IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

GABRIEL CHRISTOPHER MORRIS,
Appellant.

No. 2 CA-CR 2015-0277
Filed April 13, 2017

Appeal from the Superior Court in Pima County
No. CR20133497001
The Honorable Danelle B. Liwski, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
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By Amy Pignatella Cain, Assistant Attorney General, Tucson
Counsel for Appellee

Kevin M. Burke, Interim Pima County Public Defender
By Erin K. Sutherland, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

V Á S Q U E Z, Judge:

¶1 After a jury trial, Gabriel Morris was convicted of five counts of forgery and one count of theft. The trial court sentenced him to concurrent prison terms, the longest of which is twenty years. On appeal, Morris argues the court erred (1) by precluding him from cross-examining the lead investigator about a letter of reprimand he received from a previous employer; (2) in making various evidentiary rulings; and (3) by allowing the jury to consider several duplicitous forgery charges. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining Morris's convictions. *See State v. Allen*, 235 Ariz. 72, ¶ 2, 326 P.3d 339, 341 (App. 2014). In 2013, A.F. discovered that he had become "a victim of identity theft." While selling a car, he learned that the Arizona Department of Transportation, Motor Vehicle Division, had the wrong address on file for him and that several copies of his driver license had been ordered with incorrect addresses. Then, he received letters indicating that, unbeknownst to him, two credit card accounts had been opened in his name.

¶3 Later, A.F. was contacted by Patelco Credit Union about several accounts opened in his name, including a loan for a 2008 Dodge Durango he did not own. After receiving a telephone call about an insurance claim on the Durango, A.F. spoke to an investigator with the insurance company who immediately recognized that he was not the same man who had identified himself as A.F. earlier that day when they met to discuss the claim. The investigator contacted agents with the Arizona Department of Insurance, and they devised a plan for the man who had identified

himself as A.F. to pick up a check for the claim. At the arranged time and place, Morris arrived in the Durango. When he walked into the office, Morris saw police officers and ran away. However, officers quickly detained him.

¶4 In a search incident to arrest, officers found in Morris's wallet several driver licenses bearing A.F.'s name but Morris's photograph, as well as various debit and credit cards in A.F.'s name. During an inventory search of the Durango, officers also found, among other things, a driver license with A.F.'s name but no photograph; DirecTV checks made payable to A.F.; Tucson Electric Power checks made payable to Morris and A.F.; savings bonds issued to C.W. and H.W.; a certificate of title with the vehicle and owner information missing; a certificate of title issued to J.K.; multiple driver licenses bearing J.K.'s and S.S.'s names but Morris's photograph; a small black notebook containing handwritten notes about A.F. and others, including addresses, phone numbers, and account numbers; scanners; and printers.[1]

¶5 A grand jury indicted Morris for fraudulent schemes and artifices, insurance fraud, two counts of theft, six counts of forgery, and two counts of aggravated identity theft.[2] The jury found him not guilty of fraudulent schemes and artifices, insurance fraud, one count of theft, one count of forgery, and both counts of identity theft, but it found him guilty of the remaining offenses. The court sentenced him as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

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[1]The notebook included a list of email addresses, several of which used some variation of Morris's name. It was in a locked safe that also contained the savings bonds and a license issued to J.K. but with Morris's photograph.

[2]During trial, the court granted the state's motion to amend one of the counts of aggravated identity theft to identity theft.

Cross-Examination

¶6 Morris argues the trial court erred by precluding him from cross-examining the lead investigator about a fifteen-year-old letter of reprimand he had received from a former employer.[3] We review the court's ruling on the admissibility of evidence for an abuse of discretion. *State v. Davis*, 205 Ariz. 174, ¶ 23, 68 P.3d 127, 131 (App. 2002).

¶7 After the close of evidence and both parties had rested but before closing arguments, the state disclosed a letter of reprimand that had been given to R.F., the lead investigator in the case. The letter was written by one of R.F.'s supervisors at the Arizona Game and Fish Department in December 1999. R.F. was reprimanded for (1) his "continued lack [of] responsiveness to assignments and customer inquiries" and (2) "a significant liability issue regarding an improper search and seizure for which [he was] involved and should have used better judgment."

¶8 Morris argued the state's failure to timely disclose the letter constituted a *Brady* violation, and he requested the trial court dismiss the case.[4] Alternatively, he maintained that the letter was

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[3]Morris additionally contends that the trial court's limitation on his cross-examination violated his Sixth Amendment right of confrontation. Because Morris failed to raise this argument below, he has forfeited review for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005); *see also State v. Alvarez*, 213 Ariz. 467, ¶ 7, 143 P.3d 668, 670 (App. 2006) (constitutional argument subject to fundamental-error review). And because Morris does not argue the alleged error was fundamental, and we find no error that can be so characterized, the argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

[4]Under *Brady v. Maryland*, 373 U.S. 83 (1963), "the prosecution is required unilaterally to disclose any impeachment or exculpatory evidence that is favorable to the defendant and which may create a reasonable doubt in jurors' minds regarding the defendant's guilt." *Milke v. Mroz*, 236 Ariz. 276, ¶ 6, 339 P.3d 659, 663 (App. 2014).

relevant to his "theory of the case," specifically the "lack of follow up" investigation by the state, and suggested that he should be allowed to impeach R.F.'s credibility with it. In response, the state explained that it had requested *Brady* material from R.F.'s current employer—the Department of Insurance—but was told none existed. The state had not submitted a similar request to Game and Fish because R.F. left that agency in 2003. However, another attorney in the prosecutor's office had received the letter of reprimand, brought it to the attention of the prosecutor in this case, and the prosecutor disclosed it twenty minutes after she saw it. The state further argued that the information contained in the letter was not relevant and did not bear on R.F.'s credibility.

¶9 The trial court denied the motion to dismiss and to impeach and ordered the parties to proceed with closing arguments. The court found that the letter was "not relevant" because it was from a different employer over fifteen years ago and it dealt with "deadlines [and the] failure to return customer calls in a timely manner." The court noted that the search-and-seizure issue mentioned in the letter related to the "plain view doctrine," which was "not the issue involved in this case."

¶10 On appeal, Morris again maintains the letter was "material" to his defense that the state "failed to prove the charges . . . because [R.F.] failed to properly investigate leads that had the potential to absolve [him] of the charges." He contends the trial court should have allowed him to recall R.F. and cross-examine him about the letter because it was relevant to R.F.'s "credibility as a witness and lead investigator."

¶11 Generally, all relevant evidence is admissible. Ariz. R. Evid. 402; *see also* Ariz. R. Evid. 401 (defining relevant evidence). However, the trial court may preclude relevant evidence "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Ariz. R. Evid. 403. "Trial courts retain wide latitude to impose reasonable limits on cross-examination to prevent confusion of the issues or interrogation that is only marginally relevant." *State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 8, 312 P.3d 123, 127 (App. 2013).

¶12 Arizona courts have long recognized that, in general, "the jury should be informed of all matters which may in the slightest degree affect a witness' credibility." *State v. Roberts*, 139 Ariz. 117, 121, 677 P.2d 280, 284 (App. 1983); *see also State v. McCall*, 139 Ariz. 147, 158-59, 677 P.2d 920, 931-32 (1983). However, as evidence "becomes more remote in time, it has proportionately less bearing on the credibility of the witness." *State v. Fleming*, 117 Ariz. 122, 125-26, 571 P.2d 268, 271-72 (1977); *see also State v. Zuck*, 134 Ariz. 509, 513, 658 P.2d 162, 166 (1982) (Rule 403 helps protect against cross-examination that does little to impair credibility).

¶13 Despite the low threshold for relevance, *State v. Tucker*, 215 Ariz. 298, ¶ 51, 160 P.3d 177, 192 (2007), the trial court did not abuse its discretion in concluding that the letter was not relevant, *see* Ariz. R. Evid. 401. R.F.'s duties with Game and Fish included investigating "watercraft registration and safety issues." In contrast, as part of his current employment with the Department of Insurance, R.F. investigates insurance fraud. The letter of reprimand first mentioned R.F.'s lack of responsiveness, specifically his "continuing failure to provide adequate and timely follow up to customer[s] in regards to ongoing cases." We agree with the trial court that there is no correlation between not returning telephone calls in a timely manner over fifteen years ago and R.F.'s alleged failure to investigate leads in this case. The second item in the letter was an "improper search and seizure" based on a "joint decision" between R.F. and his supervisor. According to the letter, the search "did not fall under the 'plain view doctrine,'" as R.E. had asserted originally. The issues in this case, however, do not include a challenge to a search conducted by R.F., much less one based on the plain-view doctrine.

¶14 Additionally, as noted above, the letter was more than fifteen years old. *See Fleming*, 117 Ariz. at 125-26, 571 P.2d at 271-72. Notably, criminal convictions, which are often used to challenge a witness's character for truthfulness, provide a useful benchmark in determining the utility of impeachment evidence. *See* Ariz. R. Evid. 609(a). A conviction that is over ten years old is considered "stale" and "remote," and before being admitted "the proponent [must show] that its probative value '*substantially* outweighs its prejudicial effect.'" *State v. Green*, 200 Ariz. 496, ¶ 9, 29 P.3d 271, 273 (2001),

quoting Ariz. R. Evid. 609(b) (emphasis in *Green*). Here, given its age, and even assuming the letter has any bearing on R.F.'s credibility, its probative value on that issue has diminished. *See id.*

¶15 Moreover, although the trial court did not cite "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence" as grounds for preclusion, we agree with the state that recalling R.F. to question him about the letter posed such concerns. Ariz. R. Evid. 403; *see State v. Boteo-Flores*, 230 Ariz. 551, ¶ 7, 288 P.3d 111, 113 (App. 2012) (we must affirm trial court's ruling if legally correct for any reason). At the time of the letter's disclosure, both parties had rested, and the court had given its final instructions; all that remained were closing arguments. As both Morris and the state point out, defense counsel thoroughly cross-examined R.F. about his investigation and theory of the case. And defense counsel explored several areas of the investigation that R.F. did not "follow[] up on." Thus, recalling R.F. could have caused unnecessary delay and confusion to present evidence that had questionable evidentiary value. Accordingly, we cannot say the court abused its discretion by precluding Morris from cross-examining R.F. about the letter of reprimand. *See Davis*, 205 Ariz. 174, ¶ 23, 68 P.3d at 131.

Evidentiary Issues

¶16 Morris also argues that the trial court erred by admitting other-act evidence that he claims was "irrelevant, inflammatory" and "inadmissible propensity evidence," which carried "a danger of unfair prejudice that outweighed any potential probative value." Generally, we review the admission of evidence for an abuse of discretion. *State v. Dann*, 220 Ariz. 351, ¶ 44, 207 P.3d 604, 615 (2009). "We are required to affirm a trial court's ruling if legally correct for any reason and, in doing so, we may address the state's arguments to uphold the court's ruling even if those arguments otherwise could be deemed waived by the state's failure to argue them below." *Boteo-Flores*, 230 Ariz. 551, ¶ 7, 288 P.3d at 113.

¶17 On the first day of trial, Morris objected to the admission of several exhibits, including certificates of title issued to

J.K., W.R., and M.G. and various driver licenses, some of which were issued to J.K. and S.S. but contained Morris's photograph.[5] Morris argued the evidence was not relevant, consisted of "some sort of prior bad act," and was substantially prejudicial. The state responded that the exhibits were relevant, helped to "complete the story," and were not "unduly prejudicial." As to the driver licenses with Morris's photograph, the state further maintained that they were relevant because they show Morris "has intentionally created these documents," pointing out that it "goes to his preparation, his intent, his plan, his knowledge, [and] absence of mistake."

¶18 The trial court ruled some exhibits admissible and precluded others. With regard to J.K.'s certificate of title and J.K.'s and S.S.'s driver licenses, the court found them admissible as "proving motive, opportunity, and intent, preparation, plan, knowledge, identity, and absence of mistake." The parties then stipulated to the admission of several exhibits, including J.K.'s certificate of title. At trial, the state only moved to admit certain driver licenses with J.K.'s and S.S.'s names but Morris's photograph.

¶19 On the state's motion, and without objection from Morris, the trial court also admitted the small black notebook with handwritten personal information about A.F. and others. In addition, the state offered testimony from B.V., the daughter of C.W. and H.W. B.V. testified about a burglary at her mother's home in 2012 (hereinafter "White burglary"), when her parents' savings bonds and other items were stolen. She identified the savings bonds found in the Durango as her parents'.

Driver Licenses and Certificates of Title

¶20 Morris contends that "the multiple copies of the driver's licenses belonging to [J.K.] and [S.S.] with [Morris's] photo were relevant only to show that because he had created these two identifications, he also must have created the license with [A.F.'s] information." He asserts that this evidence "is the textbook definition of propensity evidence" and should have been precluded. Similarly, Morris argues that "the vehicle title belonging to [J.K.] . . .

[5]Most of the licenses were not actual cards but printed copies.

had no relevance other than to prove that [Morris] was in the business of forging vehicle titles." Because the trial court precluded the certificates of title belonging to W.R. and M.G. as more prejudicial than probative, Morris also reasons that J.K.'s title was "equally prejudicial."

¶21 Generally, "evidence of other crimes, wrongs, or acts"—also known as propensity evidence—"is not admissible to prove the character of a person in order to show action in conformity therewith." Ariz. R. Evid. 404(b); *see State v. Machado*, 226 Ariz. 281, ¶¶ 10, 14, 246 P.3d 632, 634 (2011). However, such evidence may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ariz. R. Evid. 404(b). When applying this exception, "four protective provisions" must be met:

> (1) the evidence must be admitted for a proper purpose under Rule 404(b); (2) the evidence must be relevant under Rule 402; (3) the trial court may exclude evidence if its probative value is substantially outweighed by the potential for unfair prejudice under Rule 403; and (4) the court must give an appropriate limiting instruction if requested under Rule 105, [Ariz. R. Evid.].

State v. Lee, 189 Ariz. 590, 599, 944 P.2d 1204, 1213 (1997).

¶22 The driver licenses with J.K.'s and S.S.'s names, as well as J.K.'s certificate of title, were admissible under Rule 404(b) as proof of identity.[6] *See id.* Rule 404(b)'s identity exception applies "if

[6]Morris maintains that, because intent was not an issue in this case, the exhibits could not be admitted to prove intent under Rule 404(b). But the trial court did not limit its finding of admissibility to intent, and we likewise do not rely solely on that basis. *See State v. Ives*, 187 Ariz. 102, 110, 927 P.2d 762, 770 (1996) (if intent not at issue, "and no other valid 404(b) grounds exist," state may not introduce evidence of other acts to prove intent).

identity is in issue, and if the behavior of the accused both on the occasion charged and on some other occasion is sufficiently distinctive, then proof that the accused was involved on the other occasion tends to prove his involvement in the crime charged." *State v. Goudeau*, 239 Ariz. 421, ¶ 58, 372 P.3d 945, 968 (2016), *quoting State v. Stuard*, 176 Ariz. 589, 597, 863 P.2d 881, 889 (1993). "[T]he pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature." *Id.*, *quoting Stuard*, 176 Ariz. at 597, 863 P.2d at 889 (alteration in *Goudeau*).

¶23 At trial, Morris testified that someone named "Abraham" let him borrow the Durango. He explained that Abraham had offered to pay him $500 if he would impersonate A.F. when taking the Durango in for an estimate and picking up a check. Morris claimed that nothing in the Durango was his, aside from some laundry, a tablet, and some personal papers. He stated that Abraham had given him identification and credit cards with A.F.'s name, suggesting that Abraham had also created the other false licenses found in the Durango.

¶24 Based on his testimony, Morris squarely put identity at issue in this case. Evidence of the driver licenses issued to J.K. and S.S. but containing Morris's photograph tended to identify Morris as the perpetrator of the charged acts. *See id.* ¶ 61 (where identity disputed, state could properly introduce other-act evidence to prove defendant committed crimes). We disagree with Morris that "the method of forgery was not so distinct that it could be viewed as a signature"—the licenses contained Morris's photograph. In addition, J.K.'s certificate of title further linked Morris to the offenses, given the driver licenses with J.K.'s name and Morris's photograph. Because this evidence tended to establish that Morris had committed the offenses, they were also relevant under Rule 402. *See Lee*, 189 Ariz. at 599, 944 P.2d at 1213; *cf. Stuard*, 176 Ariz. at 602, 863 P.2d at 894 (photos relevant to issue of perpetrator's identity).

¶25 Moreover, we cannot say the trial court abused its discretion in concluding that the probative value of these exhibits was not substantially outweighed by a danger of unfair prejudice under Rule 403. *See Lee*, 189 Ariz. at 599, 944 P.2d at 1213. Indeed, the court's exclusion of W.R.'s and M.G.'s certificates of title shows

that the court carefully considered the evidence and narrowly tailored its ruling. *See State v. Kiper*, 181 Ariz. 62, 65, 887 P.2d 592, 595 (App. 1994) ("Because the trial court is best able to balance the probative value versus the prejudicial effect, it is afforded wide discretion in deciding the admissibility of such evidence."). Although the evidence involved uncharged acts against other victims, which may have been harmful to Morris, not all harmful evidence is unfairly prejudicial. *See State v. Martinez*, 230 Ariz. 208, ¶ 21, 282 P.3d 409, 414 (2012). And the evidence "did not suggest a decision based on an improper basis 'such as emotion, sympathy or horror.'" *State v. Escalante-Orozco*, 241 Ariz. 254, ¶ 80, 386 P.3d 798, 822 (2017), *quoting State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997).

¶26 Accordingly, the trial court did not abuse its discretion by admitting J.K.'s and S.S.'s driver licenses and J.K.'s certificate of title as proof of identity under Rule 404(b).[7] *See Dann*, 220 Ariz. 351, ¶ 44, 207 P.3d at 615. We additionally note that this evidence was admissible under Rule 404(b) to rebut the defense theory that Morris was unaware of the items in the Durango. *See State v. Villalobos*, 225 Ariz. 74, ¶ 19, 235 P.3d 227, 233 (2010) (evidence of prior abuse rebutted defendant's claim that he did not intend to hurt victim); *State v. Schurz*, 176 Ariz. 46, 51, 859 P.2d 156, 161 (1993) (evidence of robbery tended to rebut defense that defendant was inebriated). Specifically, the evidence showed that Morris had more than a casual connection with the Durango and its contents, as he had alleged, and the jury could infer that it was unlikely "Abraham" would have created the additional licenses with Morris's photograph.

[7]Below, Morris did not request a limiting instruction pursuant to Rule 105. *See Lee*, 189 Ariz. at 599, 944 P.2d at 1213. He also does not argue on appeal that the trial court failed to give such an instruction. We therefore do not address it further. *See State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) (failure to argue claim constitutes abandonment and waiver).

White Burglary and Black Notebook

¶27 Morris also challenges the admission of the black notebook and B.V.'s testimony about the White burglary. Because he failed to object to this evidence below, Morris has forfeited review for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005).

¶28 With regard to the White burglary, Morris contends that the state "intentionally elicited information . . . about all of the other property," aside from the savings bonds, "that was stolen, although it had absolutely no relevance to [his] case." He maintains, "The only reason to elicit this information was to garner additional sympathy from the jurors for the eighty-seven-year-old, widowed victim, while at the same time prejudicing the jury against [him]." With regard to the notebook, Morris similarly argues that "the parts related to uncharged victims" had no relevance "other than to show that [he] is a serial identity thief."

¶29 Intrinsic evidence—that is, acts that "are so closely related to the charged act that they cannot fairly be considered 'other' acts, but rather are part of the charged act itself"—is admissible without regard to Rule 404(b). *State v. Ferrero*, 229 Ariz. 239, ¶¶ 14, 23, 274 P.3d 509, 512, 514 (2012); *accord State v. Salamanca*, 233 Ariz. 292, ¶ 11, 311 P.3d 1105, 1108 (App. 2013). Evidence is intrinsic "if it (1) directly proves the charged act, or (2) is performed contemporaneously with and directly facilitates commission of the charged act." *Ferrero*, 229 Ariz. 239, ¶ 20, 274 P.3d at 513. However, the intrinsic-evidence doctrine "may not be invoked merely to 'complete the story' or because evidence 'arises out of the same transaction or course of events' as the charged act." *Id.*

¶30 B.V.'s testimony about the White burglary was intrinsic to proving the charged offense of theft. *See id.* Morris was charged with "knowingly controll[ing] the property of [H.W.], knowing or having reason to know that the property, to wit, U.S. Savings Bonds, . . . was stolen." *See* A.R.S. § 13-1802(A)(5); *see also* A.R.S. § 13-2305(1) (allowing inference that person in possession of stolen property, unless satisfactorily explained, was aware of risk it was stolen or participated in theft). Thus, the state needed to show that

the savings bonds were stolen, and B.V.'s testimony about the White burglary accomplished that purpose. *See State v. Curiel*, 130 Ariz. 176, 183, 634 P.2d 988, 995 (App. 1981) (victim's testimony that gun was stolen, coupled with statutory inference, helped establish defendant's knowledge that gun was stolen). Nevertheless, we agree with Morris that evidence of the other property stolen during the White burglary was not intrinsic to the charged offenses. But, as we discuss below, even if the trial court erred by admitting such evidence, Morris cannot meet his burden of showing prejudice. This is particularly true given B.V.'s brief discussion of the other property, some of which she reported had been recovered from other individuals, in light of the state's eleven other witnesses over three days of testimony.

¶31 Likewise, the notebook was intrinsic to proving the charged offense of aggravated identity theft. *See Ferrero*, 229 Ariz. 239, ¶ 20, 274 P.3d at 513. Morris was charged with aggravated taking the identity of A.F. under A.R.S. § 13-2009(A)(2). The charge required proof that Morris knowingly took, purchased, manufactured, recorded, possessed, or used "any personal identifying information" about A.F. § 13-2009(A)(2). The notebook contained detailed handwritten information about A.F., including phone numbers, addresses, family members, and employment. It therefore directly proved the charged act. *Cf. State v. Butler*, 230 Ariz. 465, ¶¶ 30-31, 286 P.3d 1074, 1082 (App. 2012) (sheriff's department receipt for seized money directly proved alleged conspiracy).

¶32 Even assuming the trial court erred by admitting B.V.'s testimony about the other property taken during the White burglary or the information about other individuals contained in the notebook, Morris cannot meet his burden of showing fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08. The evidence was overwhelming. Morris was convicted of five counts of forgery for knowingly possessing the four DirecTV and Tucson Electric Power checks and the certificate of title with the vehicle and owner information missing. *See* A.R.S. § 13-2002(A)(2); *see also* A.R.S. § 13-105(34) ("'Possess' means knowingly to have physical possession or otherwise to exercise dominion or control over property."). He was also convicted of theft for knowingly

controlling H.W.'s savings bonds. *See* § 13-1802(A)(5), (D); *see also* § 13-2305(1).

¶33 Morris admitted he was driving the Durango, where agents found the DirecTV and Tucson Electric Power checks, the certificate of title, and H.W.'s savings bonds. The state presented evidence that neither DirecTV nor Tucson Electric Power issued the checks on which they were the purported payors. As to the certificate of title, R.F. explained that information about the vehicle, owner, and lienholder had been "crudely removed," likely "to facilitate an illegal act to changing the identification or the ownership of a particular vehicle." B.V. also identified the savings bonds as the ones stolen from her mother's house. Morris's possession of the vehicle, coupled with the evidence tying him thereto, rebut his claim that he "d[id]n't know what was in the [Durango]." Thus, overwhelming evidence of Morris's guilt supports the jury's verdicts. *See State v. Gallegos*, 178 Ariz. 1, 11, 870 P.2d 1097, 1107 (1994) (no fundamental error in light of overwhelming evidence of guilt).

Duplicitous Charging

¶34 Morris lastly contends that the trial court erred by submitting duplicitous forgery charges to the jury, thereby creating the possibility of non-unanimous verdicts. Generally, we review de novo questions of law concerning jury unanimity. *State v. West*, 238 Ariz. 482, ¶ 12, 362 P.3d 1049, 1055 (App. 2015). However, as Morris acknowledges, he failed to raise this argument below. Accordingly, he has forfeited review for all but fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08. Nevertheless, a violation of a defendant's right to a unanimous jury verdict constitutes such error. *State v. Davis*, 206 Ariz. 377, ¶ 64, 79 P.3d 64, 77 (2003).

¶35 Pursuant to § 13-2002(A),

> A person commits forgery if, with intent to defraud, the person:
>
> 1. Falsely makes, completes or alters a written instrument; or

> 2. Knowingly possesses a forged instrument; or
>
> 3. Offers or presents, whether accepted or not, a forged instrument or one that contains false information.

The three types of forgery enumerated in § 13-2002(A) are distinct offenses with separate elements. *See State v. Reyes*, 105 Ariz. 26, 27, 458 P.2d 960, 961 (1969) (although "common law forgery" and "uttering" coupled under "forgery," they are separate offenses based on elements and proof required); *State v. King*, 116 Ariz. 353, 355, 569 P.2d 295, 297 (App. 1977) ("forging" and "uttering" a false instrument, although proscribed by same statute, are "actually distinct offenses").

¶36 Here, the indictment for counts four, five, six, seven, and eight separately alleged that Morris "with intent to defraud knowingly possessed" the four checks and certificate of title, all "forged instrument[s], in violation of . . . § 13-2002(A)(2)." However, the final jury instruction describing the offense of forgery included all three subsections of § 13-2002(A). The trial court also instructed the jury on the meaning of "possess," "written instrument," and "forged instrument." *See* A.R.S. §§ 13-105(34), 13-2001(8), (12).

¶37 A duplicitous charge exists "[w]hen the text of an indictment refers only to one criminal act, but multiple alleged criminal acts are introduced to prove the charge." *State v. Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d 844, 847 (App. 2008). It arises from "the evidence presented to prove a count of the indictment," not the indictment itself. *Id.* ¶ 13. Like a duplicitous indictment, which charges more than one offense in a single count, a duplicitous charge can "create the 'hazard of a non-unanimous jury verdict.'" *Id.* ¶¶ 10, 12, *quoting Davis*, 206 Ariz. 377, ¶ 54, 79 P.3d at 76.

¶38 Morris acknowledges the indictment was limited to § 13-2002(A)(2) but asserts the state argued and presented evidence that his conduct also fell under § 13-2002(A)(1). Specifically, he maintains, "[E]vidence was presented that [he] had the tools to create the documents [and] that there were a number of documents he was in the process of creating." He therefore contends that the

forgery charges were duplicitous and that the trial court failed to cure the error.[8]

¶39 The forgery charges were not duplicitous. Although the trial court erroneously instructed the jury on all three types of forgery in § 13-2002(A), the prosecutor's and defense counsel's closing arguments clarified that knowing possession under subsection (A)(2) was the only type of forgery at issue in this case. *See State v. Morales*, 198 Ariz. 372, ¶ 5, 10 P.3d 630, 632 (App. 2000) (court may consider counsel's arguments when evaluating possible ambiguity in jury instructions). The prosecutor argued:

> Now Count Four is forgery, [and] the State has shown that the defendant knowingly possessed a forged instrument, which is that Arizona MVD title.
>
> That was found in the Durango. That was the one that was kind of a washed title. Everything except the title number was missing. That is a forged document. The key with this, and what the defendant has denied, is that he didn't know anything about the Durango, he didn't know what was in there. He had nothing to do with any of that stuff. But you can infer that the defendant acted knowingly by the evidence. Evidence that ties the defendant to the Durango and its contents.
>
> . . . .

[8]Morris relies heavily on *State v. Paredes-Solano*, 223 Ariz. 284, ¶ 5, 222 P.3d 900, 903 (App. 2009), which involved a duplicitous indictment, not a duplicitous charge. Thus, *Paredes-Solano*'s explanation of a single unified offense, which Morris spends considerable time discussing, is not helpful here. *See id.* ¶¶ 9-10; *see also West*, 238 Ariz. 482, ¶¶ 19-21, 362 P.3d at 1056-57 (discussing meaning of single unified offense).

Now Count Five is forgery, and . . . the State has proven he knowingly possessed, this is the Tucson Electric check for $498.12, it's payable to the defendant. And you heard [from] . . . the Tucson Electric employee, who said this is, that is our checking account across the bottom, but that's not our check.

Count [S]ix is kind of the same as Count Five, it is just a different check. It is the Tucson Electric check for 472.23, Exhibit 6B, payable to [A.F.]. Now the defendant had forged driver's licenses with [A.F.'s] name with his photo on it. He could use those to cash the checks in [A.F.'s] name. He could use those to deposit those checks in that Patelco account . . . in the victim's name. His intent to defraud can be inferred by the circumstances.

Count Seven, which is one of the [DirecTV] checks, the check for 392.15, payable to [A.F.]. [D.C.] testified, that is not a legitimate [DirecTV] check, that is a forged document. Again, defendant had the means, he had the ID's to cash a check in the name of [A.F.].

Count Eight, that's that second [DirecTV] check, Exhibit 6E, payable to [A.F.]. Just as in Count Seven, defendant had the means and the intent to defraud by possessing that check. Now in regard to the [DirecTV] forgery accounts, to show he knowingly possessed and having intent to defraud, because there was a [L.V.] check, which is Exhibit 6D. Now, [D.C.] testified, he said that was a legitimate check, that was a legitimate customer for [DirecTV].

> You can infer that he used that as a template to create those two [DirecTV] checks in [A.F.'s] name. I mean there was a blank check stub, Exhibit 7A, look at that, compare that to the checks that were forged in [A.F.'s] name. Defendant had the tools . . . to create the forged checks, he had the tools to cash those forged checks. He had the intent to defraud.

Defense counsel similarly stressed the element of knowing possession. Specifically, he argued that "the government has to prove that [Morris] knowingly possessed these items."

¶40 Although the prosecutor referred to the creation of the checks generally as part of her closing argument, the point of the discussion was that Morris "had the intent to defraud," which is relevant under § 13-2002(A)(2). Likewise, the state introduced evidence that several items found in the Durango—like the scanners and printers—could be used to create false documents. However, that evidence was relevant to prove the charges and to rebut Morris's third-party defense. *See* §§ 13-2001(8) (defining "[f]orged instrument" as one "that has been falsely made, completed or altered"), 13-2002(A)(2) (requiring proof of "intent to defraud" and "forged instrument"), 13-2009(A) (requiring proof that "person knowingly takes, purchases, manufactures, records, possesses or uses any personal identifying information").

¶41 Moreover, at the start of trial, the jury was provided with a copy of the indictment, which expressly limited the forgery charges to § 13-2002(A)(2). The verdict forms for each of the forgery counts indicated that the jury found Morris guilty "as alleged in . . . the indictment." There was thus no likelihood of a non-unanimous verdict, *see Davis*, 206 Ariz. 377, ¶ 54, 79 P.3d at 76, and Morris has not met his burden of showing fundamental, prejudicial error, *see Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08.

¶42 In a related argument, Morris contends that, because he was charged with forgery under § 13-2002(A)(2) but the state admitted evidence that he created false documents under

§ 13-2002(A)(1), "there was a real possibility that he was convicted of an offense not presented to the grand jury." However, as discussed above, the state did not argue or offer evidence that Morris had committed forgery under § 13-2002(A)(1). Morris's reliance on *State v. Mikels*, 119 Ariz. 561, 582 P.2d 651 (App. 1978), is therefore misplaced. In *Mikels*, the state presented different acts of sodomy to the grand jury and to the trial jury to support one count of the offense. *Id.* at 562, 582 P.2d at 652. Here, the evidence and charges were consistent throughout. Thus, Morris has not met his burden of showing fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08.

Disposition

¶43 For the foregoing reasons, we affirm Morris's convictions and sentences.