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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

STATE OF ARIZONA, Appellee, v. ANDRES FERNANDO BUELNA, Appellant.	2 CA-CR 2013-0018 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20112701001

Honorable Scott Rash, Judge

AFFIRMED IN PART; VACATED IN PART

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M I L L E R, Judge.

¶1 Andres Buelna was convicted after a jury trial of second-degree murder for the shooting death of B.C. during a road-rage incident. On appeal, Buelna argues the trial court erred in precluding evidence of cocaine metabolites in B.C.'s system and in precluding testimony from two expert witnesses.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to upholding the jury's verdict." *State v. King*, 226 Ariz. 253, ¶ 2, 245 P.3d 938, 940 (App. 2011). On the afternoon of August 1, 2011, B.C. drove his Mustang northbound on Campbell Avenue, weaving in and out of traffic and cutting off one driver. Buelna, driving a truck, attempted to change lanes and nearly hit the Mustang. Both vehicles continued driving up Campbell in the left lane, and B.C. illegally passed Buelna using the center, universal-turn lane. Near Fort Lowell Road, both vehicles turned left into a parking lot with B.C. in the lead. B.C. parked his Mustang diagonally across multiple parking spaces while Buelna stopped his truck in the driveway five to fifteen feet behind B.C. B.C. got out of the car and walked quickly toward the door of Buelna's truck with his hands out to the side, yelling, "What the f---?" B.C. got within three to six feet of the driver's side of Buelna's truck. Buelna asked, "What, what," displayed a gun he pulled out from between his seat and console, and fired three times in quick succession. Buelna testified the first shot was a warning, and the next two he fired with his eyes closed. B.C. was struck in the chest and back. He died at the hospital. Buelna drove away, but police found him in a motel room

one day later. He confessed that he had shot at B.C. and told police where to find the gun and the truck.

¶3 Buelna asserted justification defenses at trial, specifically the use of force in prevention of an aggravated assault pursuant to A.R.S. § 13-411 and the use of force in defense of an occupied vehicle under A.R.S. § 13-418. Buelna was sentenced to a substantially mitigated term of eleven years. This appeal followed.

Discussion

Was the Cocaine Evidence Relevant?

¶4 Buelna claims the trial court erred in precluding toxicology reports showing that B.C. had metabolites of cocaine in his system when he died, as well as testimony from Dr. Ed French, a pharmacologist, who would have testified that a person with B.C.'s level of cocaine metabolites would have used cocaine four to twenty-four hours previously, and would be anxious, irritable, and impulsive.[1] The trial court precluded the evidence as irrelevant and prejudicial.

¶5 We review the court's determination on the admissibility of evidence, including expert testimony, for an abuse of discretion. *State v. Amaya-Ruiz*, 166 Ariz. 152, 169, 800 P.2d 1260, 1277 (1990); *see also State v. Wright*, 214 Ariz. 540, ¶ 5, 155 P.3d 1064, 1066 (App. 2007). A court may abuse its discretion if it commits an error of

[1]The state did not object to Dr. French's qualification as an expert witness pursuant to Rule 702, Ariz. R. Evid.

law in reaching a discretionary conclusion. *State v. Fields*, 196 Ariz. 580, ¶¶ 4, 10, 2 P.3d 670, 672, 674 (App. 1999) (trial court abused discretion in granting discovery requests).

¶6 Evidence is relevant if it has any tendency to make a fact that is of consequence in the action more or less probable. Ariz. R. Evid. 401; *see also State v. Fulminante*, 193 Ariz. 485, ¶ 57, 975 P.2d 75, 92 (1999). "This standard of relevance is not particularly high." *State v. Oliver*, 158 Ariz. 22, 28, 760 P.2d 1071, 1077 (1988). A trial court may exclude relevant evidence, however, if its probative value is "substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, . . . or needlessly presenting cumulative evidence." Ariz. R. Evid. 403.

¶7 Before trial, the state moved to preclude the laboratory results and expert testimony related to cocaine metabolites. The trial court granted the motion, concluding the evidence was not relevant because it was generalized testimony about how a person might act and did "not provide the jury insight into how [B.C.] has acted in similar situations in the past." The court also found the use of expert testimony would be unfairly prejudicial because it would provide "undue weight and credibility to [Buelna's] version of events." Finally, the court found the expert testimony would be cumulative to "what [Buelna] and other witnesses are capable of describing regarding [B.C.'s] aggressive actions."

¶8 As he did before the trial court, Buelna relies on *State v. Plew*, 155 Ariz. 44, 745 P.2d 102 (1987), as well as several out-of-state cases, for the proposition that expert witness testimony regarding behavior-altering drugs is relevant to a defendant's

self-defense claim. In *Plew*, the defendant, a cocaine addict, was charged with attempted murder of his drug dealer. 155 Ariz. at 44-45, 745 P.2d at 102-03. Plew proffered expert testimony to show why the victim was the aggressor and how the victim could have continued to struggle after being shot. *Id*. at 46, 745 P.2d at 104. The court applied four criteria for admissibility of behavioral science expert testimony: (1) a qualified expert; (2) a proper subject; (3) conformity to a generally accepted explanatory theory; and, (4) probative value compared to prejudicial effect. *Id*., *citing State v. Chapple*, 135 Ariz. 281, 291, 660 P.2d 1208, 1218 (1983) (trial court erred in precluding expert psychologist testimony regarding eyewitness identification). The court relied, in part, on Rule 702, Ariz. R. Evid., which changed in significant ways before the trial of this case. *See* Ariz. Sup. Ct. Order R-10-0035 at 34-35 (Sept. 8, 2011). We first address whether the *Chapple* and *Plew* holdings have been affected by the new rule.

¶9 The current Rule 702, Ariz. R. Evid., adopts Rule 702, Fed. R. Evid., and states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

¶10 New Rule 702, Ariz. R. Evid., marks a notable departure from Arizona's former test for the admissibility of expert testimony detailed in *Logerquist v. McVey*, 196 Ariz. 470, 1 P.3d 113 (2000). *Logerquist* established a low threshold for the admissibility of scientific evidence based on the "general acceptance" test from *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Logerquist*, 196 Ariz. 470, ¶¶ 30, 61, 1 P.3d at 123, 133. *Frye* was rejected by the federal courts and the subsequent amendment to Rule 702, Fed. R. Evid. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587-89 (1993); Fed. R. Evid. 702 2000 advisory committee note. The initial *Chapple* criteria, however, continue in the new Rule 702, Ariz. R. Evid. The final factor, balancing probative value with prejudicial effect, continues through Rule 403, Ariz. R. Evid., which, as noted above, provides that relevant evidence may be excluded if its probative value is substantially outweighed by a danger of unfair prejudice. In the context of this case, the *Chapple* and *Plew* holdings remain intact after the *Daubert* rule was adopted in Arizona, albeit through a combination of rules and with a greater emphasis on reliability.

¶11 The trial court distinguished *Plew* on the basis that in that case the defendant knew the victim and knew how he acted when he was high; further, the victim and defendant were the only witnesses and they told different stories. *See Plew*, 155 Ariz. at 44-45, 745 P.2d at 102-03. Here, the court noted that Buelna and B.C. did not know each other before the incident, B.C. was not testifying so only one participant's version of events

would be submitted to the jury, and several independent witnesses observed the altercation. In both cases, however, the principal issue is whether the shooting was justified self-defense. The relevance of testimony about B.C.'s conduct is obvious. *See id.* at 46, 745 P.2d at 104. Our supreme court also concluded that "the effect of cocaine intoxication on mental and physical behavior is a proper subject for expert testimony" in a case with a self-defense justification. *Id.* at 48, 745 P.2d at 106. As the court observed, "behavioral and medical testimony on the [use of illegal substances] could be especially useful to the jury in evaluating the evidence, thus hopefully ensuring an informed and dispassionate jury verdict." *Id.* The *Plew* court's holding cannot be limited to the situation in which the defendant had prior knowledge of the victim. As in *Plew*, the evidence here is relevant to answer "one of the central questions raised by the facts and the prosecution." *Id.* at 46, 745 P.2d at 104.

¶12 Buelna admitted to shooting B.C. but asserted justification defenses that turned on whether he reasonably believed physical force was necessary. A.R.S. §§ 13-411, 13-418. Buelna said B.C. was the aggressor, driving recklessly, suddenly turning into the parking lot after Buelna began his turn, approaching Buelna's truck with his hands in the air, saying that he was going to "f--- [Buelna] up" and that Buelna "messed with the wrong guy," reaching for the truck door, and moving toward Buelna even after he fired a warning shot.

¶13 The state disputed several elements of the story, casting Buelna as the instigator, pointing out that the other witnesses did not hear any threats such as "I'm going

to f--- you up" or see B.C. reach for the door, and arguing that the pause between the first and second shots was too short to be a warning. Likewise, testimony conflicted regarding what B.C. had said to Buelna as he walked toward him, and no witness corroborated Buelna's statement that he displayed the gun as a warning and then fired a warning shot. The fact that B.C. had used cocaine within the previous four to twenty-four hours, coupled with testimony that such use could result in anxiety, irritability, and impulsivity, corroborated Buelna's testimony that B.C. was acting outside of the range of typical behavior, and was therefore relevant to the issue of whether Buelna reasonably believed the use of physical force was necessary. *See Plew*, 155 Ariz. at 46-47, 745 P.2d at 104-05.

¶14 Cases from other jurisdictions support this broader use of such expert testimony as well. In *People v. Chevalier*, 644 N.Y.S.2d 508, 510 (App. Div. 1996), the court reversed and remanded a murder case in which the trial court had precluded evidence of the victim's use of cocaine and cannabis as well as testimony regarding the possible effects. The prosecution argued the evidence was irrelevant because there was no evidence the defendant knew the victim had used drugs, therefore failing to address the defendant's state of mind at the time of the incident. *Id*. at 509. The appellate court held that the victim's drug use was a "potentially powerful objective causal factor of [the victim's] purportedly 'crazy' conduct, and since a person under the influence of both alcohol and drugs might well be perceived—*even by an observer unaware of the cause of the conduct*—as acting more dangerously than one who had merely been drinking, the evidence . . . was admissible and relevant to the justification defense." *Id*. (emphasis

added); *see also McBean v. State*, 688 So. 2d 383, 386 (Fla. Dist. Ct. App. 1997) (holding error not harmless where case relied on witness credibility and toxicologist testimony would have corroborated defendant's story that victim made "unprovoked" attack); *McWilliams v. State*, 632 S.E.2d 127, 130 (Ga. 2006) (though ultimately harmless in context of case, trial court erred in precluding relevant evidence of cocaine metabolites in victim's blood); *Brawner v. City of Chicago*, 787 N.E.2d 282, 295 (Ill. App. Ct. 2003) (evidence of victim's cocaine intoxication relevant and admissible to support defendant police officer's conclusion that victim was "behaving like a crazy person" even though cocaine use was unknown to officer); *but see State v. Lewis*, 166 P.3d 786, 796-97 (Wash. Ct. App. 2007) (proffered testimony of general effects of methamphetamine irrelevant where expert could not say specifically that victim would have acted in such manner). We conclude the trial court abused its discretion in determining the evidence of cocaine metabolites was irrelevant.

Did the Trial Court Err in Precluding the Cocaine Evidence Pursuant to Rule 403?

¶15 The trial court also held that even if the evidence of cocaine metabolites was relevant, its probative value was outweighed by the danger of unfair prejudice, jury confusion, and needlessly presenting cumulative evidence, pursuant to Rule 403. A trial judge has substantial discretion regarding Rule 403 balancing because it involves weighing factors that "'cannot easily be quantified.'" *State v. Gibson*, 202 Ariz. 321, ¶ 17, 44 P.3d 1001, 1004 (2002), *quoting* Joseph M. Livermore et al., *Arizona Practice: Law of Evidence* § 403, at 83 (4th ed. 2000). When applying the balancing test:

> "[I]t is first necessary to assess the probative value of the evidence on the issue for which it is offered. The greater the probative value . . . and the more significant in the case the issue to which it is addressed, the less probable that factors of prejudice or confusion can 'substantially' outweigh the value of the evidence."

Id., *quoting* Livermore et al., *supra*, § 403, at 82 (first alteration in *Gibson*).

¶16 We first consider the trial court's conclusion that Dr. French's expert testimony would be unfairly prejudicial because it did not address "cocaine's specific effect" on B.C. The court reasoned that without such specificity, the testimony would provide "undue weight and credibility to [Buelna's] version of events." Presumably, the court was weighing the probative value of testimony about cocaine's effect on the average person with the potential for unfair prejudice to the state arising out of Dr. French's expert status. Our supreme court held that "[u]nfair prejudice 'means an undue tendency to suggest decision on an improper basis,' such as emotion, sympathy or horror." *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993), *quoting* Fed. R. Evid. 403 advisory committee note. Testimony by an expert generally does not suggest an improper basis, particularly of an emotional nature. Likewise, expert testimony is not unfairly prejudicial simply because it corroborates the testimony of a defendant. *See*, *e.g.*, *Plew*, 155 Ariz. at 47-48, 50, 745 P.2d at 105-06, 108 (holding that defendant was entitled to corroborating expert testimony on behavioral effects of cocaine metabolites); *State v. Betancourt*, 131 Ariz. 61, 62-63, 638 P.2d 728, 729-30 (App. 1981) (finding error where trial court denied admission of expert testimony on effects of LSD, where defense was voluntary

intoxication). To the extent the court concluded the expert was merely "placing an imprimatur on the justice of [Buelna's] cause," the concern is not supported by the evidence or arguments. Livermore et al., *supra*, § 702.1, at 270. Dr. French's testimony would only have corroborated Buelna's testimony but would not have gone so far to say he was telling the truth or his actions in response were reasonable. *Cf. State v. Moran*, 151 Ariz. 378, 382, 728 P.2d 248, 252 (1986) (expert testimony not admissible to tell jury who is lying); *State v. Salazar*, 182 Ariz. 604, 610, 898 P.2d 982, 988 (App. 1995) (reasonableness of defendant's actions not proper subject of expert testimony). Dr. French's expertise, standing alone, was not sufficient to preclude it pursuant to Rule 403.

¶17 The principal issue in the trial court's Rule 403 decision was the balancing of the probative value of Dr. French's testimony with the danger of unfair prejudice or confusion by the jury. Buelna's offer of proof was limited to counsel's avowal that Dr. French would testify "the average individual . . . [in] this stage of cocaine withdrawal would exhibit symptoms of anxiousness, irritability and impulsive behavior." There is no suggestion in the record, however, that Dr. French was prepared to opine on the average person's aggressiveness or propensity for violence with cocaine metabolites in his system. In contrast, the drug and behavioral expert in *Plew* opined that "cocaine intoxication" would engender "false bravery, aggression, loss of emotional control, and irrationality"; further, it could cause a person to "absorb abnormal levels of bodily injury and continue fighting without feeling the pain." 155 Ariz. at 45-46, 745 P.2d at 103-04. Whether the

difference in opinions reflects variability among experts, the difference between cocaine intoxication and withdrawal, or something else is unclear. The court was required to consider the testimony of this expert in the context of this case, and it could not extrapolate expert testimony from other cases to B.C.

¶18 Dr. French's testimony would have provided only indirect evidence on the question of whether B.C. was aggressive. Certainly, irritability and impulsivity could accompany aggressive behavior, but Dr. French would not opine on the relationship between those traits and aggression. Nor would he have testified concerning the severity of the symptoms of irritability or impulsivity B.C. might have experienced. Without specific expert testimony, the jury would be left to determine causal relationships among cocaine metabolites, irritability or impulsivity, and B.C.'s conduct based only on the arguments of counsel. Further, as the state generally argued, the jury could use B.C.'s recent cocaine use for improper purposes, such as relieving Buelna of criminal responsibility. These possibilities support the trial court's conclusion that unfair prejudice and jury confusion outweighed the probative value of the evidence. In that respect, the court's Rule 403 conclusion follows the intent of *Plew* that scientific and sociological advances should aid jurors in the search for truth by "assist[ing] them in evaluating and understanding the evidence," rather than interjecting weak possibilities. *Id.* at 49, 745 P.2d at 107.

¶19 We also note that the trial court was presented with Buelna's motions to preclude evidence about his fight earlier in the day with his girlfriend and drugs found in

his possession when arrested by the police. The court observed that its decision to grant Buelna's motion to exclude the fight and its effect on his mental state at the time of the shooting weighed against Dr. French's testimony to the extent it was offered for the ultimate purpose of showing B.C.'s mental state. The court was in the best position to balance all evidentiary factors, *see Gibson*, 202 Ariz. 321, ¶ 17, 44 P.3d at 1005, which necessarily included its rulings on independent but related issues.

¶20 We conclude the trial court did not abuse its discretion when it determined that the probative value of the cocaine metabolite evidence was so minimal that it would be substantially outweighed by a danger of unfair prejudice and confusion of the issues. *See State v. Neal*, 143 Ariz. 93, 101, 692 P.2d 272, 280 (1984) (no abuse of discretion in determining probative value was outweighed by dangers of prejudice and confusion where court refused to allow evidence of cocaine and methaqualone in victim's system).

Expert Testimony Regarding Instinct

¶21 Buelna's second argument is that the trial court erred in precluding the expert testimony of Dr. Barry Morenz, a psychiatrist who would have testified about "human beings' instinctive response when faced with a situation that threatens serious injury or death." Expert testimony is admissible if, among other factors, "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Ariz. R. Evid. 702(a). Expert testimony is inappropriate if the jury is qualified to "'reach a conclusion as intelligently as the [expert] witness'" but is appropriate if "'the matter is sufficiently beyond common experience that

the opinion of an expert would assist the trier of fact.'" *State v. Dickey*, 125 Ariz. 163, 169, 608 P.2d 302, 308 (1980), *quoting State v. Owens*, 112 Ariz. 223, 227, 540 P.2d 695, 699 (1975). As above, we review the trial court's preclusion of the expert testimony for an abuse of discretion. *Wright*, 214 Ariz. 540, ¶ 5, 155 P.3d at 1066.

¶22 The state moved in limine to preclude Dr. Morenz's testimony as irrelevant and an inappropriate subject for expert testimony. Buelna responded that Dr. Morenz would be called to "explain the common reactions of the average person." The trial court granted the state's motion, concluding, "If they're common reactions, then it is not necessary in helping the jury understand a fact in issue." Buelna now argues that the court misunderstood the purpose of Dr. Morenz's testimony because Buelna's instinctive reactions during his encounter with B.C. were "not within the common knowledge of the members of the jury."

¶23 The reaction of a person in Buelna's situation, however, is not beyond the common sense, experience, and education of the average juror. *See Dickey*, 125 Ariz. at 168-69, 608 P.2d at 307-08 (in self-defense case, expert deposition testimony allowed on defendant's personality traits, but whether defendant was actually afraid was province of jury); *Braley v. State*, 741 P.2d 1061, 1064 (Wyo. 1987) (upholding denial of expert testimony regarding fear in support of self-defense justification because "fear and stress are emotions experienced by all mankind"). Likewise, the purpose of the testimony would be to answer the question of whether Buelna's reactions were reasonable, and reasonableness of a defendant's actions in self-defense is "generally not a proper subject

for expert testimony because '[t]he question of reasonableness is quintessentially a matter of applying the common sense and the community sense of the jury to a particular set of facts.'" *State v. Salazar*, 182 Ariz. 604, 610, 898 P.2d 982, 988 (App. 1995), *quoting Wells v. Smith*, 778 F. Supp. 7, 8 (D. Md. 1991); *see also State v. Ortiz*, 158 Ariz. 528, 533, 764 P.2d 13, 18 (1988) (although expert testimony allowed on "'general personality trait,'" a person's "'probable state of mind at the time of the offense'" is for the jury to determine), *quoting State v. Rivera*, 152 Ariz. 507, 514, 733 P.2d 1090, 1097 (1987).

¶24 In support of his argument, Buelna cites several out-of-state cases in which testimony about instinctual reactions was admitted. But only one of those cases involved the admissibility of the testimony at issue, and the focus of that argument was whether the witness was qualified. *See Fultz v. Whittaker*, 261 F. Supp. 2d 767, 777-78 & n.8 (W.D. Ky. 2003) (expert testimony that "jerking" or "kicking out" are instinctive responses to pressurized neck restraint, in support of claim police officer had applied pressure to plaintiff's neck). Further, in every case Buelna cites, the instinctive reactions were in response to specific situations potentially out of the realm of the jury's knowledge, not a general threat of serious injury or death, as was the focus of Dr. Morenz's proffered testimony. *See, e.g.*, *People v. Mehserle*, 142 Cal. Rptr. 3d 423, 445 (Ct. App. 2012) (testimony that police officer's drawing of handgun instead of Taser due to instinct and lack of muscle memory of Taser); *LeBlanc v. State*, 419 So. 2d 853, 856 (La. 1982) (driver's instinct after dropping four inches down off paved highway is to overcorrect to try to get back on road); *Campos v. Firestone Tire & Rubber Co.*, 485 A.2d 305, 308 (N.J.

1984) (manufacturing employee in product liability suit instinctively inserted hand into protective cage in attempt to stop tire accident); *People v. Leon*, 558 N.Y.S.2d 718, 719 (App. Div. 1990) (arm wound of deceased would have come from instinctively blocking blow); *U.S. v. Williams*, 24 C.M.R. 380, 383-84 (A.B.R. 1957) (instinctive reaction to falling is to protect oneself, to the exclusion of letting go of items in hands). Buelna cites no cases, in Arizona or elsewhere, in which an expert was allowed to testify over objection to the general human instinct to protect oneself in general dangerous situations. The trial court did not abuse its discretion in precluding testimony by Dr. Morenz. *See Wright*, 214 Ariz. 540, ¶ 5, 155 P.3d at 1066.

Criminal Restitution Order

¶25 Although Buelna has not raised the issue on appeal, we find fundamental error in the sentencing minute entry, which states that "all fines, fees, assessments and/or restitution are reduced to a Criminal Restitution Order [CRO], with no interest, penalties or collection fees to accrue while the defendant is in the Department of Corrections." *See State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it). Based on A.R.S. § 13-805(C), "the imposition of a CRO before the defendant's probation or sentence has expired 'constitutes an illegal sentence, which is necessarily fundamental, reversible error.'" *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013), *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009).

Disposition

¶26 For the foregoing reasons, we affirm Buelna's conviction and sentence and vacate the CRO.

/s/ Michael Miller
MICHAEL MILLER, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

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