IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JOSE FERNANDO RUIZ,
Appellant.

No. 2 CA-CR 2013-0484
Filed November 14, 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NOT FOR PUBLICATION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. CR20123802001
The Honorable Deborah Bernini, Judge

AFFIRMED

COUNSEL

Thomas C. Horne, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Diane Leigh Hunt, Assistant Attorney General, Tucson
Counsel for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Scott A. Martin, Assistant Legal Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Kelly authored the decision of the Court, in which Judge Howard and Judge Vásquez concurred.

K E L L Y, Presiding Judge:

¶1 Jose Ruiz appeals his convictions and sentences for two counts each of aggravated driving under the influence of an intoxicant (DUI) and aggravated driving with an alcohol concentration of .08 or more. He argues the trial court erred by admitting evidence of his breath test results. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding Ruiz's convictions. *See State v. Gay*, 214 Ariz. 214, ¶ 2, 150 P.3d 787, 790 (App. 2007). At around 3:30 on an October 2012 morning, Tucson Police Department Officer Sean Towle noticed Ruiz's vehicle stopped in the left-turn lane after the traffic light had turned green. After a few seconds, Towle honked his horn to get Ruiz's attention and followed his vehicle as he turned left. Towle saw Ruiz "drift" from the left- into the right-hand lane, and he initiated a traffic stop.

¶3 Ruiz did not stop immediately, so Towle followed him for approximately one mile in his marked patrol car with the overhead lights activated. Towle saw Ruiz drive down the middle and "left half of the road way" before Ruiz parked and got out of his vehicle. Ruiz ignored Towle's instructions to stay in the car and "just kind of stared off to the side."

¶4 Towle detained Ruiz, handcuffed him and put him in the patrol vehicle until additional officers arrived one minute later. Towle noted that Ruiz "had bloodshot, watery eyes" and "seemed unresponsive." He also saw an open beer bottle in the center console of Ruiz's vehicle.

¶5 When Towle administered field sobriety tests, Ruiz exhibited three out of eight cues of intoxication for the walk-and-turn test and three out of four cues for the one-leg-stand test. Sergeant Terrence O'Hara administered a horizontal gaze nystagmus (HGN)[1] test, which Ruiz failed by displaying six out of six cues. After Officer John Murphy arrived with an Intoxylizer machine to conduct breath tests, he read Ruiz the administrative per se implied consent form, and Ruiz consented to a breath test. His first sample, taken at 3:56 a.m., registered .191; his second, taken at 4:02 a.m., read .187.

¶6 Ruiz was charged with aggravated DUI with a suspended or revoked driver's license, aggravated driving with an alcohol concentration of .08 or more with a suspended or revoked driver's license, aggravated DUI with two or more prior DUI violations, and aggravated DUI with an alcohol concentration of .08 or more with two prior DUI violations. After a jury trial, he was found guilty of all charges and sentenced to concurrent terms of six years imprisonment. Ruiz timely appealed.

Discussion

¶7 On appeal, Ruiz contends the trial court should have suppressed the breath-test evidence based on a lack of foundation regarding the deprivation period. Specifically, he claims the court erred by "allowing the State to prove the mandatory breath-test

[1]"'The HGN test is one of several field sobriety tests police officers use to detect whether a suspect is under the influence of alcohol.'" *State v. Campoy*, 214 Ariz. 132, n.1, 149 P.3d 756, 757 n.1 (App. 2006), *quoting State ex rel. Hamilton v. City of Mesa*, 165 Ariz. 514, n.1, 799 P.2d 855, 856 n.1 (1990).

deprivation period through the testimony of Officer Murphy, when he did not start and observe the deprivation period."

¶8 The foundational requirements for the admission of breath test results to prove alcohol concentration are set forth in A.R.S. § 28-1323(A), which provides that the "results of a breath test administered for the purpose of determining a person's alcohol concentration are admissible as evidence in any trial" when certain conditions are met. One requirement is that the test operator follow an "operational checklist approved by the department of health services or the department of public safety for the operation of the device used to conduct the test." § 28-1323(A)(4).

¶9 The checklist requires that the DUI suspect undergo a "deprivation period" before testing when duplicate tests are administered.[2] *State v. King,* 213 Ariz. 632, ¶ 32, 146 P.3d 1274, 1281 (App. 2006); Ariz. Admin. Code R13-10-104(B). The deprivation period is "a 15-minute period immediately prior to a duplicate breath test during which period the subject has not ingested any alcoholic beverages or other fluids, eaten, vomited, smoked or placed any foreign object in the mouth." Ariz. Admin. Code R13-10-101(8). Section 28-1323(A)(4) further provides that "[t]he testimony of the operator is sufficient to establish" that the prescribed procedures were followed.

¶10 At trial, Murphy—who had been the operator of the Intoxylizer—stated he had completed the prescribed checklist to ensure he followed "the proper steps and sequence" for administering breath tests, which included ensuring Ruiz had "maintain[ed] a deprivation period" that lasted "exactly 20 minutes," even though it is only "a 15-minute requirement." He testified that the deprivation period had started at "whatever time [O'Hara] looked at his watch or his phone . . . and [went] all the way to the time of the first breath test" at 3:56 a.m.

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[2]Pursuant to R13-10-101(11), Ariz. Admin. Code, a "duplicate breath test" means two consecutive tests taken within five to ten minutes of each other immediately following a deprivation period.

¶11 Ruiz objected to Murphy's testimony and moved to strike it, stating "I guess I think it would be hearsay without Officer O'Hara's testimony about that." He explained that O'Hara had not testified about the time he started the deprivation period and that if Murphy were to testify that O'Hara had told him when it started, such a statement would be hearsay. Ruiz argued that Murphy's testimony thus lacked the "foundation for personal knowledge" as to when the deprivation period had started. The trial court told Ruiz he could "object to foundation"—essentially granting Ruiz's objection to Murphy's testimony on that basis—but it refused to grant Ruiz's request to strike Murphy's statement as hearsay.

¶12 The court then instructed the prosecutor to "[l]ay more foundation," and Murphy testified the deprivation period had lasted from 3:36 a.m. until 3:56 a.m. He then testified that the results of the tests were .191 and .187 and the written results were admitted. Ruiz did not object to this testimony on foundation or any other grounds, nor did he seek to voir dire Murphy as to the basis for his knowledge of the deprivation period's starting time.

¶13 Moreover, when Murphy later acknowledged during cross-examination that he had no personal knowledge about when O'Hara had started the deprivation period, and could not say if he had been present with O'Hara for the entire deprivation period, Ruiz did not renew his foundation objection. Once the witness had been excused, the trial court stated it wanted to make a "brief record on something," telling Ruiz it

> didn't realize that the last witness, Officer Murphy, had not watched the entire deprivation period. So while your objection should have been foundation, it wasn't the objection you lodged, I understand why you lodged your objection to the testimony from Officer Murphy. But at this point the Court finds . . . [its] ruling on your evidentiary objection has not deprived [Ruiz] of a fair trial. So my ruling stands. But I did misunderstand what the

> testimony was going to be or should have been.

When Ruiz asked "for a clarification" regarding "foundation," the court replied that Ruiz had not "object[ed] to foundation" but rather to "hearsay, which may have been an appropriate objection" but the court "denied [his] request [to strike] at the bench." Ruiz did not object to the court's characterization of his objection.

¶14 Ruiz maintains that had his objection to Murphy's testimony "been properly sustained, the [breath test] results (and [alcohol concentration]-based statutory presumptions) would have been precluded entirely or disregarded by the jury, casting doubt on all 4 of [Ruiz's] convictions." Accordingly, he urges us to reverse his convictions and remand for a new trial "at which the [breath test] results, correlating statutory presumptions of impairment, and correlating expert opinion on universal impairment may not be admitted."

¶15 But, as noted above, Ruiz did not specifically object to admission of the breath test evidence in the trial court. Rather, he objected to Murphy's statement that O'Hara had started the deprivation period by looking at his watch or phone, insisting that if Murphy had known the starting time, it was because O'Hara told him and any statement to that effect would be hearsay. Although the court told Ruiz he could object to foundation, and implicitly sustained Ruiz's objection by directing the prosecutor to lay more foundation, Ruiz did not object further to the adequacy of the foundation.[3]

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[3]In his reply brief, Ruiz argues that after his initial objection, he "could not object further to the State's failure to establish foundation for the deprivation period . . . given the trial court's refusal to strike Murphy's testimony." He claims Murphy's "testimony established the foundation," resulting in "no cognizable basis for objecting to the test results." But, as noted in our discussion, an objection based on a lack of personal knowledge for a witness's testimony is not a specific objection to the admission of breath test evidence for failing to meet the statutory requirements

¶16 Although Ruiz argues that his challenge to Murphy's statement was necessarily a challenge to the foundation for the breath test evidence, we disagree. Ruiz's hearsay objection occurred after Murphy testified the deprivation period had begun when O'Hara looked at his watch or phone. But it was not then apparent whether Murphy was referring to what he personally had observed or to an out-of-court statement made by O'Hara. *See* Ariz. R. Evid. 801(c). Thus, the trial court did not err in denying Ruiz's motion to strike Murphy's testimony on hearsay grounds.

¶17 Ruiz's reference to foundation when he was making his hearsay objection addressed Murphy's not having had personal knowledge of the deprivation period's starting time. But the trial court sustained this objection, directing the state to solicit more foundation from Murphy. Ruiz did not renew his foundational objection to Murphy's testimony, even after Murphy admitted on cross-examination that he lacked personal knowledge of when the deprivation period started. And, after Murphy's testimony, Ruiz did not argue to the court that the statutory requirements for the admission of breath test evidence had not been met. Thus, he has not preserved his argument that there was insufficient foundation for the admission of the test results. *See State v. Hamilton*, 177 Ariz. 403, 408, 868 P.2d 986, 991 (App. 1993) (objections must be made with specificity; objection on one ground does not preserve objections on other grounds); *see also State v. Alvarez*, 213 Ariz. 467, ¶ 7, 143 P.3d 668, 670 (App. 2006) ("A 'hearsay' objection does not preserve for appellate review a claim that admission of the evidence violated the Confrontation Clause."). Ruiz therefore has forfeited

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for admissibility. And if Ruiz believed—as he urges on appeal—that Murphy lacked personal knowledge regarding the start of the deprivation period, it was his obligation both to renew his objection to Murphy's testimony for lack of foundation and to challenge the admission of the breath test results on statutory grounds. *See State v. Lopez*, 217 Ariz. 433, ¶¶ 5-6, 175 P.3d 682, 684 (App. 2008) (objection to witness testimony on one ground does not preserve argument on appeal that later testimony was objectionable when defendant did not renew objection).

the right to review for all but fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to raise claim in trial court constitutes forfeiture of claim absent fundamental and prejudicial error).

¶18 Fundamental error is that "'going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20.

¶19 Ruiz has failed to establish error, let alone error that is fundamental. Ruiz bypassed the opportunity to voir dire Murphy and did not renew his objection to Murphy's testimony when it became clear Murphy lacked personal knowledge of the deprivation period's starting time. And by failing to object to the admission of the breath evidence or to move for its preclusion, Ruiz has deprived the trial court of the opportunity to correct any alleged error. *See 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"). Additionally, as the state points out, had it been aware there was a continuing objection to the foundation for the deprivation period, it would have "simply recalled O'Hara" to satisfy the deficiency. In any event, because Ruiz has failed to allege fundamental, prejudicial error or provide any argument thereon, we deem this claim waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (failure to allege fundamental error waives claim on appeal); *see also State v. Musgrove*, 223 Ariz. 164, ¶ 4, 221 P.3d 43, 45 (App. 2009).

Disposition

¶20 For the foregoing reasons, we affirm Ruiz's convictions and sentences.