IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

BRENNAN EUGENE PATTERSON,
Appellant.

No. 2 CA-CR 2015-0294
Filed August 2, 2016

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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20143465001
The Honorable Scott Rash, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Jonathan Bass, Assistant Attorney General, Tucson
Counsel for Appellee

Steven R. Sonenberg, Pima County Public Defender
By Michael J. Miller, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

V Á S Q U E Z, Presiding Judge:

¶1 After a jury trial, Brennan Patterson was convicted of aggravated driving under the influence (DUI) and aggravated driving with an alcohol concentration of .08 or more, both while his license was suspended and revoked. The trial court sentenced him to concurrent, 3.5-year terms of imprisonment. On appeal, Patterson argues the court erred in various evidentiary rulings. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to upholding Patterson's convictions. *See State v. Allen*, 235 Ariz. 72, ¶ 2, 326 P.3d 339, 341 (App. 2014). In May 2014, Tucson Police Department officer Mark Holderness stopped a vehicle he had continuously observed, driven by Patterson with one passenger, after it pulled out of a convenience store parking lot at a "high rate of speed" and run a stop sign. After Holderness activated his lights and siren, he saw a cup "thrown out of the vehicle." Patterson then returned to the parking lot and stopped. When Holderness approached the vehicle, Patterson provided his name but no driver's license. Holderness immediately noticed that Patterson had "slurred speech, bloodshot and watery eyes, and an odor of intoxicants." As Patterson stepped out of the vehicle, he had to "lean on [it] to keep his balance." According to Holderness, Patterson's "clothes were disorderly" and his "pants were saggy and falling down."

¶3 When Holderness asked if he was willing to perform field-sobriety tests, Patterson responded with profanities and refused. Patterson subsequently agreed to the tests, exhibiting six of eight cues for impairment on one and two of four on another. By

that time, another officer had arrived at the scene and was about to administer the horizontal gaze nystagmus test, but Patterson became "very aggressive and angry." The officers decided to arrest Patterson for DUI, but Patterson would not "turn around and put his hands behind his back." A struggle ensued, and the officers had to "take [Patterson] to the ground" to detain him. Although Patterson sustained minor injuries, he declined medical attention.

¶4 Holderness transported Patterson to a nearby police station, where he obtained a warrant to draw Patterson's blood. A trained phlebotomist then completed the blood draw. Subsequent testing revealed a .309 alcohol concentration. A records check also showed that Patterson's license had been "[s]uspended and revoked."

¶5 A grand jury indicted Patterson for aggravated DUI and aggravated driving with an alcohol concentration of .08 or more, both while his driver's license was suspended or revoked. The jury convicted him as charged, and the trial court sentenced him as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Preclusion of Defense Witness

¶6 Patterson argues the trial court erred by precluding the testimony of a defense investigator who would have explained that the officers failed to obtain "potentially helpful" video evidence from the convenience store. We review the preclusion of evidence for an abuse of discretion. *State v. Moody*, 208 Ariz. 424, ¶ 135, 94 P.3d 1119, 1152 (2004); *State v. Davis*, 205 Ariz. 174, ¶ 23, 68 P.3d 127, 131 (App. 2002).

¶7 Four days before Patterson's trial, defense counsel disclosed Harry Goss as a witness. The prosecutor interviewed Goss the day before trial and then filed a motion to preclude his testimony. On the first day of trial, defense counsel explained that Goss, a former police officer, would testify the convenience store where the encounter had occurred had surveillance cameras and the store would only allow police to access the video. Defense counsel maintained that "[t]he police failed to get [the] video," which was

only available for thirty days. He further asserted that the video was relevant because it "might contain exculpatory evidence and it might not, but just like *Willits*,[1] somebody was in control of it and that person allowed it to be destroyed." The prosecutor argued Goss had not been disclosed in a timely manner, but defense counsel asserted, "[T]he Office of Court-Appointed Counsel was slow to approve funding to hire [him]." The court granted the state's motion to preclude based on untimely disclosure, also noting "the testimony [was not] relevant at this point."

¶8 On appeal, Patterson argues, "[T]he trial court erred when it found that Goss was disclosed too late." He maintains that "defense [counsel] provided a sufficient explanation of why Goss could not have been disclosed at an earlier time." He also points out that the state "still had an opportunity to interview Goss prior to trial."

¶9 A defendant must disclose "[t]he names and addresses of all persons . . . whom the defendant intends to call as witnesses at trial" either "40 days after arraignment or within 10 days after the prosecutor's disclosure . . . , whichever occurs first." Ariz. R. Crim. P. 15.2(c)(1), (d). The duty to disclose is a continuing duty, and a defendant must "make additional disclosure, seasonably, whenever new or different information subject to disclosure is discovered." Ariz. R. Crim. P. 15.6(a). Generally, disclosure must be completed at least seven days before trial. Ariz. R. Crim. P. 15.6(c). A defendant "seeking to use material and information not disclosed at least seven days prior to trial shall obtain leave of court by motion, supported by affidavit, to extend the time for disclosure and use the material or information." Ariz. R. Crim. P. 15.6(d).

¶10 Because there were less than seven days before trial when Patterson disclosed Goss as a witness, he had to seek leave of the court to extend the time for disclosure under Rule 15.6(d). However, Patterson failed to do so—he filed neither a motion to permit the untimely disclosure nor a supporting affidavit.

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[1]*State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

¶11 A trial court has discretion to fashion an appropriate remedy for a Rule 15 violation. *State v. Scott*, 24 Ariz. App. 203, 205, 537 P.2d 40, 42 (1975). And "Rule 15.7(a)(1), Ariz. R. Crim. P., provides that one of the sanctions available to the court for a [defendant's] failure to disclose evidence is preclusion of that evidence." *State v. Aguilar*, 217 Ariz. 235, ¶ 20, 172 P.3d 423, 429 (App. 2007). The court was thus within its discretion in granting the motion to preclude based on the untimely disclosure. *See id.* ¶ 21 (when state failed to file "proper request to permit untimely disclosure" or "proper motion or affidavit" explaining why evidence could not have been discovered earlier, trial court was within its discretion to preclude untimely disclosed evidence); *Scott*, 24 Ariz. App. at 205, 537 P.2d at 42 (trial court acted within its discretion in precluding testimony of two defense witnesses not disclosed pursuant to Rule 15.2(c)(1)).

¶12 Patterson points out that preclusion is "rarely an appropriate sanction for a discovery violation" and should be used as a "last resort." *State v. Delgado*, 174 Ariz. 252, 257, 848 P.2d 337, 342 (App. 1993); *see also State v. Valencia*, 186 Ariz. 493, 502, 924 P.2d 497, 506 (App. 1996) (preclusion should be rarely used because it impinges on defendant's Sixth Amendment right to present witnesses). However, even if we assume the trial court erred in precluding Goss's testimony, "[s]uch error is subject to a harmless error analysis." *Delgado*, 174 Ariz. at 260, 848 P.2d at 345. "Error is harmless if we can conclude, beyond a reasonable doubt, that the error did not contribute to or affect the jury's verdict." *State v. Davolt*, 207 Ariz. 191, ¶ 64, 84 P.3d 456, 474 (2004).

¶13 We conclude that any error in precluding Goss's testimony was harmless. *See State v. Carlos*, 199 Ariz. 273, ¶ 24, 17 P.3d 118, 124 (App. 2001) (preclusion of cumulative testimony constitutes harmless error). Defense counsel elicited the same testimony he sought to introduce from Goss through his cross-examination of Holderness and another officer. The trial court admitted two photographs—taken by Goss—that showed the convenience store's surveillance camera, and Holderness acknowledged the camera existed and he had requested to see video from the store in the past. The officers also admitted that they did

not request any video in this case. Holderness was not certain whether the "camera specifically would have caught the DUI investigation," but notably neither was Goss. For that matter neither could have been certain whether the video supported or, as Patterson argues for the first time on appeal, contradicted Holderness's testimony that he had seen Patterson driving the vehicle. Defense counsel nevertheless argued in closing that the convenience store had used a surveillance camera that must have recorded "everything [that] happened," but the officers had "never even bothered to go look" at the video. Goss's testimony thus "would have been merely cumulative," *id.*, and we are confident that any error in precluding it did not contribute to or affect the jury's verdicts, *see Davolt*, 207 Ariz. 191, ¶ 64, 84 P.3d at 474.[2]

¶14 As part of this argument, Patterson also maintains the trial court erred by not giving a *Willits* instruction for the "missing video." However, Patterson failed to request a *Willits* instruction below. Patterson maintains, "Defense counsel was perhaps not as artful as he might have been, but it is clear that he [was] seeking admission of Goss's testimony because he wanted a *Willits* instruction." We disagree. After the court precluded Goss's testimony, and defense counsel questioned the officers about the video, Patterson still had an obligation to request the instruction. *See* Ariz. R. Crim. P. 21.3(c) ("No party may assign as error on appeal the court's giving or failing to give any instruction . . . unless the party objects thereto before the jury retires to consider its verdict . . . ."); *State v. Islas*, 132 Ariz. 590, 591, 647 P.2d 1188, 1189 (App. 1982) (failure to request instruction precludes review unless error is fundamental). Patterson has therefore forfeited review for all but

[2]During his pretrial interview with the prosecutor, Goss also indicated that he would testify about "any police procedure issues that [he] might disagree with based on the officers[']s testimony." However, the trial court did not preclude this testimony and said it would "address that [if] it comes [up]." Patterson did not raise the issue again.

fundamental, prejudicial error.[3] *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

¶15 When police lose or destroy potentially exculpatory evidence, a *Willits* instruction "permits the jury to infer that the evidence would have been exculpatory." *State v. Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d 75, 93 (1999); *see also State v. Bolton*, 182 Ariz. 290, 308, 896 P.2d 830, 848 (1995). "To be entitled to a *Willits* instruction, a defendant must prove that (1) the state failed to preserve material and reasonably accessible evidence that could have had a tendency to exonerate the accused, and (2) there was resulting prejudice." *State v. Glissendorf*, 235 Ariz. 147, ¶ 8, 329 P.3d 1049, 1052 (2014), *quoting State v. Smith*, 158 Ariz. 222, 227, 762 P.2d 509, 514 (1988). In showing that evidence has a "tendency to exonerate," a defendant cannot "simply speculate about how the evidence might have been helpful." *Id.* ¶ 9. Rather, "there must be a real likelihood that the evidence would have had evidentiary value." *Id.*

¶16 Patterson has failed to establish fundamental error. First, the officers did not lose or destroy evidence; they simply did not collect evidence that Patterson wanted. The state "does not have an affirmative duty to seek out and gain possession of potentially exculpatory evidence." *State v. Rivera*, 152 Ariz. 507, 511, 733 P.2d 1090, 1094 (1987). Consequently, "[a] *Willits* instruction is not given merely because a more exhaustive investigation could have been made." *State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995). Second, Patterson failed to show that the video would have tended to exonerate him. Below, the state pointed out that Goss "was not able to confirm that the videos would have shown the area in the parking lot where [Patterson] was stopped." Patterson did not

[3]The state additionally maintains that Patterson waived the argument because he did not assert on appeal that the error was fundamental. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008). Although Patterson failed to explicitly state in his opening brief that the alleged error was "fundamental," he sufficiently raised the standard, and we therefore address the argument.

dispute this contention and admitted "what that video would show, we don't know." This is insufficient to warrant a *Willits* instruction. *See Glissendorf*, 235 Ariz. 147, ¶ 9, 329 P.3d at 1052.

¶17 Patterson has also failed to establish prejudice. He maintains, "The video would have provided objective evidence of the officers' testimony." He then lists what the video might have shown: who was driving the vehicle, his performance on the field-sobriety tests, and his confrontation with the officers. But prejudice "must appear affirmatively from the record." *State v. Trostle*, 191 Ariz. 4, 13-14, 951 P.2d 869, 878-79 (1997); *see also State v. Gerhardt*, 161 Ariz. 410, 413, 778 P.2d 1306, 1309 (App. 1989) (showing of prejudice insufficient when based on speculation as to potentially exculpatory value of lost evidence). We therefore conclude the trial court did not commit error, much less fundamental, prejudicial error, by failing to give a *Willits* instruction sua sponte. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607.

Admission of Photograph

¶18 Patterson next contends the trial court erred in admitting a photograph of him in handcuffs. We review the decision to admit a photograph for an abuse of discretion. *State v. Dann*, 220 Ariz. 351, ¶ 44, 207 P.3d 604, 615 (2009); *State v. Morris*, 215 Ariz. 324, ¶ 69, 160 P.3d 203, 218 (2007).

¶19 While questioning Holderness, the prosecutor sought to admit into evidence six photographs of Patterson taken on the night of his arrest. Defense counsel objected, arguing the photographs were "more prejudicial than probative" because "[Patterson] in handcuffs is akin to him being dressed in orange." He also asserted it was unclear whether Patterson's pants, which were falling off in at least two of the photographs, were "like this all along or . . . [as] a result of him being taken to the ground." The prosecutor responded that she only needed to admit two photographs, Exhibits 14 and 18, which showed Patterson's injuries but not his handcuffs or clothing. The court then admitted those two photographs.

¶20 During cross-examination, however, defense counsel questioned Holderness about his earlier testimony that Patterson's

clothing had been "disorderly," pointing out he had not checked off "disorderly clothing" on the DUI worksheet. At a bench conference, the trial court informed the prosecutor that defense counsel had opened the door to the issue of Patterson's clothing and suggested she could use the other photographs.

¶21 On redirect, the prosecutor asked Holderness if two additional photographs, Exhibits 15 and 16, "accurately depict[ed Patterson's] clothing on that night." After Holderness responded affirmatively, the prosecutor moved to admit them. Defense counsel objected, again asserting they were "more prejudicial than probative." He also explained, "If that's how he was driving, then I think it would be relevant, but this is after he's been in three fights with the police several hours later. So I don't know that his clothing was like that when he was supposedly driving because it's when he's roughed up." The prosecutor reiterated that Holderness's report indicated Patterson's clothes were disorderly at the time of the stop. The court admitted the photographs based on Holderness's testimony that they depicted "what [he] looked like when he got him out of the car in terms of what he meant by disorderly."[4]

¶22 "In assessing the admissibility of photographs, courts consider the photographs' relevance, the likelihood that the photographs will incite the jurors' passions, and the photographs' probative value compared to their prejudicial impact." *State v. McGill*, 213 Ariz. 147, ¶ 30, 140 P.3d 930, 937 (2006). A photograph is relevant if "it assists the jury in understanding an issue in dispute." *State v. Doerr*, 193 Ariz. 56, ¶ 29, 969 P.2d 1168, 1176 (1998); *see also* Ariz. R. Evid. 401. The trial court has broad discretion in weighing the probative value and unfair prejudice of evidence. *State v. Connor*, 215 Ariz. 553, ¶ 39, 161 P.3d 596, 607 (App. 2007); *see also* Ariz. R. Evid. 403.

¶23 As he did below, Patterson maintains the photographs were "irrelevant and misleading" because they were taken after an

[4]The fifth and sixth photographs, Exhibits 17 and 19, were not admitted.

altercation with the officers. He compares this situation to photographs of an accident scene "taken long after the accident when the scene had been modified." He relies on *Jimenez v. Wal-Mart Stores, Inc.*, 206 Ariz. 424, ¶ 15, 79 P.3d 673, 677 (App. 2003), in which this court concluded it was within the trial court's discretion to exclude the plaintiff's photographs of a store entrance where she had fallen.

¶24 This case, however, is distinguishable from *Jimenez*, in which the plaintiff did not "dispute that the excluded photographs were all taken some time after her fall and did not depict the store entrance as it was when she fell." *Id.* But in this case Holderness testified that Patterson's clothing as depicted in the photographs "look[ed] the same as . . . the first time [he] made contact with [Patterson]." Whether Patterson's clothing was disorderly at the time of the stop, which would support the inference that he was intoxicated, became an issue, and the photographs coupled with Holderness's testimony were relevant to that issue. *See State v. Hampton*, 213 Ariz. 167, ¶ 18, 140 P.3d 950, 956 (2006) (photographs relevant to corroborate or illustrate testimony).

¶25 Patterson also maintains, even if the photographs were relevant, the risk of unfair prejudice substantially outweighed their probative value. He asserts, "[T]he handcuffs were prejudicial" because of "the clear implication that a man in handcuffs must have committed a crime."

¶26 Our supreme court has recognized the potential prejudice of using evidence that depicts a defendant in handcuffs. *See State v. Atwood*, 171 Ariz. 576, 643, 832 P.2d 593, 660 (1992), *disapproved on other grounds by State v. Nordstrom*, 200 Ariz. 229, ¶ 25, 25 P.3d 717, 729 (2001). In *Atwood*, the defendant argued that "he was denied a fair trial because the jury was permitted to view videotapes of television broadcasts showing him in police custody, handcuffed, and wearing jail attire." *Id.* The court explained that "the danger inherent" in permitting the jury to view evidence showing the defendant in handcuffs is that "'the visual impact of the improper picture of a restrained defendant' might prejudice the jury against the defendant by portraying him as a bad or dangerous person." *Id.*, *quoting Lucas v. State*, 791 S.W.2d 35, 56 (Tex. Crim.

App. 1989). Although the video footage had portrayed the defendant in a "prejudicial light," the court concluded the "videotape viewing . . . was not so prejudicial that it abrogated the probative value of the evidence." *Id.* at 645, 832 P.2d at 662. The court found that, because the video showed the defendant "being transported from police vehicles to various jail facilities, . . . the jury easily could conclude that common practice requires criminal defendants in custody to be handcuffed when they are outside the jail setting." *Id.* The court was also "unpersuaded that the brief viewings of [the] defendant on the videotapes could have had any measurable impact on the jury or its verdict." *Id.*

¶27 The trial court admitted two photographs to demonstrate what Holderness meant by "disorderly," one of which shows him in handcuffs, which is potentially prejudicial. It is unclear why the photograph showing Patterson in handcuffs was admitted when the other photograph showing Patterson's clothing but not his handcuffs could have served the same purpose. *See State v. Coghill*, 216 Ariz. 578, ¶¶ 16-22, 169 P.3d 942, 947-48 (App. 2007) (trial courts should remove unnecessary inflammatory detail from otherwise relevant evidence). However, only one photograph depicting handcuffs was admitted, as opposed to the multiple videos in *Atwood*. And like the defendant in *Atwood*, Patterson was outside the jail, and the jury could have inferred that handcuffs were standard procedure. Furthermore, the focus of the photograph at trial was on Patterson's clothing, not his handcuffs. Indeed, the prosecutor never mentioned the handcuffs. *See Lucas*, 791 S.W.2d at 56 (error in admitting videotape of defendant in handcuffs harmless when focus on defendant's words not handcuffs). These factors suggest the photograph was not unfairly prejudicial.

¶28 In any event, even if the trial court erred in admitting the photograph, we need not reverse Patterson's convictions if the error was harmless. *See State v. Spreitz*, 190 Ariz. 129, 142, 945 P.2d 1260, 1273 (1997); *see also State v. Sanchez-Equihua*, 235 Ariz. 54, ¶ 26, 326 P.3d 321, 327 (App. 2014). Error admitting a photograph is harmless if the state presents overwhelming evidence of the defendant's guilt without considering the photograph. *See Spreitz*, 190 Ariz. at 142, 945 P.2d at 1273. In this case, Holderness testified

that he had seen Patterson run a stop sign while speeding. Patterson had bloodshot eyes, emitted an odor of intoxicants, and used slurred speech. He exhibited multiple cues for impairment on field-sobriety tests, and subsequent blood testing revealed a .309 alcohol concentration. His license was also suspended and revoked. We therefore conclude beyond a reasonable doubt that any error in admitting the photograph did not contribute to or affect the jury's verdicts. *See Davolt*, 207 Ariz. 191, ¶ 64, 84 P.3d at 474.

Scope of Cross-Examination

¶29 Patterson lastly asserts the trial court erred in limiting his cross-examination of Holderness. We conclude that Patterson has waived this argument.

¶30 During cross-examination, defense counsel extensively questioned Holderness about the field-sobriety tests. At a bench conference when trying to plan the rest of the day, defense counsel informed the trial court that he had about forty-five more minutes of cross-examination left to show that "the tests don't mean anything." The court became concerned because "the tests [were not] on trial." Defense counsel explained, "The evidence of impairment is the tests and the blood. So I'm attacking the tests and the blood. . . . If the tests don't really show impairment, they're just a coordination test that is evaluated haphazardly." The court then said, "I'm going to break for lunch, and I'm going to do some research on this because I'm not thinking this is relevant at all. Maybe it is." Patterson acknowledges that when trial resumed after lunch, there was no further discussion of this issue.

¶31 To preserve an argument for appeal, a defendant must bring the issue to the trial court's attention and ensure that the ruling is part of our record on appeal. *State v. Lujan*, 136 Ariz. 326, 328, 666 P.2d 71, 73 (1983); *State v. Deschamps*, 105 Ariz. 530, 533, 468 P.2d 383, 386 (1970); *see also Fulminante*, 193 Ariz. 485, ¶ 64, 975 P.2d at 93 ("An objection is sufficiently made if it provides the judge with an opportunity to provide a remedy."). Because our record does not indicate that the trial court ever ruled on whether defense counsel could continue to cross-examine Holderness about the field-sobriety tests, Patterson has failed to preserve the argument for appeal.

See State v. Lopez, 217 Ariz. 433, ¶ 6, 175 P.3d 682, 684 (App. 2008). Accordingly, we review for fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. However, Patterson does not argue that the error was fundamental, and because we conclude no such error occurred, the argument is waived.[5] *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

Disposition

¶32 For the forgoing reasons, we affirm Patterson's convictions and sentences.

[5]Patterson contends that he argued "there was fundamental error" but "merely omitted the magic words." We disagree. In his opening brief, Patterson failed to state any standard of review for this issue, as required by Rule 31.13(c)(1)(vi), Ariz. R. Crim. P., or to explain how he was prejudiced by the alleged error. And any argument made for the first time in his reply brief was untimely. *See State v. Aleman*, 210 Ariz. 232, ¶ 9, 109 P.3d 571, 575 (App. 2005).