IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

HERBERT HENRY HOLTZMAN III,
Appellant.

No. 2 CA-CR 2015-0341
Filed October 27, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Santa Cruz County
No. S1200CR201400027
The Honorable Anna M. Montoya-Paez, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Mariette S. Ambri, Assistant Attorney General, Tucson
Counsel for Appellee

Law Offices of Charles A. Thomas, P.L.C., Nogales
By Charles A. Thomas
Counsel for Appellant

MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

S T A R I N G, Judge:

¶1 After a jury trial, Herbert Holtzman was convicted of transportation of methamphetamine for sale and transportation of heroin for sale. He was sentenced to concurrent prison terms, the longer of which was five years. Holtzman argues on appeal that the trial court erred in allowing the state to present late-disclosed evidence in rebuttal and by failing to sua sponte order a mistrial based on the state's purported efforts to shift the burden of proof during closing argument. We affirm.

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On August 24, 2011, Holtzman was attempting to enter the United States from Mexico at the Nogales port of entry when law enforcement officers discovered hidden in the roof of his vehicle over thirty pounds of methamphetamine and approximately three pounds of heroin. At trial, Holtzman testified he had recently obtained the vehicle as payment for managing a restaurant he had sold. He acknowledged he had driven the vehicle several times, but claimed it had mechanical problems and the previous owner had brought him the vehicle that morning after having it repaired.

¶3 On Tuesday, August 4, 2015, the first day of trial, the prosecutor informed the court he had disclosed to the defense the vehicle's certificate of title the previous day. The prosecutor explained he had just "obtained certified documents in the case on Friday[, July 31]" and had been "unaware" the documents would contain the certificate. The certificate purportedly showed the vehicle had been transferred to Holtzman in 2009. Acknowledging

the disclosure was "very late," the state asked permission to present the evidence in its case-in-chief or, in the alternative, "as impeachment evidence" should Holtzman testify. The trial court stated it would exclude the documents, including for impeachment purposes. However, the court granted the state's subsequent motion for reconsideration, determining it would permit the state to present the evidence if Holtzman "open[ed] the door about just purchasing that vehicle [recently]." At trial, Holtzman testified he had only recently obtained the vehicle and denied having owned the truck "for two years" before his arrest; during cross-examination, after being shown the certificate, he acknowledged having signed it but denied that he had done so in 2009.

¶4 On appeal, Holtzman first argues the trial court erred by reconsidering its previous decision because the state's motion did not comply with Rule 35.1, Ariz. R. Crim. P., and did not demonstrate "good cause" for reconsideration as required by Rule 16.1(d), Ariz. R. Crim. P. Holtzman did not raise this argument below and therefore has forfeited the right to seek relief for all but fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). To obtain relief, Holtzman must demonstrate fundamental error exists—that is, error going to the foundation of his case that necessarily renders his trial unfair—and that he was thereby prejudiced. *See id.* ¶¶ 23-26, 115 P.3d at 608. Holtzman does not assert any error was fundamental. Thus, he has waived this argument on appeal and we do not address it further. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

¶5 Holtzman further asserts the trial court abused its discretion by allowing the state to impeach his testimony based on the certificate. We review a trial court's choice of discovery sanctions for an abuse of discretion. *State v. Ramos*, 239 Ariz. 501, ¶ 7, 372 P.3d 1025, 1028 (App. 2016). Untimely disclosure of evidence is subject to sanctions pursuant to Rule 15.7(a), Ariz. R. Crim. P., including preclusion of the evidence or continuance of the case. In evaluating what sanction to impose, "courts should consider 'the vitality of the evidence to the proponent's case; the degree to which the evidence or the sanctionable conduct has been

prejudicial to the opposing party; whether the sanctionable conduct was willful or motivated by bad faith; and whether a less stringent sanction would suffice.'" *Ramos*, 238 Ariz. 501, ¶ 9, 372 P.3d at 1028, *quoting State v. Meza*, 203 Ariz. 50, ¶ 32, 50 P.3d 407, 414 (App. 2002).

¶6 "The sanction 'should be proportionate to the harm caused' and 'cure that harm to the maximum practicable extent.'" *Id.*, *quoting State v. Krone*, 182 Ariz. 319, 322, 897 P.2d 621, 624 (1995). However, the sanction "must have a minimal effect on the evidence and merits" of the case. *State v. Naranjo*, 234 Ariz. 233, ¶ 30, 321 P.3d 398, 407 (2014), *quoting State v. Payne*, 233 Ariz. 484, ¶ 155, 314 P.3d 1239, 1273 (2013). Preclusion, therefore, "is rarely an appropriate sanction for a discovery violation." *Id., quoting State v. Delgado*, 174 Ariz. 252, 257, 848 P.2d 337, 342 (1993).

¶7 Before we analyze the relevant factors, we emphasize that the trial court precluded the state from introducing the evidence in its case-in-chief. Additionally, Holtzman was advised that he could testify without the certificate being admitted into evidence so long as he did not open the door to its admission by claiming he had only recently obtained the vehicle. Holtzman claims on appeal that he "ha[d] to testify" "[i]n this type of case" "to have a realistic chance of a not guilty verdict." But his assertion about obtaining the vehicle only recently was not critical to his defense—the core of his defense was that another individual had possession of the vehicle for some time just before Holtzman drove it across the border.

¶8 Holtzman claims the certificate was not "vital" to the state's case because it had been willing to proceed to trial without it. He seems to be suggesting a court must preclude evidence the state fails to timely disclose unless the state establishes the evidence is so critical that prosecution of the case would fail without that evidence. But he cites no authority to support this proposition, and we have found none. Additionally, Holtzman ignores the fact that the court did preclude the state from introducing the certificate unless he opened the door by testifying he had bought the vehicle recently. The certificate was obviously of great probative value in rebutting that claim.

¶9 Holtzman argues he was prejudiced, however, because the late disclosure prevented him from properly investigating how best to address the certificate at trial. Holtzman made no timely claim of prejudice below.[1] Nor did he request a continuance so he could further investigate the title certificate. Whatever prejudice resulted from the state's late disclosure could have been resolved by means other than preclusion of the certificate. Moreover, Holtzman could have avoided admission of the certificate by avoiding testimony not central to his defense.

¶10 Holtzman next argues the state's failure to disclose the certificate constituted "willful misconduct" because the prosecutor had learned of the evidence on a Friday but had not disclosed it until the following Monday, the day before trial. He relies on *State v. Killean*, in which our supreme court determined willful misconduct included "an unexplained failure to do what the rules require." 185 Ariz. 270, 271, 915 P.2d 1225, 1226 (1996). In *Killean*, the trial court precluded evidence corroborating the defense for late disclosure. *Id.* at 270, 915 P.2d at 1225. Our supreme court concluded there was willful misconduct because defense counsel "knew of the evidence at least a week before trial" and, in light of his experience, "could not and did not claim ignorance of the requirements of the [disclosure] rules." *Id.* at 271, 915 P.2d at 1226.

¶11 The facts here do not resemble those in *Killean*. As we noted above, the prosecutor informed the court that he had received certified documents on the Friday before trial, that he was unaware those documents would include the certificate, and that he had disclosed the title certificate to the defense on Monday. Nothing in the record suggests the prosecutor was aware on Friday that the certificate was included in the documents he had received or that it had evidentiary value such that it would be subject to disclosure. *See* Ariz. R. Crim. P. 15.1(b)(5) (requiring disclosure of "[a] list of all papers, documents, photographs or tangible objects that the

[1]Holtzman argued he was prejudiced by the late disclosure for the first time in his reply to the state's response to his motion for a new trial.

prosecutor intends to use at trial"); 15.6(a) (prosecutor has continuing duty of additional disclosure). In any event, even assuming the prosecutor should have disclosed the certificate on Friday or over the weekend, we decline to extend the court's reasoning in *Killean* to conclude the relatively brief disclosure delay presented here constituted willful misconduct.

¶12 Finally, Holtzman claims no other sanction other than absolute preclusion would have been sufficient, again arguing he was prejudiced because he could have investigated the certificate further had it been disclosed sooner. But, as already noted, Holtzman did not request a continuance or argue at trial that further investigation was needed. Thus, for the reasons stated, we conclude Holtzman has not demonstrated the trial court abused its discretion by precluding the certificate from the state's case-in-chief but nonetheless allowing its admission to rebut his testimony.

¶13 Holtzman next argues the state committed misconduct during closing argument by pointing out that he had not supported his testimony about owning a restaurant with any documentary evidence. As Holtzman acknowledges, he did not object and therefore has forfeited relief for all but fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. We find no error, fundamental or otherwise.

> When a prosecutor comments on a defendant's failure to present evidence to support his or her theory of the case, it is neither improper nor shifts the burden of proof to the defendant so long as such comments are not intended to direct the jury's attention to the defendant's failure to testify.

State v. Sarullo, 219 Ariz. 431, ¶ 24, 199 P.3d 686, 692 (App. 2008); *see also State v. Fuller*, 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985) (prosecutor may properly comment on defendant's failure to present exculpatory evidence, so long as comment not phrased to accentuate defendant's failure to testify).

¶14 We affirm Holtzman's convictions and sentences.