IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

SERGIO FABIAN ALVARADO,
Appellant.

No. 2 CA-CR 2016-0290
Filed June 29, 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NOT FOR PUBLICATION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. CR201502476
The Honorable Lawrence M. Wharton, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By Karen Moody, Assistant Attorney General, Tucson
Counsel for Appellee

Flores & Clark, PC, Globe
By Daisy Flores
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Espinosa and Judge Howard[1] concurred.

V Á S Q U E Z, Presiding Judge:

¶1 After a jury trial, appellant Sergio Alvarado was convicted of possession of a dangerous drug and possession of drug paraphernalia. The trial court sentenced him to concurrent prison terms, the longer of which is eight years. Alvarado argues the court erred by denying his motion to preclude evidence pursuant to Rule 15.8(c), Ariz. R. Crim. P. We affirm.

¶2 We view the evidence in the light most favorable to upholding the jury's verdicts. *State v. Cox*, 217 Ariz. 353, ¶ 22, 174 P.3d 265, 269 (2007). In July 2015, a law enforcement officer stopped Alvarado because he knew from a prior contact that Alvarado was driving with a suspended license. During the stop, the officer found in Alvarado's car a bag containing a glass pipe, a digital scale, and three small baggies, one of which contained 1.79 grams of methamphetamine.

¶3 The officer's report included a statement that he had taken photographs and they were available in evidence. However, the state was "unable to retrieve" the photographs for Alvarado's review. In April 2016, Alvarado rejected a plea offer from the state that was set to expire the day he rejected it. He then filed a motion requesting a jury instruction pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964), regarding the photographs. Alvarado asserted

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[1]The Hon. Joseph W. Howard, 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.

the missing photographs "could refute the State's assertion that the items allegedly found in [his] vehicle were actually there."

¶4 About a week later, the State filed a notice stating the photographs "may actually exist and have been mislaid." The following day, it disclosed the photographs. Alvarado then sought to preclude the photographs pursuant to Rule 15.8(c), asserting the lack of photographs was material to his decision whether to plead guilty because he would have been entitled to a *Willits* instruction had the photographs never been found. The trial court denied the motion to preclude on the first day of trial, concluding the photographs had been timely disclosed pursuant to Rule 15.6(c), Ariz. R. Crim. P. It noted, inter alia, that by rejecting the state's plea offer, Alvarado "ran the risk that the photographs that were described by [the officer's report] would be accurately described and essentially corroborate what would be his testimony." After a two-day jury trial, Alvarado was convicted and sentenced as described above. This appeal followed.

¶5 Pursuant to Rule 15.8(a), when the state extends a plea offer, "the prosecutor must provide the defense with material disclosure listed in Rule 15.1(b) then within the prosecutor's possession." "If the disclosure is made less than 30 days before the offer expires or is withdrawn, sanctions may be imposed under Rule 15.8(c)." *Id.* That rule provides that the trial court, upon motion, "shall consider the impact of the prosecutor's failure to comply with Rule 15.8(a) on the defendant's decision to accept or reject a plea offer" and, if "the prosecutor's failure to provide such disclosure materially impacted the defendant's decision and the prosecutor declines to reinstate the lapsed or withdrawn plea offer, then the presumptive minimum sanction shall be preclusion from admission at trial of any evidence not disclosed as required by Rule 15.8(a)." Ariz. R. Crim. P. 15.8(c).

¶6 Alvarado asserts the trial court erred by failing to "address the Rule 15.8 violation" and thus "allowed the State to withhold evidence . . . and then alter the expected evidence at trial," thus violating his right to "make a knowing and intelligent decision regarding any plea offer." We review for an abuse of discretion a

trial court's rulings on discovery and disclosure matters, including its decision whether to impose sanctions. *State v. Towery*, 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996); *State v. Bernini*, 220 Ariz. 536, ¶ 7, 207 P.3d 789, 791 (App. 2009).

¶7 Alvarado is correct that the trial court did not discuss Rule 15.8 in its ruling nor determine whether the photographs were material to his decision to reject the state's plea offer. As we have noted, the court instead based its ruling on Rule 15.6(c), which requires the photographs to have been disclosed at least seven days before trial. Implicit in that determination is a conclusion that Rule 15.8(c) does not apply.

¶8 Rule 15.8 would apply only if the photographs were in the prosecutor's possession at the time Alvarado rejected the plea, just before it was scheduled to be withdrawn. *See* Ariz. R. Crim. P. 15.8(a). But the only evidence in the record shows the state believed at that time that the photographs were not retrievable. Alvarado does not address this issue, and instead assumes the photographs were in the prosecutor's possession as contemplated by Rule 15.8.[2] But he cites no authority, and we have found none, concluding that evidence the state reasonably, but incorrectly, believes cannot be recovered is within the state's possession or control. *Cf.* Ariz. R. Crim. P. 15.6 (parties have ongoing obligation to make "additional

[2] We assume, without deciding, that Rule 15.8 applies to material or information "within the prosecutor's possession or control" as contemplated by Rule 15.1(b), Ariz. R. Crim. P., despite that Rule 15.8(a) omits materials within the prosecutor's "control" from the evidence subject to the rule, referring only to items in the prosecutor's "possession." We therefore need not decide whether the state's disclosure obligation under Rule 15.8 includes information in the possession of a law enforcement agency but not the prosecutor. *See* Ariz. R. Crim. P. 15.1(f) (extending "prosecutor's obligation under [Rule 15.1]" to materials "in the possession or control of . . . [a]ny law enforcement agency which has participated in the investigation of the case and that is under the prosecutor's direction or control").

disclosure, seasonably, whenever new or different information subject to disclosure is discovered"); *State v. Chaney*, 141 Ariz. 295, 307, 686 P.2d 1265, 1277 (1984) (state's failure to disclose photographs that "did not develop" does not violate Rule 15.1). In the absence of any argument that the trial court erred by determining the photographs were not subject to disclosure at the time the plea was to expire, Alvarado has waived this issue on appeal. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995).

¶9 But, even if the photographs were deemed to be in the prosecutor's possession at the time Alvarado rejected the plea offer, the absence of those photographs was material to that decision, and the trial court was thus required to preclude them from evidence, we agree with the state that any resulting error was harmless. "Error is harmless if we can conclude, beyond a reasonable doubt, that the error did not contribute to or affect the jury's verdict." *State v. Davolt*, 207 Ariz. 191, ¶ 64, 84 P.3d 456, 474 (2004).

¶10 We can discern no reasonable possibility that the jury would have reached a different verdict absent the photographs. The evidence of Alvarado's guilt was largely undisputed—he was the sole occupant of the vehicle and acknowledged he was aware of the pipe contained in the bag, and therefore that he was aware of the bag's other contents. *See State v. Lizardi*, 234 Ariz. 501, ¶ 19, 323 P.3d 1152, 1157 (App. 2014) ("We may find an error to have been harmless when there is overwhelming evidence of a defendant's guilt."). And the photographs were cumulative to the arresting officer's testimony about the location and contents of the bag. *See State v. Williams*, 133 Ariz. 220, 226, 650 P.2d 1202, 1208 (1982) (erroneous admission of entirely cumulative evidence harmless). Notably, Alvarado has not filed a reply brief, which would justify our summary acceptance of the state's harmless-error argument. *See State v. Morgan*, 204 Ariz. 166, ¶ 9, 61 P.3d 460, 463 (App. 2002) (failure to file reply brief on issue presented in answering brief is sufficient basis for rejecting appellant's position); *cf. Ariz. Dep't of Pub. Safety v. Indus. Comm'n*, 170 Ariz. 275, 277, 823 P.2d 1283, 1285 (App. 1991) ("A failure to reply to arguments raised in an answering brief may justify a summary disposition of an appeal.").

¶11 We affirm Alvarado's convictions and sentences.