IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

AARON TODD COKER,
Appellant.

No. 2 CA-CR 2013-0551
Filed November 18, 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NOT FOR PUBLICATION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. CR20124483001
The Honorable Scott Rash, Judge

AFFIRMED

COUNSEL

Thomas C. Horne, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Amy Pignatella Cain, Assistant Attorney General, Tucson
Counsel for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Robb P. Holmes, Assistant Legal Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

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

¶1 Following a jury trial, appellant Aaron Coker was convicted of criminal damage and two counts of aggravated driving under the influence of an intoxicant (DUI). The trial court imposed concurrent prison terms, the longest of which are eight years. On appeal, Coker challenges the court's rulings admitting his blood test results and precluding his expert witness. He also maintains the court erred in responding to questions from the jury during deliberations. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the convictions. *See State v. Nereim*, 234 Ariz. 105, ¶ 2, 317 P.3d 646, 648 (App. 2014). In the early afternoon of November 26, 2012, several witnesses rushed to investigate a loud noise they heard outside the victim's house. The noise was caused by a pickup truck crashing into a tree in the victim's front yard, damaging her fence, mailbox, and gas meter in the process. The truck was "completely totaled," inoperable, and lodged against a chain-link fence on its passenger side.

¶3 A neighbor, B.G., approached and saw Coker "sitting behind the wheel" of the truck with lacerations on his face and head. The doors of the truck were both closed, and Coker was its only occupant. No one was seen leaving the scene of the accident. B.G. asked Coker if he was all right. Coker stumbled out of the truck, surveyed the damage, then got back in and attempted to drive away. Once B.G. informed Coker that emergency services were coming, Coker became agitated and belligerent. He retrieved an empty liquor bottle from the vehicle and fled into a nearby lot, leaving a

trail of blood. A pastor of a nearby church followed Coker and showed police officers his location.

¶4 When the officers made contact with Coker, he ignored their commands to stop and show his hands, responding with profanity and racial slurs. Police used a Taser to take him into custody. They then transported him to a hospital to receive medical treatment. A blood draw conducted at the hospital indicated Coker's blood alcohol concentration (BAC) was .292. Because his driver's license had been suspended at the time of the accident, Coker was charged with two counts of aggravated DUI pursuant to A.R.S. § 28-1383(A)(1): one based on his impairment, *see* A.R.S. § 28-1381(A)(1), and the other on his BAC, *see* § 28-1381(A)(2). The state also charged one count of criminal damage of property with a value of more than $1,000 but less than $2,000. *See* A.R.S. § 13-1602(A), (B)(4).[1] Coker was convicted and sentenced as noted above, and this appeal followed.

Blood Test

¶5 Coker first contends the trial court erred in admitting his blood test results over his objection, arguing a "faulty" chain of custody caused a lack of proper foundation. We review for an abuse of discretion a trial court's admission of evidence, including its determination of whether adequate foundation was laid for the evidence. *See State v. McCray*, 218 Ariz. 252, ¶ 8, 183 P.3d 503, 507 (2008); *State v. Romanosky*, 162 Ariz. 217, 224, 782 P.2d 693, 700 (1989). "An item is authenticated when there is 'evidence sufficient to support a finding that the matter in question is what its proponent claims.'" *McCray*, 218 Ariz. 252, ¶ 9, 183 P.3d at 507, *quoting* Ariz. R. Evid. 901(a).

¶6 Coker contends there was inadequate foundation for the test results because the police officer who testified that he had witnessed the blood draw and taken the blood samples into

[1]We cite the current version of this statute, as it has not changed in relevant part since Coker committed his offenses. *See* 2013 Ariz. Sess. Laws, ch. 97, § 2; 2014 Ariz. Sess. Laws, ch. 176, § 1.

evidence did not arrive at the hospital, according to an "Event Unit Information" report, until approximately twenty minutes after the blood draw had been completed. The officer explained this discrepancy by noting that the event report was simply incorrect. That report was based on manual input into a computer in the officer's vehicle, and the officer did not update his location information when he arrived at the hospital. The correct information was provided in the officer's blood draw report, which he completed immediately after witnessing the blood draw and collecting Coker's samples.

¶7 The discrepancy here concerns the weight to be given to the evidence, not its admissibility, *see State v. Morales*, 170 Ariz. 360, 365, 824 P.2d 756, 761 (App. 1991), and Coker offers no support for his suggestion that the event report is dispositive evidence of when the officer arrived at the hospital. Despite the discrepancy in the police reports, a sufficient foundation was laid to authenticate the blood samples and test results. *See State v. Lavers*, 168 Ariz. 376, 386, 814 P.2d 333, 343 (1991) ("The judge does not determine whether the evidence is authentic, but only whether evidence exists from which the jury could reasonably conclude that it is authentic."). Accordingly, the trial court did not abuse its discretion by admitting the evidence.

Expert Witness

¶8 Coker next contends the trial court erroneously precluded his expert witness and a report that the expert had prepared. Although Coker had disclosed the witness's name as an "Investigator/Accident Reconstructionist" before trial, the state only received the expert's report on the day the trial began. The court precluded the expert as a sanction under Rule 15.7, Ariz. R. Crim. P., and it also ruled the evidence inadmissible under Rule 403, Ariz. R. Evid. We address only the latter ruling, as we may affirm on any ground supported by the record. *See State v. Inzunza*, 234 Ariz. 78, ¶ 18, 316 P.3d 1266, 1271 (App. 2014). We review a court's evidentiary ruling for an abuse of discretion. *State v. Garza*, 216 Ariz. 56, ¶ 37, 163 P.3d 1006, 1016 (2007).

¶9 Coker maintains the expert would have supported the defense that Coker had been a passenger at the time of the accident "by explaining that . . . it was entirely possible that another person had been driving." The trial court noted that the expert's report ultimately stated he was "not able to offer an opinion as to the definitive presence of a passenger in the vehicle." Coker acknowledged this point below but nonetheless sought to admit the witness's testimony to show that the possibility of a passenger could not be ruled out by the physical evidence from the truck. According to the expert's report, that possibility was based on police photographs showing "damage to the passenger side windshield and glove compartment" of the truck, as well as what appeared to be blood on a bottle on the passenger floor. Those photographs were admitted as defense exhibits at trial, and Coker used them to make the same argument to the jury.

¶10 Relevant evidence may be excluded under Rule 403 if its probative value is "substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *State v. Hardy*, 230 Ariz. 281, ¶ 49, 283 P.3d 12, 22 (2012). A trial court has considerable discretion when weighing these factors. *State v. Gibson*, 202 Ariz. 321, ¶ 17, 44 P.3d 1001, 1004 (2002). And when a jury's common knowledge and experience make it equally capable of reaching a conclusion as a purported expert, the testimony should be excluded. *State v. Williams*, 132 Ariz. 153, 160, 644 P.2d 889, 896 (1982); *State v. Mosley*, 119 Ariz. 393, 399-400, 581 P.2d 238, 244-45 (1978); *State v. Kevil*, 111 Ariz. 240, 247, 527 P.2d 285, 292 (1974).

¶11 Here, the jury could easily understand how the photographs suggested the possibility of a passenger in the vehicle, without any need of expert testimony. Indeed, the neighbor who first responded to the accident testified that it "[l]ooked like [Coker's] face had bounced off the windshield." Without a more detailed offer of proof explaining what the expert's testimony would have been, *see* Ariz. R. Evid. 103(a)(2), there is nothing in the record to suggest he would have provided "information . . . beyond [the jury's] competence." *Wal-Mart v. Indus. Comm'n*, 183 Ariz. 145, 147, 901 P.2d 1175, 1177 (App. 1995). Permitting the expert to state an

obvious conclusion, however, would have wasted time and risked unfair prejudice to the state by suggesting that the possibility of a passenger somehow seemed more likely to a person with specialized knowledge. *See id.* (expert testimony not a mechanism for person of elevated station to place imprimatur on cause).

¶12 But even assuming the expert testimony had some probative value, the trial court did not abuse its discretion in finding it substantially outweighed by the dangers listed in Rule 403. Contrary to Coker's assertion, the exclusion of the expert did not infringe on Coker's constitutional right to present a defense, because that right "'is limited to the presentation of matters admissible under ordinary evidentiary rules.'" *Hardy*, 230 Ariz. 281, ¶ 49, 283 P.3d at 22, *quoting State v. Dickens*, 187 Ariz. 1, 14, 926 P.2d 468, 481 (1996), *abrogated in part on other grounds by State v. Ferrero,* 229 Ariz. 239, ¶ 20, 274 P.3d 509, 513 (2012).

Jury Questions

¶13 Last, Coker challenges the trial court's actions during deliberations when it "respond[ed] to two jury questions by sending back a single instruction . . . over defense objection." The two questions concerned the meaning of the phrase "actual physical control" that appeared repeatedly in the jurors' final instructions and was emphasized by the state during its argument. *See* § 28-1381(A) ("driv[ing] or be[ing] in actual physical control of a vehicle" an element of DUI). The court responded to the questions by providing the jury a written definition of the phrase "actual physical control."

¶14 Coker does not dispute that the supplemental instruction correctly stated the law. Rather, as he did below, he contends the instruction was not supported by the evidence because the truck was inoperable once it crashed. He also argues the trial court should have granted additional argument so he could address the topic of actual physical control. Coker further asserts, for the first time in his reply brief, that providing the instruction created the risk of a nonunanimous verdict, because the charges were duplicitous and subject to separate defenses. *See State v. Klokic*, 219 Ariz. 241, ¶¶ 12, 32, 196 P.3d 844, 847, 851 (App. 2008). According to

Coker, some jurors might have convicted him on the theory that he was the driver during the accident whereas others might have convicted him solely on the theory that his later attempts to start the truck amounted to actual physical control.

¶15 When a jury in the midst of its deliberations submits a question to the trial court, the decision to further instruct the jury is within the trial court's discretion. *State v. Ramirez*, 178 Ariz. 116, 126, 871 P.2d 237, 247 (1994). Generally, "[a] conviction will not be reversed based on the instructions unless, taken as a whole, they misled the jurors." *State v. Zaragoza*, 221 Ariz. 49, ¶ 15, 209 P.3d 629, 633 (2009); *accord State v. Schrock*, 149 Ariz. 433, 440, 719 P.2d 1049, 1056 (1986).

¶16 The duplicitous nature of the charges was apparent from the evidence presented at trial as well as the prosecutor's argument. The proper remedy for a duplicitous charge is (1) a timely objection forcing the state to elect which act it alleges as the crime or (2) a special instruction or verdict form ensuring that jurors unanimously agree on the specific act that constitutes the offense. *See State v. Waller*, 235 Ariz. 479, ¶ 33, 333 P.3d 806, 816 (App. 2014); *State v. Butler*, 230 Ariz. 465, n.4, 286 P.3d 1074, 1079 n.4 (App. 2012). Because the duplicity error was not expressly identified or preserved below with a proper objection, we review that issue only for fundamental, prejudicial error. *See State v. Delgado*, 232 Ariz. 182, ¶¶ 18-19, 303 P.3d 76, 81-82 (App. 2013).

¶17 We find no basis to disturb the verdicts here. Insofar as Coker maintained the supplemental instruction was unsupported by the evidence, the trial court correctly could have viewed that issue as being waived due to Coker's failure to object to either the final jury instructions that included the phrase "actual physical control," *see* Ariz. R. Crim. P. 21.2, 21.3(c), or the prosecutor's argument that jurors could find Coker guilty even if he was not the driver because "[h]e got back in [the truck] and controlled it" by sitting behind the wheel with the keys in the ignition. *See State v. Porter*, 122 Ariz. 453, 455, 595 P.2d 998, 1000 (1979) (observing objections to instructions generally waived unless raised before jury retires to deliberate); *see also* Ariz. R. Crim. P. 21.1 (applying civil law relating to jury instructions to criminal cases); *Hiett v. Howard*, 17 Ariz. App. 1, 7,

494 P.2d 1347, 1353 (1972) (disapproving objections to instructions made after deliberations have begun). Despite Coker's assertion on appeal, actual physical control was neither a new theory of guilt nor unanticipated by the time of deliberations. And the trial court did not mislead the jury by correctly defining the statutory terms that were already in the jury's instructions.[2]

¶18 Nor did the trial court abuse its discretion by declining to grant Coker an additional opportunity to argue about actual physical control when he had made an apparent strategic decision to not respond to that point earlier, during his own closing argument. *See State v. Fernandez*, 216 Ariz. 545, ¶¶ 16-17, 169 P.3d 641, 647 (App. 2007) (recognizing court's discretion to allow further argument to assist jurors and remove confusion). Moreover, we do not find the court erred or abused its discretion by declining further argument on the basis of the duplicitous charges, given that argument from a defendant is not the appropriate remedy for a duplicity error.

¶19 Although Coker improperly raises the duplicity issue in his reply brief, *see State v. Cannon*, 148 Ariz. 72, 79, 713 P.2d 273, 280 (1985), we will not ignore fundamental error when we encounter it, *Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d at 650, and the danger of a nonunanimous verdict presented by a duplicitous charge can sometimes constitute fundamental, prejudicial error. *See Waller*, 235 Ariz. 479, ¶ 34, 333 P.3d at 816. But Coker has failed to carry his burden of establishing prejudice here. *See Delgado*, 232 Ariz. 182, ¶ 19, 303 P.3d at 82. A duplicity error does not result in prejudice if no reasonable jury could have failed to find the defendant guilty under one of the theories presented. *See State v. Payne*, 233 Ariz. 484,

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[2]To the extent Coker now complains that the supplemental instruction was provided only in writing rather than by recalling jurors into open court, *see* Ariz. R. Crim. P. 22.3; *State v. Werring*, 111 Ariz. 68, 69, 523 P.2d 499, 500 (1974), he failed to specifically object on this ground below and preserve the issue for appeal, *see State v. Coward*, 108 Ariz. 270, 271, 496 P.2d 131, 132 (1972), and he neither alleges nor establishes that the court's action constitutes fundamental, prejudicial error. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶¶ 16-17, 185 P.3d 135, 140 (App. 2008).

¶ 90, 314 P.3d 1239, 1264 (2013); *Waller*, 235 Ariz. 479, ¶ 36, 333 P.3d at 817.

¶20 The overwhelming evidence here demonstrated Coker was in fact the driver of the vehicle. No one else was seen in or near the truck, despite neighbors running to the scene and arriving within thirty seconds of the crash. The physical evidence from the truck also was consistent with Coker being its driver and sole occupant. As the state established at trial, most of the blood in the vehicle was found in the driver's side of the truck, and what little was found in the passenger's side could be accounted for by the pastor's observation that Coker had "[l]eaned over to the passenger side of the car . . . [and] got out with a bottle in his hand" before stumbling away from the scene. Coker's other behavior after the accident—attempting to flee in the vehicle, fleeing on foot, and then resisting arrest—provided further evidence that he had been driving the truck while impaired. *See State v. Edwards*, 136 Ariz. 177, 184, 665 P.2d 59, 66 (1983). And the jury's verdict of guilt on the criminal damage count reflects that the jury ultimately rejected his defense that he was not the driver. As defense counsel said during closing argument, "[I]f . . . Coker wasn't the driver, he didn't cause the damage." Because no reasonable jury could have failed to find Coker guilty of driving on the record before us, we find no prejudice from the duplicitous charges.

Disposition

¶21 For the foregoing reasons, the judgment is affirmed.