

NOTICE: NOT FOR PUBLICATION.
UNDER ARIZ. R. SUP. CT. 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

State of Arizona, *Appellee*,

v.

Eric Edgar Abat, *Appellant*.

No. 1 CA-CR 13-0211

FILED 12-12-2013

Appeal from the Superior Court in Coconino County
No. S0300CR201100753
The Honorable Jacqueline Hatch, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz

Counsel for Appellee

Coconino County Public Defender's Office, Flagstaff
By Brad Bransky,

Counsel for Appellant

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MEMORANDUM DECISION

Presiding Judge Andrew W. Gould delivered the decision of the Court, in which Judge Donn Kessler and Judge Michael J. Brown joined.

G O U L D, Judge:

¶1 Eric Edgar Abat appeals his convictions and sentences for one count of armed robbery, a class two dangerous felony, one count of theft, a class one misdemeanor, and seven counts of aggravated assault, class three dangerous felonies.

¶2 Abat admitted robbing a bank at gunpoint, and ordering the tellers and customers to the ground, but testified that the gun was not loaded, and he used it only as a prop, believing that it would not fire. A Department of Public Safety (“DPS”) firearms expert testified that he was able to fire the gun in the second of two tests. The jury convicted Abat of the offenses, and the judge sentenced him to a mitigated term of ten years on the armed robbery, and lesser, concurrent sentences on the aggravated assaults and the theft. Abat filed a timely notice of appeal.

Denial of *Willits* Instruction

¶3 Abat argues that the superior court abused its discretion in denying him a *Willits*¹ instruction for the State’s refusal to allow a defense expert to observe or record the firearms expert’s second, successful test firing of the gun used in the bank robbery. The *Willits* instruction informs a jury it is allowed to draw an inference from the State’s destruction of material evidence that the lost or destroyed evidence would be unfavorable to the State. *State v. Fulminante*, 193 Ariz. 485, 503, ¶ 62, 975 P.2d 75, 93 (1999). A defendant is entitled to a *Willits* instruction upon proving that (1) the State failed to preserve accessible, material evidence that “might tend to exonerate him” and (2) there was resulting prejudice. *Id.*

¹ *State v. Willits*, 96 Ariz. 184, 187, 393 P.2d 274, 276 (1964).

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¶4 The superior court found in this case that the State had not lost, destroyed, or failed to preserve the gun; and that Abat had failed to show that he was prejudiced by his inability to observe or record the test. We review a superior court's decision to deny a *Willits* instruction for abuse of discretion. *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984).

¶5 We find no such abuse of discretion. The State's refusal to allow a defense expert to observe or record the test pursuant to DPS policy did not result in loss or destruction of the gun, the material evidence. The expert testified that he did not alter the gun in conducting the second test; the only thing he changed during the second test was to use different ammunition. Moreover, he testified that he had been of the opinion after the first test, even though he had been unable to fire the gun, that the gun was not permanently inoperable. Defense counsel was able to, and did, cross-examine the expert at length on what steps the expert took that caused the gun to fire during the second test. Had a defense expert wanted to conduct his own independent test on the gun (in light of the denial of the request to observe or record the State's test), he could have done so. Nonetheless, even though the gun was available for independent testing, no defense expert conducted a test. Defendant was not entitled to a *Willits* instruction under these circumstances.

Expert Opinion on Ultimate Issue

¶6 Abat next argues that the superior court fundamentally erred in allowing the State's firearms expert to opine that the gun Abat used in the bank robbery was not permanently inoperable, a factor considered in determining whether the gun was a "deadly weapon." See Arizona Revised Statutes ("A.R.S.") § 13-105 (15), (19) (2013).² Because Abat did not object at trial, he bears the burden of establishing that the court erred, that the error was fundamental, and that the error caused him prejudice. See *State v. Henderson*, 210 Ariz. 561, 568, ¶¶ 22, 23, 26, 115 P.3d 601, 608 (2005).

¶7 Abat has not met his burden. An expert may offer an opinion if his expertise "will help the trier of fact to understand the

² We cite to the current version of the statutory definitions, because they have not changed since the commission of the offense on October 12, 2011.

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evidence or to determine a fact in issue.” Ariz. R. Evid. 702. An opinion otherwise admissible “is not objectionable just because it embraces an ultimate issue.” Ariz. R. Evid. 704; *State v. Fornof*, 218 Ariz. 74, 79-80, ¶ 21, 179 P.3d 954, 959-60 (App. 2008) (stating that detective experienced in narcotics transactions may give his opinion that defendant possessed the drugs “for sale,” even though his testimony embraced the ultimate issue). Abat misplaces his reliance on *State v. Sosnowicz*, 229 Ariz. 90, 270 P.3d 917 (App. 2012), in which we concluded that the medical examiner’s classification of the death as a homicide was improper because he based this opinion on the circumstances described to him by police, and thus was in no better position to opine on this issue than was the jury. *Id.* at 95-98, ¶¶ 19-26, 270 P.3d at 922-25. The State expert’s opinion that the firearm was not permanently inoperable was based on his training, experience, and testing of the gun (which revealed that it did ultimately fire twice), and would have been helpful to the jury in evaluating the evidence. Under these circumstances, we conclude that the superior court did not err, much less fundamentally err, in failing to strike this expert’s opinion that the gun was not permanently inoperable.

¶8 Moreover, the record also fails to show that Abat suffered prejudice from this testimony. The expert testified that he was able to fire the gun twice, and the court instructed the jury to give expert opinion testimony the weight the jury believed it deserved considering the witness’s qualifications and experience, the reasons given for his opinion, and all other evidence in the case. On this record, we conclude that Abat did not suffer the prejudice necessary for reversal on fundamental error review. *See Henderson*, 210 Ariz. at 569, ¶ 27, 115 P.3d at 609 (stating that to demonstrate prejudice, defendant must show that, absent the error, a reasonable jury could have reached a different conclusion).

Constitutionality of Firearm Definition

¶9 Abat finally argues that A.R.S. § 13-105 (15) and (19), read together, are unconstitutional, because the inclusion of an unloaded handgun in the definition of “deadly weapon” fails to reasonably relate to the promotion of a legitimate legislative objective. Because Abat did not raise this issue at trial,³ we review for fundamental error only. *See Henderson*, 210 Ariz. at 568, ¶¶ 22, 23, 26, 115 P.3d at 608.

³ We note also that nothing in the record indicates that Abat has complied with A.R.S. § 12-1841(A) (2013) (“In any proceeding in which a

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¶10 We presume “that the legislature acts constitutionally and when there is a reasonable, even though debatable, basis for the enactment of a statute, we will uphold the act unless it is clearly unconstitutional.” *State v. Murphy*, 117 Ariz. 57, 61, 570 P.2d 1070, 1074 (1977). Abat concedes, and we agree, that we review the statutory definitions at issue to determine whether there is a rational basis for them. *See State v. Watson*, 198 Ariz. 48, 51-52, ¶¶ 7-8, 6 P.3d 752, 755-56 (App. 2000). To establish a substantive due-process violation subject to this type of review, the proponent must prove either that the objective of the legislation is not proper for governmental involvement, or that “the legislation is clearly arbitrary and unreasonable, having no reasonable relation to promoting legitimate objectives.” *Id.* at 52, ¶ 12, 6 P.3d at 756. “If a statute could serve any purpose related to public health, safety, or welfare, we will not question the wisdom of the legislature.” *Knapp v. Miller*, 165 Ariz. 527, 530-31, 799 P.2d 868, 871-72 (App. 1990).

¶11 We need go no further than the definitions themselves to discern a legitimate purpose. *See Watson*, 198 Ariz. at 53, ¶ 14, 6 P.3d at 757. The legislature defined a deadly weapon as “anything designed for lethal use, including a firearm.” A.R.S. § 13-105 (15). It further defined a “firearm” as meaning “any loaded or unloaded handgun, pistol, revolver, rifle, [or] shotgun.” A.R.S. § 13-105 (19). The legislature’s designation of a firearm as a weapon designed for lethal use, and its clarification that it is immaterial whether the firearm is loaded, clearly has a legitimate purpose: to deter the use of a firearm to force compliance with criminal demands. An unloaded firearm, after all, can quickly be made operable. Moreover, whether the firearm is loaded or not, it poses the same apparent danger to the victim. We conclude that the definitions serve legitimate objectives, and accordingly are constitutional.

state statute . . . is alleged to be unconstitutional, the attorney general and the speaker of the house of representatives and the president of the senate . . . shall be entitled to be heard.”). Because we reject Abat’s constitutional challenge, we need not address the consequences of his failure to comply with the mandatory notice requirements.

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Conclusion

¶12 For the foregoing reasons, we affirm Abat's convictions and sentences.



Ruth A. Willingham · Clerk of the Court
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