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AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

MICHAEL P. THIEME, *Appellant*.

No. 1 CA-CR 16-0767
FILED 1-11-2018

Appeal from the Superior Court in Yavapai County
No. P1300CR201300164
The Honorable Tina R. Ainley, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Jillian Francis
Counsel for Appellee

Michael P. Thieme, Prescott
Appellant

MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which
Presiding Judge James P. Beene and Judge Kent E. Cattani joined.

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HOWE, Judge:

¶1 Michael Thieme appeals his convictions and sentences for felony criminal damage to a utility, driving under the influence (“DUI”), and failing to notify after striking a highway fixture. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

1. Incident

¶2 In March 2012, Thieme’s neighbor heard a loud noise around 10 p.m. and saw that a car had crashed into an Arizona Public Service (“APS”) transformer box. The neighbor saw that the transformer box had been knocked off its pedestal, and the car was overturned. As the neighbor went to check if any passengers were injured, his wife called 9-1-1. When he approached the car, the neighbor saw Thieme appear on the other side of the car nearest the driver’s side. The neighbor asked Thieme if he had fallen asleep, and Thieme responded “yes.” The neighbor saw that Thieme’s arm was bleeding, and he asked Thieme if his family was with him. Thieme replied “no,” and his neighbor told him that he had called 9-1-1. The neighbor offered to walk Thieme home, but Thieme refused and ran home alone.

¶3 Deputies Clyde Bentley and Richard Grimes responded to the collision shortly after the 9-1-1 call. The deputies saw the overturned car with deployed airbags and the damaged transformer box. They also saw blood on the airbags and inside of the car, but they did not see anyone but the neighbor at the scene. The neighbor told the deputies that Thieme got out of the car with blood on his arm, spoke to him briefly, and then “took off running” towards his house. The deputies then drove to Thieme’s home and checked the road and nearby areas to see if anyone had collapsed or was hiding, but they did not see anyone.

¶4 When the deputies arrived at Thieme’s home, they knocked and announced but no one responded. Deputy Bentley walked around the home looking for Thieme, but found no one. While looking through a window, Deputy Bentley saw a man in boxer shorts, later identified as Thieme, standing in the dark and leaning against a wall. Deputy Bentley announced that he was from the sheriff’s office and asked Thieme to come to the door to check on his welfare. Thieme then urinated on himself and walked away towards a bathroom without saying anything. Deputy Bentley reported this to Deputy Grimes who then stepped over a “dog run,”

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a small area with a low fence that could easily be stepped over, to get a better view of the man. The deputies knocked and announced again, but no one responded. They contacted their sergeant because they were concerned about Thieme's possible injuries, and then they spoke with the fire department to learn about the possible injuries that could have occurred from the collision. Deputy Grimes received information from fire personnel that a head injury is "almost guarantee[d]" with an overturned car, and an untreated head injury could be fatal. After speaking with the fire department, the deputies contacted their sergeant again and decided to enter Thieme's home to check on his welfare.

¶5 The deputies entered through the garage door into a kitchen and announced their presence. They saw Thieme's wife and explained that they were looking for the man they had seen earlier in the window. As they were speaking, Thieme appeared and started yelling and screaming at the deputies as he approached them. Reacting to Thieme's behavior, the deputies told Thieme to go to his knees so that they could handcuff him. As Deputy Bentley spoke with Thieme's wife, Thieme yelled in English and Polish for her not to speak. During this exchange, the deputies saw that Thieme had a head injury. Deputy Bentley noticed signs of intoxication, such as bloodshot and watery eyes, belligerent behavior, loss of coordination, and an odor of alcohol. Similarly, Deputy Grimes noted that Thieme had acted erratically, had slurred speech, and had trouble putting sentences together.

¶6 Deputy Grimes read Thieme his *Miranda*¹ rights and recorded the conversation. Thieme told his wife in Polish that he had "drunk a lot of alcohol," and she replied "yes, I know" and said that he drank the "whole bottle." Thieme then said many times in Polish, "shut up" and "don't tell them anything." Thieme continued to act in a belligerent and combative manner by ridiculing the officers and attempted to turn and face Deputy Scott Blakely, who had arrived to escort Thieme out of the home to be evaluated by Captain Albert Camacho of Central Yavapai Fire District and other medical personnel. The medical personnel attempted to evaluate Thieme, but he refused medical attention. Captain Camacho smelled an odor of alcohol from Thieme. While Thieme was speaking to medical personnel, a deputy stated that Thieme's wife said that he "was already drunk when he got here." Thieme then interjected and said, "yeah, I was[.]" Thieme was then driven to the Yavapai County Sheriff's Office. Thieme continued to act belligerently towards the deputies while in the patrol car.

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

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Deputy Grimes read the administrative per se admonition to Thieme, and Thieme refused to provide a blood or breath sample.

¶7 The police called a towing company to move the car because it was too damaged to drive and its location prevented APS from repairing the transformer. Deputies Blakely and Brian Krumm were at the collision scene when a towing company up-righted the car. Deputy Krumm made a tow sheet to record the car's contents and safeguard against claims of missing items. Deputy Blakely looked in the car and saw a half-empty bottle of scotch on the front passenger side floorboard. After his arrest, Thieme was charged with felony criminal damage, DUI, possession of an open container of spirituous liquor within the compartment of a motor vehicle on a public highway, and failure to notify after striking a fixture.

¶8 Thieme moved to dismiss the indictment for prosecutorial misconduct. He claimed that the State indicted him only because he filed a civil lawsuit against Yavapai County and Deputy Grimes. He also argued that the State charged him with violating the open container law when it had no good faith basis to do so. The State moved to dismiss the open container charge and denied filing charges in retaliation. The State explained that it had waited to file charges until it had received sufficient evidence about the DUI charge and the damage estimates of the transformer box, and it had asked Deputy Grimes to gather this information. The State noted that Deputy Grimes did not gather the information, however, and had been demoted for reasons unrelated with the case. The State obtained the information only when a deputy captain realized that Deputy Grimes had not provided it. After providing the State with the additional records, the case was presented to the grand jury. The trial court denied the motion to dismiss, noting that the charging attorney had requested additional information before Thieme filed his civil lawsuit. Additionally, the trial court found that the open container issue was moot because the State had moved to dismiss the count.

¶9 Thieme moved to compel the State to disclose Deputy Grimes's personnel file and the basis of his demotion. The trial court directed the State to prepare the material for the court's in camera review. After doing so, the trial court found "nothing that qualifies as potentially exculpatory or impeachment evidence" within the file. Thieme moved to file Deputy Grimes's records under seal, which the court granted. Thieme obtained Deputy Grimes's personnel record through a public records request and moved for admission of those records. The trial court restated that nothing in Deputy Grimes's file was relevant to his credibility at trial. Thieme also moved under Arizona Rule of Criminal Procedure ("Rule")

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15.1(g) to compel disclosure of the deputies' personal cellphone records. The trial court denied Thieme's request because it "exceed[ed] the scope of proper impeachment and that the need given [did] not outweigh the officers' privacy interests."

¶10 Thieme moved to suppress evidence obtained from the entry into his home, and the testimony at the evidentiary hearing reflected the aforementioned facts. Additionally, Captain Camacho testified that rollover collisions are serious because they are violent and have a propensity to result in great bodily injury. He stated that possible injuries included heart contusions, bilateral femur fractures, massive head injuries, and internal injuries or bleeding that could be fatal. He further testified that the highest level of care is given to people in rollovers, and even if no serious injury is apparent, they are still treated as having a life-threatening injury until proved otherwise.

¶11 Deputy Bentley testified that exigent circumstances existed based on the collision, unknown injuries, blood at the scene and on Thieme, and that Thieme "ran toward [his] house." Deputy Bentley also testified that he had experienced accidents where "people were up walking around, talking, and by the time I got to the hospital they were dead." He also stated that he relied heavily on the medical personnel's opinions. The State did not present inventory search guidelines, and Thieme raised this as an issue at the conclusion of the hearing in his written closing argument. Thieme asserted that under Arizona law, evidence obtained from the car search was inadmissible because the State did not show that the inventory search fell within Yavapai County guidelines. Additionally, he argued that the State had failed to justify the search under any other legal principle.

¶12 The trial court denied Thieme's motions to suppress. The trial court found that the deputies' entry into the home was permissible under the emergency aid exception and that the inventory search of Thieme's car was lawful. The trial court noted in particular that the collision damaged a transformer box, airbags were deployed, the car was overturned, and a witness had seen an injury and blood on Thieme.

¶13 Thereafter, Thieme filed numerous motions. He moved for reconsideration regarding the inventory search, again arguing that the State did not present inventory search guidelines. The trial court, however, denied the motion. Next, Thieme moved to suppress the fruits of his arrest because no probable cause existed. The trial court found that the deputies had probable cause to arrest him for criminal damage based on the collision, his leaving the scene, and failing to notify APS about the transformer box.

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Additionally, the trial court found that once the officers entered Thieme's home and observed Thieme's signs of intoxication, they had probable cause for DUI. The trial court thus denied Thieme's motion to suppress the fruits of an illegal arrest.

¶14 Thieme also moved in limine to preclude: (1) evidence of the whiskey bottle found in his car, (2) an audio recording of his conversations with his wife in Polish in front of the deputies, and (3) testimony that he did not answer the door after the deputies knocked and announced. The trial court denied each of the motions, finding that the probative value of the evidence outweighed any prejudice, and Thieme's conversation with his wife was made in the presence of third parties and was outside the marital privilege. Thieme also moved to sever each of the three counts before trial, and the trial court denied the motion. During *voir dire* and before opening statements or any testimony, Thieme renewed his motion to sever, and the trial court denied the motion.

¶15 Thieme also moved to preclude the State from admitting evidence about the amount of damage incurred by APS and asked the trial court to "exclude all labor, material, equipment and transportation costs" from the damage calculation. The State responded that the damage amount was a jury question and that evidence of replacement costs was relevant and should not be precluded. The trial court found that the case law was clear and that the jury had broad discretion in determining the damage amount; thus, the court denied the motion.

¶16 Next, Thieme moved to determine whether the State had destroyed evidence, such as the 9-1-1 calls, conversations between deputies and dispatchers, and blood spots on the airbags. In a letter attached to the motion, the Yavapai Custodian of Records confirmed that the 9-1-1 audio recordings requested by Thieme no longer existed. At the hearing, the State confirmed that the 9-1-1 calls and conversations between the deputies and dispatch were no longer available. The prosecutor believed that the car might have been returned to Thieme or Thieme's insurance company, but was unsure, and presented no further information about the car's location. The State also argued that none of the evidence Thieme requested was exculpatory. The trial court took the matter under advisement. Thieme also filed a memorandum in support of his anticipated Rule 20 motion based on lack of *corpus delicti*. At trial, Thieme argued that insufficient *corpus delicti* existed to establish the criminal damage and DUI charges. Based on the evidence available, the trial court rejected Thieme's arguments.

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¶17 Afterwards, the State moved to preclude the result of a Motor Vehicle Division (“MVD”) hearing under A.R.S. § 28-1321(N) because Deputy Grimes did not receive a subpoena for the MVD hearing and did not appear. Without a witness, Thieme’s license suspension under A.R.S. § 28-1321(D) was not upheld. Thieme argued that the MVD hearing was relevant and A.R.S. § 28-1321(N) was unconstitutional. After oral argument, the trial court precluded the MVD hearing results based on A.R.S. § 28-1321(N) and denied Thieme’s motion to find the statute unconstitutional.

¶18 Thieme next moved in limine to preclude his wife’s statements arguing that they contained testimonial hearsay. The trial court deferred ruling on this motion until the first day of trial, when the court ruled that the State could admit Thieme’s wife’s statements to provide context for Thieme’s recorded conversation with the deputies. The court stated that if Thieme believed a statement that his wife made was being offered for the truth of the matter asserted, then he would need to raise individual objections as the statements came up. Nevertheless, Thieme did not object when several of his wife’s statements were elicited during trial. Thieme also moved to preclude the State from arguing that “such accidents do not happen in a residential neighborhood in the absence of intoxication.” The trial court ruled that it would not preclude the State from arguing that “this type of accident . . . can be an indicator of intoxication.”

¶19 At a voluntariness hearing held in February 2016, Thieme argued that the marital privilege applied to his recorded conversations because he spoke to his wife in Polish. The State countered that Thieme’s decision to communicate with his wife in the presence of the deputies showed that the communication was not private; thus, the communication was admissible. The trial court found that the communication did not fall under the marital privilege.

¶20 Twelve days before trial, Thieme provided notice for the first time that he intended to call his wife as a witness and that she would require an interpreter. The State responded that Thieme needed to expressly waive the marital privilege if his wife was going to testify, and the State requested a pretrial interview with his wife, but Thieme denied these requests. Thereafter, the State moved to preclude his wife as a witness based on Thieme’s late disclosure and the State’s inability to interview her. Thieme responded that the State waived its right to a pretrial interview of his wife by not seeking it earlier and by not providing an interpreter. The trial court considered the motions on the first day of trial, and it granted the State’s motion to preclude Thieme’s wife as a witness.

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¶21 At trial, Thieme’s neighbor and Deputy Bentley had varying accounts of what the neighbor told the deputy. The neighbor denied that he saw Thieme run after the accident, but Deputy Bentley testified that the neighbor told him that Thieme “took off running” after the accident, and Thieme did not object. Only when the State asked Deputy Bentley to clarify his statement did Thieme object on hearsay grounds. An APS employee testified that the damage caused by the collision was \$11,078.78. At the close of evidence, Thieme requested a *Willits*² instruction on the basis that the State could have preserved evidence but did not. The trial court denied Thieme’s request finding that the elements for a *Willits* instruction were not met. The trial court provided the jury with instructions that informed them that opening and closing arguments were not evidence. Thieme objected to providing the jury with a flight instruction, but the trial court found that the instruction was warranted. The jury found Thieme guilty of felony criminal damage and DUI. The trial court found Thieme guilty of failing to notify after striking a fixture. The trial court suspended Thieme’s sentence and placed him on two years’ probation. Thieme timely appealed.

DISCUSSION

1. Motion to Suppress

¶22 Thieme argues that the trial court erred by finding that the deputies entered his home under the emergency aid exception and for failing to suppress evidence from the entry. A trial court’s denial of a motion to suppress evidence is reviewed for an abuse of discretion if it involves a discretionary issue, but legal and constitutional issues are reviewed de novo. *State v. Dean*, 241 Ariz. 387, 389 ¶ 4 (App. 2017). “In reviewing a motion to suppress, we consider only the evidence presented at the suppression hearing and view the facts in the light most favorable to sustaining the trial court’s ruling.” *State v. Gonzalez*, 235 Ariz. 212, 213 ¶ 2 (App. 2014). Although a warrant is generally required for deputies to enter a home, the emergency aid exception “permits a warrantless entry into a dwelling when [deputies] reasonably believe that someone within is in need of immediate aid or assistance.” *State v. Bennett*, 237 Ariz. 356, 358 ¶ 9 (App. 2015). The deputies’ subjective intent is not relevant to whether the emergency aid exception applies because the exception “requires only an objectively reasonable basis for believing” that a person within the home

² *State v. Willits*, 96 Ariz. 184, 191 (1964) (holding that a defendant is entitled to an adverse-inference instruction when the State loses or destroys evidence that would have been useful to the defense, even if that destruction was innocent).

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needs immediate aid. *State v. Wilson*, 237 Ariz. 296, 299 ¶ 12 (2015). Based on the evidence, such as the type of collision, the presence of blood, Thieme's uncontrolled urination, and fire personnel's opinion about the possible injuries, an objectively reasonable basis existed for the deputies to enter the home without a warrant.

¶23 Thieme also argues that the evidence obtained as a result of the deputies' entry into his dog run should have been suppressed because the deputies had no reason to believe that Thieme was inside the dog run or to enter the fenced area under the emergency aid exception. Even assuming that the dog run was part of the curtilage, thereby protected by the Fourth Amendment against unlawful entry, *see State v. Olm*, 223 Ariz. 429 (App. 2010), the deputies' actions were still justified under the emergency aid exception because they had a reasonable belief that Thieme needed immediate assistance.

¶24 Additionally, Thieme contends that the trial court erred by failing to separately consider his right to privacy under the Arizona Constitution. His claim, however, does not present any analysis showing how this separate analysis should be administered. Thieme's failure to provide support for his assertion waives this claim. *State v. Dean*, 206 Ariz. 158, 161 n.1 ¶ 8 (2003); *see also State v. Bolton*, 182 Ariz. 290, 298 (1995) (insufficient arguments presented for appellate review are considered waived).

¶25 Next, Thieme argues that the trial court erred by finding that the passage of time is irrelevant to the emergency aid exception. The trial court, however, did not make that finding, and it simply dismissed Thieme's claim that if the incident was a true emergency, then the deputies would have acted more quickly. The trial court found that the entry was reasonable under the emergency aid exception because fire personnel stated that individuals in a rollover collision are treated as if they have a life-threatening injury until proved otherwise. Similarly, Thieme argues that the trial court erred by failing to consider when the emergency ended. The emergency in this case could only be extinguished once Thieme was evaluated by medical personnel. As such, the trial court did not err by finding that the emergency had not ended when the deputies saw Thieme in his home.

¶26 The trial court did not abuse its discretion by finding that the emergency aid exception applied in this case. Therefore, the deputies' entry into Thieme's home and dog run were permitted, and the trial court

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appropriately denied Thieme's motion to suppress evidence obtained by the entries.

2. Evidence Found in Thieme's Car

¶27 Thieme argues that the trial court erred by not suppressing the fruits of the search and seizure of his car. "There is no search within the meaning of the Fourth Amendment where the objects seized are within the plain view of a [deputy] who has the right to be in the position to view the objects." *State v. Cobb*, 115 Ariz. 484, 488 (1977). Because deputies have not conducted a "real search" if an item is observed in plain view, it "cannot be unreasonable or unconstitutional to seize the item in plain view." *Id.* Here, Deputy Blakely was lawfully present at the collision scene and, relying on A.R.S. § 28-872(C)(3), had Thieme's car towed. When Thieme's car was up-righted, a deputy found a bottle of alcohol on the passenger side floorboard. Because the bottle was in plain view and no search occurred, Deputy Bentley lawfully seized the evidence. Thus, the trial court did not abuse its discretion by denying Thieme's motion to suppress evidence found in his car.

3. Probable Cause

¶28 Thieme contends that the trial court erred by failing to suppress the fruits of his illegal arrest. Whether probable cause existed at the time of arrest is reviewed de novo. *State v. Snyder*, 240 Ariz. 551, 555 ¶ 9 (App. 2016). To make a warrantless arrest, a deputy must have probable cause to believe that a crime has been committed and that the person to be arrested committed the crime. *State v. Keener*, 206 Ariz. 29, 32 ¶ 15 (App. 2003). Here, the deputies had probable cause to arrest Thieme for felony criminal damage before entering his home. *See* A.R.S. § 13-1602(B)(2). The deputies saw an overturned car and a damaged transformer box, and Thieme's neighbor identified him as the driver. Therefore, the deputies had probable cause to believe Thieme recklessly damaged a "property of a utility." *See id.* After entering the home, the deputies also had probable cause to arrest for: (1) DUI, based on Thieme's signs of intoxication; and (2) failure to notify the owner after striking a fixture, based on Thieme's departure from the scene and attempt to hide in his home. Thus, the trial court did not err by finding that Thieme was lawfully arrested.

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4. *Brady* Evidence

¶29 Thieme claims that the trial court erred by failing to order the State to disclose *Brady*³ evidence in Deputy Grimes's employment file. He also requests this Court to compare trial exhibits 105-07 with the attached exhibits to record on appeal item 215 to determine if they should have been allowed at trial as impeachment evidence. A trial court's ruling on an alleged *Brady* violation is reviewed for an abuse of discretion. *See State v. Arvallo*, 232 Ariz. 200, 206 ¶ 36 (App. 2013). A *Brady* violation occurs when the prosecutor withholds evidence that is material to a defendant's guilt or punishment. *Id.* "To warrant a new trial, impeachment evidence must substantially undermine[] testimony that was of critical significance at trial." *Id.* This Court has reviewed the sealed employment file for Deputy Grimes and agrees with the trial court that no impeachment evidence is contained within the file.

¶30 As for Thieme's request that this Court review the exhibits, he has failed to explain their relevancy or impeachment value, has not provided supporting authority for their admission, and has not explained how the trial court abused its discretion by finding the documents inadmissible as impeachment evidence. Thus, his argument is waived. *See Ariz. R. Crim. P. 31.13(c)(1)(vi)*; *see also Bolton*, 182 Ariz. at 298.

5. Deputies' Personal Cellphone Records

¶31 Thieme next argues that the trial court abused its discretion by refusing to order disclosure of the deputies' personal cellphone records. He asserts that they were necessary to investigate his defenses to the charges and for impeachment purposes. The trial court has discretion to determine whether a criminal defendant is entitled to discovery of certain evidence. *State v. Tyler*, 149 Ariz. 312, 314 (App. 1986). A trial court may order disclosure of information not otherwise required to be disclosed if the defendant shows a substantial need for the information, and the defendant cannot obtain the substantial equivalent by other means without undue hardship. Ariz. R. Crim. P. 15.1(g). Thieme has not demonstrated a substantial need for the cellphone records. He has not shown that he was unable to obtain the information sought through other means, such as

³ *Brady v. Maryland*, 373 U.S. 83 (1963).

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witness interviews.⁴ As such, the trial court did not abuse its discretion by denying Thieme's request for the cellphone records.

6. Motions in Limine to Suppress Evidence

¶32 Thieme claims that the trial court abused its discretion by denying his motions in limine to preclude the whiskey bottle, recorded conversations, and his failure to answer the door. A trial court's ruling on a motion in limine is reviewed for an abuse of discretion. *State v. Gamez*, 227 Ariz. 445, 449 ¶ 25 (App. 2011). Generally, relevant evidence is admissible, but a trial court may exclude relevant evidence if it is unfairly prejudicial. Ariz. R. Evid. 401–403. Evidence that is relevant and material will generally be harmful to the opponent; however, not all harmful evidence is unfairly prejudicial to warrant its exclusion under Arizona Rule of Evidence 403. *State v. Jean*, 239 Ariz. 495, 498–99 ¶ 9 (App. 2016). Thieme argues that the whiskey bottle was unfairly prejudicial because no evidence showed that he had consumed it, but contrary to his argument, that issue was for the jury to decide. *See State v. Fimbres*, 222 Ariz. 293, 297 ¶ 4 (App. 2009). Thus, the trial court did not abuse its discretion by allowing the whiskey bottle into evidence.

¶33 Thieme also contends that the recorded conversation should have been excluded under 18 U.S.C. § 2515 because the deputies were not parties to his conversation with his wife. To have oral communications protected under the statute, the defendant must have a reasonable expectation of privacy in the conversation. *See* 18 U.S.C. § 2510(2); *State v. Hauss*, 142 Ariz. 159, 164 (App. 1984). Here, Thieme made statements in the deputies' presence when he communicated to his wife, and he did so voluntarily and after receiving his *Miranda* warnings. Citing *State v. Archibeque*, 223 Ariz. 231, 236 ¶¶ 15–17 (App. 2009), Thieme argues that because he spoke to his wife in Polish, he showed a clear intent to keep their communications privileged. In *Archibeque*, this Court concluded that the clergy-penitent privilege was not waived by the presence of a third party if the communicant believed the communication would remain private and

⁴ Relying on *Lunney v. State*, 1 CA-CV 16-0457, 2017 WL 6049445, at *1 ¶ 1, Thieme argues that a public employee's private cellphone records may become subject to disclosure in a public records request if the cellphone was used for a public purpose. In *Lunney*, however, the requestors made public records requests under Arizona's Public Records Law, A.R.S. § 39–121. *Id.* ¶ 2–3. In contrast, Thieme requested personal cellphone records through Rule 15.1(g), and thus, the trial court appropriately applied the standard under Rule 15.1(g) rather than A.R.S. § 39–121.

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such belief was reasonable. *Id.* ¶ 16. Here, although Thieme may have believed his communication would remain private, his belief was unreasonable. The facts show that he had just been read his *Miranda* warnings and knew that anything he said could be used against him in a criminal case. Furthermore, the use of cameras in law enforcement has become commonplace, and Thieme had no reasonable expectation to believe that his statements would not be recorded for later translation. Therefore, the trial court did not abuse its discretion by allowing the recorded conversation into evidence.

¶34 Next, Thieme claims that the trial court erred by not precluding from evidence the fact that he did not answer the door. Again, Thieme's failure to answer the door was relevant evidence and not unfairly prejudicial. *See* Ariz. R. Evid. 401–403. Thieme asserts that he had no duty to answer the door because the deputies did not have a warrant. He was free to make this argument to the jury and let it weigh the relevant evidence. As such, the trial court did not abuse its discretion.

7. Willits Instruction

¶35 Thieme argues that the State destroyed evidence, including 9-1-1 calls, conversations between deputies and dispatch, and blood evidence. Thieme, however, does not attempt to explain how the trial court erred, provide any argument, or address any of the requirements for a *Willits* instruction. Moreover, he has only incorporated arguments at trial by reference in his appellate brief. Therefore, this claim is waived. *See State v. Barraza*, 209 Ariz. 441, 447 ¶ 20 (App. 2005).

8. Preclusion of Wife as a Witness

¶36 Thieme contends that the trial court abused its discretion when it precluded his wife as his witness based on his untimely disclosure of her testimony and refusal to allow the State to conduct a pretrial interview. A trial court's sanction for an untimely disclosure is reviewed for an abuse of discretion. *State v. Ramos*, 239 Ariz. 501, 504 ¶ 7 (App. 2016). Rule 15.2 provides that the names of all persons that a defendant intends to call as witnesses at trial must be disclosed no later than 40 days after arraignment or within 10 days after the prosecutor's disclosure pursuant to Rule 15.1(b), whichever occurs first. Ariz. R. Crim. P. 15.2(c)(1), (d)(1). Rule 15.7 allows the trial court to impose sanctions for discovery violations, including "[p]recluding or limiting the calling of a witness . . . in support of or in opposition to a charge or defense." Ariz. R. Crim. P. 15.7(a)(1). Before precluding a witness under Rule 15.7, however, the trial court must

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consider the following factors: “(1) how vital the precluded witness is to the proponent’s case; (2) whether the witness’s testimony will surprise or prejudice the opposing party; (3) whether bad faith or willfulness motivated the discovery violation; and (4) any other relevant circumstances.” *State v. Naranjo*, 234 Ariz. 233, 242 ¶ 30 (2014).

¶37 Here, Thieme did not suggest at trial that his wife was a vital or material witness to his case, and the record does not contain an offer of proof concerning her proposed testimony. Although the State did list Thieme’s wife as a potential witness, the record reflects that no one, including Thieme, intended to call her as a witness. Therefore, the State was “surprised” when it first received notice 12 days before trial. As such, the trial court did not abuse its discretion by precluding Thieme’s wife from testifying as a sanction for his late disclosure and his refusal to permit the State to conduct an interview.

9. Wife’s Statements

¶38 Thieme argues that the trial court abused its discretion by allowing the deputies to testify to his wife’s hearsay statements while not allowing Thieme to do the same. A trial court’s evidentiary rulings are reviewed for an abuse of discretion. *State v. Steinle*, 239 Ariz. 415, 417 ¶ 6 (2016). A party “invites prejudicial testimony by being the first party to elicit the testimony.” *State v. Lucero*, 223 Ariz. 129, 136 ¶ 20 (App. 2009). The invited error doctrine precludes a party who initiated an error from profiting from the error on appeal. *Id.* at 135 ¶ 17. When defense counsel asks a witness a question and the “answer is clearly responsive to the question asked . . . it falls within the ‘invited error’ rule, and defendant may not be heard to object, when the answer is unfavorable.” *State v. Maggard*, 104 Ariz. 462, 465 (1969). At trial, Thieme’s counsel asked Deputy Bentley on cross-examination what made him think this was a DUI investigation, and Deputy Bentley responded that Thieme’s wife had said he had been drinking. Because this testimony was elicited on cross-examination, Thieme invited any error pertaining to this evidence and cannot challenge its admission. See *State v. Lawrence*, 123 Ariz. 301, 304 (1979).

¶39 Thieme’s second argument is that he should have been allowed to admit his wife’s other statements under the rule of completeness because the State was able to introduce some statements for context. The rule of completeness does not always require the admission of the entire statement, and it only requires the admission of those portions of the statement that are “necessary to qualify, explain or place into context the portion already introduced.” *State v. Prasertphong*, 210 Ariz. 496, 499 ¶ 15

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(2005). Here, his wife's introduced statements were not hearsay because they were not used to prove the truth of the matter asserted and were instead used for context for Thieme's own recorded statements. Thieme argues that he should have been able to introduce his wife's statements to show that he had been drinking after he came home. That action would result in the admission of exculpatory hearsay statements rather than provide any further context for the portion already introduced.

¶40 Additionally, Thieme argued that his wife's interview should have been admitted under Arizona Rule of Evidence 106. Because his wife was a precluded witness, the admission of her interview would have essentially allowed his wife to testify without cross-examination, thereby defeating the rule's purpose of fairness. Accordingly, the trial court did not abuse its discretion in allowing portions of Thieme's wife's interview for context and excluding other portions that would have been used as exculpatory hearsay.

10. Motion to Sever

¶41 Thieme claims that the trial court erred by denying his motion to sever the charges, which prevented him from testifying on certain charges but not on others. He also argues that trying the charges together confused the jury between the applicable mental states for DUI and criminal damage. A trial court's ruling on a motion to sever offenses is reviewed for an abuse of discretion. *State v. Prince*, 204 Ariz. 156, 159 ¶ 13 (2003). A motion to sever charges made and renewed before commencement of trial but not renewed during trial or at the close of evidence is waived. *State v. Flythe*, 219 Ariz. 117, 120 ¶ 10 (App. 2008). Here, Thieme renewed his motion to sever on the day set for trial, but he did so before the presentation of any opening statements or evidence. He did not renew his motion during trial or at the close of evidence. Thus, he has waived this issue on appeal.

11. Criminal Damage Calculation

¶42 Thieme contends that the trial court erred by refusing to apply the rule of lenity to the issue of damages and by leaving the jury without any instruction about how to calculate damages. This Court reviews the trial court's application of the law de novo. *State v. Lucas*, 199 Ariz. 366, 368 ¶ 6 (App. 2001). A trial court's refusal to give a jury instruction, however, is reviewed for an abuse of discretion. *State v. Anderson*, 210 Ariz. 327, 343 ¶ 60 (2005). Here, Thieme committed criminal damage under A.R.S. § 13-1602(A)(3), and subsection (B) of the statute provides the level of

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punishment based on the dollar amount of the damage. A.R.S. § 13-1602(B). The statute does not provide guidance on how to calculate damages, except in the case of damages sustained from graffiti. A.R.S. § 13-1602(A)(5), (C). Thus, the statute is ambiguous and the issue of how to calculate damage amounts on charges other than graffiti cannot be determined by the statute's plain language. In this case, the Court must turn to other canons of statutory construction to determine its meaning. *State v. Barnett*, 209 Ariz. 352, 355 ¶ 12 (App. 2004). "Statutes should be construed sensibly to avoid reaching an absurd conclusion." *State ex rel. Montgomery v. Harris*, 237 Ariz. 98, 101 ¶ 13 (2014). In *State v. Brockell*, 187 Ariz. 226, 227-28 (App. 1996), this Court acknowledged that A.R.S. § 13-1602 does not provide guidance for calculating damages, but the Court determined that no particular method of calculation is required under the statute. *Id.* at 228. Rather, the damage amount "is determined by applying a rule of reasonableness to the particular fact situation presented." *Id.*

¶43 Thieme argues that the Court should apply the principle of statutory construction where the express mention of one thing implies the exclusion of others, thereby finding that because the legislature included costs for labor, materials, and equipment for graffiti damage, then these costs should not be included in other cases. That principle, however, would lead to an absurd conclusion because exclusion of labor, material, and equipment costs here would leave no remaining cost to apportion to the criminal damage amount. Accordingly, the trial court did not err by rejecting Thieme's interpretation of the statute. Additionally, Thieme's claim that the rule of lenity should have been applied is not persuasive. The rule of lenity "is a construction principle of last resort." *State v. Bon*, 236 Ariz. 249, 253 ¶ 13 (App. 2014). In light of case law interpreting the damage amount to be a question for the jury, the trial court did not err by refusing to apply the rule of lenity. Accordingly, the trial court acted appropriately in not instructing the jury whether costs for labor and equipment, as well as depreciation, should be included in the calculation.

12. Flight Instruction

¶44 Thieme claims that the trial court erred by providing a flight instruction because he was not required to stay at the scene of the collision. This Court reviews a trial court's decision to give a flight instruction for an abuse of discretion. *State v. Parker*, 231 Ariz. 391, 403 ¶ 44 (2013). "The trial court may give a flight instruction if the state presents evidence from which jurors may infer consciousness of guilt for the crime charged." *Id.* Here, the evidence shows that Thieme's car hit the transformer box, Thieme was intoxicated, and his neighbor testified that Thieme got out of the car and

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went home, even though he knew 9-1-1 had been called. Therefore, the flight instruction was appropriate, and the trial court did not abuse its discretion.

13. Witness's Prior Inconsistent Statement

¶45 Thieme contends that the trial court erred by allowing the State to elicit the neighbor's prior inconsistent statement that Thieme "ran" from the scene of the collision. Evidentiary rulings are reviewed for an abuse of discretion. *State v. Ellison*, 213 Ariz. 116, 129 ¶ 42 (2006). An out-of-court statement offered to prove the truth of the matter asserted is "hearsay," and hearsay is generally inadmissible. Ariz. R. Evid. 801(c), 802. Under Arizona Rule of Evidence 801(d)(1)(A), however, a statement is not hearsay if the declarant testifies at trial, is subject to cross-examination, and the statement is inconsistent with prior testimony. Here, the neighbor testified at trial, was available for cross-examination, was questioned whether Thieme walked or ran from the scene, and Deputy Bentley proffered out-of-court statements that were inconsistent with the neighbor's trial testimony. Thieme relies on *State v. Cruz*, 128 Ariz. 538 (1981) to argue that Deputy Bentley's impeaching statements should have been precluded. The Arizona supreme court, however, recognizes that prior inconsistent statements may be admitted for both impeachment and substantive evidence of guilt. *State v. Hernandez*, 232 Ariz. 313, 323 ¶ 47 (2013). Thus, the trial court did not abuse its discretion by admitting the neighbor's prior inconsistent statement.

14. Prosecutorial Misconduct

¶46 Thieme claims that the trial court erred by permitting the State to argue in closing argument that collisions such as Thieme's do not happen in the absence of intoxication. Thieme did not object to the State's closing argument, and thus, review is for fundamental error only. *State v. Rutledge*, 205 Ariz. 7, 13 ¶ 30 (2003). To prevail on a claim of prosecutorial misconduct, a defendant must show that "(1) misconduct is indeed present; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial." *State v. Moody*, 208 Ariz. 424, 459 ¶ 145 (2004). Appellant has the burden of proving both fundamental error and prejudice. *Henderson*, 210 Ariz. at 568 ¶¶ 22-24, 26. Here, the State's arguments were "consistent with the evidence" at trial and "fell within the wide latitude permitted [to] prosecutors in arguing to the jury." See *State v. Goudeau*, 239 Ariz. 421, 466 ¶ 197 (2016). Accordingly, this Court finds no fundamental error.

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15. Access to Whiskey Bottle

¶47 Thieme argues that the trial court erred by allowing the jurors access to a whiskey bottle admitted into evidence. He relies on *State v. Meehan*, 139 Ariz. 20 (App. 1983), where this Court found no abuse of discretion in granting a motion for new trial. In *Meehan*, the relevant issue was the outside appearance of a coat, but the jury inspected the inside of the coat during deliberations and discovered marijuana roaches and discussed them briefly. *Id.* at 22. The case here is distinguishable because evidence of the whiskey bottle was relevant, and the jurors were entitled to inspect the bottle if they wished. Accordingly, Thieme's argument fails.

16. Corpus Delicti Rule

¶48 Thieme contends that the trial court erred by not granting his Rule 20 motion because insufficient evidence existed to establish *corpus delicti*. Although this Court reviews a trial court's decision on a Rule 20 motion de novo, *State v. West*, 226 Ariz. 559, 562 ¶ 15 (2011), sufficiency of the evidence for *corpus delicti* is reviewed for an abuse of discretion, *State v. Chappell*, 225 Ariz. 229, 234 ¶ 8 (2010). "To establish corpus delicti there must be some proof of a certain result, and that some one is criminally responsible therefor." *State v. Gill*, 234 Ariz. 186, 188 ¶ 5 (App. 2014). This common-law rule prevents a defendant from being convicted based on an uncorroborated confession in a DUI case and requires that the State show independent evidence, beyond the defendant's own pretrial statements, that the DUI occurred. *Id.* "[C]orpus delicti can be established by circumstantial evidence alone . . . or through independent corroboration of the defendant's statements." *Id.*

¶49 Here, sufficient circumstantial and independent evidence existed to corroborate Thieme's statement acknowledging that he was driving while intoxicated and to establish that he committed the DUI and criminal damage crimes. Thieme damaged a transformer box with his car and was the only person observed getting out of the car. After learning that 9-1-1 had been called, Thieme left the scene with physical injuries from the collision and was observed acting belligerent and intoxicated. Thieme's wife stated that he had been drinking, and a half bottle of whiskey was found on his car's floorboard. Thus, the evidence corroborated Thieme's admission, and the trial court did not abuse its discretion by finding that *corpus delicti* had been established.

¶50 Thieme also argues that the trial court erred by not adopting the trustworthiness doctrine. Thieme cites no authority or case law for his

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trustworthiness doctrine argument, and he only refers this Court to his pretrial motion on this issue. Therefore, Thieme has abandoned this issue on appeal. *See Barraza*, 209 Ariz. at 447 ¶ 20.

17. Sufficiency of Evidence to Support Convictions

¶51 Thieme claims that the evidence was insufficient to support his convictions. Sufficiency of the evidence is reviewed de novo. *West*, 226 Ariz. at 562 ¶ 15. “Substantial evidence is that which reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt.” *State v. Davolt*, 207 Ariz. 191, 212 (2004). Pertaining to the criminal damage conviction, the State presented evidence that Thieme’s car collided with a transformer box. Furthermore, the State showed that the damage amount was \$11,078.78 through the testimony of an APS employee. Thieme was free to give his own argument to the jury about the damage amount calculation. As such, sufficient evidence supports the conviction for criminal damage above \$5,000.

¶52 Additionally, Thieme claims that the evidence was insufficient to support his DUI conviction because the State did not present evidence that he committed a voluntary act or was intoxicated at the time of the offense. The evidence detailed above, however, is more than adequate to show that he was driving a car involved in a collision and that he was intoxicated.

¶53 Next, Thieme argues that insufficient evidence existed to support his conviction for failing to notify the owner after striking a fixture. The statute provides that a “driver of a vehicle involved in an accident resulting only in damage to fixtures or other property legally on or adjacent to a highway shall . . . [t]ake reasonable steps to locate and notify the owner or person in charge of the property.” A.R.S. § 28-665(A)(1). Thieme claims that the State failed to prove that he did not take reasonable steps to locate and notify and that the transformer box was legally on or adjacent to a highway. Here, the evidence shows that Thieme attempted to conceal his involvement in the collision. When he learned that 9-1-1 had been called, Thieme left the scene, had his lights off in his house, and did not respond to the deputies when they knocked and announced. Accordingly, Thieme did not take reasonable steps to notify APS about the collision. Additionally, the trial court found that the transformer box was a fixture and that the “legally on or adjacent to” language applied only to “other property.” Thus, sufficient evidence existed to support his criminal damage conviction under A.R.S. § 28-665.

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18. Constitutionality of A.R.S. § 28-665

¶54 Thieme argues that A.R.S. § 28-665 is unconstitutionally vague because it requires a person to take “reasonable steps” without giving a definition for reasonable steps. Statutes are presumed to be constitutional, and the party challenging the statute’s constitutionality bears the burden of persuasion to the contrary. *State v. Russo*, 219 Ariz. 223, 225 ¶ 4 (App. 2008). “The presumption in favor of the constitutionality of a statute requires the challenging party to establish beyond a reasonable doubt that the statute violates some provision of the constitution.” *Bird v. State*, 184 Ariz. 198, 203 (App. 1995). Here, Thieme provided no case law or authority to support his vagueness challenge; thus, he has not overcome his burden of establishing beyond a reasonable doubt that the statute violates the constitution and has waived his challenge to the statute.

¶55 Thieme also claims that the trial court erred by refusing to allow him to argue necessity as a defense to A.R.S. § 28-665, and he asks this Court to reverse *State v. Fell*, 203 Ariz. 186 (App. 2002) (concluding that the necessity defense does not apply to criminal offenses outside of Title 13). Because Thieme provides no argument or authority to persuade this Court to reverse *Fell*, we reject his invitation to do so. Thus, he has waived this claim.

19. Preclusion of Implied Consent Hearing

¶56 Thieme contends that the trial court erred by precluding evidence of the MVD hearing and also claims that A.R.S. § 28-1321(N) is unconstitutional. A trial court’s evidentiary rulings are reviewed for an abuse of discretion. *Steinle*, 239 Ariz. at 417 ¶ 6. A trial court’s application of a statute is reviewed de novo. *State v. Carrasco*, 201 Ariz. 220, 222 ¶ 4 (App. 2001). Here, Thieme argues that A.R.S. § 28-1321(N) is unconstitutional, violates separation of powers, and is overbroad, but he does not provide any argument or authority to support his claims. As such, his claims are waived. See *Bolton*, 182 Ariz. at 298.

¶57 Thieme additionally argues that the State’s use of his implied consent refusal violated the Fourth and Fifth Amendments and Article 2, section 10 of the Arizona Constitution, but he offers no supporting argument or authority for this assertion. Under A.R.S. § 28-1388(D), if a person under arrest refuses to submit to a test under A.R.S. § 28-1321, evidence of the refusal is admissible in any civil or criminal action or other proceeding. Thus, the trial court did not abuse its discretion by admitting the fact that Thieme refused to submit to alcohol testing.

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¶58 Next, Thieme claims that by allowing the State to present evidence of the implied consent refusal without allowing evidence of the MVD hearing, the trial court violated his due process rights. Although due process guarantees criminal defendants a right to present a defense, that right does not extend to presenting irrelevant evidence. *State v. Paxson*, 203 Ariz. 38, 41 ¶ 13 (App. 2002). Here, the MVD hearing and its outcome were irrelevant. The scope of the MVD hearing is provided under A.R.S. § 28-1321(K), and its purpose is to show whether an officer had reasonable grounds to believe a person was driving under the influence, was arrested, and knowingly refused to submit to alcohol testing. *Sherrill v. Dep't of Transp.*, 165 Ariz. 495, 497-98 (1990) (interpreting prior version of the statute). The result of the MVD hearing was irrelevant because the purpose of Thieme's jury trial differed in that the purpose was to determine whether the jury found beyond a reasonable doubt that Thieme committed a DUI. Thus, no error occurred.

20. Vindictive Prosecution and Judicial Bias

¶59 Thieme argues that the trial court erred when it found no presumption of vindictiveness. This Court reviews a trial court's ruling on a motion to dismiss for vindictive prosecution for an abuse of discretion. *State v. Mieg*, 225 Ariz. 445, 447 ¶ 9 (App. 2010). A defendant can demonstrate prosecutorial vindictiveness by showing actual vindictiveness or circumstances that establish a "realistic likelihood of vindictiveness." *Id.* at 447-48 ¶ 11.

¶60 Here, Thieme does not argue actual vindictiveness but only that the sequence of events established a presumption of vindictiveness. The collision occurred in March 2012, and the charging attorney requested further investigation shortly after. In September 2012, Thieme filed a civil lawsuit against Yavapai County and Deputy Grimes. Although the State did not decide to charge Thieme immediately, the reason for the delay was to make sure that it had all necessary facts for the charging decision. "There is good reason to be cautious before adopting [a] presumption of prosecutorial vindictiveness in a pretrial setting. . . . [T]he prosecutor may uncover additional information that suggests a basis for further prosecution . . . [or] the prosecutor's assessment of the proper extent of prosecution may not have crystallized." *United States v. Goodwin*, 457 U.S. 368, 381 (1982). Considering the sequence of events and the State's reasoning for its actions, Thieme's motion to dismiss for vindictiveness was properly denied.

¶61 Thieme also claims that a previous judge on his case was biased against him, and he refers this Court to his motion for change of

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judge for cause. Thieme's reference to his trial court motion is insufficient to support an argument on appeal, and he has therefore abandoned this issue. *See Barraza*, 209 Ariz. at 447 ¶ 20.

CONCLUSION

¶62 For the foregoing reasons, we affirm.



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