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 17 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2008-0082
Appellee,	)	DEPARTMENT A
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
STEPHANIE HOLFORD,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20070136

Honorable Gus Aragon, Judge

AFFIRMED IN PART; VACATED IN PART

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Kathryn A. Damstra — Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Rose Weston and Frank P. Leto — Tucson
Attorneys for Appellant

H O W A R D, Chief Judge.

¶1 While intoxicated, appellant Stephanie Holford drove through a red light and collided into the side of an airport shuttle van as it was passing through an intersection on a

green light. She was charged with three counts of aggravated assault with a dangerous instrument, three counts of aggravated assault causing serious physical injury, one count of criminal damage, three counts of endangerment, driving under the influence of an intoxicant (DUI), driving with an alcohol concentration of .08 or more, and driving with an alcohol concentration (AC) of .15 or more (extreme DUI). A jury found her guilty of all but one charge, endangerment of her brother who had been a passenger in her car. The trial court sentenced her to presumptive, concurrent prison terms of 7.5-years on counts one through nine. It suspended the imposition of sentence on counts eleven through thirteen and imposed a consecutive, five-year term of probation. On appeal, Holford argues the DUI charges were multiplicitous and violated the prohibition against double jeopardy under the federal and state constitutions. She also maintains the court abused its discretion when it excluded evidence that some of the victims had not been using seat belts.

¶2 Holford first contends the charges of DUI and driving with an AC of .08 or more are lesser-included offenses of extreme DUI. She argues that the charges are multiplicitous because a single act was the basis for three counts and resulted in "multiple punishments for the same offense." She concedes she did not raise this issue below but contends the error is fundamental and was not waived. Relying on *Merlina v. Jejna*, 208 Ariz. 1, 90 P.3d 202 (App. 2004), Holford contends the charging of the three DUI offenses was proper, though multiplicitous, but that she could not be convicted of all three because they involved the same conduct.

¶3 We review this legal issue de novo. *See State v. Ramsey*, 211 Ariz. 529, ¶ 5, 124 P.3d 756, 759 (App. 2005). "The Double Jeopardy Clauses of the United States and Arizona Constitutions protect criminal defendants from multiple convictions and punishments for the same offense." *State v. Ortega*, 220 Ariz. 320, ¶ 9, 206 P.2d 769, 772 (App. 2008); *see also* U.S. Const. amend. V; Ariz. Const. art. II, § 10. The prohibition against double jeopardy also protects a defendant from subsequent prosecution for a lesser-included offense. *See State v. Moroyoqui*, 125 Ariz. 562, 564, 611 P.2d 566, 568 (App. 1980). "Distinct statutory provisions constitute the same offense if they are comprised of the same elements." *State v. Siddle*, 202 Ariz. 512, ¶ 10, 47 P.3d 1150, 1154 (App. 2002). If statutory provisions require proof of one or more different facts, they are not the same offense. *Id.*, *citing Brown v. Ohio*, 432 U.S. 161, 166 (1977), and *Blockburger v. United States*, 284 U.S. 299, 304 (1932). The state concedes error with respect to the charge of driving with an AC of .08 or more. As the court stated in *Merlina*, the offense of driving with an AC of .08 or more does not require proof of any fact that driving with an AC of .15 or more does not require. 208 Ariz. 1, ¶ 12, 90 P.3d at 205; *see also* A.R.S. §§ 28-1381(A)(2), 28-1382(A)(1).

¶4 Nor is the fact that two convictions were obtained rendered harmless because the sentences are concurrent and, therefore, do not offend A.R.S. § 13-116. *See State v. Brown*, 217 Ariz. 617, ¶¶ 12-13, 177 P.3d 878, 882 (App. 2008). Such multiple convictions violate the prohibition against double jeopardy. *Ortega*, 220 Ariz. 320, ¶ 9, 206 P.3d at 772. A violation of the prohibition against double jeopardy is fundamental, reversible error. *See*

State v. Price, 218 Ariz. 311, ¶ 4, 183 P.3d 1279, 1281 (App. 2008). But the same is not true with respect to the DUI charge under § 28-1381(A)(1) and extreme DUI under § 28-1382(A)(1). *Cf. Anderjeski v. City Court*, 135 Ariz. 549, 550-51, 663 P.2d 233, 234-35 (1983) (finding no double jeopardy violation resulting from prosecution and conviction of DUI and driving with an AC of .10 or more under former DUI statute).

¶5 Holford also contends the trial court abused its discretion when it prohibited the defense from admitting evidence that some of the victims had not been wearing seat belts when the collision occurred.[1] The evidence was first precluded during defense counsel's cross-examination of the state's accident reconstructionist. The driver of the van had been ejected during the collision, and defense counsel asked the witness whether that had been because the driver had not been wearing a seat belt. The state objected on the ground that the evidence was not relevant, and the court sustained the objection. A juror asked a similar question, and again on the ground that the evidence was irrelevant, the court would not allow the witness to answer. During its deliberations, the jury asked whether it would affect the charge of aggravated assault causing serious physical injury if the jury were to consider a victim's use or nonuse of seatbelts. The court instructed the jury it was not to consider the use or nonuse of seatbelts. Holford contends the court repeatedly erred because the evidence was relevant, given the state's burden to prove Holford had caused the person to suffer serious physical injury.

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[1]We note Holford did not make an offer of proof establishing that, in fact, these victims had not been using their seat belts.

¶6 The trial court did not abuse its discretion in precluding the evidence. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 7, 186 P.3d 33, 35 (App. 2008) (trial court's ruling on admissibility of evidence reviewed for abuse of discretion). The evidence would only have been admissible if the failure to wear a seat belt were a superseding cause of the victim's injuries. *See State v. Freeland*, 176 Ariz. 544, 548, 863 P.2d 263, 267 (App. 1993). An event is superseding if its occurrence was unforeseeable and it could be described as abnormal or extraordinary in hindsight. *State v. Bass*, 198 Ariz. 571, ¶ 11, 12 P.3d 796, 800-01 (2000); *see also State v. Slover*, 220 Ariz. 239, ¶ 11, 204 P.3d 1088, 1093 (App. 2009) ("An intervening event must be unforeseeable and abnormal or extraordinary to qualify as a superseding cause that can excuse a defendant from liability for a criminal act."). Citing our supreme court's decision in *State v. Shumway*, 137 Ariz. 585, 672 P.2d 929 (1983), the court stated in *Freeland*, "[a]lthough a victim's contributory negligence is generally no defense to criminal prosecution, a victim's conduct might constitute an intervening, superseding cause that breaks the causal chain." 176 Ariz. at 547, 863 P.2d at 266. But, the court concluded, "[o]ne who drinks and drives should reasonably foresee that some among the potential victims of drunken driving will not wear seat belts and that such victims, among others, might be seriously injured in an alcohol-induced collision." 176 Ariz. at 548, 863 P.2d at 267. Drawing on civil cases addressing the issue, the court reasoned in *Freeland* that an injured plaintiff's failure to wear a seat belt might be relevant to the jury's apportionment of damages. *Id*. But, the court added, "just as the victim's failure to wear a seat belt does

not supersede the defendant's causal responsibility for the victim's enhanced injuries in tort law, it does not supersede the defendant's causal responsibility in criminal law." *Id*.

¶7 Additionally, the legislature's enactment of A.R.S. § 28-909, which mandates the wearing of seat belts, does not render inaccurate the court's holding in *Freeland*.[2] Whether a victim was wearing a seat belt for the purposes of the offense was irrelevant, regardless of the enactment of the seat belt statute. Moreover, Holford did not demonstrate whether the lack of restraints had caused their injuries.

¶8 For the reasons stated above, we vacate the conviction based on Holford's having driven with an AC of .08 or more and the probationary term imposed on that conviction. But we otherwise affirm the convictions, probationary terms, and sentences imposed.

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JOSEPH W. HOWARD, Chief Judge

CONCURRING:

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PHILIP G. ESPINOSA, Presiding Judge

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JOHN PELANDER, Judge

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[2]The court pointed out in *Freeland* that the jury had been instructed that, consistent with the law at that time, an adult is not required to wear a seat belt but that § 28-909 was subsequently enacted, requiring persons sitting in the front seats to wear them. 176 Ariz. at 548 n.3, 863 P.2d at 267 n.3. Nevertheless, that a person must wear a seat belt does not change the accuracy of the court's conclusion in *Freeland* that a victim's failure to wear a seat belt is not a superseding cause of a collision and resulting injuries when a defendant chooses to drive while intoxicated. *Id*. at 548, 863 P.2d at 267.