

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

---

THE STATE OF ARIZONA,  
*Appellee,*

*v.*

TOAN NGOC TRAN,  
*Appellant.*

No. 2 CA-CR 2013-0487  
Filed September 24, 2014

---

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

*See* Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

---

Appeal from the Superior Court in Pima County  
No. CR20123069001  
The Honorable Casey F. McGinley, Judge Pro Tempore

**REVERSED AND REMANDED**

---

COUNSEL

Thomas C. Horne, Arizona Attorney General  
Joseph T. Maziarz, Section Chief Counsel, Phoenix  
By Myles A. Braccio, Assistant Attorney General, Phoenix  
*Counsel for Appellee*

Isabel G. Garcia, Pima County Legal Defender  
By Robb P. Holmes, Assistant Legal Defender, Tucson  
*Counsel for Appellant*

STATE v. TRAN  
Decision of the Court

---

**MEMORANDUM DECISION**

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

---

ECKERSTROM, Chief Judge:

¶1 Toan Tran appeals from his convictions and sentences for two counts of aggravated driving under the influence of an intoxicant (DUI). Because the charges are duplicitous, we reverse and remand for further proceedings consistent with this decision.

**Factual and Procedural Background**

¶2 “We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the verdicts.” *State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). In August 2011, a car crashed onto some boulders in front of the home of K.H., and she called 9-1-1 to report the incident. After her call, Tran approached her door and attempted to apologize. Around the same time that K.H. was calling 9-1-1, her son, M.H., arrived at the house. Tran attempted to “jack the car up” off of the rocks on which it was stuck. He also started the car and attempted to drive it off of the boulders. Tran continued attempting to move the car for five to ten minutes, during which time M.H. approached and tried to talk to him.

¶3 After a jury trial, Tran was convicted of two counts of aggravated DUI: DUI while license was revoked, A.R.S. §§ 28-1381(A)(1), 28-1383(A)(1),<sup>1</sup> and DUI with a blood alcohol concentration of .20 or more while license was revoked, A.R.S. §§ 28-

---

<sup>1</sup>We cite the current versions of our DUI statutes in this decision, as the relevant provisions have not changed since Tran’s offenses.

STATE v. TRAN  
Decision of the Court

1382(A)(2), 28-1383(A)(1).<sup>2</sup> He was sentenced to concurrent four-month prison terms pursuant to § 28-1383(D) followed by concurrent four-year terms of probation. This appeal followed.

**Duplicity**

¶4 The record demonstrates that the state introduced evidence of two separate criminal acts that could support the charges of aggravated DUI. First, the state asserted that Tran was driving when he crashed his car outside the home of K.H., and second, it claimed that after the accident, Tran was in actual physical control of the car when he entered and attempted to move it. During closing argument, the state told the jury that “not only did [Tran] drive and crash the car . . . but then he got in the car and tried to drive away.”

¶5 Tran asserted separate defenses to these separate acts. As to the first act of driving, he maintained that he was not the driver of the car at the time of the accident. As to the second, he asserted that he was not in actual physical control of the vehicle because the car was immobile. Although Tran did not raise this issue to the trial court or on appeal, duplicitous charges constitute fundamental error. *State v. Delgado*, 232 Ariz. 182, ¶¶ 18-19, 303 P.3d 76, 82 (App. 2013); see *State v. Klokic*, 219 Ariz. 241, ¶ 32, 196 P.3d 844, 851 (App. 2008) (“[W]hen the State introduces evidence of more than one criminal act to prove a single count, it raises the possibility that the defendant’s right to a unanimous jury verdict . . . may be violated.”). We will not ignore fundamental error when we find it. *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007).<sup>3</sup>

---

<sup>2</sup>Tran was also charged with criminal damage, but he was acquitted of that charge, and it is not at issue on appeal.

<sup>3</sup>In its supplemental brief, the state suggests that Tran may have failed to argue the issue on appeal for strategic reasons and has therefore abandoned the claim. Specifically, the state contends that Tran may have consciously decided not to raise the claim because “reversal by this Court . . . subject[s Tran] to the possibility of reindictment by the State for two *additional* counts of aggravated DUI to address the separate acts, thus facing a total of *four* felony

STATE v. TRAN  
Decision of the Court

We therefore granted the parties leave to submit supplemental briefing concerning “whether . . . the appellant was subjected to duplicitous charges, and, if so, whether that constitutes fundamental error.”

¶6 In its supplemental brief, the state conceded that it “presented two separate acts to prove the aggravated DUI charges and that [Tran] was subjected to duplicitous charges, and that this constitutes ‘fundamental error.’” But the state asserted that Tran had not demonstrated prejudice and that the duplicitous charges therefore did not warrant reversal. A duplicitous charge does not result in prejudice from the risk of nonunanimity if “no reasonable jury could have found” the defendant not guilty as to at least one of the criminal acts. *State v. Payne*, 233 Ariz. 484, ¶ 90, 314 P.3d 1239, 1263-64 (2013); *State v. Waller*, 694 Ariz. Adv. Rep. 8, ¶ 36 (Ct. App. Aug. 29, 2014). The state contends that “no reasonable juror could have failed to find [Tran] was *not* in ‘actual physical control’ of the vehicle when he was inside of it revving the engine.” The state relies on *State v. Zaragoza*, 221 Ariz. 49, 209 P.3d 629 (2009), to support its argument.

¶7 In that case, our supreme court articulated a list of factors relevant to determining whether a person is in “actual physical control” of a vehicle. *Id.* ¶ 21. As the state points out, none of the thirteen factors listed are in Tran’s favor. *See id.* However, the ultimate question is whether, under “the totality of the circumstances . . . the defendant’s current or imminent control of the vehicle presented a real danger to [himself] . . . or others at the time alleged.” *Id.*; *see State v. Love*, 182 Ariz. 324, 327-28, 897 P.2d 626,

---

convictions rather than two.” However, we presume that if Tran had declined to raise the duplicity issue on appeal for strategic reasons, he would have so advised this court when we ordered supplemental briefing. Instead, Tran requested that this court reverse his convictions and sentences based on the duplicity error. Neither party has briefed whether the state could reindict the defendant and add additional charges under these circumstances. We therefore do not address that question further.

STATE v. TRAN  
Decision of the Court

629-30 (1995). The court further observed that the list of factors “is not meant to be all-inclusive” and that it is up to the jury “to examine all the available evidence and weigh its credibility in determining whether the defendant actually posed a threat to the public by the exercise of present or imminent control of the vehicle while impaired.” *Zaragoza*, 221 Ariz. 49, ¶ 21, 209 P.3d at 634.

¶8 The fact that a vehicle is inoperable does not preclude a conclusion that a person was in actual physical control of a vehicle, but it is a factor the jury may consider. *See State v. Dawley*, 201 Ariz. 285, ¶¶ 7-8, 34 P.3d 394, 397 (App. 2001); *State v. Larriva*, 178 Ariz. 64, 65, 870 P.2d 1160, 1161 (App. 1993). Here, Tran attempted to move the car for at least five minutes, and possibly as long as ten minutes, without any success. M.H. came within five feet of the car and testified that “the car was not going anywhere.” Accordingly, a reasonable juror could have concluded that Tran’s “current or imminent control of the vehicle” did not present any real danger to himself or others, and that Tran was therefore not in actual physical control of the vehicle. *Zaragoza*, 221 Ariz. 49, ¶ 21, 209 P.3d at 634; *see Love*, 182 Ariz. at 327-28, 897 P.2d at 629-30.

¶9 Although the state has not claimed that no reasonable juror could have acquitted Tran of driving to the place of the accident, Tran bears the burden of proving prejudice. *See State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005). Accordingly, we will also consider whether he has established that a reasonable juror could have concluded he was not driving at the time of the accident. Tran testified to such, provided the name of the person he alleged was driving, and stated that the driver ran away. K.H. and M.H. testified that they did not see anyone else near the house, but K.H. also testified she was talking on the phone when the accident happened and did not look outside “instantaneously.” She stated that “five to ten seconds” passed in between when she heard the crash and when she looked outside. Additionally, K.H. only looked through the window, she did not actually go outside. Neither K.H., nor M.H., nor any other witness actually saw Tran driving, or even sitting in the driver’s seat, prior to the accident. K.H. and M.H.’s testimony did not preclude the possibility that, as Tran asserted, another person was driving the vehicle at the time of the crash and

STATE v. TRAN  
Decision of the Court

that person ran away. It was not entirely implausible for the jury to believe Tran. See *State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 38, 312 P.3d 123, 133 (App. 2013) (“[T]he credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury.”), quoting *State v. Cox*, 217 Ariz. 353, ¶ 27, 174 P.3d 265, 269 (2007). Tran has therefore demonstrated that he was prejudiced because the jury may have reached a nonunanimous verdict, and his convictions must be reversed. See *Delgado*, 232 Ariz. 182, ¶ 19, 303 P.3d at 82.

**Disposition**

¶10 For the foregoing reasons, we reverse Tran’s convictions and sentences and remand this case for further proceedings consistent with this decision.