IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

FRANCISCO JAVIER RAMIREZ,
Appellant.

No. 2 CA-CR 2018-0139
Filed July 29, 2019

Appeal from the Superior Court in Pima County
No. CR20131562001
The Honorable Scott Rash, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Amy Pignatella Cain, Assistant Attorney General, Tucson
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Sarah L. Mayhew, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

E S P I N O S A, Judge:

¶1 After a jury trial, Francisco Ramirez was convicted of two counts of aggravated driving under the influence, two counts of aggravated driving with an illegal drug in his body, and one count each of possession of drug paraphernalia and possession of marijuana. The trial court sentenced him to concurrent, four-month prison terms and concurrent terms of probation, the longest of which are seven years. On appeal, Ramirez primarily argues the court erred by admitting certain testimony and failing to conduct a colloquy to determine if he knowingly and voluntarily waived his right to testify. For the following reasons, we affirm.

Factual and Procedural Background

¶2 In the early morning of June 19, 2012, Deputies Bart Davis and Laura Gil of the Pima County Sheriff's Department responded to a 911 call in northwest Tucson and found a vehicle in the middle of the road with Ramirez "slumped back" in the driver's seat and the engine still running. The deputies woke Ramirez and got him out of the car. He "staggered" as he exited the vehicle, and Deputy Gil observed "white stuff on the corner of his lips," Ramirez's "eyes were red and bloodshot," and a pill bottle containing a substance resembling marijuana was on the driver's side floorboard. Another deputy found a marijuana pipe in the center console of Ramirez's vehicle and pointed it out to Davis.

¶3 Deputy Davis conducted a DUI investigation, including the administration of field sobriety tests ("FSTs"), while Deputy Gil interviewed the 911 caller and secured the scene. Gil observed Ramirez "had body tremors" which "can be caused by someone smoking marijuana" and also noticed that his speech "was slow and slurred." Deputy Davis then arrested Ramirez, and Deputy Gil drew his blood after obtaining a telephonic search warrant. Subsequent testing revealed the presence of marijuana and oxycodone in Ramirez's blood. Additionally,

Ramirez had two prior DUI convictions, and his privilege to drive was restricted. Ramirez was charged with the counts of conviction noted above.

¶4 Because Deputy Davis died before the case went to trial, Deputy Gil was the state's primary witness regarding the investigation. Ramirez repeatedly indicated his desire to testify, but on the last day of trial, his defense counsel rested without calling any witnesses, including Ramirez. While reading the final jury instructions, the trial court began to instruct the jurors on how to evaluate Ramirez's testimony, but it quickly corrected itself and properly instructed the jurors that Ramirez's choice not to testify was not to affect their deliberations. The jury convicted Ramirez as charged, and he was sentenced as described above. Ramirez now brings this appeal, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).[1]

Deputy Gil's Testimony

¶5 Ramirez raises multiple issues relating to Deputy Gil's testimony, arguing that the trial court abused its discretion and violated Ramirez's Sixth Amendment right to confront and cross-examine witnesses. Although we generally review the admission of testimony for abuse of discretion, *State v. Fischer*, 219 Ariz. 408, ¶ 24 (App. 2008), if an objection was not raised before the trial court, our review is limited to fundamental, prejudicial error, *State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005); *see also State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018).

Demonstration of FSTs

¶6 On direct examination, the state asked Deputy Gil to demonstrate how she would administer the walk-and-turn and one-leg-stand FSTs. Ramirez objected "as to the relevance" of the demonstrations, arguing that Deputy Gil may have observed Deputy Davis administer those tests, but that Davis may have conducted them differently than Gil would in the demonstrations. The trial court stated, "[y]ou may be right on that. You can cover that on cross, but I think she can illustrate it for the jury" and overruled the objection.

¶7 Ramirez contends the trial court abused its discretion by permitting the demonstrations, arguing they were irrelevant and highly

[1]Ramirez timely filed a delayed notice of appeal after the trial court granted his motion for a delayed appeal pursuant to Rule 32.1(f), Ariz. R. Crim. P.

prejudicial. Because Ramirez preserved his relevance objection, we review that claim for abuse of discretion. He has not, however, preserved his claim that the probative value of the demonstration was substantially outweighed by the danger of unfair prejudice, and we therefore review that claim only for fundamental, prejudicial error.[2]

¶8 Evidence is relevant, and therefore admissible, if it "has any tendency to make a fact more or less probable than it would be without the evidence" and the fact is "of consequence in determining the action." Ariz. R. Evid. 401, 402. However, even relevant evidence can be excluded if its probative value is substantially outweighed by a danger of unfair prejudice. Ariz. R. Evid. 403. Unfair prejudice means the evidence has "an undue tendency to suggest a decision on an improper basis." *State v. Schurz*, 176 Ariz. 46, 52 (1993). "But not all harmful evidence is unfairly prejudicial. Indeed, evidence which is relevant and material will generally be adverse to the opponent." *Id.*

¶9 Ramirez argues the demonstrations were "irrelevant to the manner in which [Deputy] Davis administered the FSTs" and unfairly prejudicial because the state relied on the demonstrations to prove Ramirez was impaired.[3] But even assuming, without deciding, that the demonstrations were irrelevant and unfairly prejudicial in this case, we would conclude that any error in admitting them was harmless. An error is harmless if we can say, "beyond a reasonable doubt[] that it did not contribute to or affect the verdict." *State v. Poyson*, 198 Ariz. 70, ¶ 21 (2000). When overwhelming evidence of the defendant's guilt is presented, the erroneous admission of evidence is harmless. *See State v. Romero*, 240 Ariz.

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[2] Ramirez contends that "[f]aced with an objection for lack of relevance under Ariz. R. Evid. 401, before permitting the [s]tate to introduce the [demonstration], the [trial] court was obligated to balance the probative and prejudicial value of the evidence" under Ariz. R. Evid. 403. But he cites no authority for the proposition that a Rule 401 objection preserves a Rule 403 challenge. *Cf. State v. Lopez*, 217 Ariz. 433, ¶ 4 (App. 2008) (objection on one ground does not preserve the issue on another ground).

[3] Ramirez also claims "[t]he trial court acknowledged that [he] was likely correct when he objected" to the demonstration on relevance grounds. In context, the court's comment was not an acknowledgment that the evidence was irrelevant, but that Ramirez may be correct that Deputy Davis administered the tests differently than Deputy Gil's demonstration would show, a topic appropriate for cross-examination.

503, ¶ 9 (App. 2016); *see also State v. Ramos*, 235 Ariz. 230, ¶ 20 (App. 2014) (holding defendant failed to satisfy burden of establishing prejudicial error in light of "overwhelming evidence [of his guilt] presented at trial").

¶10 Ramirez contends any error was not harmless because of the state's "strenuous and persistent effort to place the FST evidence before the jury." But regardless of the state's desire to admit the demonstrations, there was overwhelming evidence of Ramirez's guilt of the aggravated DUI offenses, *see* A.R.S. § 28-1383(A)(1), (2). Ramirez's vehicle was found in the middle of the road, with Ramirez "slumped back" in the driver's seat and the vehicle in gear with keys in the ignition. His eyes were red and bloodshot, his speech was slow and slurred, and he staggered as he got out of the car. Marijuana was found in the vehicle, which also had a "pungent" aroma of recently smoked marijuana. A blood test revealed the presence of marijuana and oxycodone, which trial testimony showed can impact the ability to drive and move muscles, slur speech, and cause individuals to fall asleep. Finally, the state presented evidence that Ramirez's privilege to drive was restricted and he had been convicted of two prior DUI violations.

Other Issues Reviewed for Fundamental Error

¶11 Ramirez also generally challenges Deputy Gil's "entire line of testimony . . . related to the FSTs administered by Davis," claiming it "was an improper end-run around the rules precluding hearsay," and as such, violated his constitutional right to confront and cross-examine witnesses. Because Ramirez did not object to any of Deputy Gil's testimony on this basis below, he has forfeited review for all but fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶ 19; *see also Escalante*, 245 Ariz. 135, ¶ 12. Such error "goes to the foundation of [the] case, takes away a right that is essential to [the] defense, and is of such magnitude that [the defendant] could not have received a fair trial." *Henderson*, 210 Ariz. 561, ¶ 24.

¶12 "A criminal defendant has the constitutional right to confront the witnesses against him face-to-face, and this right is implemented primarily through cross-examination." *State ex rel. Montgomery v. Padilla*, 237 Ariz. 263, ¶ 9 (App. 2015). Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Ariz. R. Evid. 801(c). "Testimony not admitted to prove the truth of the matter asserted by an out-of-court declarant is not hearsay and does not violate the confrontation clause." *State v. Rogovitch*, 188 Ariz. 38, 42 (1997).

¶13 Ramirez asserts the state "used Gil's testimony as a conduit for Davis's statements regarding how he administered the FSTs and how [Ramirez] performed on them." He specifically challenges Deputy Gil's opinion that Ramirez performed poorly on the FSTs.[4] He argues that "[b]y permitting the [s]tate to introduce Davis's statements and opinions through a surrogate, who lacked personal knowledge, the [trial] court violated [his] [c]onstitutional right to confront and cross-examine the witnesses against him."

¶14 But Ramirez has not demonstrated that any hearsay statement of Deputy Davis's was admitted at trial.[5] The state did not offer any of Deputy Davis's notes, reports, observations, or opinions. Rather, Deputy Gil testified as to her own observations and opinions. She testified that although she was providing scene security, she was "close enough to see that Mr. Ramirez was performing the field sobriety tests," and based on her own observations, she "noticed that his performance during the field sobriety tests was poor." Despite Ramirez's repeated assertions otherwise, these were not Deputy Davis's observations, but Deputy Gil's. Moreover, Ramirez had the opportunity to, and in fact did, thoroughly cross-examine

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[4]Ramirez also claims Deputy Gil's opinion was inadmissible because it lacked foundation as either a lay witness opinion or expert opinion. But he did not raise this objection at trial. Assuming, without deciding, that Gil's opinion lacked foundation, Ramirez has failed to satisfy his burden of establishing that any such error was fundamental and prejudicial in light of the overwhelming evidence establishing his guilt, as described above. *See Ramos*, 235 Ariz. 230, ¶ 20.

[5]The only hearsay specifically identified by Ramirez is Deputy Gil's response on cross-examination that she later learned Davis administered the HGN test to Ramirez, which Ramirez argues is "blatant inadmissible hearsay because it was offered for the truth of the matter asserted: that Davis had in fact administered the HGN test." But the sole mention of HGN in relation to Ramirez was when his counsel asked, "HGN was conducted; correct? That's the horizontal gaze nystagmus test," and Deputy Gil answered, "I didn't see Deputy Davis administer the horizontal gaze nystagmus, but I learned that he did it." Even if this passing statement, arguably, was hearsay, Ramirez did not object to Gil's answer, nor did he move to strike it. We therefore review only for fundamental error. *See Escalante*, 245 Ariz. 135, ¶ 12. And because Ramirez does not argue fundamental error in connection with this testimony, his argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008).

Deputy Gil as to what she observed during the FSTs, her physical distance from Ramirez while observing the FSTs, and deficiencies in her memory as to the order of the tests and specific cues relating to the test. Accordingly, there was no Confrontation Clause violation, and the trial court did not fundamentally err in admitting this testimony.

Waiver of Right to Testify

¶15 Ramirez next argues the trial court erred by failing to *sua sponte* conduct a colloquy to determine whether he knowingly and voluntarily waived his right to testify when his defense counsel rested after previously and repeatedly indicating Ramirez intended to testify. Ramirez concedes he failed to raise this issue at trial, thereby waiving the right to seek relief for all but fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶ 19. The first step in this analysis is determining whether any trial error occurred. *Id.* ¶ 23.

¶16 Ramirez cites *State v. Noble*, 109 Ariz. 539 (1973), claiming it "established that a trial court errs when the court fails to question the defendant to determine whether he has knowingly and voluntarily waived his right to testify." But that case did not hold that a trial court must conduct a hearing on whether a defendant waived his right to testify. *Id.* at 540-41. Instead, it found error resulting from such a hearing held outside of the defendant's presence. *Id.* at 541. In Arizona, a defendant is not required to make an on-the-record waiver of his right to testify. *See State v. Prince*, 226 Ariz. 516, ¶ 45 (2011); *State v. Gulbrandson*, 184 Ariz. 46, 65 (1995); *State v. Allie*, 147 Ariz. 320, 328 (1985). Moreover, in most situations, "a *sua sponte* inquiry by the trial court as to whether a defendant desires to testify is neither necessary nor appropriate." *Allie*, 147 Ariz. at 328. In dicta, our supreme court suggested it may be prudent for a trial court to make such an inquiry "in an appropriate case." *Gulbrandson*, 184 Ariz. at 64-65.

¶17 Ramirez attempts to distinguish those cases, arguing that unlike the defendants there, he "made his unwavering intention to testify on his own behalf clear" as demonstrated by the trial court's correction of its related instruction to the jury. The law, however, does not support his argument that a trial court commits fundamental, prejudicial error by failing to conduct a colloquy to determine whether a defendant voluntarily

has waived his right to testify. And we are bound by the decisions of our supreme court.[6] *State v. Smyers*, 207 Ariz. 314, n.4 (2004).

Disposition

¶18 For the foregoing reasons, Ramirez's convictions and sentences are affirmed.

[6]Ramirez asserts "the decision to waive [his] right to testify appears to have been made unilaterally by defense counsel," but there is nothing in the record to suggest that Ramirez disagreed with this change in trial strategy; he did not object, nor did he reassert his desire to testify after defense counsel rested, at sentencing, or any other time. Additionally, there is no evidence in the record suggesting that defense counsel failed to discuss with Ramirez the issue of his testifying or that Ramirez did not understand his legal rights.