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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 6/25/2013  
RUTH A. WILLINGHAM,  
CLERK  
BY: mjt

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) 1 CA-CR 12-0007  
)  
Appellee, ) DEPARTMENT A  
)  
v. ) **MEMORANDUM DECISION**  
)  
KHALIL K. HATTAR, ) (Not for Publication -  
) Rule 111, Rules of the  
Appellant. ) Arizona Supreme Court)  
)

Appeal from the Superior Court in Yavapai County

Cause No. P1300CR201100590

The Honorable Tina R. Ainley, Judge

**AFFIRMED**

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**G E M M I L L**, Judge

¶1 Khalil Kamal Hattar appeals from his convictions and

sentences for two counts of disorderly conduct with a deadly weapon, and one count each of misconduct involving weapons and child abuse. We affirm.

#### **FACTS AND PROCEDURAL HISTORY**

¶12 In accordance with applicable standards of appellate review, we view the evidence in the light most favorable to sustaining the convictions and resolve all reasonable inferences in support of the jury verdict. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

¶13 The State charged Hattar with numerous criminal offenses arising out of a physical altercation at home with his wife in the presence of their daughters. During the fight, Hattar aimed a rifle at his wife and one of his daughters. Hattar also handled other firearms that were located in the home.

¶14 The jury found Hattar guilty of two counts of disorderly conduct with a deadly weapon, class six dangerous felonies and domestic violence offenses ("Count 1" and "Count 2"); one count of misconduct involving weapons, a class four felony ("Count 3"); and one count of child abuse, a class six felony and domestic violence offense ("Count 4"). The court imposed a 1.5-year term of imprisonment for Count 3 to be served consecutively to concurrent 2-year terms of imprisonment for Counts 1 and 2. For Count 4, Hattar received seven years'

supervised probation upon his release from incarceration. Hattar timely appeals. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010) and -4033(A) (2010).

#### ANALYSIS

##### **Evidence of Citizenship Offered to Disprove Prohibited Possessor Status**

¶15 Hattar was charged with weapons misconduct under A.R.S. § 13-3102(A)(4) (Supp. 2012) for carrying a deadly weapon as a prohibited possessor.<sup>1</sup> Hattar challenges the court's denial of his request to present evidence that he became a naturalized citizen in 2007 in defense of the prohibited possessor charge. Hattar argued such evidence would demonstrate that his right to possess firearms had been restored. The court precluded the evidence, reasoning it was irrelevant. Based on the record before the trial court, we agree.

¶16 We review a superior court's ruling on the admissibility of evidence for abuse of discretion. *State v. Tucker*, 215 Ariz. 298, 314, ¶ 58, 160 P.3d 177, 193 (2007). "An abuse of discretion occurs when the reasons given by the court for its decision are clearly untenable, legally incorrect, or amount to a denial of justice." *State v. Childress*, 222 Ariz.

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<sup>1</sup> We cite the current version of statutes when no material revisions have occurred since the events in question.

334, 338, ¶ 9, 214 P.3d 422, 426 (App. 2009). To be admissible, evidence must be relevant, and all relevant evidence is admissible except as otherwise provided by rule or law. Ariz. R. Evid. 402. Evidence is relevant "if it has any tendency to make the existence of any fact that is of consequence more or less probable than it would be without the evidence." *State v. Oliver*, 158 Ariz. 22, 28, 760 P.2d 1071, 1077 (1988); *see also* Ariz. R. Evid. 401.

¶7 A person commits misconduct involving weapons by knowingly "[p]ossessing a deadly weapon . . . if such person is a prohibited possessor[.]" A.R.S. § 13-3102(A)(4). A "[p]rohibited possessor" means any person . . . [w]ho has been convicted within or without this state of a felony . . . and whose civil right to possess or carry a gun or firearm has not been restored." A.R.S. § 13-3101(A)(7)(b) (Supp. 2012). The nonrestoration of a defendant's civil rights is not an element of the offense. *State v. Kelly*, 210 Ariz. 460, 463, ¶ 11, 112 P.3d 682, 685 (App. 2005). Rather, restoration is an exception under the prohibited possessor statutes that must be proven by the defendant. *Id.* at 462-63, ¶¶ 6, 10, 112 P.3d at 684-85. At trial, the defendant bears the burden to offer admissible evidence that his civil rights have been restored, and if he fails to do so, "the state will prevail on the issue without being required to present any evidence of nonrestoration." *Id.*

at 462-64, ¶¶ 6, 13, 112 P.3d 682, 684-86.

¶8 It was undisputed in this case that Hattar was convicted of a felony in 1994 in New Mexico. The State was not required to prove the nonrestoration of Hattar's civil rights. See *id.* Therefore, the burden was Hattar's to present admissible evidence that his right to possess firearms had been restored. See *id.*

¶9 We agree with the superior court that Hattar failed to establish that becoming a United States citizen is relevant to whether his civil rights had been restored at the time of the offense. The naturalization process lies within the province of the federal government. 8 U.S.C. § 1421 (Westlaw 2013).

¶10 The United States Constitution, however, allows states to withhold civil rights from citizens who are convicted of felonies. See *Richardson v. Ramirez*, 418 U.S. 24, 54-56 (1974) (upholding a California provision barring convicted felons from voting); *McDonald v. City of Chicago*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 3020, 3047 (2010) (noting that the United States Constitution allows states to continue longstanding "prohibitions on the possession of firearms by felons"); *United States v. Cassidy*, 899 F.2d 543, 549 (6th Cir. 1990) (holding courts must look to state law to determine whether convicted felon is entitled to possess a firearm, vote, hold public office, and serve on jury). In Arizona, the right of any "person" to possess a firearm is

suspended upon conviction of a felony. A.R.S. § 13-904(A)(5) (2010). Thus, under Arizona law, the suspension of a person's right to possess a firearm depends not on citizenship status, but on the person's status as a convicted felon.

¶11 Hattar argues that his naturalization necessarily means that his full civil rights have been restored. Hattar, however, provided no pertinent legal authority supporting his argument in the trial court or on appeal. Nor did Hattar offer at trial any expert testimony or testimony from governmental witnesses to establish that his successful attainment of citizenship would have necessarily established that his right to possess firearms had been restored. Additionally, our analysis of the law supports the contrary conclusion that the naturalization process does not automatically confer or restore all rights when a person has a prior felony conviction. See *Lopez v. Kase*, 975 P.2d 346, 349 (N.M. 1999) (holding naturalization of a prior felon does not confer the right to vote or hold office in New Mexico).

¶12 Further, the restoration of a felon's civil rights does not appear to be a requirement to complete the naturalization process. See generally 8 U.S.C. § 1427(a) (Westlaw 2013). An applicant for naturalization must show that he is a person of "good moral character." *Id.* In determining whether a person is of good moral character, the government must

consider the applicant's moral conduct in the five years preceding the filing of the application, though it may also consider "the applicant's conduct and acts at any time prior" to the preceding five years. *Id.* at § 1427(a), (e). Although a prior felony may negatively affect a person's application for citizenship, it does not necessarily require permanent rejection of the application. See *In re Paoli*, 49 F.Supp. 128, 131 (granting application for naturalization where applicant had been convicted of a felony but was nevertheless found to be of "good moral character"). The commission of a felony does not impose a permanent disability because an applicant may reform, show good moral character, and thereby become eligible for citizenship. See *id.* We conclude, therefore, that the restoration of a felon's civil rights is not required for naturalization. Furthermore, we have no basis to conclude that the civil rights governed by state law are automatically restored as a result of obtaining naturalized citizenship.

¶13 Based on this legal analysis and in light of the fact that no legal authority or evidence was offered by Hattar to establish that the naturalization process either restores a person's right to possess firearms or means that a person's right to possess firearms has previously been restored, the bare fact that Hattar became a naturalized citizen in 2007 is irrelevant to whether his right to possess a firearm had been

restored under state law. Therefore, the trial court did not abuse its discretion in ruling evidence of his United States citizenship status inadmissible.<sup>2</sup>

¶14 We ordered supplemental briefing on the issue of whether Hattar's right to possess a firearm had been restored under New Mexico law by the time of the present offense in Arizona and, if so, whether his conviction for misconduct involving weapons was based on fundamental, prejudicial error. We also asked whether Hattar has forfeited appellate review of this question by not raising it for consideration by the trial court. The parties submitted supplemental briefing and we have considered the issue further.

¶15 The New Mexico statute regarding the restoration of the right to legally possess a firearm states, in pertinent part:

(A) It is unlawful for a felon to receive, transport or possess any firearm or destructive device in this state.

. . .

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<sup>2</sup> We decline to address Hattar's undeveloped argument that his inability to present evidence of his United States citizenship allowed the jury "to improperly imply that [he] was an illegal immigrant," impairing his defense to the other charges against him. Hattar points to nothing in the record to support the premise of his argument, which seems to be that the jury believed he is in this country illegally. "The appellant's brief shall include . . . the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on." Ariz. R. Crim. P. 31.13(c)(1)(vi); see also *State v. Moody*, 208 Ariz. 424, 452, ¶ 101 n. 9, 94 P.3d 1119, 1147 n. 9 (2004).



(C) As used in this section:

(2) "felon" means a person convicted of a felony offense . . . and:

(a) less than ten years have passed since the person completed serving his sentence or period of probation for the felony conviction, whichever is later[.]

N.M. Stat. Ann. § 30-7-16(C)(2) (Westlaw 2013). Hattar was convicted of a felony in New Mexico in 1994 and sentenced to eighteen months of probation. Arguably, under this statute Hattar's right to possess a firearm may have been automatically restored by 2006, well before he committed the present offense in 2011. The State agrees with this analysis in its supplemental brief. As previously discussed, however, it was Hattar's burden to present evidence that his right to possess a firearm had been restored and he did not argue in the trial court that his rights had been restored under the New Mexico statute. Therefore, absent fundamental error, Hattar has waived review of this issue on appeal. See *State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991) ("Absent a finding of fundamental error, failure to raise an issue at trial . . . waives the right to raise the issue on appeal.").

¶16 We do not find fundamental error in Hattar's conviction for misconduct involving weapons. Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such a

magnitude that the defendant could not possibly have received a fair trial." *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). Here, nothing in the proceedings took from Hattar "a right essential to his defense." See *id.* The State proved the elements of the offense charged by presenting evidence that Hattar possessed a weapon and that he had been convicted of a felony in New Mexico in 1994. See A.R.S. § 13-3102(A)(4). Hattar then had the opportunity to present relevant evidence that his right to possess a firearm had been restored and he did not do so. No error was committed by the trial court in convicting Hattar of this charge.<sup>3</sup>

#### **Consecutive Sentences**

¶17 Hattar also argues the superior court fundamentally erred by imposing consecutive sentences in violation of A.R.S. § 13-116 (2010) for his disorderly conduct convictions and the weapons misconduct conviction because they all stemmed from the same act and involved the same weapon. He argues that concurrent sentences are mandated by *State v. Gordon*, 161 Ariz. 308, 315, 778 P.2d 1204, 1211 (1989). We disagree because the disorderly conduct and weapons misconduct convictions did not arise from a "single act."

¶18 "An act or omission which is made punishable in different ways by different sections of the laws may be punished

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<sup>3</sup> Hattar may be entitled to raise this issue in a Rule 32 petition for post-conviction relief.

under both, but in no event may sentences be other than concurrent." A.R.S. § 13-116. We review *de novo* whether a superior court has complied with § 13-116 in imposing consecutive sentences. *State v. Urquidez*, 213 Ariz. 50, 52, ¶ 6, 138 P.3d 1177, 1179 (App. 2006).

¶19 In determining whether a defendant has committed a single act pursuant to § 13-116, the Arizona Supreme Court explained in *Gordon* that it first considers "the facts of each crime separately, subtracting from the factual transaction the evidence necessary to convict on the ultimate charge—the one that is at the essence of the factual nexus and that will often be the most serious of the charges." 161 Ariz. at 315, 778 P.2d at 1211. Consecutive sentences may be allowed under A.R.S. § 13-116 if the remaining evidence meets the elements of the other crime. *Id.* We then consider the entire "transaction" and decide whether "it was factually impossible to commit the ultimate crime without also committing the secondary crime." *Id.* If so, then it is more likely the defendant committed a single act under A.R.S. § 13-116. *Id.* We will then look to whether the commission of the lesser crime "caused the victim to suffer an additional risk of harm beyond that inherent in the ultimate crime." *Id.* In that event, the court should find the defendant committed multiple acts and may be given consecutive sentences. *Id.*

¶120 Applying *Gordon*, Hattar's disorderly conduct and misconduct convictions regarding the rifle clearly exposed him to consecutive sentences. Although the convictions both required proof related to the rifle, the misconduct offense (but not the disorderly conduct offenses) required evidence that Hattar was a prohibited possessor, while the disorderly conduct offenses (but not the misconduct offense) required proof that he recklessly handled, displayed, or discharged the rifle while disturbing the peace or quiet of his wife and daughters. See A.R.S. §§ 13-2904(A)(6) (2010) and 13-3102(A)(4).

¶121 Furthermore, Hattar's argument that the crimes arose from a single act with the same weapon, presupposes that the misconduct conviction was based solely on his handling of the rifle during the altercation with his wife. The evidence, however, supports a conviction for misconduct involving the rifle on another basis: Hattar purchased the rifle some days before the altercation and showed it to his wife. Because Hattar was a prohibited possessor, this conduct alone supports the weapons misconduct offense.

¶122 Both convictions required proof of an element not found in the other offense. Therefore, Hattar's disorderly conduct involving the rifle and his misconduct involving that weapon were separate criminal acts under *Gordon* that subjected

him to consecutive sentences pursuant to A.R.S. § 13-116.<sup>4</sup> Accordingly, we find no sentencing error, fundamental or otherwise, on this basis.

**CONCLUSION**

¶23 For the reasons stated, Defendant's convictions and sentences are affirmed.

/s/

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JOHN C. GEMMILL, Presiding Judge

CONCURRING:

/s/

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MARGARET H. DOWNIE, Judge

/s/

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DIANE M. JOHNSEN, Judge

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<sup>4</sup> We therefore need not consider the "additional risk of harm" issue in *Gordon*. See *State v. Boldrey*, 176 Ariz. 378, 382-83, 861 P.2d 663, 667-68 (App. 1993) (concluding it is not necessary to consider *Gordon's* third prong where analysis of first two lead to conclusion that consecutive sentences are permissible under § 13-116).