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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THE STATE OF ARIZONA, Appellee, v. DONALD HUGH WADLEY, Appellant.	2 CA-CR 2011-0176 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20092774001

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz, and
Alan L. Amann
Tucson
Attorneys for Appellee

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H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Donald Wadley was convicted of aggravated driving under the influence (DUI) while a minor child was present, aggravated DUI with an alcohol concentration of 0.08 or more while a minor was present, and child abuse. On appeal, Wadley argues the trial court erred in denying his motion to suppress evidence obtained from the traffic stop because the evidence showed he complied with A.R.S. § 28-775(E)[1] and because the statute does not apply to the facts in this case. Because Wadley forfeited and waived his arguments, we affirm.

Factual and Procedural Background

¶2 "In reviewing the denial of a motion to suppress evidence, we consider only the evidence that was presented at the suppression hearing, which we view in the light most favorable to sustaining the trial court's ruling." *State v. Kinney*, 225 Ariz. 550, ¶ 2, 241 P.3d 914, 917 (App. 2010). Arizona Department of Public Safety Officer Brian Shaw had parked his marked patrol car on the side of the road to conduct a traffic stop. His red, blue, and amber emergency lights were flashing from the rear window of his car. As Officer Shaw finished the stop, Wadley drove past in the closest lane. Officer Shaw observed the other two traffic lanes were open and nothing was preventing Wadley from moving into one of the two lanes further from the parked patrol car. Officer Shaw stopped Wadley for violating A.R.S. § 28-775(E), which requires a vehicle to move away from a stopped emergency vehicle, and subsequently arrested him for DUI. The state later added the additional charges described above.

[1]We refer throughout this decision to the version of the statute in effect at the time Wadley committed the offense. *See* 2005 Ariz. Sess. Laws, ch. 139, § 1.

¶3 Before trial, Wadley moved to suppress evidence obtained from the traffic stop, claiming it was unconstitutional because the officer's emergency lights on his patrol car were not activated as required for the statute to apply. The trial court denied his motion, finding "there was reasonable suspicion to make the traffic stop." After Wadley was tried and convicted as noted above, the court suspended imposition of his sentences and placed Wadley on concurrent terms of two years' probation. This appeal followed.

Discussion

¶4 Wadley argues the trial court erred by failing to suppress evidence collected from the traffic stop for his failure to comply with A.R.S. § 28-775(E), which he terms the "move-over law." He contends evidence from the suppression hearing establishes he did not have sufficient time to change lanes safely after seeing the patrol car. Wadley further asserts that, even if he had been able to change lanes safely, § 28-775(E) does not apply when the patrol car's lights alternate between red, blue, and amber, as they did here.

¶5 At the suppression hearing, the court identified the issues as whether Wadley had been unable to change lanes safely and whether he instead had proceeded with caution or reduced his speed. Wadley had not raised the second issue in his motions. Wadley then argued perfunctorily that he had not been able to change lanes but had slowed down. On appeal, Wadley presents sophisticated calculations concerning the distance of the stop from a nearby underpass and the length of time it would have taken Wadley to cover that distance. But these calculations and the issue of the underpass were

not presented to the trial court, nor was the argument concerning the emergency vehicle having three alternating lights.

¶6 To preserve an argument for review, the defendant must make sufficient argument to allow the trial court to rule on the issue. *State v. Fulminante*, 193 Ariz. 485, ¶ 64, 975 P.2d 75, 93 (1999) ("objection is sufficiently made if it provides the judge with an opportunity to provide a remedy"). "And an objection on one ground does not preserve the issue [for appeal] on another ground." *State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008). If a defendant does not object in the trial court, he has forfeited the right to seek appellate relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object to alleged error in trial court results in forfeiture of review for all but fundamental error). Thus, Wadley has forfeited his right to appeal on these grounds.

¶7 Furthermore, because Wadley does not argue on appeal that the error is fundamental, and because we find no error that can be so characterized, the argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it).

¶8 Wadley also asserts "the uncontroverted evidence showed [Wadley] did precisely what he was obligated to do if he could not change lanes—slow down and proceed with due caution." However, the officer testified Wadley could have changed lanes. And the testimony of another driver did not support that Wadley slowed down.

The trial court is in the best position to evaluate the credibility of witness testimony and we defer to its factual determinations. *See State v. Estrada*, 209 Ariz. 287, ¶ 2, 100 P.3d 452, 453 (App. 2004). Thus, the court was entitled to reject testimony it found not credible and make factual determinations adverse to the defendant. *See id.*

Conclusion

¶9 For the foregoing reasons, we affirm Wadley's convictions and sentences.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

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

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge