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See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



DIVISION ONE
FILED: 07/26/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

STATE OF ARIZONA,) 1 CA-CR 11-0021
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
DANIEL JEREMIAH JAMES,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-005976-001DT

The Honorable Randall H. Warner, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division
and Barbara A. Bailey, Assistant Attorney General
Attorneys for Appellee

Maricopa County Public Defender Phoenix
by Joel M. Glynn, Deputy Public Defender
Attorneys for Appellant

H O W E, Judge

¶1 Daniel Jeremiah James appeals his conviction and sentence for misconduct involving weapons as a prohibited possessor of a deadly weapon. Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Police arrested James during an identity-theft investigation. A search of James's wallet incident to his arrest revealed identification cards belonging to several different people. Police obtained a warrant and searched his mother's home, where he had been living. Police found in his bedroom numerous stolen identification and credit cards; several guns with ammunition; two sets of nunchucks--one metal, one wooden with metal studs; and gang and drug paraphernalia. At the time, James was serving probation for a felony offense and was prohibited from possessing weapons under Arizona Revised Statutes ("A.R.S.") section 13-3101(A)(7)(d) (West 2012).¹

¶3 The State charged James with Aggravated Taking Identity of Another, a class 3 felony (count 1); one count of Misconduct Involving Weapons, a class 4 felony, for possessing the guns while being prohibited from possessing deadly weapons (count 2); one count of Misconduct Involving Weapons, a class 4 felony, for possessing the nunchucks while being prohibited from possessing deadly weapons (count 3); and possession of drug

¹ Absent material revisions to this decision, we cite the current Westlaw version of statutes in effect at the time of the offense.

paraphernalia (count 4), a class 6 felony. At trial, a police detective testified that, although he was not trained in using nunchucks, he was familiar with them and compared them to the batons that he and other officers routinely use. The detective described nunchucks as an "impact weapon" designed to be lethal. Appellant did not contest that the nunchucks were lethal, but argued only that he did not possess them because at the time of the search he was not living at the home where they were found.

¶4 The jury acquitted James of the drug-paraphernalia charge but convicted him on all other counts. James was sentenced to concurrent prison terms of 11.25 years on count 1, and ten years each on counts 2 and 3.

¶5 James timely appeals. We have jurisdiction pursuant to Arizona Constitution Article VI, Section 9, and A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).

DISCUSSION

¶6 On appeal, James challenges only his conviction for count 3, misconduct involving weapons for possession of nunchucks as a deadly weapon. James argues for the first time on appeal that insufficient evidence supported his conviction because nunchucks are not "deadly weapons" as a matter of law, and even if they are so deemed, the State did not present sufficient evidence at trial for the jury to conclude that the nunchucks in this case constituted "deadly weapons." Because he

failed to raise these arguments at trial, we review them only for fundamental error. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). “To obtain relief under fundamental error review, a defendant must prove: (1) that error occurred; (2) that the error was fundamental; and (3) that the error was prejudicial.” *State v. Avila*, 217 Ariz. 97, 99, ¶ 9, 170 P.3d 706, 708 (App. 2007).

¶7 Neither claim constitutes error, much less fundamental error. See *State v. Thomas*, 130 Ariz. 432, 436, 636 P.2d 1214, 1218 (1981) (“Before a finding of fundamental error can be made, it must be apparent that error was committed by the trial court in some aspect of the proceedings.”). Although the issue of sufficiency of the evidence “is one of law, subject to *de novo* review on appeal,” *State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011), our review is limited to whether substantial evidence exists to support the verdict, see Ariz. R. Crim. P. 20(a) (stating trial court shall enter judgment of acquittal “if there is no substantial evidence to warrant a conviction”); *State v. Scott*, 177 Ariz. 131, 138, 865 P.2d 792, 799 (1993). “Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant’s guilt beyond a reasonable doubt.” *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). To set aside a jury verdict based on insufficient evidence, “it must clearly

appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶8 A person is guilty of misconduct involving weapons under A.R.S. § 13-3102(A)(4) by possessing a deadly weapon or a prohibited weapon while being a prohibited possessor. A "deadly weapon" means "anything designed for lethal use, including a firearm." A.R.S. § 13-3101(A)(1). A "prohibited weapon," for relevant purposes, includes "[a]n instrument, including a nunchaku, that consists of two or more sticks, clubs, bars or rods to be used as handles, connected by a rope, cord, wire or chain, in the design of a weapon used in connection with the practice of a system of self-defense." A.R.S. § 13-3101(A)(8)(v). In the instant case, however, the State specifically charged James with possessing the nunchucks as "deadly weapons," and so had to prove that the nunchucks were "deadly weapons." See Ariz. R. Crim. P. 13.5(b) ("The preliminary hearing or grand jury indictment limits the trial to the specific charge or charges stated in the magistrate's order or grand jury indictment"); *State v. Freeny*, 223 Ariz. 110, 111, ¶ 2, 219 P.3d 1039, 1040 (2009) (concluding that an amendment of the charges on the first day of trial violated Rule 13.5(b) because it changed the nature of the offense).

¶9 Sufficient evidence established that James committed Misconduct Involving Weapons. James did not dispute that he is a prohibited possessor under A.R.S. § 13-3101(A)(7) because he had been convicted of several felonies and was on probation at the time he possessed the nunchucks. Although James disputed that he possessed the nunchucks, the State presented evidence that the nunchucks were (1) found in his bedroom and closet, and (2) an "impact weapon" that, as designed, could kill a person. A weapon that, as designed, could kill a person satisfies the definition of "deadly weapon." See Webster's Third New International Dictionary 1297 (2002) (defining "lethal" as "capable of causing death: DEADLY"). In addition, the nunchucks themselves were admitted at trial, and the jurors could reasonably conclude from examining them that their design and constituent materials (metal and wood with metal studs) made them lethal. See *R.V. v. State*, 497 So.2d 912 (Fla. App. 1986) (noting that a nunchaku is "a potentially lethal device"; "the sole modern use of a nunchaku is to cause great bodily harm"). Thus, the State presented sufficient evidence to sustain James's conviction for misconduct involving weapons. See *State v. Williams*, 209 Ariz. 228, 231, ¶ 6, 99 P.3d 43, 46 (App. 2004) ("Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction.") (internal quotation marks omitted).

¶10 James nevertheless argues that nunchucks, as a matter of law, cannot qualify as “deadly weapons” because they are expressly listed as “prohibited weapons” under A.R.S. § 13-3101(A)(8). He contends that the Legislature intended to distinguish “prohibited weapons” from “deadly weapons” when it created the separate list of prohibited weapons. But listing nunchucks as prohibited weapons does not preclude them from also being deadly weapons. The terms are not mutually exclusive. An item may be simultaneously a “deadly weapon” and a “prohibited weapon.” For example, all firearms are “deadly weapons” under § 13-3101(A)(1), yet, particular firearms—automatic firearms and sawed-off rifles or shotguns—are also listed as “prohibited weapons” under § 13-3101(A)(8)(a)(iii) and (iv). Bombs, grenades, certain rockets, and improvised explosive devices are also listed as “prohibited weapons” under § 13-3101(A)(8)(i) and (viii), but undoubtedly are “designed for lethal use” under § 13-3101(A)(1). Nothing in the Legislature’s creation of a list of prohibited weapons indicates that prohibited weapons cannot also be “deadly weapons.”

¶11 This does not mean that terms are redundant or superfluous. See *State v. Falcone*, 228 Ariz. 168, 171, ¶ 13, 264 P.3d 878, 881 (App. 2011) (noting that courts must avoid statutory constructions that make language superfluous). Although some items may indeed be both “deadly weapons” and

"prohibited weapons," some are not. The definition of "prohibited weapon" includes "[a] device that is designed, made or adapted to muffle the report of a firearm," and "any combination of parts or materials that is designed and intended for use in making or converting a device into [certain prohibited weapons]." A.R.S. § 13-3101(A)(8)(ii), (ix). These items are not "deadly weapons" under § 13-3101(A)(1) because, while they are used to make deadly weapons or are used in conjunction with deadly weapons, they themselves are not "designed for lethal use." Thus, the terms "deadly weapon" and "prohibited weapon" are not coterminous and one does not render the other superfluous.

¶12 James also argues that § 13-3102(G) indicates legislative intent to treat prohibited weapons differently from deadly weapons. But that subsection does not support James's argument. Subsection G provides that a person who possesses a nunchuck will not be guilty of "[m]anufacturing, possessing, transporting, selling or transferring a prohibited weapon" under § 13-3102(A)(3) if the person possesses it "for the purposes of preparing for, conducting or participating in lawful exhibitions, demonstrations, contests or athletic events involving the use of such weapon." That the Legislature has exempted in narrow circumstances the possession of nunchucks from prosecution for possession of a prohibited weapon under

§ 13-3102(A)(3) says nothing about whether a prohibited weapon may not also be a deadly weapon.

¶13 Subsection G is inapplicable to James's case in any event because it exempts possession of nunchucks for prosecution only under § 13-3102(A)(3). James was prosecuted as a prohibited possessor of a deadly weapon under § 13-3102(A)(4) and therefore could never claim subsection G's exemption. James's argument that nunchucks are not deadly weapons as a matter of law is meritless.

¶14 James further argues that, even if nunchucks could qualify as deadly weapons, the State's evidence was insufficient on that point because the trial court erred in admitting the police detective's testimony that nunchucks are lethal weapons. He complains that the detective's testimony was in response to a leading question and that the detective was not an expert on nunchucks. Because James did not object at trial to the testimony on these bases, we review for fundamental error. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607.

¶15 At trial, the detective testified without objection as follows:

[Prosecutor:] How does a nunchuck work?

[Detective:] Well, it's an impact weapon. It's similar to an expandable baton that I am certified to carry that a lot of patrol officers carry. But it's connected, by you know, a chain or a rope so there's actually

more leverage than you would get from a baton.

[Prosecutor:] As designed, can a nunchuck kill somebody?

[Detective:] Oh yeah.

¶16 The prosecutor's questions were not leading. A question is leading if it suggests the desired answer. *State v. McKinney*, 185 Ariz. 567, 575, 917 P.2d 1214, 1222 (1996), *superseded by statute on other grounds*, *State v. Martinez*, 196 Ariz. 451, 999 P.2d 795 (2000). Neither question suggested the desired answer. The fact that an answer may be obvious does not make a question leading. *Id.* Moreover, because leading questions are permissible at the discretion of the trial court, see Arizona Rule of Evidence 611(c), we find no fundamental error even if the questions were leading, *State v. Duffy*, 124 Ariz. 267, 273-74, 603 P.2d 538, 544-45 (App. 1979).

¶17 Likewise, the record shows that the detective could competently testify about the nunchucks based on his experience as a police officer and on his familiarity with their use and design. See Ariz. R. Evid. 702 (a witness may qualify as an expert based on "knowledge, skill *experience*, *training*, or education") (emphasis added). If James had doubts about the detective's qualifications to testify about nunchucks, he could have objected at trial and required the detective to present his

qualifications. But he chose not to do so. Under these circumstances, we find no error.

¶18 The detective properly testified about the lethality of the nunchucks. His testimony, along with the jurors' own examination of the nunchucks, provided sufficient evidence for the jurors to find that the nunchucks in James's possession were deadly weapons.²

CONCLUSION

¶19 For these reasons, we affirm.

/s/
RANDALL M. HOWE, Judge

CONCURRING:

/s/
MARGARET H. DOWNIE, Presiding Judge

/s/
PHILIP HALL, Judge

² James argues at length that the prosecutor in closing argument conflated the concepts of deadly weapons and dangerous instruments, and that nunchucks are not "dangerous instruments," as that term is statutorily defined. We reject this argument because, although the prosecutor called the nunchucks "dangerous" during closing argument, he did so in the context of explaining why they were "deadly weapons." The prosecutor did not discuss the statutory concept of "dangerous instruments." Therefore, a "dangerous instruments" instruction was not warranted on the theory or evidence presented at trial.