IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

RICARDO VILLAVICENCIO-ESTRADA,
Appellant.

No. 2 CA CR 2019-0139
Filed April 30, 2020

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NOT FOR PUBLICATION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. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20173482001
The Honorable John C. Hinderaker, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
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Counsel for Appellee

The Law Office of Mark F. Willimann LLC, Tucson
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MEMORANDUM DECISION

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

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

¶1 Ricardo Villavicencio-Estrada appeals from his convictions and sentences for his role in causing a motor vehicle accident while intoxicated. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the jury's verdicts, resolving all inferences against the defendant. *State v. Nihiser*, 191 Ariz. 199, 201 (App. 1997). In January 2017, Villavicencio-Estrada ran a red light at a high rate of speed, broadsiding a car in the intersection. The driver of the other car sustained serious injuries, including a broken neck and nerve damage, and his car was damaged beyond repair. A breath test conducted at the scene revealed that Villavicencio-Estrada—who admitted to police that he had been drinking and exhibited signs of impairment—had a blood alcohol content of over 0.140.

¶3 After a jury trial, Villavicencio-Estrada was convicted of aggravated assault causing serious physical injury, aggravated assault with a dangerous instrument (a motor vehicle), felony criminal damage, misdemeanor driving under the influence (DUI) while impaired to the slightest degree, and misdemeanor DUI with a blood alcohol concentration of 0.08 or more. The trial court sentenced him to three concurrent prison terms, the longest of which is five years, to be followed by three years of probation for the two misdemeanor offenses. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Motion to Suppress

¶4 Before trial, Villavicencio-Estrada moved to suppress the results of the breath test on the ground that he had been legally "incapable

of giving consent to [the] search" due to "his level of intoxication."[1] After a hearing, the trial court denied the motion. Villavicencio-Estrada now challenges that ruling on appeal. He contends that "information about the content of alcohol in one's body is protected" under the Fourth Amendment to the United States Constitution and cannot be seized, even through a breath test, without voluntary consent, which cannot legally be given by someone who is intoxicated.

¶5 When reviewing a trial court's ruling on a motion to suppress, we consider only the evidence before the court at the time of the ruling, viewing it in the light most favorable to upholding the ruling. *State v. Moran*, 232 Ariz. 528, ¶ 2 (App. 2013). Although we defer to the trial court's factual findings, we review any legal conclusions de novo. *See id.* ¶ 5.

¶6 The jurisprudence of both the United States Supreme Court and our own supreme court conclusively establishes that warrantless breath tests administered to lawfully arrested DUI suspects are constitutionally permissible under the search-incident-to-arrest exception to the warrant requirement.[2] *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2184 (2016) ("Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving"); *Diaz v. Bernini*, 246 Ariz. 114, ¶ 6 (2019) ("Under the search-incident-to-arrest exception, the United States and Arizona Constitutions permit law enforcement officers to administer warrantless breath tests to lawfully arrested DUI suspects."). The trial court did not err in rejecting Villavicencio-Estrada's motion to suppress.

Sixth Amendment Claim

¶7 At trial, Villavicencio-Estrada repeatedly requested permission to argue that, rather than the offenses charged by the state, he

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[1]In particular, Villavicencio-Estrada argued—as he does again on appeal—that, because his intoxication rendered him legally incapable of consenting to sexual activity, entering into a plea agreement or a contract, or obtaining a tattoo, he likewise lacked the capacity to "waive his Fourth Amendment rights when the officer requested that he do so knowing that [he] was under the influence of alcohol."

[2]Villavicencio-Estrada conceded in his motion to suppress that the arresting officer had a reasonable suspicion that he had been driving under the influence. Indeed, at trial, Villavicencio-Estrada admitted that he was guilty of the two DUI offenses and therefore properly arrested.

had committed, and should only have been charged with, the civil traffic offense of running a red light (A.R.S. § 28-644(A)(1)) and/or the misdemeanor offense of aggressive driving (A.R.S. § 28-695). He conceded these were not lesser-included offenses of the crimes actually charged, but argued they were an "alternative theory" that "better fit the facts" of his case. The trial court denied Villavicencio-Estrada permission to make such arguments and refused to instruct the jury on the suggested "alternative charges."

¶8 On appeal, Villavicencio-Estrada contends these rulings "den[ied] him the ability to argue his theory of his defense to the jury," in violation of the Sixth Amendment to the United States Constitution. We review a trial court's denial of requested jury instructions for an abuse of discretion. *State v. Anderson*, 210 Ariz. 327, ¶ 60 (2005). No such abuse occurred here.

¶9 "Choosing which offense to prosecute rests within the duty and discretion of the prosecutor." *State v. Gooch*, 139 Ariz. 365, 367 (1984). When conduct can be prosecuted under multiple statutes, the prosecutor has discretion to determine which statute to apply. *State v. Lopez*, 174 Ariz. 131, 143 (1992). Villavicencio-Estrada cites no authority, and we are aware of none, establishing that a defendant is entitled to an instruction regarding different offenses that were not charged by the state and that were not lesser-included offenses of the crimes that were charged.[3] To the contrary, our jurisprudence conclusively establishes that "[a] defendant is not entitled to an instruction on an uncharged offense that does not qualify as a lesser-included offense, even if he might have been charged and convicted of the offense." *State v. Gonzalez*, 221 Ariz. 82, ¶ 8 (App. 2009). And a defendant's characterization of uncharged offenses as an alternative "theory of the case" does not entitle him to an instruction. *State v. Lewis*, 236 Ariz. 336, ¶ 46 (App. 2014). Finally, although Villavicencio-Estrada claims to have been prevented from making his case to the jury, the state did not object when he asserted, nonsensically, that the jury should acquit him of grave felony charges because he had simultaneously committed a traffic infraction that is sometimes committed by individuals who are not intoxicated.

[3]As the state points out, Villavicencio-Estrada does not argue in his opening brief that his non-crime and misdemeanor "alternative theories" somehow constituted lesser-included offenses of those actually charged, and he has therefore waived any such claim on appeal. *See State v. Carver*, 160 Ariz. 167, 175 (1989).

Disposition

¶10 We therefore affirm Villavicencio-Estrada's convictions and sentences.