NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

ROBERT JAMES DODD, *Appellant*.

No. 1 CA-CR 16-0034
FILED 12-7-2017

Appeal from the Superior Court in Mohave County
No. S8015CR201400581
The Honorable Steven F. Conn, Judge (Retired)

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Terry M. Crist, III
Counsel for Appellee

Mohave County Legal Advocate, Kingman
By Jill L. Evans
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge Lawrence F. Winthrop and Judge Jon W. Thompson joined.

H O W E, Judge:

¶1 Robert James Dodd appeals his convictions and sentences for second-degree murder, aggravated assault, aggravated driving while under the influence of intoxicating liquor or any drug, aggravated driving while any drug or metabolite in body, possession of dangerous drugs, criminal damage, possession of drug paraphernalia, and endangerment. Because our resolution of only one issue from Dodd's appeal merits publication, we have addressed that argument in a separate published opinion issued simultaneously with this unpublished memorandum decision. *See* Ariz. R. Sup. Ct. 111(h); Ariz. R. Crim. P. 31.26. For the following reasons, and for reasons addressed in the accompanying published opinion, we affirm Dodd's convictions and sentences.

FACTS AND PROCEDURAL HISTORY

¶2 One evening in April 2014, an Arizona Department of Public Safety ("DPS") officer was attempting to locate and arrest Dodd pursuant to a warrant. Familiar with Dodd's physical appearance and acting on a tip that Dodd was driving a white Nissan, the officer patrolled the streets of Kingman in an unmarked vehicle.

¶3 While surveying the area, the officer observed a white Nissan traveling at a high rate of speed, so he began pursuit. As he approached the Nissan from behind, the officer saw the driver of the vehicle through the driver's side mirror and recognized him as Dodd. At that point, Dodd accelerated quickly and began driving "erratic[ally]." Believing that Dodd realized that he was being followed, the officer turned on his patrol car's emergency lights and siren and requested backup assistance. Trying to end the pursuit as quickly as possible, the officer then positioned his car so that he could "ram" the Nissan, but instead took sudden evasive action when he saw Dodd reach into the console and make a "furtive" motion, leading the officer to believe that Dodd might be armed.

¶4 As the pursuit continued, Dodd drove into oncoming traffic. The officer continued to follow, hoping the lights and siren would alert drivers to pull out of the way. Dodd also began throwing large items out of the vehicle while traveling at a speed of approximately 80 miles per hour in a designated 35 miles per hour zone. Dodd hit one vehicle while attempting to evade the DPS officer, and at least two other vehicles had to swerve off the road to avoid being struck by Dodd as he drove into oncoming traffic.

¶5 After covering some distance, the Nissan began to decelerate and then hit a garbage can, but did not stop. Dodd then ran a stop sign at an intersection, striking a blue vehicle that had the right-of-way. After the collision, Dodd's car came to a stop. The DPS officer who had followed Dodd since the beginning of the chase parked his car and ran across the intersection toward Dodd's vehicle with his weapon drawn. As the officer approached, Dodd got out of the Nissan. Believing that Dodd might attempt to flee, another DPS officer who had joined the pursuit hit the back of Dodd's car, which in turn struck Dodd and caused him to fall to the ground.

¶6 With Dodd lying face-down on the ground, the first officer ordered him to "give up his hands," and Dodd responded by "pulling his hands up under his body." The officer then hit Dodd several times to try to gain his compliance. The officer that struck Dodd's car then came in to help, and together they eventually placed Dodd in handcuffs.

¶7 After taking Dodd into custody, the first officer discovered that Dodd had a passenger, B.B., who had gotten out of the car and was lying on the ground next to the car, bleeding from her mouth and crying. B.B. was initially transported to the local hospital to treat her injuries, including a pulmonary contusion and multiple fractures of the ribs, the femur, and the hip socket. After the treating physician examined her, however, she was moved to a facility that could treat a higher level of trauma because her femur fracture required surgical reduction to place the bone's dislocated head back into the corresponding socket.

¶8 Dodd likewise was transported by ambulance to the hospital, accompanied by an officer. When Dodd unclenched his fist so that the emergency medical technician could insert an IV, a small baggie fell on the floor. The technician retrieved the fallen baggie and handed it to the officer, who immediately recognized its white crystal contents as methamphetamine.

¶9 Meanwhile, other officers at the scene attended to L.C., the driver of the blue vehicle with which Dodd collided. While with her, the officers detected limited responsiveness, and by the time that medical responders arrived, L.C. was entirely non-responsive. The medical personnel transported L.C. to the hospital where she died later that evening. The medical examiner that performed an autopsy on L.C. concluded that she died from the multiple injuries sustained in the car crash, and further opined that the laceration she received to her aorta alone would have been fatal. L.C.'s family filed a civil lawsuit against Dodd approximately a year later.

¶10 The State charged Dodd with one count of second-degree murder, two counts of aggravated assault (one for causing serious physical injury to B.B. and one for causing physical injury with a deadly weapon or dangerous instrument to B.B.), one count of aggravated driving a vehicle while under the influence of intoxicating liquor or any drug, one count of aggravated driving while any drug or metabolite in body, one count of possession of dangerous drugs, two counts of felony criminal damage in an amount of at least $2,000, one count of possession of drug paraphernalia, one count of felony endangerment, one count of misdemeanor endangerment, and one count of misdemeanor criminal damage.[1] The State also alleged aggravating circumstances and that Dodd had prior felony convictions and was on parole. The court appointed the county public defender to Dodd.

¶11 In a March 2015 letter to the trial court, Dodd moved for new counsel, claiming that he was "not receiving [an] adequate defense" from his appointed attorney. Dodd claimed that he had only met with his counsel twice, and on both occasions counsel had encouraged him to enter into a plea agreement. Dodd also alleged that his attorney had not responded to his letters and phone calls and had failed to file the motions that he had requested. At the hearing held on the motion, defense counsel declined to make any statement. The trial court denied Dodd's request for new counsel, but informed Dodd that he could renew his request later if the situation did not improve.

¶12 Six months later, Dodd filed another letter with the trial court requesting the appointment of new counsel. Dodd alleged that defense counsel had stated that he believed that Dodd was guilty. The same week, defense counsel moved to withdraw representation, claiming that Dodd

---

[1] On the State's motion, the trial court later dismissed the misdemeanor criminal damage charge with prejudice.

refused to assist in trial preparation and did not want to be represented by the county public defender's office.

¶13 At the subsequent hearing on the motions, the trial court noted that defense counsel had recently represented Dodd in three other matters, one in which the jury found Dodd not guilty, one in which the charges were ultimately dismissed, and one in which defense counsel presented a "spirited defense" at trial. When the court then invited Dodd to state the basis for his request, Dodd explained that defense counsel had encouraged him to take a plea deal and told him that many people believed that Dodd "should have died instead of [L.C.]." In addition to those statements, which Dodd deemed inappropriate, he stated that he had yet to see all of the evidence and disclosures in his case. In response, defense counsel denied ever expressing a personal belief in Dodd's guilt, but acknowledged that he had informed Dodd that a jury verdict of not guilty was unlikely. Defense counsel also discussed his efforts on the case, noting that he had already conducted over twenty interviews and expected to conduct approximately twenty more before trial. Following defense counsel's response, Dodd stated that he liked defense counsel and believed that they had a "good relationship," but did not want him defending the case. The trial court denied Dodd's request for new counsel.

¶14 A week before Dodd's October 2015 jury trial, Dodd moved to admit evidence regarding DPS's internal policy on pursuits. Specifically, Dodd sought to introduce evidence that DPS policy required that a pursuit be terminated when, among other things, the pursuit presents a "clear and unreasonable hazard" to officers, the suspect, or other citizens, and the suspect's criminal acts do not "justify the risk to life and property." The policy also noted that, among other considerations, pursuit may not be warranted when the suspect is identified, such that "later apprehension can be accomplished." Dodd explained that he intended to introduce the policy and show that the officers failed to adhere to it during the pursuit. He also claimed that he struck the victims' vehicles only because the officers were chasing him. The court concluded that such a theory provided no defense to the charges and that the evidence was irrelevant. Accordingly, the court denied Dodd's motion.

¶15 At trial, the State and Dodd entered four stipulations: (1) the white Nissan that Dodd drove on the night of the collision did not belong to him; (2) the baggie that the officer collected from the ambulance floor contained 1.90 grams of methamphetamine; (3) Dodd's blood, drawn at 7:00 p.m. on the night of the collision, contained no alcohol but did contain 35 ng/ml amphetamine and 270 ng/ml methamphetamine; and (4) on the

night of the collision Dodd knew or had reason to know that his license was suspended.

¶16 As part of its case-in-chief, the State called the first DPS officer—who began the pursuit of Dodd—to testify. On cross-examination, Dodd asked whether the officer prepared a report regarding the chase. The officer explained that DPS's internal policy required that officers who are witnesses to a "critical incident," which includes any "critical injury," do not write a written report, but instead must be interviewed as witnesses by an assigned case officer. Consistent with that policy, he did not write a report but did participate in a recorded interview conducted by a detective the day following the collision. The officer also acknowledged that he had initiated the pursuit and could have terminated the pursuit at any time. In response to a question, the officer also acknowledged that he had been named as a defendant in the lawsuit filed by L.C.'s family. Similarly, the second DPS officer also acknowledged during his testimony that he had been named as a defendant in the lawsuit filed by L.C.'s family and testified that, pursuant to DPS's policy, he did not write a report regarding the police chase.

¶17 After both DPS officers testified, Dodd moved to preclude the State from eliciting any of the officers' prior consistent statements to the interviewing detective. In so moving, Dodd acknowledged that he claimed that an "improper influence [] motivated them to fabricate or slant their testimony a certain way." He argued, however, that the threat motivating the officers to fabricate was not recent, and "had to be on [the] mind of at least the supervisors . . . when they invoked the policy" and instructed the officers not to write personal reports. In other words, Dodd argued that "within 24 hours" of the police chase the "motive to fabricate arose." Rejecting Dodd's argument, the trial court ruled out the possibility that the officers knew that a legal action was pending when they spoke to the detective and determined the detective's testimony regarding the consistency of the officers' in-court testimonies was admissible to rebut the express or implied charge that the officers had recently fabricated their testimonies.

¶18 The State called the detective to testify on the last day of trial. The detective stated that he instructed the officers to not write narrative reports and instead, pursuant to DPS's policy, conducted separate recorded interviews with each officer. Having listened to the officers testify at trial, the detective testified that the officers' testimonies and their interview statements were not materially different. Relating to the collision itself, the detective testified that he had performed a collision reconstruction

investigation and analysis of the police chase and associated collisions. Based on his evaluation, the detective opined that the damage to the Nissan was "probably several thousand dollars . . . significant damage."

¶19 After the State rested, Dodd moved for a judgment of acquittal, but the court denied the motion. As part of its final instructions to the jury, the trial court provided a general causation instruction consistent with A.R.S. § 13–203: "Conduct is the cause of a result if, but for the conduct, the result in question would not have occurred." During the following closing arguments, Dodd argued that his conduct neither caused B.B.'s injuries nor much of the damage to the Nissan.

¶20 After the four-day trial, the jury convicted Dodd on all counts. The jury also found two aggravating factors on the second-degree murder conviction: (1) emotional and financial harm to the victim's family, and (2) the victim was at least 65 years old. The trial court sentenced Dodd to an aggregate of 67 years' imprisonment, comprised of consecutive and concurrent sentences for the respective convictions. Dodd timely appealed.

DISCUSSION

1. Denial of Motion for Substitute Counsel

¶21 Dodd first argues that the trial court violated his Sixth Amendment right to counsel by denying his motions to appoint new counsel. We review a trial court's denial of a request for new counsel for an abuse of discretion. *State v. Cromwell*, 211 Ariz. 181, 186 ¶ 27 (2005). No abuse occurred here.

¶22 An indigent criminal defendant has a right to competent counsel, but "is not entitled to counsel of choice, or to a meaningful relationship with his or her attorney." *State v. Torres*, 208 Ariz. 340, 342 ¶ 6 (2004). A complete breakdown in attorney-client communication or an irreconcilable conflict between a defendant and appointed counsel, however, violates a defendant's constitutional right to counsel. *Id.* When a defendant requests substitution of counsel, the trial court must inquire regarding the basis for the request. *Id.* at 343 ¶ 7. "The nature of the inquiry will depend upon the nature of the defendant's request." *Id.* at ¶ 8. A formal hearing may not be necessary to address general complaints about differences in strategy, but one is required when a defendant sets forth "sufficiently specific, factually based allegations" supporting his request. *Id.*

¶23 The defendant bears the burden to demonstrate that he has a genuine irreconcilable conflict with his counsel or that his communication with counsel has totally broken down. *Id.* To establish a total breakdown in communication, a defendant must prove that a severe and pervasive conflict with his attorney exists or provide evidence that he had such minimal contact with the attorney that meaningful communication was not possible. *State v. Paris-Sheldon*, 214 Ariz. 500, 505 ¶ 12 (App. 2007). If the defendant proves this, the trial court must appoint new counsel. *Torres*, 208 Ariz. at 343 ¶ 8. In evaluating a request for change of counsel, the trial court should consider whether an irreconcilable conflict exists, whether new counsel would face the same conflict, the timing of the motion, the inconvenience to witnesses, the time period already elapsed between the alleged offense and trial, the proclivity of the defendant to change counsel, and the quality of counsel. *Id.* at 344 ¶ 15.

¶24 Here, Dodd initially requested new counsel based on defense counsel's alleged lack of communication and failure to file requested motions. In his subsequent request, Dodd alleged that defense counsel believed he was guilty. Defense counsel also requested to end his representation based on Dodd's lack of assistance in trial preparation. But neither differences in strategy nor a defendant's lack of participation constitute an irreconcilable conflict. *See Cromwell*, 211 Ariz. at 186 ¶ 29 (explaining that disagreement over trial strategy does not constitute an irreconcilable conflict); *State v. Peralta*, 221 Ariz. 359, 363 ¶ 18 (App. 2009) (holding that a defendant's refusal to assist counsel in preparing for trial or insistence on unreasonable trial tactics does not "compel a change of counsel"). Likewise, defense counsel's alleged statements that he believed it unlikely that a jury would find Dodd not guilty did not warrant a change of counsel. *See State v. LaGrand*, 152 Ariz. 483, 486 (1987) (concluding that "[n]o real conflict between the [defendant] and counsel is discernible from the record," notwithstanding that counsel had allegedly informed the defendant that he would be "found guilty no matter what"). Additionally, Dodd acknowledged at the hearing that he and defense counsel had a good relationship and defense counsel explained that he would be ready to proceed to trial as scheduled. On this record, the trial court, after hearing statements from both Dodd and defense counsel and considering the other relevant factors, did not abuse its discretion by finding no irreconcilable conflict and denying Dodd's motion for new counsel. *See Paris-Sheldon*, 214 Ariz. at 505 ¶ 13 (explaining that a trial court must resolve any factual dispute that arises during a *Torres* inquiry, and a reviewing court defers "to that resolution so long as the record supports it"). Accordingly, the trial court did not err.

2. Sufficiency of the Evidence

¶25 Dodd argues next that the State presented insufficient evidence showing that his actions, rather than those of the DPS officer, caused damage to the Nissan in an amount of at least $2,000. We review a claim of insufficient evidence de novo. *State v. West*, 226 Ariz. 559, 562 ¶ 15 (2011). Sufficient evidence may be direct or circumstantial and "is such proof that reasonable persons could accept as adequate" to "support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Borquez*, 232 Ariz. 484, 487 ¶¶ 9, 11 (App. 2013). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatsoever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316 (1987). In evaluating the sufficiency of the evidence, we test the evidence "against the statutorily required elements of the offense," *State v. Pena*, 209 Ariz. 503, 505 ¶ 8 (App. 2005), and "do not reweigh the evidence to decide if [we] would reach the same conclusions as the trier of fact," *Borquez*, 232 Ariz. at 487 ¶ 9. The record here sustains Dodd's conviction.

¶26 As relevant here, a person commits criminal damage if he or she recklessly damages the property of another person in an amount of $2,000 or more. A.R.S. § 13–1602(A)(1), (B)(3). The State bears the burden of proving the amount of damages and how it calculated that amount. *State v. Brockell*, 187 Ariz. 226, 229 (App. 1996). To establish legal cause, the State had to present evidence that "but for" Dodd's conduct, the Nissan would not have been damaged. *See* A.R.S. § 13–203 (explaining that conduct is the cause of a result when the "result in question" would not have occurred "but for the conduct" at issue). To establish proximate cause, the State needed to present evidence showing "that the difference between the result intended" by Dodd and damage to the Nissan was "not so extraordinary that it would be unfair to hold" Dodd responsible for the result. *See State v. Marty*, 166 Ariz. 233, 237 (App. 1990). Under Arizona law, a proximate cause may be interrupted only when "another cause with which the defendant was in no way connected intervenes, and but for which" the injuries would not have occurred. *Id.*

¶27 Although the detective did not specify the portion of the Nissan's damages attributable to collisions in which Dodd drove into other vehicles versus the portion attributable to the collision with the DPS officer's vehicle, Dodd's illegal conduct was both the proximate and in fact cause of all damage to the Nissan. That is, but for Dodd's reckless and illegal behavior, none of the collisions would have occurred. Had Dodd not attempted to evade arrest by driving into oncoming traffic and endangering

the lives of numerous people, he would not have hit two vehicles and the DPS officer would not have struck the Nissan to prevent his further flight. Given the nature of Dodd's reckless behavior, the police officers' use of force to apprehend him was entirely foreseeable. In addition, the detective testified that based on his experience, the damage caused to the Nissan was significant and likely several thousand dollars. Therefore, the record sufficiently establishes that Dodd's actions were the legal and proximate cause of the Nissan's damages.

3. Jury Instruction

¶28 Dodd also argues that the trial court erred by failing to sua sponte instruct the jury on superseding causation. Because Dodd did not request a superseding causation instruction or object to the lack of such an instruction, we review only for fundamental error. *See* Ariz. R. Crim. P. 21.3(c) (requiring a party to object to the court's failure to give an instruction before the jury deliberates to prevent waiver of that argument); *State v. Gonzalez*, 221 Ariz. 82, 84 ¶ 7 (App. 2009) ("Because appellant did not object to the trial court's failure to instruct the jury on the offense . . . we review his claim for fundamental error only."). As discussed above, however, the DPS officer's ramming maneuver to end Dodd's flight was within the scope of risk created by Dodd's illegal conduct. *See State v. Vandever*, 211 Ariz. 206, 208 ¶ 8 (App. 2005). Because the officer's act was not unforeseeable, it did not constitute a superseding event, and the trial court therefore did not err, much less fundamentally err, by failing to sua sponte provide a superseding causation instruction.

4. Exclusion of DPS Policy

¶29 Dodd contends that the trial court erroneously excluded DPS's internal policy on pursuits from trial, thereby denying him his right to present a full and complete defense. We review evidentiary rulings for an abuse of discretion. *State v. Garza*, 216 Ariz. 56, 66 ¶ 37 (2007). No abuse of the court's discretion occurred here.

¶30 A defendant has a constitutional right to present a defense, but not the right to present "that theory in whatever manner and with whatever evidence [the defendant] chooses." *State v. Carlson*, 237 Ariz. 381, 393 ¶ 36 (2015). Instead, a defendant's right to present evidence is subject to the rules of evidence. *Id.* Relevant evidence is admissible unless it is otherwise precluded by the federal or state constitution, an applicable statute, or rule. Ariz. R. Evid. 402. Evidence is relevant if it has "any

tendency" to make a fact of consequence in determining the action "more or less probable than it would be without the evidence." Ariz. R. Evid. 401.

¶31 Here, the jury had to determine whether Dodd acted recklessly by driving directly into oncoming traffic at speeds far exceeding the posted limits. Whether pursuing police officers acted in compliance with their agency's internal policies was not "a fact of consequence" for the jury to determine. That is, as found by the trial court, Dodd's claim that he only drove dangerously and illegally because he was attempting to evade police capture provided no defense to the crimes charged. Moreover, as the State noted, Dodd did not claim, much less present evidence, that he knew of the DPS policy and somehow acted in reliance on the policy. Therefore, the trial court did not abuse its discretion by excluding the policy as irrelevant.

5. Admission of Prior Consistent Statements

¶32 Dodd argues next that the trial court erred by permitting the detective to testify that the officers involved in the chase testified consistently with their interview statements taken the day after the pursuit. He contends that the officers were motivated to fabricate their trial testimonies based on the possibility that a civil lawsuit may be filed against them, and further claims that the basis for this motive preceded their interviews with the detective. We review admissions of evidence under exceptions to the rule against hearsay for an abuse of discretion. *State v. Tucker*, 205 Ariz. 157, 165 ¶ 41 (2003).

¶33 In general, out-of-court statements offered to prove the truth of the matter asserted are inadmissible unless rooted in a hearsay exception. Ariz. R. Evid. 801(c); 802. A declarant's prior statement that is consistent with his testimony is admissible as non-hearsay, however, when offered "to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying[.]" Ariz. R. Evid. 801(d)(1)(B). To be admissible under this non-hearsay exception, the prior consistent statement "must precede the motive to fabricate." *State v. Martin*, 135 Ariz. 552, 553 (1983). "The only way to be certain that a prior consistent statement in fact controverts a charge of 'recent fabrication or improper influence or motive' is to require that the statement be made at a time when the possibility that the statement was made for the express purpose of corroborating or bolstering other testimony is minimized." *Id.* at 554. Thus, in evaluating the applicability of Arizona Rule of Evidence 801(d)(1)(B), a trial court must determine when a motive to fabricate began. *Id.*

¶34 The record reflects that L.C.'s family filed a civil lawsuit naming the individual officers as defendants approximately a year after the collision. Although the officers acknowledged that they were aware of the lawsuit, they did not testify when they learned of it. Moreover, the record reflects that DPS's internal policy requires officers who witness a critical event to submit to recorded interviews in lieu of writing narrative reports. Given these facts, no basis exists to believe that the officers knew, or even suspected, a lawsuit might be filed against them because of their conduct during the chase. Thus, the officers' failures to write personal reports does not demonstrate that they responded to an improper influence or had motive to fabricate. On this record, the trial court did not abuse its discretion by permitting the detective to rebut the charge of a motive to fabricate by testifying that the officers' testimonies were consistent with their interview statements.

CONCLUSION

¶35 For the foregoing reasons, and for reasons addressed in the accompanying published opinion, we affirm Dodd's convictions and sentences.

AMY M. WOOD • Clerk of the Court
FILED: AA