

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

BRUCE ALLEN COLE,
Appellant.

No. 2 CA-CR 2012-0498
Filed March 27, 2014

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NOT FOR PUBLICATION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); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County

No. CR20093743001

The Honorable Christopher C. Browning, Judge

AFFIRMED

COUNSEL

Thomas C. Horne, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Diane Leigh Hunt, Assistant Attorney General, Tucson
Counsel for Appellee

Manch Law Firm PLLC, Tucson
By Eric S. Manch
Counsel for Appellant

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MEMORANDUM DECISION

Chief Judge Howard authored the decision of the Court, in which Presiding Judge Miller and Judge Brammer¹ concurred.

H O W A R D, Chief Judge:

¶1 After a jury trial, Bruce Cole was convicted of driving while under the influence of liquor and criminally causing \$2,000 or more but less than \$10,000 of damage. On appeal, he argues the trial court erred by vacating and resetting his trial date in violation of his right to a speedy trial, by denying his motion to continue trial so he could prepare to testify, and by denying his motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. Because the court did not abuse its discretion, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against Cole. *See State v. Martin*, 225 Ariz. 162, ¶ 2, 235 P.3d 1045, 1046 (App. 2010). In October 2008, other drivers observed Cole swerving erratically on Wilmot Road until he crashed into a concrete wall located in the victim's yard. Witnesses then observed Cole jump out of his vehicle and throw a beer can away. First responders to the scene noted that Cole smelled strongly of intoxicants, his eyes were watery and bloodshot, his speech was slurred, and his car contained an open beer can and a partially full bottle of liquor.

¶3 Cole was charged with and convicted of criminal damage and driving while under the influence of liquor. He was sentenced to concurrent terms of probation, the longest of which was five years, on condition of spending forty-five days in jail. We

¹The Hon. J. William Brammer, Jr., a retired judge of this court, is called back to active duty and is assigned to serve on this case pursuant to orders of this court and the supreme court.

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have jurisdiction over Cole's appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).²

Speedy Trial

¶4 Cole first argues the trial court erred by vacating and resetting his trial date, and by denying him his right to a speedy trial pursuant to Rule 8.2, Ariz. R. Crim. P., and the state and federal constitutions. Although Cole invoked his right to a speedy trial on March 12, 2012, he did not object to the court resetting his April 2012 trial date or his August 2012 trial date. Nor did he ever move to dismiss the case due to a violation of Rule 8 or his constitutional rights or provide the court with any authority regarding those rights. Thus, he has forfeited review of this claim for all but fundamental, prejudicial error. *See State v. Miller*, 234 Ariz. 31, ¶ 7, 316 P.3d 1219, 1224 (2013) (Sixth Amendment speedy trial rights forfeited if not properly raised below); *State v. Spreitz*, 190 Ariz. 129, 138-39, 945 P.2d 1260, 1269-70 (1997) (defendant forfeits state speedy trial rights by not advising court of impending dismissal as required by Rule 8.1(d)); *State v. Lee*, 25 Ariz. App. 220, 222-23, 542 P.2d 413, 415-16 (1975) (defendant must move to dismiss case on speedy trial grounds before trial to preserve appellate review). But because he does not argue the error was fundamental, he has waived this argument on appeal. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008); *see also Spreitz*, 190 Ariz. at 139, 945 P.2d at 1270 (Rule 8 right to speedy trial not fundamental).³

² Cole's notice of appeal was filed at least three days prematurely. Pursuant to Rule 31.20, Ariz. R. Crim. P., in our discretion we suspend the requirements of Rule 31.3, Ariz. R. Crim. P., because he did not waive his right to an appeal, the untimeliness appears to be through no fault of his own, the trial court would be "virtually required" to grant him relief pursuant to Rule 32.1(f), Ariz. R. Crim. P., and the interests of judicial economy would best be served by doing so. *See State v. Parra*, 27 Ariz. App. 756, 757-58, 558 P.2d 951, 952-53 (1976).

³ Cole apparently relies on *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989), for the proposition he need not argue the

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Motion to Continue Trial

¶5 Cole next argues the trial court erred by denying his motion to continue the trial until the next day so he could prepare to testify. We review the denial of a motion for continuance for an abuse of discretion. *State v. Hein*, 138 Ariz. 360, 368, 674 P.2d 1358, 1366 (1983). The court does not abuse its discretion unless, considering all the circumstances of the case, the decision “substantially prejudiced the defendant.” *State v. Barreras*, 181 Ariz. 516, 520, 892 P.2d 852, 856 (1995), quoting *State v. Clabourne*, 142 Ariz. 335, 342, 690 P.2d 54, 61 (1984). The court is accorded discretion in ruling on a motion for continuance based on the fact that “[t]he trial court is . . . the only unbiased party in a position to observe the proceeding.” *Hein*, 138 Ariz. at 368, 674 P.2d at 1366. Hence, the court “is the only party in a position to judge the inconvenience of a continuance to the litigants, counsel, witnesses, and the court, and further is the only party in a position to determine whether there are ‘extraordinary circumstances’ warranting a continuance and whether ‘delay is indispensable to the interests of justice.’” *Id.*, quoting Ariz. R. Crim. P. 8.5(b).

¶6 Cole was indicted on October 1, 2009, and had delayed the beginning of trial until October 23, 2012, by his own requests for competency hearings, motions to continue, and engendering repeated conflicts with appointed counsel. When the case finally went to trial, Cole moved at the close of the state’s case to continue

alleged error was fundamental because he otherwise has argued the merits of his claim. But that case involved our supreme court searching the record for fundamental error pursuant to a since-repealed statute, A.R.S. § 13-4035, and *Anders v. California*, 386 U.S. 738 (1967). After repeal of the statute, we do not have the obligation to conduct sua sponte fundamental error review. *State v. Taylor*, 187 Ariz. 567, 931 P.2d 1077, *supp. op.*, 187 Ariz. 571, 571, 931 P.2d 1081, 1081 (App. 1996). Therefore, *Carver* does not contradict our conclusion in *Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140, that when our review is limited to fundamental error, the defendant has an affirmative duty to “argue the alleged error was fundamental.” Accordingly, *Carver* does not help Cole.

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proceedings until the next day because he was “not prepared enough” to testify in his defense. He offered no explanation of why he was not prepared after over three years of pretrial litigation or what benefit he would gain by having additional time. On appeal, he does not identify how the denial of his motion prejudiced his defense. Under these circumstances, we cannot say the trial court abused its discretion in denying the motion to continue. *See Barreras*, 181 Ariz. at 520, 892 P.2d at 856.

Rule 20 Motion

¶7 Cole last argues the trial court erred when it denied his Rule 20, Ariz. R. Crim. P., motion because the “proof of impairment was entirely subjective and clouded by evidence of Cole’s injuries following the accident,” “[n]o witnesses saw Cole driving,” and no substantial evidence demonstrated that “Cole was in actual physical control of the vehicle at the time alleged.” He argues that these shortcomings render the evidence insufficient for both charges.

¶8 We review de novo the denial of a Rule 20 motion. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). In so doing, we view the evidence in the light most favorable to sustaining the convictions and determine whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* ¶ 16 (emphasis omitted), quoting *State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990). “[T]he controlling question is solely whether the record contains ‘substantial evidence to warrant a conviction.’” *Id.* ¶ 14, quoting Ariz. R. Crim. P. 20(a). Substantial evidence is evidence that “reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt.” *State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997). “And in reviewing the sufficiency of the evidence, we do not distinguish circumstantial from direct evidence.” *State v. Borquez*, 232 Ariz. 484, ¶ 11, 307 P.3d 51, 54 (App. 2013).

¶9 Cole moved below for Rule 20 relief only on the charge of “driving while under the influence of liquor.” *See* § 28-1381(A). Thus, to the extent he argues on appeal that insufficient evidence supported the criminal damage charge, he has forfeited that claim for all but fundamental, prejudicial error. *State v. Valverde*, 220 Ariz.

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582, ¶ 12, 208 P.3d 233, 236 (2009). But because he does not argue that any error on that charge was fundamental or prejudicial, he has waived this argument on appeal. *Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140. Moreover, although we will not ignore fundamental error if we find it, here we find no error that could be so characterized. See *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007).

¶10 Pursuant to A.R.S. § 28-1381(A), it is illegal “for a person to drive or be in actual physical control of a vehicle” if that person is “under the influence of intoxicating liquor . . . if the person is impaired to the slightest degree.” Whether a defendant was in actual physical control is a question of fact for the jury, which must “consider all the circumstances, [and] also . . . decide if [the] defendant ‘actually posed a threat to the public by the exercise of present or imminent control over [the vehicle] while impaired.’” *State v. Zarragoza*, 221 Ariz. 49, ¶ 21, 209 P.3d 629, 634-35 (2009), quoting *State v. Love*, 182 Ariz. 324, 326-27, 897 P.2d 626, 628-29 (1995).

¶11 Here, one eyewitness saw Cole driving his vehicle. Another saw the car travelling on the road, but, at trial, he could not identify Cole as the driver. That witness, however, testified that he saw police officers and paramedics speaking with the driver after the crash, and the police and paramedics testified about their contact with Cole at the scene. Both eyewitnesses saw the car swerving erratically on the road until it crashed into a wall,⁴ then saw the driver jump out of the vehicle and throw a beer can away. Cole smelled strongly of intoxicants after the crash, his eyes were bloodshot and watery, his speech was slurred, and his car contained an open beer can and a partially full bottle of liquor. This evidence was sufficient to permit a rational trier of fact to find that Cole drove his vehicle and was in actual control of it, that he posed a threat to the public, that he was under the influence of liquor, and that he was impaired. See § 28-1381(A); *Zarragoza*, 221 Ariz. 49, ¶ 21, 209 P.3d at

⁴Counsel’s assertion that no witnesses saw Cole driving is flatly contradicted by the record. Counsel is cautioned that misleading the court may warrant sanctions.

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634-35; *Borquez*, 232 Ariz. 484, ¶ 11, 307 P.3d at 54. Accordingly, the trial court did not abuse its discretion in denying the Rule 20 motion. *See West*, 226 Ariz. 559, ¶¶ 14-16, 250 P.3d at 1191.

Disposition

¶12 For the foregoing reasons, Cole's convictions and sentences are affirmed.