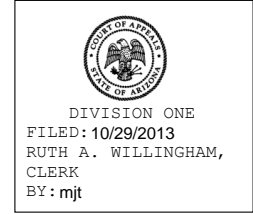


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 12-0770
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
JULIAN PENA,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-132936-002

The Honorable Daniel G. Martin, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Andrew Reilly, Assistant Attorney General
Attorneys for Appellee

Marty Lieberman, Maricopa County Office Phoenix
of the Legal Defender
By Cynthia D. Beck, Deputy Legal Defender
Attorneys for Appellant

B R O W N, Judge

¶1 Julian Pena appeals from his conviction and sentence for misconduct involving weapons. He argues the trial court erred in denying his motion for judgment of acquittal because

the only evidence the State presented at trial that Pena possessed a firearm was his uncorroborated confession. For the following reasons, we affirm.

BACKGROUND¹

¶12 On the night of June 27, 2011, a police officer responded to an emergency call of "shots-fired" at a residence. When the officer arrived, he conducted a protective sweep of the scene. There were numerous people in the vicinity; the officer also noticed a vehicle parked in front of the residence. Using his flashlight, he looked in the vehicle and saw a rifle on the rear passenger seat. He also noticed there were pizza boxes partially covering the rifle.

¶13 While speaking with Antonio Gonzales,² who was in the front yard of the residence, the officer learned that Gonzales had been a passenger in the vehicle with Pena. The officer asked Gonzales whether he had a felony conviction, which Gonzales admitted. The officer then gave Gonzales his *Miranda*³ warning. Gonzales acknowledged the warning and admitted he knew there was a rifle inside the vehicle, and because he had touched

¹ We review the evidence and inferences drawn from the evidence in a light most favorable to upholding the verdict. See *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

² Gonzales was indicted as Pena's co-defendant but is not a party to this appeal.

³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

it, his DNA and fingerprints could possibly be on the rifle. Gonzales also admitted he knew he was a "prohibited possessor" and that "he could not be around guns." Gonzales added that Pena had been in the front passenger seat of the car that evening.

¶4 While speaking with Pena, the officer asked Pena if he had a felony conviction, and Pena admitted he had prior felony convictions. The officer also read Pena the *Miranda* warning, and Pena acknowledged he understood and agreed to proceed with the conversation. Pena admitted he had been in the front passenger seat of the car and that prior to the officer arriving on scene he tried to conceal the rifle by moving it. He also said that the rifle belonged to someone else who fled from the scene. Finally, Pena stated that he knew the rifle was in the car and that as a convicted felon he could not be around guns.

¶5 Pena was indicted for misconduct involving weapons for knowingly possessing a deadly weapon, while being a prohibited possessor in violation of Arizona Revised Statutes ("A.R.S.") section 13-3102(4). Neither Pena nor Gonzales appeared for trial and were tried in absentia. The State's primary evidence against Pena consisted of the officers' testimony and the proof of Pena's prior felony convictions. Testimony was also given that a latent fingerprint taken from the rifle could not be matched to Pena.

¶16 After the state rested, Pena moved for a judgment of acquittal, arguing there was insufficient evidence that Pena had exercised dominion and control over the rifle to establish possession and that the only evidence of his presence near the weapon were his statements made to the police. The trial court denied Pena's motion. The jury found Pena guilty as charged and he was sentenced to a presumptive term of ten years imprisonment. Pena timely appealed.

DISCUSSION

¶17 Pena argues that the trial court abused its discretion in denying his motion for judgment of acquittal because the only evidence presented at trial that he possessed a firearm was his confession without corroborating proof of the crime charged. We disagree.

¶18 A trial court's ruling on a motion for judgment of acquittal is reviewed for an abuse of discretion. *State v. McCurdy*, 216 Ariz. 567, 573, ¶ 14, 169 P.3d 931, 937 (App. 2007). Furthermore, "the sufficiency of the evidence of the *corpus delicti* [is a] matter[] within the discretion of the trial court." *State ex rel. Romley v. Jones*, 198 Ariz. 18, 23, ¶ 13, 6 P.3d 323, 328 (App. 2000).

¶19 Under the *corpus delicti* doctrine, a defendant may not be convicted of a crime based on an uncorroborated confession without independent proof of the *corpus delicti*, or the body of

the crime. See *State v. Gillies*, 135 Ariz. 500, 506, 662 P.2d 1007, 1013 (1983). The purpose of the *corpus delicti* doctrine is to prevent a defendant from being convicted based on a coerced or otherwise untrue confession. *Smith v. United States*, 348 U.S. 147, 153 (1954); *State v. Gerlaugh*, 134 Ariz. 164, 170, 654 P.2d 800, 806 (1982). "If the state fails to make this showing, the trial court should grant a motion for directed verdict of acquittal." *Gillies*, 135 Ariz. at 506, 662 P.2d at 1013. Ultimately, "only a reasonable inference" that the *corpus delicti* exists is sufficient to permit the fact-finder to consider the defendant's confession. *State v. Janise*, 116 Ariz. 557, 559, 570 P.2d 499, 501 (1977). A confession may be corroborated when "independent evidence . . . bolster[s] the confession itself and thereby prove[s] the offense 'through' the statements of the accused." *State v. Morgan*, 204 Ariz. 166, 171, ¶ 18, 61 P.3d 460, 465 (App. 2002). Applying these principles here, we conclude that the trial court did not abuse its discretion in denying Pena's motion for judgment of acquittal because Pena's admissions were corroborated by independent evidence introduced at trial.

¶10 The State charged Pena with misconduct involving weapons. To establish the *corpus delicti* of that crime, the State was required to prove that Pena knowingly possessed a deadly weapon and did so while he was a prohibited possessor.

A.R.S. § 13-3102(4). A prohibited possessor is defined to include "any person [w]ho has been convicted within . . . this state of a felony." A.R.S. § 13-3101(7).

¶11 Pena has conceded on appeal that the State proved he had a prior felony conviction on the night of his arrest and was therefore a prohibited possessor. Thus, no *corpus delicti* issue exists with respect to Pena's statement that he had a prior felony conviction. The State also presented evidence that Pena was in the vicinity of the car when the police officer arrived on the scene; the officer spoke to Pena's co-defendant, Gonzales, who told the officer that Pena was in the car that evening; and the officer also observed that the rifle was present in the car. Therefore, the State's independent evidence corroborated Pena's statements that he had been in the car earlier that evening, and he was aware of the rifle.⁴ Thus,

⁴ Pena has not raised any claim that his right under the Confrontation Clause was violated based on the admission of Gonzalez' statements at trial, nor did he make any objection to such statements. Pena has therefore waived that right on appeal. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 314, n.3 (2009) ("The right to confrontation may, of course, be waived, including by failure to object to the offending evidence[.]"); *Griffin v. Harrington*, 915 F. Supp. 2d 1091, 1111 (C.D. Cal. 2012) ("Confrontation Clause rights may be waived by the actions of counsel alone."); cf. *State v. King*, 212 Ariz. 372, 375, ¶ 14, 132 P.3d 311, 314 (App. 2006) ("Because King objected on the basis of hearsay and also on the basis that he would not be able to cross-examine T.S., his objections were sufficient to avoid waiver of his Confrontation Clause argument.").

sufficient circumstantial evidence exists in the record to create "a reasonable inference" that the State established the *corpus delicti*. See *Janise*, 116 Ariz. at 559, 570 P.2d at 501.

¶12 Finally, because we find that the trial court did not abuse its discretion in denying the motion for judgment of acquittal, we need not address the issues the State raises regarding the continued validity of the *corpus delicti* doctrine under Arizona law. *State v. Barragan-Sierra*, 219 Ariz. 276, 282, 196 P.3d 879, 885 (App. 2008).

CONCLUSION

¶13 For the foregoing reasons, we affirm Pena's conviction and sentence.

_____/s/_____
MICHAEL J. BROWN, Judge

CONCURRING:

_____/s/_____
ANDREW W. GOULD, Presiding Judge

_____/s/_____
DONN KESSLER, Judge