IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

RYAN ROBERT UMLAH,
Appellant.

No. 2 CA-CR 2015-0339
Filed July 31, 2017

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NOT FOR PUBLICATION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 Pinal County
No. S1100CR201402998
The Honorable Dwight P. Callahan, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By David A. Sullivan, Assistant Attorney General, Tucson
Counsel for Appellee

The Nolan Law Firm, P.L.L.C., Mesa
By Cari McConeghy Nolan
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Kelly[1] concurred.

E C K E R S T R O M, Chief Judge:

¶1 Ryan Umlah appeals from his convictions and sentences for one count of burglary and one count of theft, raising multiple claims of error in his trial and sentencing. For the following reasons, we affirm.

Factual and Procedural Background

¶2 In May 2014, officers with the Apache Junction Police Department responded to a complaint of suspicious activity in a neighbor's shed. After arriving, one officer saw Umlah look out the shed door; the officer made eye contact with him and gestured for him to approach. Officers discovered several tools and other items that belonged to the property owner in Umlah's backpack.

¶3 After a jury trial, Umlah was convicted of burglary in the third degree and misdemeanor theft. The trial court sentenced him to enhanced, presumptive, concurrent prison terms, the longer of which was ten years. Umlah timely appealed. We have jurisdiction. A.R.S. §§ 13-4031, 13-4033.

Demonstrative Exhibit

¶4 Umlah first contends that the trial court erred by admitting a diagram of the premises, drawn outside the courtroom by one of the officers, claiming the drawing was "inaccurate," which we interpret as a challenge to the foundation for admitting the

[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

diagram pursuant to Rule 901, Ariz. R. Evid.[2] We review a trial court's evidentiary rulings for abuse of discretion. *State v. Payne*, 233 Ariz. 484, ¶ 56, 314 P.3d 1239, 1258 (2013).

¶5 Umlah argues the drawing so lacked any pretense of accuracy that the state did not lay an adequate foundation for its admission.[3] *See* Ariz. R. Evid. 901(a). "Whether a party has laid sufficient foundation for the admission of evidence is within the sound discretion of the trial court, and we will not disturb its ruling absent a clear abuse of that discretion." *State v. George*, 206 Ariz. 436, ¶ 28, 79 P.3d 1050, 1060 (App. 2003).

¶6 Generally, the proponent of evidence "must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Ariz. R. Evid. 901(a). "Diagrams are widely accepted to illustrate other evidence and to assist the jury in understanding testimony." *State v. Doerr*, 193 Ariz. 56, ¶ 47, 969 P.2d 1168, 1178 (1998). Here, Officer T.P. testified that he had been at the subject property during the incident, that he had drawn the diagram "off memory," and that he had drawn it "to the best of [his] recollection, [as an] accurate representation of the layout of the buildings on the property." Thus, the state laid an adequate foundation to establish that the diagram represented the property.

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[2]Umlah also contends the diagram constituted impermissible hearsay, violated his rights under the Confrontation Clause, and was more prejudicial than probative. He did not object on any of these grounds in the trial court and has therefore forfeited review absent fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005); *State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008) (objection on one ground does not preserve objection on other grounds). Because he does not argue any of these alleged errors was fundamental, and we see no error that can be characterized as such, he has waived these issues on appeal. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

[3] For example, Umlah complains the diagram included a driveway that did not exist and the diagram was not drawn to scale, making the shed appear much closer to the home.

See Ariz. R. Evid. 901(a), (b)(1). As such, the complained-of discrepancies in the diagram are not foundational, going to admissibility, but are better characterized as matters of weight. *See Doerr*, 193 Ariz. 56, ¶ 47, 969 P.2d at 1178 (noting that courts "have upheld the use of maps and diagrams to illustrate testimony even when they are not absolutely correct"); *see also State v. King*, 213 Ariz. 632, ¶ 34, 146 P.3d 1274, 1282 (App. 2006) ("discrepancies in the evidence affect the weight of evidence, not its admissibility"). Thus, we cannot say the trial court abused its discretion.

Ultimate Issue Testimony

¶7 Umlah also contends that the trial court erred when it allowed two officers to offer "ultimate issue opinion testimony."[4] He argues the statements were "couched in legal conclusions" and thereby invaded the province of the jury. We review a trial court's ruling on the admissibility of evidence for abuse of discretion. *State v. Ellison*, 213 Ariz. 116, ¶ 42, 140 P.3d 899, 912 (2006).

¶8 The officers testified as follows:

> THE STATE: At approximately 3 p.m. on that afternoon, tell me what happened.

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[4] He additionally argues that the officers' testimony was erroneous because the recording of the call demonstrated that the neighbor complained of "suspicious activity." Nevertheless, such discrepancies are a matter of weight rather than admissibility. *King*, 213 Ariz. 632, ¶ 34, 146 P.3d at 1282.

Umlah also invokes the Sixth and Fourteenth Amendments, arguing the testimony "violate[d] the presumption of innocence, the burden of proof, and due process ideals guaranteed by the federal and Arizona constitutions." While Umlah cites numerous Supreme Court cases, he fails to develop any argument sufficient for appellate review and, therefore, has waived these claims. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995).

> OFFICER T.P.: We received a call of a crime in progress, a burglary in progress.
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> DEFENSE COUNSEL: Objection, your Honor, conclusion.
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> THE COURT: Overruled. You may answer.
>
> OFFICER T.P.: The call that came out was a burglary in progress with a white male subject in a shed on the property.
>
> . . . .
>
> THE STATE: Tell me what happened on that afternoon around 3 p.m. approximately?
>
> OFFICER J.F.: I was dispatched as a support officer to a burglary in progress call.
>
> DEFENSE COUNSEL: Objection; inclusion [sic] again.
>
> THE COURT: Overruled.
>
> THE STATE: Sorry?
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> THE COURT: He answered already. Next question.

¶9 Umlah claims the officers, in this testimony, expressed an opinion that his conduct constituted a burglary. Opinion evidence is "A witness's belief, thought, inference, or conclusion concerning a fact or facts." *Evidence*, Black's Law Dictionary (10th ed. 2014). Opinions on ultimate issues should be admitted only when "they assist the trier of fact to understand the evidence or to determine a fact in issue." *See* Ariz. R. Evid. 704 cmt. to 1977 Rule. Further, such

opinions "are not within the spirit of the rules [of evidence]" when a "witness is actually being asked his opinion of whether the defendant was guilty." *Fuenning v. Superior Court*, 139 Ariz. 590, 605, 680 P.2d 121, 136 (1983).

¶10 The testimony of Officers T.P. and J.F., however, did not constitute opinion evidence. Rather than offer their own "belief, thought, inference, or conclusion" derived from the facts of the case, the officers merely testified to the content of a call prompting their response to the subject property.[5] In context, this testimony did not express an opinion as to Umlah's guilt or tell the jury how it should decide the case. *See State v. Sosnowicz*, 229 Ariz. 90, ¶ 25, 270 P.3d 917, 924 (App. 2012). Accordingly, we cannot say the trial court abused its discretion by admitting the statements over Umlah's objection.

Prosecutorial Misconduct

¶11 Umlah next contends that the state committed prosecutorial misconduct by vouching for its witnesses during opening and closing arguments. Because Umlah did not object at trial, we review for fundamental error. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005).

¶12 "[I]t is improper for the prosecution to vouch for the credibility of the state's witnesses" by either placing "the prestige of the government behind the witness or . . . indicat[ing] that information not presented to the jury supports the witness's testimony." *State v. Salcido*, 140 Ariz. 342, 344, 681 P.2d 925, 927 (App. 1984). Umlah complains that the state vouched during opening arguments by saying, "[T]his defendant was caught red-handed committing a burglary and committing a theft. And he wants—today he wants to get away with it. Your verdict is going to tell him whether or not he's right." And again, during closing, "And the defendant thinks he can get away with it, even after he has been caught red-handed. Your verdict today will tell him if he's right." But these

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[5]Umlah did not challenge below or before this court whether that content constituted impermissible hearsay, and we therefore do not address any such claim.

statements do not constitute vouching—they neither placed the prestige of the government behind any witness nor did they refer to information not in evidence. *See id.* Thus, we cannot agree that the state vouched for its witnesses.[6]

Daubert Hearing

¶13 Umlah next complains the trial court erred by denying his motion for a pretrial hearing pursuant to Rule 702, Ariz. R. Evid., and *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). We review a trial court's evidentiary rulings for abuse of discretion. *Payne*, 233 Ariz. 484, ¶ 56, 314 P.3d at 1258.

¶14 Umlah contends that the state is required to produce evidence concerning the fingerprint expert's qualifications and methods at a pretrial hearing, rather than at trial. But this court has stated that "the trial court has broad discretion to determine the reliability of evidence and need not conduct a hearing to make a *Daubert* decision." *State v. Perez*, 233 Ariz. 38, ¶ 19, 308 P.3d 1189, 1194 (App. 2013). Furthermore, Umlah had the opportunity to cross-examine the expert at length about his qualifications and methods during the bench trial concerning his prior convictions.

¶15 To the extent Umlah challenges the expert's qualifications to conduct fingerprint analysis, Rule 702, Ariz. R. Evid., places the trial judge in the role of a "'gatekeeper' who makes a preliminary assessment as to whether the proposed expert testimony

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[6]Nevertheless, pleas to convict "in order to protect community values, preserve civil order, or deter future law breaking" are improper. *State v. Herrera*, 174 Ariz. 387, 396, 850 P.2d 100, 109 (1993), *quoting United States v. Monaghan*, 741 F.2d 1434, 1441 (D.C. Cir. 1984). However, Umlah has not objected to this feature of the argument before either the trial court or this court, and we do not believe the error to be fundamental. Thus, the argument is waived and we do not address it further. *See State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004); *see also State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court does not ignore fundamental error when it finds it).

is relevant and reliable." *State ex rel. Montgomery v. Miller*, 234 Ariz. 289, ¶ 19, 321 P.3d 454, 463 (App. 2014), *quoting* Ariz. R. Evid. 702 cmt. to 2012 amend. Here, the expert testified at length concerning his qualifications and the methods he employed. He testified about his extensive training and continuous experience, beginning in 1987, which included hundreds of fingerprint comparisons. To the extent Umlah challenges the court's finding that the evidence was reliable, our supreme court has concluded that fingerprint evidence is considered reliable and admissible under *Daubert*. *See State v. Favela*, 234 Ariz. 433, 323 P.3d 716 (2014).

¶16 Accordingly, we cannot say the trial court abused its discretion either by denying the motion for a separate pretrial hearing on the expert's qualifications or by admitting the expert testimony.

Late Disclosure of Historical Convictions

¶17 Finally, Umlah contends the trial court improperly considered his prior felony convictions at sentencing because the state did not timely amend the indictment. We review a trial court's decision to allow the state to amend an indictment for abuse of discretion. *State v. Johnson*, 198 Ariz. 245, ¶ 4, 8 P.3d 1159, 1161 (App. 2000).

¶18 "The prosecutor may amend an indictment . . . to add an allegation of . . . prior convictions . . . within the time limits of Rule 16.1(b)." Ariz. R. Crim. P. 13.5(a). Notwithstanding the requirements of Rule 16.1(b), Ariz. R. Crim. P., courts must allow the state to allege prior convictions any time before trial unless "the allegation is filed fewer than twenty days before [trial] and the court finds on the record that the person was in fact prejudiced by the untimely filing and states the reasons for these findings." A.R.S. § 13-703.

¶19 Although the state moved to amend the indictment in this case just eight days before trial, the trial court found that Umlah had adequate notice of the allegations and was not prejudiced. Further, the record supports the trial court's findings. Under a prior indictment arising out of the same underlying offense, the state

alleged Umlah's prior convictions and disclosed both its intent to call the same fingerprint expert as well as Umlah's "pen pack," which included his fingerprints from both the Arizona Department of Corrections and from Maricopa County. After the state voluntarily remanded to the grand jury, which returned the instant indictment, the common understanding among the parties and the court appeared to be that the re-indictment subsumed the previous indictment. In its brief on the issue below, the state asserted that plea negotiations had been conducted with the understanding that Umlah had two prior convictions, and Umlah has never disputed that assertion. Viewing the facts in the light most favorable to upholding the trial court's ruling, *State v. Howard*, 163 Ariz. 47, 49, 785 P.2d 1235, 1237 (App. 1989), we cannot say that the trial court erred by allowing the state to amend the indictment or by considering Umlah's prior felony convictions at sentencing.

Disposition

¶20 For the foregoing reasons, we affirm Umlah's convictions and sentences.