably of all charges, on the same grounds. The trial court denied the motion, finding Rumsey had been detained legally and her arrest was supported by probable cause.

¶5 We will not reverse a trial court’s denial of a motion to dismiss or motion to 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. Length of detention

¶6 Rumsey contends that, although her initial detention was proper, “[t]he length of detention . . . before the HGN test was performed was not reasonable” and

therefore required suppression of the HGN and blood test results.² We review de novo whether the duration of an investigative detention is reasonable. *State v. Sweeney*, 224 Ariz. 107, ¶ 12, 227 P.3d 868, 872 (App. 2010).

¶7 “[A] police officer may make a limited investigatory stop in the absence of probable cause if the officer has an articulable, reasonable suspicion, based on the totality of the circumstances, that the suspect is involved in criminal activity.” *State v. Teagle*, 217 Ariz. 17, ¶ 20, 170 P.3d 266, 271-72 (App. 2007). The “investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop.” *Florida v. Royer*, 460 U.S. 491, 500 (1983). However, an individual suspected of committing a serious crime may be detained for a longer period of time than one suspected of a lesser crime. *Teagle*, 217 Ariz. 17, ¶ 33, 170 P.3d at 275. In determining whether the length of a detention is reasonable, we consider

whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases th[is] court [will] not engage in unrealistic second-guessing.

Id. ¶ 32, quoting *United States v. Sharpe*, 470 U.S. 675, 686 (1985).

²Rumsey minimally made this assertion below. Without citation to authority, she argued that “[e]ven if there had been a reasonable basis to [detain her], the detention exceeded the time necessary to effectuate the purpose of the stop, and was not by the least intrusive means possible.” However, in its ruling on the motion, the trial court did not specifically address this argument.

¶8 The accident in this case occurred at approximately 7:20 p.m., and officers began arriving within minutes. Officer Cleary, a member of the DUI Enforcement Unit, arrived at 7:35 p.m. to determine whether drugs or alcohol were a factor in the collision. Officers already at the scene gave him “a general idea [of] what had occurred,” and he approached Rumsey. After observing “some signs and symptoms . . . that were consistent with consumption of alcohol,” Cleary asked Rumsey if she had consumed alcohol that evening, which she denied. But, based on his observations that “her eyes were blood shot and watery, her face was flushed[,] . . . there was . . . a moderate odor of alcohol . . . on her breath,” and she exhibited “a distinctive, noticeable front to back body sway,” Cleary initiated a DUI investigation. He administered the HGN test, observing all six cues of impairment. When he asked if she would agree to perform additional field sobriety tests, Rumsey stated that, due to the seriousness of the accident, she wished to call an attorney.

¶9 An officer provided Rumsey a cellular telephone, and she attempted to call an attorney at 8:01 p.m., twenty-six minutes after Cleary began his investigation. When she was unable to reach that attorney, she called another, to whom she spoke for six minutes. At 8:14, she told Cleary an attorney would arrive in approximately fifteen minutes. After waiting twenty minutes for the attorney to arrive, Cleary believed he “ha[d] to move forward in [his] investigation,” so he advised Rumsey of her rights and arrested her at 8:39 p.m. All told, one hour and four minutes had elapsed between the time Cleary started his investigation and when he arrested Rumsey.

¶10 In her reply brief, Rumsey contends “the 30 minute delay for the HGN was nonetheless unreasonable.” We are aware of no authority, and Rumsey has cited none, standing for the proposition that a twenty-five minute investigatory detention was unreasonable under the circumstances. Moreover, Cleary was investigating a serious traffic accident involving two injured children. During the twenty-five-minute investigation, he spoke with other officers to determine what had happened, spoke with and observed Rumsey long enough to determine if a further DUI investigation was warranted, and administered an HGN test. Thus, we cannot say the investigation lasted longer than necessary to confirm whether alcohol likely had played a role in the accident, and the trial court therefore did not err in denying Rumsey’s motion to suppress the evidence and dismiss the charges.

B. Illegal arrest

¶11 Rumsey also contends her initial detention by police officers was converted into an arrest without probable cause “when they moved her about [the scene] repeatedly.” In particular, she argues the detention was transformed into an arrest by “the officer[s]’ mov[ing her] to prevent her from having contact with others, . . . their demand that she not drink her soft drink,” and the fact that “she was ‘kept under constant supervision’ at all times while she was with the officers.” *See State v. Winegar*, 147 Ariz. 440, 448, 711 P.2d 579, 587 (1985). “Whether an illegal arrest occurred is a mixed question of fact and law. We give great deference to the trial court’s factual

determination, but we review the ultimate question de novo.” *State v. Blackmore*, 186 Ariz. 630, 632, 925 P.2d 1347, 1349 (1996).

¶12 “An arrest is made by the actual restraint of [a] person . . . , or by his submission to the custody of the person making the arrest,” A.R.S. § 13-3881(A), and is “complete when the suspect’s liberty of movement is interrupted and restricted by the police,” *Winegar*, 147 Ariz. at 447-48, 711 P.2d at 586-87. However, “[t]he fact that [a] defendant was not free to leave does not, in and of itself, transform a valid investigatory detention into a traditional arrest.” *State v. Clevidence*, 153 Ariz. 295, 299, 736 P.2d 379, 383 (App. 1987); *see also State v. Romero*, 178 Ariz. 45, 50, 870 P.2d 1141, 1146 (App. 1993) (“Even the fact that a suspect is physically detained at the scene . . . does not in and of itself dictate that an arrest has occurred.”). Whether an investigative detention has been transformed into an arrest “turns upon an evaluation of all the surrounding circumstances to determine whether a reasonable person, innocent of any crime, would reasonably believe that he was being arrested.” *Winegar*, 147 Ariz. at 448, 711 P.2d at 587; *see also State v. Aguirre*, 130 Ariz. 54, 56, 633 P.2d 1047, 1049 (App. 1981) (whether arrest occurred “must be evaluated in light of the circumstances”).

¶13 Rumsey relies on *Winegar* and *State v. Solano*, 187 Ariz. 512, 930 P.2d 1315 (App. 1996), to support her argument that she was arrested when the police “did not merely investigate whether [she] was intoxicated,” but “instead . . . moved her around the scene.” However, both *Winegar* and *Solano* are distinguishable. The officers in those cases had moved *Winegar* and *Solano* to entirely different locations from where the

initial stops had been made. *See Winegar*, 147 Ariz. at 446, 711 P.2d at 585; *Solano*, 187 Ariz. at 516, 930 P.2d at 1319. Here, the officers had separated Rumsey from her companions, told her to get rid of her beverage, and watched her movements at all times but had not transported her from the accident scene. Furthermore, given the seriousness of the accident Rumsey had caused, officers were entitled to detain her at the scene, segregate her from other potential witnesses, and preserve potential DUI evidence while they conducted their investigation. Under these circumstances, a reasonable person would not believe the officers' actions constituted an arrest, and the trial court therefore did not err in denying Rumsey's motion on this ground as well.

II. Reasonableness of Blood Draw

¶14 Rumsey next argues the trial court erred in refusing to suppress evidence of the blood test results because the officer who drew her blood was not qualified to do so under A.R.S. § 28-1388(A) and the draw therefore was unreasonable under the Fourth Amendment to the United States Constitution. Blood tests administered at the behest of law enforcement officers constitute searches that implicate Fourth Amendment protections, which “constrain . . . against intrusions . . . not justified in the circumstances, or . . . made in an improper manner.” *Schmerber v. California*, 384 U.S. 757, 768 (1966). However, “allowing a properly qualified police officer to draw blood during a DUI arrest does not violate the Fourth Amendment,” *State v. Noceo*, 223 Ariz. 222, ¶ 7, 221 P.3d 1036, 1038-39 (App. 2009), and “a person is ‘qualified’ to draw blood for DUI purposes

if he or she is competent, by reason of training or experience, in that procedure,” *State ex rel. Pennartz v. Olcavage*, 200 Ariz. 582, ¶ 20, 30 P.3d 649, 655 (App. 2001).

¶15 Relying on expert testimony produced in *Noceo* and made part of the record in this case, Rumsey argues that, although Officer Cleary may have been proficient in phlebotomy initially when he completed the training program, he lost that proficiency by failing to conduct a minimum number of blood draws over time and by being unsupervised when he did conduct them. However, when he drew Rumsey’s blood, Cleary had successfully completed his phlebotomy training, had conducted approximately 150 successful blood draws, and, contrary to Rumsey’s argument, was in compliance with Tucson Police Department regulations regarding the frequency with which officers should perform blood draws.³ In *State v. May*, 210 Ariz. 452, ¶ 10, 112 P.3d 39, 42 (App. 2005), and *State v. Carrasco*, 203 Ariz. 44, ¶ 11, 49 P.3d 1140, 1142 (App. 2002), we found this level of training and experience sufficient to make officers “qualified” to draw blood, and we see no reason to depart from that conclusion here. *See also Noceo*, 223 Ariz. 222, n.2, 221 P.3d at 1039 n.2.

¶16 Rumsey further contends that, when the state’s interests are balanced against her own, the blood draw was unreasonable. *See Schmerber*, 384 U.S. at 768

³Cleary testified that “for each 12-month period, [officers a]re supposed to have 24 blood draws. And what they actually do is . . . break it up into a six-month time period. And during each six-month time period, [officers] have to have 12 blood draws, which basically equates to two a month.” Cleary began working for the DUI Enforcement Unit in April 2007 and drew Rumsey’s blood in January 2008. During that nine-month period, Cleary conducted approximately twenty blood draws, two more than the minimum required.

(determining whether blood test “justified” under circumstances and “whether the means and procedures . . . respected relevant Fourth Amendment standards of reasonableness”). She argues the lack of supervision over officer phlebotomists, the proximity of a hospital where her blood could have been drawn, and the increased “risk . . . of pain, infection, or other problems,” outweighed the state’s interest in having an officer draw her blood at the substation. However, we have rejected the argument that supervision is required to render a blood draw reasonable, *see Noceo*, 223 Ariz. 222, ¶¶ 11-12, 221 P.3d at 1040, and although there apparently was a hospital near the accident scene, we do not find this factor dispositive.

¶17 In other cases, we have found blood draws performed while the defendant was standing and resting his arm on the trunk of a police car to result in “only a ‘slightly higher’ risk of complications . . . than those of a clinical setting.” *May*, 210 Ariz. 452, ¶ 8, 112 P.2d at 42. Here, Cleary testified that Rumsey was seated for the blood draw in a room with “adequate light” and that he had cleaned the table with a cleaning solution, washed his hands, worn gloves, cleansed the skin in the area of the draw with iodine, and applied pressure and gauze to the puncture site after finishing the draw. *See Noceo*, 223 Ariz. 222, ¶ 13, 221 P.3d at 1041 (blood draw not unreasonable when qualified officer “w[ore] protective gloves, clean[ed] and disinfect[ed] the puncture site, us[ed] a tourniquet, and ensur[ed] the punctured vein clotted properly”). The risk of complications thus was not increased unconstitutionally by the manner in which Cleary

drew Rumsey's blood, and we therefore cannot say the trial court abused its discretion in finding the draw reasonable and denying the motion to suppress.

III. Venue

¶18 Rumsey next argues the trial court abused its discretion in denying her motion for change of venue, in which she argued that widespread, inflammatory media coverage was so extensive as to warrant a presumption that the jury was biased. "The defendant has the burden of demonstrating the probability of an unfair trial," and we will not disturb the trial court's ruling "absent a clear showing of abuse of discretion . . . and resultant prejudice to the defendant." *State v. Salazar*, 173 Ariz. 399, 406, 844 P.2d 566, 573 (1992).

¶19 In her motion below, Rumsey argued that "[t]here ha[d] been substantial publicity concerning . . . the incident alleged That publicity has recently been pervasive, and was likely seen by a substantial portion of the potential jury pool. . . . [T]he publicity has presented [her] in a very negative light, and has presented information to the potential jury pool which will, in all likelihood, not be admissible at trial." Thus, she concluded, based on the pretrial publicity, "much of it close in time to the current trial date," she could not obtain a fair trial in Pima County and requested either a change of venue or a continuance. The trial court denied the motion, reasoning that the trial schedule had been set in consideration of these concerns and that any juror bias would be revealed "very quickly" through the jury questionnaire. Rumsey apparently did not

renew her motion after the jury questionnaire was administered, and she approved the jury panel without objection.

¶20 A change of venue is warranted when “there is a probability the dissemination of prejudicial information will deprive the defendant of a fair and impartial trial.” *State v. Davolt*, 207 Ariz. 191, ¶ 45, 84 P.3d 456, 471 (2004); *see also* Ariz. R. Crim. P. 10.3. “If . . . a defendant can show pretrial publicity so outrageous that it promises to turn the trial into a mockery of justice or a mere formality, prejudice will be presumed without examining the publicity’s actual influence on the jury.” *State v. Bible*, 175 Ariz. 549, 563, 858 P.2d 1152, 1166 (1993). We look to the totality of the circumstances to determine whether pretrial publicity was such that we must presume prejudice. *State v. Nordstrom*, 200 Ariz. 229, ¶ 15, 25 P.3d 717, 727 (2001). In doing so, we are concerned with the effect of the publicity, not its quantity. *Id.*

¶21 “The burden to show that pretrial publicity is presumptively prejudicial . . . is ‘extremely heavy.’” *Bible*, 175 Ariz. at 564, 858 P.2d at 1167, *quoting* *Coleman v. Kemp*, 778 F.2d 1487, 1537 (11th Cir. 1985). Indeed, we have declined to presume prejudice from pretrial publicity where “nearly all potential jurors had some knowledge of the case”; the publicity had contained inaccurate, inadmissible evidence and had erroneously referred to the defendant as a child molester, *see id.* at 563-64, 858 P.2d at 1166-67; and where “hundreds” of newspaper articles and television broadcasts had reported the crime and the defendant’s suspected guilt, local businesses had raised money for the victim’s family, and “a billboard was erected on a major Tucson street”

recognizing the victim's service to the community, *State v. Cruz*, 218 Ariz. 149, ¶ 16, 181 P.3d 196, 204 (2008).

¶22 There was substantial media coverage surrounding this case, but—with one exception—the actual newspaper articles Rumsey produced below generally reported on the developments in the case and appeared factual in nature. The only arguably inflammatory article was published eight months before trial. *See Bible*, 175 Ariz. at 564, 858 P.2d at 1167 (prejudicial nature of articles diminished over time). Rumsey, however, points to what she argues is actual evidence of public opinion, as reflected in emotionally charged comments posted on the newspaper's website by readers of the news articles online. These comments included that Rumsey “is nothing but a heartless, irresponsible, cold blooded murderer who obviously has no remorse whatsoever for what she has done and the pain she has brought [J.'s] family. . . . [She] needs to be shipped off to some deserted island somewhere and left there to rot like the trash that she is”; “The minute she got behind the wheel after drinking, it became murder. . . . Fry, baby, fry!!”; “She should be publicly hanged and that judge, right next to her.”

¶23 These comments, and others like them, may have been individually outrageous. But, to have created a presumption of widespread prejudice, they must also have “so pervaded the community as to render virtually impossible a fair trial before an impartial jury.” *Id.* at 565, 858 P.2d at 1168, *quoting Coleman*, 778 F.2d at 1540. Rumsey has offered no evidence to support her assertions that “the comments posted on newspaper websites are as widely read as the newspaper websites themselves” and “the

comments in this case . . . reflected public attitudes which were unlikely to change.” Nor did she attempt to demonstrate how widely read the online news articles were. Although reader comments were available for public viewing on the website, nothing in the record suggests they were actively disseminated to the public at large. *See Irvin v. Dowd*, 366 U.S. 717, 725 (1961) (publicity pervasive and prejudice presumed when, among other evidence of jury bias, inflammatory articles disseminated in newspaper regularly delivered to ninety-five percent of population in county where trial held). And only those individuals who chose to visit these news websites and read these particular stories even had the opportunity to view them. In the absence of any such evidence and under the circumstances presented here, particularly given that Rumsey declined to ask the trial court to reconsider its ruling after the jury questionnaires had been completed, Rumsey has not met her burden of establishing the publicity “permeated the proceedings or created a “carnival-like” atmosphere.” *Cruz*, 218 Ariz. 149, ¶ 15, 181 P.3d at 204, quoting *State v. Atwood*, 171 Ariz. 576, 631, 832 P.2d 593, 648 (1992), overruled in part on other grounds by *Nordstrom*, 200 Ariz. 229, ¶ 25, 25 P.3d at 729. The court therefore did not abuse its discretion in denying the motion for change of venue.⁴

IV. Character Witness Testimony

¶24 Rumsey also argues the trial court abused its discretion by precluding character witnesses who would have testified that she is a law-abiding and conscientious person. Citing *State v. Vandever*, 211 Ariz. 206, 119 P.3d 473 (App. 2005), the court

⁴Rumsey has not argued separately on appeal that the jury was actually prejudiced as the result of pretrial publicity.

excluded this testimony as irrelevant to the mental state of recklessness. We review the admission or exclusion of testimony for an abuse of discretion. *State v. Carlos*, 199 Ariz. 273, ¶ 10, 17 P.3d 118, 122 (App. 2001).

¶25 Rule 404(a)(1), Ariz. R. Evid., provides that “[e]vidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion except . . . [when e]vidence of a pertinent character trait [is] offered by an accused.” Thus, “[w]hen presenting his case, the defendant may offer evidence of his good character as substantive evidence from which the jury may infer that he did not commit the crime charged.” *State v. Lopez*, 174 Ariz. 131, 139, 847 P.2d 1078, 1086 (1992). This testimony is admissible “as long as it pertains to a trait involved in the charge.” *State v. Rhodes*, 219 Ariz. 476, ¶ 10, 200 P.3d 973, 975-76 (App. 2008).

¶26 In *Vandever*, the defendant, whose alcohol content was .155, had caused a fatal traffic accident when he made an illegal left turn in front of oncoming traffic. 211 Ariz. 206, ¶¶ 2-3, 119 P.3d at 474. Vandever’s defense at trial was that his left turn had not been reckless; he did not contest his blood test results or that the turn was illegal. *Id.* ¶ 9. The trial court excluded character evidence that Vandever was prudent and careful in the conduct of his life. This court affirmed that ruling on appeal, concluding that a “general reputation for prudence and care in . . . daily activities was irrelevant, or, in the word of Rule 404(a)(1), not ‘pertinent’ to whether he acted in a manner consistent with that reputation at the time of the collision.” *Id.* ¶ 13.

¶27 Rumsey suggests *Vandever* was wrongly decided because the court’s conclusion “could be said about any character trait. A person who was honest or peaceable in the past may not have been honest or peaceable [at the time in question].” We, too, question *Vandever*’s broad statement in light of the language in Rule 404(a)(1) permitting the introduction of character evidence for the express purpose of proving action in conformity therewith. Nonetheless, we need not determine whether the character traits of conscientiousness and being law-abiding may ever be admissible to rebut a charge of recklessness because any error in their exclusion was harmless under the facts of this case. *See State v. Armstrong*, 218 Ariz. 451, ¶ 20, 189 P.3d 378, 385 (2008) (evidentiary rulings reviewed for harmless error).

¶28 At trial, Rumsey did not dispute that she had driven with an alcohol concentration over the legal limit or that her vehicle had driven into a bicycle lane occupied by two children on bicycles. Both of these concessions established that, when she caused the accident, Rumsey was neither law-abiding nor conscientious. We can therefore say, beyond a reasonable doubt, that the exclusion of character evidence could not have “contribute[d] to or affect[ed] the verdict.” *See State v. Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d 601, 607 (2005).

V. Superseding Cause Instruction

¶29 Rumsey argues the trial court abused its discretion by denying her request for a jury instruction on superseding cause based on the design and construction of the intersection where the accident occurred. She presented evidence that the width of the

lane on one side of the intersection is narrower than on the other and contends that, but for the improper roadway design, J. and O. would have been south of where she was driving her car. Thus, she argues, the design of the intersection constituted a superseding cause of the accident, for which she was entitled to a jury instruction.

¶30 We review a trial court’s denial of a requested jury instruction for an abuse of discretion. *State v. Cox*, 217 Ariz. 353, ¶ 15, 174 P.3d 265, 268 (2007). Although “[a] defendant ‘is entitled to a jury instruction on any theory reasonably supported by the evidence,’ . . . a trial court’s refusal to give an instruction for a lack of factual basis is within its discretion.” *Vandever*, 211 Ariz. 206, ¶ 7, 119 P.3d at 475, *quoting State v. Tschilar*, 200 Ariz. 427, ¶ 36, 27 P.3d 331, 340 (App. 2001).

¶31 Testimony established that the accident occurred on Broadway Boulevard, just east of Vozack Lane. On the west side of Vozack, the eastbound lane of traffic on Broadway is 17.5 feet wide; on the east side, it is approximately 11.5 feet wide. Additionally, as it crosses the intersection, the bicycle lane shifts north, so that a car traveling east on Broadway in a straight line close to the bicycle lane would “end up straddling” the bike and driving lanes after traversing the intersection.

¶32 An intervening event qualifies as a superseding cause excusing the defendant from criminal liability only if it is both “unforeseeable and, with benefit of hindsight, abnormal or extraordinary.” *State v. Bass*, 198 Ariz. 571, ¶ 13, 12 P.3d 796, 801 (2000) (applying tort standard for superseding cause in criminal cases). Such an event is foreseeable if it “might ‘reasonably be expected to occur now and then, and

would be recognized as not highly unlikely if it did suggest itself to the actor’s mind.” *Tellez v. Saban*, 188 Ariz. 165, 172, 933 P.2d 1233, 1240 (App. 1996), *quoting* W. Keeton et al., *Prosser and Keaton on the Law of Torts* ¶ 44, at 307 (5th ed. 1984). Thus, “we ‘take a broad view of the class of risks and victims that are foreseeable, and the particular manner in which the injury is brought about need not be foreseeable.’” *Id.*, *quoting* *Rogers ex rel. Standley v. Retrum*, 170 Ariz. 399, 401, 825 P.2d 20, 22 (App. 1991). Furthermore, “[a]n intervening force is not a superseding cause if the original actor’s negligence creates the very risk of harm that causes the injury.” *State v. Slover*, 220 Ariz. 239, ¶ 11, 204 P.3d 1088, 1093 (App. 2009), *quoting* *Young v. Envtl. Air Prods., Inc.*, 136 Ariz. 206, 212, 665 P.2d 88, 94 (App. 1982). Likewise, an intervening cause cannot “be considered a superseding cause when the defendant’s conduct ‘increases the foreseeable risk of a particular harm occurring through . . . a second actor.’” *Id.*, *quoting* *Ontiveros v. Borak*, 136 Ariz. 500, 506, 667 P.2d 200, 206 (1983).

¶33 That Rumsey’s car might not have struck the victims if the road had been configured differently is irrelevant here, where Rumsey’s own conduct created the risk of harm that actually occurred. *See id.* Even assuming the road had been improperly designed, Rumsey has conceded she was driving with an alcohol concentration above the legal limit. This behavior increased the risk that she might strike and seriously injure or kill someone in the bicycle lane of this allegedly dangerous intersection.

[I]n the case of a defendant convicted of DUI, the law holds him accountable for precisely those harms actually risked by his conduct—namely, that he might seriously injure pedestrians on or next to the roadway, or that he might crash

his vehicle into other vehicles on the roadway, seriously injuring their occupants. All of this is fully foreseeable, and no stretch of logic is required to view the injuries caused as those actually risked by the conduct of driving drunk.

People v. Martin, 640 N.E.2d 638, 646 (Ill. App. 1994). See *State v. Freeland*, 176 Ariz. 544, 548, 863 P.2d 263, 267 (App. 1993) (“One who drinks and drives should reasonably foresee that . . . potential victims of drunken driving . . . might be seriously injured in an alcohol-induced collision.”); *Rourk v. State*, 170 Ariz. 6, 12, 821 P.2d 273, 279 (App. 1991) (“An accident caused by an intoxicated driver . . . is not an extraordinary event.”).

¶34 Rumsey’s conduct created the risk of harm that occurred and, indeed, increased the likelihood that any defect in the design of the roadway would result in a serious accident. Therefore, even assuming the road’s design could have constituted an intervening force, it could not have been considered a superseding cause as a matter of law. The trial court therefore did not abuse its discretion in declining to so instruct the jury.

VI. Lay Witness Testimony

¶35 Rumsey contends the trial court erred by excluding lay witness testimony “concerning [the witnesses’] observations of other drivers’ problems straddling the bike lane line at the intersection.” Rumsey proffered this testimony to demonstrate that drivers eastbound on Broadway routinely drive into the bicycle lane after crossing Vozack. The state moved to preclude the testimony, arguing the relevant question was not whether cars ever drove into the lane but whether “there’s . . . a bicyclist in there when the car passes through.” The court concluded the testimony was not relevant and

excluded it. We review the court’s ruling on this issue for an abuse of discretion. *Carlos*, 199 Ariz. 273, ¶ 10, 17 P.3d at 122.

¶36 Rumsey contends this evidence was relevant because “it would have provided practical evidence of what [her] expert witness had testified—that the road was improperly designed.” As we understand this argument, Rumsey is not asserting these witnesses should have been permitted to give their opinions about whether the intersection was properly designed, but, rather, she contends their observations of how drivers actually maneuver the intersection would be “relevant to [her] defense that the accident was caused by the faulty design and construction of the intersection.”⁵

¶37 All relevant evidence is admissible unless otherwise prohibited. Ariz. R. Evid. 402. Relevant evidence is evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Ariz. R. Evid. 401. As we have stated above, the design of the intersection could not relieve Rumsey of liability in this case. Therefore, whether other drivers are able to successfully negotiate the intersection is irrelevant to any fact in issue. This is particularly true because, as the state argued below,

⁵To the extent Rumsey argues the witnesses were competent to testify that the intersection was improperly configured, we disagree. While these lay witnesses may have observed certain events occurring in the intersection, whether its construction was proper or is a cause-in-fact of a particular traffic accident is beyond the witnesses’ “rational[] . . . perception[s]” and requires specialized knowledge to assess. *See* Ariz. R. Evid. 701 (lay witness may testify about opinions and inferences when “rationally based on the perception of the witness and . . . helpful to a clear understanding of . . . testimony or the determination of a fact in issue”); Ariz. R. Evid. 702 (expert may offer opinion when “specialized knowledge will assist the trier of fact to . . . determine a fact in issue”).

the issue is not whether Rumsey was reckless when she drove into the bicycle lane, but whether she was reckless in failing to observe that two bicyclists were there when she did so. The trial court therefore did not abuse its discretion in precluding this testimony. *See Carlos*, 199 Ariz. 273, ¶ 10, 17 P.3d at 122.

¶38 Moreover, Rumsey’s expert witness testified he had observed vehicles cross Vozack and enter the bicycle lane, and photographs of vehicles doing so were admitted as evidence. Thus, the substance of the lay testimony was before the jury in any event, and any error in excluding it therefore was harmless beyond a reasonable doubt. *State v. Jones*, 185 Ariz. 471, 486, 917 P.2d 200, 215 (1996) (“Error is harmless if it can be shown beyond a reasonable doubt that the error did not affect the verdict.”).

VII. Multiplicity

¶39 Rumsey next argues, and the state concedes, that her convictions and sentences for driving with an alcohol concentration over .15 (extreme DUI) and driving with an alcohol concentration over .08 (per se DUI) are multiplicitous and therefore violate the Double Jeopardy Clause. In *Merlina v. Jejna*, 208 Ariz. 1, ¶¶ 12-14, 90 P.3d 202, 205 (App. 2004), this court concluded that, because per se DUI does not require proof of any fact that extreme DUI does not also require, they are a single offense for which the defendant may not be subject to multiple punishment. We therefore vacate Rumsey’s conviction and sentence for per se DUI. *See State v. Brown*, 217 Ariz. 617, ¶ 13, 177 P.3d 878, 882-83 (App. 2008) (double jeopardy violation occurs upon multiple conviction, regardless whether concurrent sentences imposed).

VIII. Sentencing

¶40 Finally, Rumsey contends the trial court improperly weighed the aggravating and mitigating factors and sentenced her to an excessively long prison term. She contends the court “erred” in finding as aggravating factors J.’s young age and that her alcohol concentration had been above .15 and failed to give adequate weight to the mitigating facts that she had no prior offenses and a family to care for.

¶41 “A trial court has broad discretion to determine the appropriate penalty to impose upon conviction, and we will not disturb a sentence that is within statutory limits . . . unless it clearly appears that the court abused its discretion.” *State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003). An abuse of discretion in sentencing occurs when the court acts “arbitrarily or capriciously or fail[s] to adequately investigate the facts relevant to sentencing,” and we generally will find no such abuse when the trial court “fully considers the factors relevant to imposing sentence.” *Id.*; see also *State v. Ward*, 200 Ariz. 387, ¶ 6, 26 P.3d 1158, 1160 (App. 2001). We additionally presume the court considers all relevant evidence presented at sentencing, *State v. Everhart*, 169 Ariz. 404, 407, 819 P.2d 990, 993 (App. 1991), and the “weight to be given any factor asserted in mitigation rests within the trial court’s sound discretion,” *Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d at 357.

¶42 Rumsey contends the court should not have considered J.’s age in aggravation because she “did not know that J[.] was a child or in any way target him or act in indifference to the fact she knew he was a child.” However, she has utterly failed

to support this contention with argument or citation to relevant authority. “In Arizona, opening briefs must present significant arguments, supported by authority, setting forth an appellant’s position on the issues raised.” *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989); Ariz. R. Crim. P. 31.13(c)(1)(vi). And the failure to appropriately develop an argument results in waiver. *State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004). We therefore do not consider this argument further.

¶43 Additionally, adequate evidence supported the trial court’s finding that Rumsey’s alcohol concentration was greater than .15. *See* A.R.S. § 13-701(D)(16). Although there was evidence it could have been as low as .12, the jury explicitly rejected that evidence, finding her guilty beyond a reasonable doubt of driving with an alcohol concentration of at least .15. The court also appropriately considered the testimony supporting this verdict as part of the aggravation/mitigation hearing; sufficient evidence therefore supported the court’s determination.

¶44 The weighing of mitigating factors against aggravating factors is exclusively the province of the trial court, and we will not second-guess its determination.⁶ *State v. Davidson*, 19 Ariz. App. 346, 348, 507 P.2d 685, 687 (1973); *see also State v. Harvey*, 193 Ariz. 472, ¶¶ 24-25, 974 P.2d 451, 457 (App. 1998). Here, the court stated it had considered all of the mitigation evidence presented, and the sentences

⁶Rumsey also argues the trial court erred in not finding her return to the scene a mitigating factor. However, a sentencing court “is not required to find mitigating factors just because evidence is presented; [it] is only required to consider them.” *State v. Fatty*, 150 Ariz. 587, 592, 724 P.2d 1256, 1261 (App. 1986). And Rumsey has neither argued nor demonstrated that the court failed to consider this proffered mitigation evidence.

it imposed were within the statutorily authorized range. *See* A.R.S. § 13-704(A). We do not find the sentences to be so excessive under the circumstances as to warrant a reduction pursuant to A.R.S. § 13-4037(B).⁷ We therefore cannot say the court abused its discretion in finding aggravating factors that outweighed the mitigating evidence presented and imposing an aggravated sentence. *See Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d at 357.

Disposition

¶45 For the reasons stated above, we affirm all but one of Rumsey’s convictions and sentences. We vacate her conviction for driving with an alcohol concentration greater than .08.

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

CONCURRING:

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

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

⁷Section 13-4037(B) provides that in considering an appeal from a sentence on the “ground that it is excessive, the court shall have the power to reduce the extent or duration of the punishment imposed, if, in its opinion, the conviction is proper, but the punishment imposed is greater than under the circumstances of the case ought to be inflicted.”