IN THE

# ARIZONA COURT OF APPEALS

DIVISION TWO

---

THE STATE OF ARIZONA,
*Appellee*,

*v.*

JESUS MANUEL OLEA,
*Appellant*.

No. 2 CA-CR 2018-0101
Filed April 24, 2019

---



---

Appeal from the Superior Court in Pima County
No. CR20153497001
The Honorable Howard Fell, Judge Pro Tempore

**AFFIRMED**

---

COUNSEL

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

James Fullin, Pima County Legal Defender
By Robb P. Holmes, Assistant Legal Defender, Tucson
*Counsel for Appellant*

---

**MEMORANDUM DECISION**

Judge Espinosa authored the decision of the Court, in which Presiding Judge Eppich and Chief Judge Eckerstrom concurred.

---

E S P I N O S A, Judge:

**¶1** After a jury trial, Jesus Olea was convicted of two counts of driving under the influence (DUI), three counts of manslaughter, and one count of negligent homicide. The trial court sentenced him to a combination of consecutive and concurrent prison terms totaling 16.5 years. On appeal, Olea argues the court deprived him of his constitutional right to present a defense by precluding certain testimony. For the following reasons, we affirm.

**Factual and Procedural Background**

**¶2** We view the facts in the light most favorable to sustaining the convictions. *State v. Wright*, 239 Ariz. 284, ¶ 2 (App. 2016). In the early morning of July 27, 2015, Olea was driving eastbound on Sixth Street just west of the intersection at Country Club, in Tucson. The street has a thirty-degree curve as it approaches the intersection, and a large median with palm trees sits between the curve and a straight side street. Olea's vehicle traveled into the median at a "reasonably high speed" and collided with a tree. Two passengers in the car died at the scene, while a third, who was pregnant, died at the hospital. Olea too was taken to the hospital where his blood was drawn and eventually tested, revealing a blood alcohol content of 0.180.

**¶3** Olea was charged with four counts of manslaughter and two counts of misdemeanor DUI. As noted above, the jury convicted him of both DUI counts, three counts of manslaughter, and one count of negligent homicide as a lesser-included offense. After being sentenced, Olea brought this appeal; we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

**Discussion**

**¶4** Olea argues the trial court "deprived [him] of his constitutional right to present a defense" by precluding one expert from testifying, disallowing "most" of another expert's testimony, and barring the testimony of an investigating officer about how frequently police respond to traffic accidents at the intersection where the accident occurred.[1] We review the trial court's exclusion of evidence for abuse of discretion. *State v. Robinson*, 165 Ariz. 51, 56 (1990).

**¶5** We first note that while a defendant has a fundamental constitutional right to present a defense, that right is limited by ordinary evidentiary rules and does not extend to presenting evidence that is irrelevant or unduly prejudicial. *State v. Abdi*, 226 Ariz. 361, ¶ 32 (App. 2011). Olea's chief defense was that the roadway's defective design was a superseding, intervening cause that "led to the accident."[2] Relying on *State v. Shumway*, 137 Ariz. 585 (1983), and *State v. Paxson*, 203 Ariz. 38 (App. 2002), Olea argues the jury should have been "allowed to consider information regarding other factors surrounding the collision when they may have created doubt as to whether the defendant's driving actually

[1]Before trial, the state filed a motion to preclude evidence of any other collisions at the same location. The trial court held the motion in abeyance because "[u]nless and until the defense ha[d] an opinion of [an] expert, the Court [would be] unable to determine the relevancy and/or admissibility of the material." On appeal, Olea only cites to a portion of the record where he asserted that a responding officer "says he [is called] to that intersection all the time both for alcohol and nonalcohol-related accidents." But Olea has not identified any point in the record where the court precluded such testimony. We therefore deem the issue waived. *See* Ariz. R. Crim. P. 31.10(a)(7)(A) (appellant's argument must contain appropriate references to portions of record on which he relies); *see also State v. West*, 238 Ariz. 482, ¶ 55 (App. 2015).

[2]Legal causation in a criminal case may be interrupted when another cause with which the defendant was not connected intervenes, and but for which the injuries would not have occurred. *State v. Marty*, 166 Ariz. 233, 237 (App. 1990). An intervening cause is a superseding event only if it was unforeseeable by the defendant and, with the benefit of hindsight, may be described as abnormal or extraordinary. *State v. Bass*, 198 Ariz. 571, ¶¶ 11-13 (2000).

caused the collision." In *Shumway*, an alcohol-impaired driver sped through an intersection and crashed into a vehicle attempting to turn left, killing its driver. 137 Ariz. at 587. The trial court refused to instruct the jury that a driver turning left has a duty to yield to oncoming traffic, which was found erroneous "because [the decedent's] failure to yield the right of way could relieve the defendant of criminal responsibility." *Id.* at 588. In *Paxson*, an alcohol-impaired driver lost control of his vehicle and crashed into a tree, killing his passenger. 203 Ariz. 38, ¶¶ 3-4. The defendant challenged the trial court's preclusion of expert testimony from which the jury could have inferred that an air bag in the vehicle deployed prematurely, causing the defendant to veer off the road. *Id.* ¶ 5. This court concluded the testimony should have been permitted because although the desired inference was "arguably tenuous" it "was for the fact-finder at trial . . . to choose between the competing inferences." *Id.* ¶¶ 17-18.

**¶6** Here, unlike the defendants in *Shumway* and *Paxson*, Olea was permitted to present testimony supporting his superseding-cause defense. He claims, however, that "most of Dr. Bakken's testimony" was precluded, asserting Bakken should have been permitted to testify "about all the factors that contributed to the roadway where the accident occurred being abnormal and extraordinary, that the danger of the intersection would be unforeseeable and about the city's failure to make improvements." The trial court, however, only limited Bakken from testifying that the victims could have done something to prevent the crash[3] and that the city knew or should have known that the intersection was dangerous and made improvements. Bakken was permitted to testify that the intersection is "unsafe" and "abnormal" for both impaired and unimpaired drivers, the lack of lights illuminating the median made it more dangerous, and because of the trees in the median, there was a higher "probability of severe injury." He further opined that "the raised curb, [and] the lack of conspicuity between the median surface and the roadway surface" contributed to the danger, and he recommended ways to improve the median, including removing the trees and adding signage, guardrails, and reflectors. Moreover, the court,

[3]The trial court precluded testimony about the victims as irrelevant and prejudicial, and Olea does not appear to challenge that ruling. Moreover, he does not argue that such evidence was relevant to his defense. We therefore deem this portion of his claim abandoned and waived on appeal. *See State v. Weekley*, 200 Ariz. 421, n.1 (App. 2001); *In re Steven O.*, 188 Ariz. 28, 29 n.1 (App. 1997) ("A party abandons an appellate issue [when it] fails to argue the issue in [its] brief.").

over the state's objection, provided the jury with a superseding-cause instruction.

**¶7** Olea complains that Bakken's excluded testimony about the city's knowledge and failure to improve the intersection was relevant to his superseding-cause defense. The trial court, however, not only excluded this testimony as irrelevant, but also as lacking foundation and posing a danger of unfair prejudice, presumably finding its probative value outweighed by the risk of misleading the jury. *See* Ariz. R. Evid. 402, 403 (even relevant evidence can be excluded if the danger of unfair prejudice outweighs its probative value), 703; *see also Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 44 (App. 1996) (expert opinion must rely on data and facts admitted into evidence at trial, personally perceived by the expert, or reasonably relied upon by experts in the field). Olea has not explained how the court erred in finding this testimony more prejudicial than probative, nor has he challenged the court's finding that the evidence was inadmissible without further foundation.[4] Accordingly, he has failed to carry his burden of showing the court abused its discretion. *See State v. Bolton*, 182 Ariz. 290, 298 (1995); *see also* Ariz. R. Crim. P. 31.10(a)(7) (appellate brief must contain argument with supporting reasons for each contention).

**¶8** Olea additionally challenges the trial court's preclusion of former traffic engineer Anthony Voyles. Two weeks before trial, Olea sought a continuance to retain Voyles for the purpose of testifying that the intersection was abnormally complex and proper maintenance and markings would have prevented the deaths. In denying the motion, the court noted that Voyles was not available for trial and the probative value of his proposed testimony did not outweigh the danger of unfair prejudice. Olea urges that the testimony was relevant and "it would have been possible that the intersection was abnormal, that the lack of signage and proper engineering rendered it abnormal, dangerous and unforeseeable." But he again fails to address the court's express determination that the probative value of the evidence was outweighed by the risk of confusing

[4]The trial court found no basis for allowing Bakken to testify that the City of Tucson knew or should have known that the intersection was dangerous when there had "been no determination that he can base that opinion on," "no [city] repair order," no indication the city was at fault, and Bakken "never spoke with anybody from the City of Tucson." The court also noted "[m]aybe they looked at it and determined that it wasn't a dangerous intersection," to which possibility defense counsel agreed.

the issues for the jury. And in any event, as the state points out, the proffered testimony that the intersection was "abnormally complex" and that a traversable median, removal of trees, and better signage could have prevented the deaths would have been cumulative to Bakken's testimony. *See State v. Kennedy*, 122 Ariz. 22, 26 (App. 1979) (cumulative evidence merely augmenting or tending to establish points already made by other evidence properly excluded). Accordingly, Olea has not shown the court abused its discretion by precluding Voyles's testimony. *State v. Haskie*, 242 Ariz. 582, ¶ 18 (2017) ("Deciding whether expert testimony will aid the jury and balancing the usefulness of expert testimony against the danger of unfair prejudice are generally fact-bound inquiries uniquely within the competence of the trial court." (quoting *State v. Moran*, 151 Ariz. 378, 381 (1986))).

**Disposition**

**¶9** For all the foregoing reasons, Olea's convictions and sentences are affirmed.