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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000515-001 DT 02/28/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA GARY L SHUPE

v.

DAMON LAWRENCE KELLING (001) MARK H CANDIOTO

PHX MUNICIPAL CT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number 14180936.

Defendant-Appellant Damon Lawrence Kelling (Defendant) was convicted in Phoenix Municipal Court of driving under the influence. Defendant contends the trial court abused its discretion (1) in not dismissing the charges, (2) in admitting evidence about the results of Defendant's blood test, and (3) allowing the State's expert to testify. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On June 24, 2011, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2); and speed greater than reasonable and prudent, A.R.S. § 28–701(A). Prior to trial, Defendant's attorney did not file any motion to suppress any evidence, nor did he file any motion to dismiss any of the charges.

Trial began on March 7, 2012, with the selection of the jurors. On March 8, 2012, Officer Ethan Coffey testified he was on duty on June 23–24, 2011, with Officer Almond. (R.T. of Mar. 8, 2012, at 1.) At approximately 1:00 a.m., he was in the area of 40th Street in the number 1 (inside) lane on Greenway Road and saw a vehicle traveling at a high rate of speed in the number 2 (middle) lane. (*Id*. at 2–4.) He accelerated so they were within three car lengths of the vehicle, began to pace the vehicle, and determined it was traveling 58 miles per hour in what was a 45 mile-per-hour zone. (*Id*. at 4–5, 12.) While he was conducting the pace, the driver of the vehicle put on the left turn signal and immediately cut across the number 1 lane and went into the left-turn lane. (*Id*. at 12–13.) Because the driver had failed to signal for 100 feet prior to the turn and was driving above the speed limit, Officer Coffey activated the emergency lights and conducted

a traffic stop. (*Id*. at 13.) After the stop, Officer Coffey determined the driver had bloodshot, watery eyes and slurred speech, and there was an odor of alcohol coming from the vehicle. (*Id*. at 13–14.) He identified Defendant as the driver of the vehicle. (*Id*. at 14.) The officers had Defendant perform some field sobriety tests, and based on all the information known to them, placed Defendant under arrest for DUI. (*Id*. at 17–19.) They transported Defendant to the police station where he was processed for DUI (*Id*. at 19–21, 30.)

On cross-examination, Officer Coffey said he prepared the traffic citation, and the original red and yellow copies of the traffic citation were sent in with the alcohol influence report. (R.T. of Mar. 8, 2012, at 41.) Defendant's attorney asked Officer Coffey about the calibration of the police vehicle's speedometer, and Officer Coffey said he might have written that information of the back of the yellow copy of the citation, but he did not remember writing anything on the back of the yellow copy. (*Id*. at 35, 41–42.) After a discussion out of the presence of the jurors about Officer Coffey's having a reprimand on his record, Defendant's attorney mentioned the yellow copy of the citation, and the trial court told the attorneys to discuss that matter among themselves. (*Id*. at 50.) Defendant's attorney asked Officer Coffey about the lane change, and Officer Coffey said there was nothing wrong with the lane change, but the failure to signal 100 feet prior to the turn was a civil traffic violation. (*Id*. at 54.) On re-direct examination, Officer Coffey explained there were three copies of the citation; and for a DUI investigation, the red and yellow copies of the citation are stapled to the alcohol influence report and sent "downtown." (*Id*. at 59–60.) He said if he were to write any notes, he would do so on the yellow copy, but he did not recall whether or not he had written any notes in this case. (*Id*. at 60.)

After the trial court excused the jurors, Defendant's attorney raised the issue of the pace of Defendant's vehicle; noted Officer Coffey said, if he had written anything about the calibration of the police vehicle, he would have written it on the back of the yellow copy of the citation; and contended the State had not disclosed the back of the citation. (R.T. of Mar. 8, 2012, at 61–63.) Defendant's attorney said this information would go to the issue of probable cause [reasonable suspicion] for the stop. (*Id*. at 63.) Defendant's attorney said, unless the State could provide calibration showing the officers accurately paced Defendant's vehicle, the trial court should dismiss the charges. (*Id*. at 64.) After the prosecutor argued, Officer Almond stated the yellow copy of the citation is stapled to the alcohol influence report and sent downtown, but he did not believe there were any notes on the yellow copy of the citation. (*Id*. at 67.) Defendant's attorney responded by saying he could not file a motion based on probable cause [reasonable suspicion] for the stop because he did not have the calibration records. (*Id*. at 71.) After hearing arguments, the trial court denied Defendant's motion to dismiss, finding Defendant had not shown enough in the way of prejudice. (*Id*. at 73.)

After returning from the lunch recess, Defendant's attorney asked the trial court to give the jurors an instruction allowing them to draw a negative inference from the State's failure to disclose information. (R.T. of Mar. 8, 2012, at 76.) In response, the prosecutor stated the State had made a good faith effort to comply with Defendant's discovery requests, and thus there was no

basis for the imposition of any sanctions. (*Id*. at 79–80.) In response to the trial court's questions, the prosecutor stated he was not aware of the existence of a yellow copy of the citation. (*Id*. at 84, 85, 87.) After further argument from the attorneys, the trial court again denied Defendant's motion to dismiss and stated it would give a version of a *Willits* instruction (*Id*. at 90–96.)

Officer Danny Almond then testified and gave essentially the same account of the events that had occurred on June 24, 2011, as did Officer Coffey. (R.T. of Mar. 8, 2012, at 100–20.) On cross-examination, Defendant's attorney questioned Officer Almond about the testimony he had given at Defendant's license suspension hearing. (*Id*. at 122–26.) He also questioned Officer Almond about the answers he gave when interviewed by Defendant's attorney. (*Id*. at 128–30.) Officer Almond testified that he was not the officer who wrote the traffic citation for Defendant. (*Id*. at 131.) Defendant's attorney asked Officer Almond about his observations of Defendant's vehicle and the subsequent pace of that vehicle. (*Id*. at 131–35.)

Officer Richard Lang testified about drawing Defendant's blood, which he did at 2:17 a.m. (R.T. of Mar. 8, 2012, at 142, 144–51.) On cross-examination, Defendant's attorney asked Officer Lang about the documentation and logs relating to the testing of Defendant's blood. (*Id*. at 155–57.) The trial court then recessed until March 20, 2012. (*Id*. at 158–59.)

On March 19, 2012, Defendant's attorney submitted a written Trial Brief re: Motion for Dismissal With Prejudice Due to State's Destruction of Specifically Requested Material Evidence. (R.T. of Mar. 20, 2012, at 169.) The trial court said it would address that issue later. (*Id*. at 170.)

Natasha Imadiyi testified she was a forensic scientist in the toxicology section of the Phoenix Criminal Laboratory. (R.T. of Mar. 20, 2012, at 172–73.) She described the procedure she generally uses in testing blood samples submitted for testing. (*Id*. at 173–77.) She further discussed her education and experience. (*Id*. at 176–77.) She then discussed the testing she had done on the sample of Defendant's blood. (*Id*. at 178–85.) She said her testing of Defendant's blood gave BAC results of 0.0948 and 0.0950. (*Id*. at 185.) She further stated there were errors the first time she tested Defendant's blood, so she tested the samples a second time, which produced the BAC results she had given. (*Id*. at 187–88.)

The prosecutor then asked Ms. Imadiyi about alcohol impairment, and Defendant's attorney objected, with the trial court making the following rulings:

> Q: [I]s is there a level at which all persons are impaired by alcohol?
>
> [Defendant's attorney]: Objection.
>
> THE COURT: Overruled.
>
> THE WITNESS: Yes. At an alcohol concentration of 0.08 and above, all individuals, regardless of their gender or their experience with alcohol, are impaired for the specific task of driving a motor vehicle.
>
> Q: And when we're talking about impaired, what do we mean by that?

> [Defendant's attorney]: Objection, Your Honor—well, repeat my objection, Your Honor.
>
> THE COURT: Overruled.
>
> THE WITNESS: Impairment is a scientific term that describes a measureable [*sic*] decrease in a person's ability to perform a specific task as compared to when they are sober.
>
> . . . .
>
> Q: And examples of impairment as you go from lower alcohol concentrations to higher alcohol concentrations, would be what?
>
> [Defendant's attorney]: Objection. Foundation.
>
> THE COURT: Overruled.
>
> THE WITNESS: Alcohol is in the category of drugs called central nervous system depressants. So it slows down the functions of the brain and spinal cord. The way alcohol affects the human body is a continuum. So it first affects cognitive abilities and then sensory abilities and then motor skill abilities.

(R.T. of Mar. 20, 2012, at 188–90.)

> Q: If you were to have a person that weighed 170 pounds and was a male, how many standard drinks would it take for that person to reach an alcohol concentration of 0.094?
>
> [Defendant's attorney]: Objection, Your Honor. Foundation.
>
> THE COURT: Overruled.

(R.T. of Mar. 20, 2012, at 192.)

On cross-examination, Defendant's attorney asked Ms. Imadiyi about the first test, which was done on June 28, and about the error in that test, and she explained what the error was. (R.T. of Mar. 20, 2012, at 197–98.) Defendant's attorney then asked her about the second test, which was done on June 30, and she explained why there was no error in that test. (*Id*. at 198–201.) After that testimony and re-direct examination, the State rested. (*Id*. at 208.)

After the jurors were excused, Defendant's attorney again raised the issue of the missing yellow copy of the citation. (R.T. of Mar. 20, 2012, at 206, 209.) The prosecutor argued that Officer Almond had indicated there were no notations on the back of the citation, and thus no indication there was any exculpatory information on the back of that citation form. (*Id*. at 209–10.) The trial court said it would address that issue later. (*Id*. at 211.)

Defendant's attorney stated he believed Ms. Imadiyi testified there were three runs done of Defendant's blood sample, but they received documentation for only two runs. (R.T. of Mar. 20, 2012, at 211–12.) The trial court said it only heard testimony about two runs. (*Id*. at 213.) When

the trial court asked whether the prosecutor had asked Ms. Imadiyi about any other documents, the prosecutor said this issue arose only after Ms. Imadiyi had left, but he could call her and ask about it. (*Id*. at 214.) The trial court said Defendant's attorney could call Ms. Imadiyi as its witness and ask her whether she did any other runs. (*Id*. at 215.) The trial court then had the jurors brought in; Defendant's attorney made his opening statement; and the trial court recessed for the day. (*Id*. at 217, 228.)

The next day, Defendant's attorney again argued his motion to dismiss based on the absence of the yellow copy of the citation. (R.T. of Mar. 21, 2012, at 236–43.) The prosecutor again noted Officer Almond had said there was nothing written on the back of the yellow copy of the citation and argued there was no indication from anything else that anything was written on the back of the yellow copy of the citation. (*Id*. at 244–45.) Defendant's attorney saved his rebuttal for later. (*Id*. at 247.) On the issue of the number of tests done on Defendant's blood sample, the trial court said Defendant's attorney could call Ms. Imadiyi to testify. (*Id*. at 250–51.)

Chester Flaxmayer testified for Defendant, discussed the batch data, noted the problems with the first test run, and identified the sequence number used. (R.T. of Mar. 21, 2012, at 254, 262–69, 272.) He then discussed the second test run, which was done on June 30, and identified the sequence number used for that test run. (*Id*. at 272–73.) He noted the sequence numbers did not match, which he considered a serious mistake. (*Id*. at 273–75.) He did acknowledge, however, that discrepancy could have been the result of a typographical error. (*Id*. at 277.)

On cross-examination, Flaxmayer acknowledged the results of the first run were 0.0948 and 0.0956, that the instrument used for the second run was properly calibrated, and the results of the second run were 0.0948 and 0.0950. (R.T. of Mar. 21, 2012, at 279–80.) He further acknowledged all the reports had the same DR number, which was the number used for Defendant. (*Id*. at 281–82.) He said the problem was the sequence number on one document was NI063011S, while the sequence number on the other document was NI063011A. (*Id*. at 286.)

Defendant's attorney again raised the issue of the motion to dismiss with prejudice. (R.T. of Mar. 21, 2012, at 294–98.) The trial court noted the choice of sanctions to impose would be left to the discretion of the trial court, and in its discretion, it chose to impose as a sanction the giving of a *Willits* instruction. (*Id*. at 299.)

Defendant's attorney then called Officer Coffey as a witness and questioned him about statements Defendant had made. (R.T. of Mar. 21, 2012, at 301–03.) Officer Coffey acknowledged he wrote the citation in this case. (*Id*. at 306.) He said if he were to make notes after issuing a citation, he would make them on the back of the yellow copy of the citation, but it is not his standard practice to make notes on a citation in a DUI investigation, and he did not believe he made notes on the back of the yellow copy in this investigation. (*Id*. at 305.) He said if here were issuing just a civil speeding citation, he would make notes on the back of the citation, but DUI's were a different entity altogether. (*Id*. at 305–06.) He said the reason for this is he has to prepare a report in a DUI investigation, so he will put all his information in that report, even if

this includes a civil violation, such as speeding. (*Id*. at 306.) He said his usual practice for a DUI investigation is to staple both the red copy and the yellow copy of the citation to the DUI report and send it off. (*Id*.)

On cross-examination, in response to the prosecutor's question, Officer Coffey stated when he made a DUI arrest, he would document everything on the alcohol influence report and would not write anything on the back of the citation. (R.T. of Mar. 21, 2012, at 314–15.) Thus, in this case, following standard procedure, he would have put all the information in the alcohol influence report. (*Id*. at 315.) After Officer Coffey's testimony, Defendant rested. (*Id*. at 316.)

In rebuttal, the prosecutor called Ms. Imadiyi, who explained the problems with the first run, which was done on June 28, and that no data from that run was accepted. (R.T. of Mar. 21, 2012, at 317–19.) She then discussed the second run, which was done on June 30. (*Id*. at 319.) She explained the reason there were two different numbers, NI063011S and NI063011A, was she originally called the sequence NI063011A, but she changed her mind and called it NI063011S, but forgot to change the number on the printout for that sequence. (*Id*. at 319–20.) After the trial court excused the jurors, Defendant's attorney contended the State committed a discovery violation in not disclosing the discrepancy in the sequence numbers and Ms. Imadiyi's explanation of why that happened. (*Id*. at 324.) The trial court stated, to the extent Defendant's attorney was making an objection, it overruled that objection. (*Id*. at 326.) Once the jurors returned, Ms. Imadiyi further explained why the numbers had a different suffix. (*Id*. at 326–29.) After Ms. Imadiyi's testimony, the State concluded its rebuttal. (*Id*. at 330.)

The trial court then gave final instructions to the jurors, and the attorneys made their final arguments. (R.T. of Mar. 21, 2012, at 335, 341, 352, 365, 369.) After the jurors retired to deliberate, the trial court found Defendant responsible for the civil traffic violation. (*Id*. at 375.) The jurors found Defendant guilty of both DUI charges. (*Id*. at 375–76.) The trial court then imposed sentence. (*Id*. at 377–79.) On April 2, 2012, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES.

A. *Did the trial court abuse its discretion in denying Defendant's motion to dismiss.*

Defendant contends the trial court abused its discretion in denying his motion to dismiss based on the absence of the yellow copy of the traffic citation. For four reasons, this Court concludes Defendant is not entitled to relief.

First, the record does not support Defendant's contention that information was destroyed. Defendant's argument is based on his hypothesis that one of the officers wrote information on the back of the yellow copy of the citation about the pace of Defendant's vehicle. Officer Coffey said he prepared the traffic citation, and when he conducts a DUI investigation, he puts all the information in the DUI report, and that includes any information about any other traffic violations. He said when he cites a driver for speeding alone, he will make notes on the back of the traffic

citation, but that is apparently because he does not prepare a separate traffic report. Because the record does not support Defendant's contention that Officer wrote information about the pace on the back of the yellow copy of the traffic citation, the record does not support Defendant's contention the state destroyed information or caused information to be destroyed.

Second, assuming the record could be construed to show the state destroyed information or caused information to be destroyed, there is nothing in the record to show the state acted in bad faith. In *Arizona v. Youngblood*, 488 U.S. 51 (1988), the Court held "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." 488 U.S. at 58. Because Defendant was unable to show bad faith on the part of the officers, Defendant failed to establish a due process violation.

Third, Defendant failed to establish any information about the pace was material and that he was prejudiced. The case upon which Defendant relied, *State v. Lopez*, 156 Ariz. 573, 754 P.2d 300 (Ct. App. 1987), set forth the following test:

> Due process requires the state to produce any information favorable to the defendant that is material to the issue of defendant's guilt. Arizona courts have adopted a three-pronged test to determine whether a defendant's right to due process has been violated by the destruction of evidence. "First, was the evidence material to the question of guilt or the degree of punishment; second, was the defendant prejudiced by its destruction; and, third, was the government acting in good faith when it destroyed the evidence?"

Lopez, 156 Ariz. at 574, 754 P.2d at 301, *quoting State v. Cruz*, 123 Ariz. 497, 500, 600 P.2d 1129, 1132 (Ct. App. 1979). Defendant's supposed information about the pace fails all **three** parts of that test. **First,** the evidence was not material to the question of Defendant's guilt. Defendant was charged with driving under the influence under A.R.S. § 28–1381(A)(1) & (A)(2), which meant the State, in order to prove Defendant guilty of those two charges, had to prove Defendant (1) drove the vehicle, (2) was under the influence of alcohol, (3) was impaired to the slightest degree, and (4) had a BAC of 0.080 or more within 2 hours of driving. Whether the officers did or did not properly pace Defendant's vehicle had nothing to do with Defendant's guilt of innocence, and instead went only to the issue of reasonable suspicion to stop Defendant's vehicle. **Second,** Defendant failed to show prejudice. Officer Coffey testified he stopped Defendant's vehicle both because it was speeding and because it changed lanes without signaling. Thus, even if Defendant had filed a motion to suppress based on a lack of reasonable suspicion, and the trial court concluded the officers were lying about pacing Defendant's vehicle, the trial court would have been left with the testimony that Defendant made an unlawful lane change, which alone would have given the officers reasonable suspicion to stop Defendant's vehicle. And **third,** as discussed above, Defendant failed to establish bad faith. Thus, Defendant failed to meet the requirements set forth in *Lopez*.

Fourth, assuming Officer Coffey did write notes on the back of the yellow copy of the traffic citation, those notes would not have been subject to disclosure under Rule 15. The rules of discovery provide as follows:

> Handwritten notes that have been substantially incorporated into a document or report within 20 working days of the notes being created, or that have been otherwise preserved electronically, mechanically or by verbatim dictation, shall no longer themselves be considered a statement.

Rule 15.4(a)(2), ARIZ. R. CRIM. P.; *accord, State v. Axley,* 132 Ariz. 383, 386–87, 646 P.2d 268, 271–72 (1982) (officer interviewed defendant and made handwritten notes during interview, which were then transcribed and incorporated into report; officer testified handwritten notes were substantially incorporated into typewritten statement; because handwritten notes were substantially incorporated into typewritten statement, they did not need to be made available to defendant under Rule 15.1); *State v. Johnson,* 122 Ariz. 260, 270–72, 594 P.2d 514, 524–26 (1979) (detective interviewed victim and took notes, and then wrote final report; when asked if there was anything in notes not reflected in report, detective said, "I'm sure there's a lot a things that weren't reflected in the report"; court noted rule provided notes substantially incorporated into statements shall no longer themselves be considered statement, but that there was little basis to judge compliance with rule; court further noted defendant failed to develop issue and that both detective and victim testified and were subject to cross-examination, thus there was no indication of prejudice). From the record, it appears that, if Officer Coffey did write notes on the back of the yellow copy of the traffic citation, he would have incorporated them into his alcohol influence report, and thus the notes no longer would have been subject to disclosure. Moreover, to the extent the record does not show whether those notes were substantially incorporated into the alcohol influence report, Defendant had the opportunity to cross-examination both Officer Coffey and Officer Almond, so he has failed to show prejudice. *Johnson,* 122 Ariz. at 272, 594 P.2d at 526.

As a final matter, this Court would note the trial court gave the jurors a *Willits* instruction. (R.T. of Mar. 21, 2012, at 339.) A defendant is not entitled to a *Willits* instruction unless the defendant can show (1) the state failed to preserve material evidence that was accessible, (2) the evidence might have exonerated the defendant, and (3) as a result, the defendant suffered prejudice. *State v. Speer,* 221 Ariz. 449, 212 P.3d 787, ¶ 40 (2009); *see State v. Bocharski,* 200 Ariz. 50, 22 P.3d 43, ¶¶ 42–46 (2001). As discussed above, even if there were notes on the back of the yellow copy of the traffic citation and they showed the officers failed to conduct a proper pace of Defendant's vehicle, that would not have exonerated Defendant of the charges of driving under the influence of alcohol. Defendant thus was not entitled to receive a *Willits* instruction and thus received a benefit to which he was not entitled. Defendant has therefore failed to show he was harmed by the trial court's actions.

B. *Has Defendant waived any issue about the documents by not making a proper objection at trial.*

Defendant contends the trial court's "failure to strike [Ms. Imadiyi's] testimony and evidence when later proven false was a fundamental and irreversible [*sic*] error." (Appellant's Memorandum at 11.) The applicable rule provides as follows:

> A party may claim error in a ruling to admit . . . evidence only if . . . (1) . . . a party, on the record: (A) timely objects or moves to strike; and (B) states the specific ground, unless it was apparent from the context . . . .

Rule 103(a)(1)(A) & (B). Further, an objection at trial for one reason or purpose does not preserve for appeal a claim of error based on a different reason or purpose. *State v. Womble*, 225 Ariz. 91, 235 P.3d 244, ¶¶ 10–13 (2010) (hearsay objection at trial did not preserve Confrontation Clause objection on appeal); *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 38–40 (2004) (objection at trial based on untimely disclosure of expert's notes did not preserve on appeal claim that trial court should have precluded testimony because expert relied on tainted information).

In the present case, after Flaxmayer testified about the discrepancies in the run sequence numbers, the prosecutor recalled Ms. Imadiyi in rebuttal. (R.T. of Mar. 21, 2012, at 317.) She explained the problem with the first run and thus why she had to do a second run, and explained why there was first a sequence number NI063011A and then a sequence number NI063011S. (*Id*. at 317–20.) While she was testifying, she had documents in front of her, which caused Defendant's attorney to say, "Objection, Your Honor." (*Id*. at 320.) The trial court took a recess, and Ms. Imadiyi said she had a co-worker print the documents that morning. (*Id*. at 321.) Defendant's attorney questioned her, and concluded, "Your Honor, absolutely it should not be able to come in." (*Id*. at 322.) Defendant's attorney further discussed his contention about these undisclosed documents. (*Id*. at 324–26.) The trial court then ruled as follows:

> One of the purposes of rebuttal testimony is to try and correct previous problems. One answer here is to put this in front of the trier of fact as a credibility issue. The objection is overruled.
>
> . . . .
>
> [Defendant's attorney]: Your Honor, are you going to allow the documents then to be admitted into evidence.
>
> THE COURT: Your objection was overruled. No document has been proffered at this time.

(R.T. of Mar. 21, 2012, at 326.) The prosecutor resumed questioning Ms. Imadiyi and never offered any of the documents, and Defendant's attorney made no further objections. (*Id*. at 326–29.) Defendant's attorney made no further requests of the trial court concerning Ms. Imadiyi's testimony.

Defendant's attorney merely stated "objection," and thus did not state the specific ground of the objection. To the extent he objected to the admission of those documents, the prosecutor never offered them in evidence and thus the trial court never admitted them in evidence. To the extent Defendant is claiming on appeal there was a due process violation and thus the trial court should have dismissed the charges, Defendant never made that claim with the trial court, and thus has waived that claim on appeal.

C. *Has Defendant waived any issue about the blood test evidence by not making a proper objection at trial.*

Defendant contends the trial court "abused its discretion by failing to suppress all the State's blood evidence and/or failing to call a mistrial . . . ." (Appellant's Memorandum at 13.) As noted above, A party may claim error in a ruling to admit evidence only if the party, on the record, makes a timely objection or motion to strike; and states the specific ground. Rule 103(a)(1)(A) & (B). In the present case, Defendant never objected to the admission of the State's testimony and evidence about the testing of Defendant's blood and the resulting BAC readings. Defendant has thus failed to preserve that issue for appeal.

D. *Has Defendant waived any issue about Ms. Imadiyi's qualifications by not making a proper objection at trial.*

Defendant contends the trial court "abused its discretion by overruling the foundational objection to Imadiyi's qualifications." (Appellant's Memorandum at 14.) An objection of "no foundation" is insufficient to preserve the issue; the objecting party must indicate how the foundation is lacking so that the party offering the evidence can overcome the shortcoming, if possible. *State v. Rodriguez,* 186 Ariz. 240, 250, 921 P.2d 643, 653 (1996) (defendant objected to improper foundation for admission of earring; because defendant did not identify what foundation was lacking, trial court did not abuse discretion in admitting exhibit); *State v. Guerrero,* 173 Ariz. 169, 171, 840 P.2d 1034, 1036 (Ct. App. 1992) (defendant contended on appeal state failed to provide specifics about times, dates, places, or quantities of prior acts; court held that claim of insufficient foundation may not be raised on appeal unless appellant specifically points out to trial court alleged defects in foundation so that opponent may cure any defects); *Packard v. Reidhead,* 22 Ariz. App. 420, 423, 528 P.2d 171, 174 (1974) (court noted appellee laid tenuous foundation for admission of traffic signal installation report, but held appellant's "no foundation" objection was inadequate to preserve issue for review on appeal; purpose of rule is to enable adversary to obviate objection if possible and to permit trial court to make intelligent ruling).

In the present case, while Ms. Imadiyi was testifying, the extent of the objection Defendant's attorney made was either "objection" or "objection, foundation." (R.T. of Mar. 20, 2012, at 188–90, 192.) Because Defendant's attorney did not make the proper objections, he has waived this issue on appeal.

E. *Did the trial court abuse its discretion by giving a Willits instruction.*

Defendant contends the trial court "abused its discretion by sanctioning the State with a *Willits* instruction related to the destruction of the yellow Ticket." (Appellant's Memorandum at 14.) As discussed above, the trial court did not abuse its discretion in not dismissing the charges. And as also discussed above, Defendant was not entitled to a *Willits* instruction, so the giving of that instruction was merely a benefit to which Defendant was not entitled.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court did not abuse its discretion in its rulings.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Phoenix Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Phoenix Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT 022820131230•