DIVISION ONE
FILED: 01/10/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 10-0466
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
DYLAN MATTHEW GORMEY,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-127783-03DT

The Honorable John R. Hannah, Jr., Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division
And Jeffrey L. Sparks, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Cory Engle, Deputy Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 Dylan Matthew Gormey ("Appellant") and Derek Samuel Jeriha were codefendants in a criminal trial in which they were charged with armed robbery, kidnapping, and theft of an

automobile. Appellant was also charged with weapons-related offenses stemming from his status as a prohibited possessor. He was convicted on the armed robbery and kidnapping counts.

¶2 At trial, the state presented evidence that weapons of many different kinds had been found in the apartment in which Appellant was living. Appellant raised no objection to that evidence when it was presented. He now argues on appeal that the admission of that evidence was fundamental error. Because Appellant cannot establish any prejudice caused by the evidence's admission, we find no fundamental error and affirm his convictions.

FACTS AND PROCEDURAL HISTORY[1]

¶3 On the morning of January 13, 2009, Nick S. was at the apartment of his girlfriend, Heather S. Also at the apartment were two of Heather's friends, Michelle and Lee, who had arrived that morning. After Nick showered, Heather told him that Jeriha "had just showed up at the door" wanting "to get the cell phone" she had agreed to sell him. Nick knew Jeriha because Jeriha was the friend of one of Nick's old roommates. Jeriha had also previously dated Heather. Nick also knew Appellant; he had

[1] We view the facts in the light most favorable to sustaining the convictions. *State v. Haight-Gyuro*, 218 Ariz. 356, 357, ¶ 2, 186 P.3d 33, 34 (App. 2008).

"seen him at parties a couple times," but the two had never "been properly introduced."

¶4 While Nick stood in the living room talking to Heather, the front door "opened up really fast." Appellant, Jeriha, and a third person entered the apartment, each armed with a semiautomatic handgun. Nick immediately recognized Jeriha, whose face was exposed. Although Appellant wore a ski mask, Nick recognized him by his voice and tattoos. The third accomplice also wore a ski mask; Nick could not identify him.

¶5 Appellant and the third intruder stood on either side of Nick, pointed their guns at him, and told him to get on his knees. Nick "got hit from one way and then the other" and fell to the ground, where he was kicked and possibly hit with a pistol. The men duct-taped his hands and feet behind his back and also taped his face, partially covering his eyes. The three then forced Heather onto the ground beside Nick and duct-taped the two of them together.

¶6 While one of the men kept a gun pointed at Nick and Heather, the others went through the apartment, "tore it up looking for things," leaving it "trashed." Although Nick did not see Lee and Michelle during the incident, he believed they stayed in the apartment's kitchen -- he also stated that Lee and Jeriha were friends. Before leaving, Jeriha said to Nick, "[T]his is what you get for stealing my girlfriend." Appellant,

referring to Nick's 9-millimeter handgun that the men found and took from the apartment, said, "[W]hy do you have a gun, you're not a gangster."

¶7 After the intruders left, Lee unbound Nick and Heather. The apartment "was upside down," and Nick and Heather tried to determine which belongings of theirs the intruders had taken with them. They discovered that both of their cell phones, Nick's handgun, wallet, and car keys, as well as some of Heather's belongings, were missing. Several minutes later, Nick also discovered that the car he had driven to Heather's, a 2005 Volkswagen Beetle belonging to his grandmother, was also missing.

¶8 Lee and Michelle left almost immediately after Appellant and his accomplices. Nick admitted at trial that he did not call the police right away because he initially entertained the idea of taking matters into his own hands. He thought better of this idea, however, and eventually called the police, at about 11:00 a.m. Afraid to talk to the police because she had an outstanding warrant, Heather left before Nick placed the call.

¶9 Phoenix Police Officer Jarod Modica responded to Nick's call. When he arrived, Modica immediately noticed that Nick's face was red and bruised, that he had cuts on his head and knuckle, and that he had a red mark on his shoulder. Nick

was "[f]razzled" and "shaking," but cooperative. Modica also noticed that Nick had sticky duct-tape residue on his arm. Inside the apartment, Modica saw wads of duct tape on the dining room table and next to the bathroom sink; he also saw a strip of duct tape in the bedroom. Modica also observed that the bedroom "was torn apart," with drawers pulled out, clothes "all over the place," and a glass vanity broken.

¶10 About three months later, Phoenix Police officers executed a search warrant at an apartment on Maryland Avenue where Appellant lived with his girlfriend. Appellant, his girlfriend, and Jeriha were present when the search occurred. In the apartment, police found a wallet containing Nick's school identification card, his video-rental cards, his casino card, his Wells Fargo bank card, and his Arizona State University identification card, all of which had been taken on the day of the robbery. Officers also found Heather's identification card and other cards in her name. The police found probation paperwork for Appellant, who was on probation when the search was carried out. Finally, they found a wide assortment of weapons, including firearms.

¶11 On May 4, 2009, the state filed an indictment. It charged Appellant and Jeriha with two counts of armed robbery, a class 2 felony (Counts 1 and 2); one count of aggravated assault, a class 4 felony (Count 3); two counts of kidnapping, a

class 2 felony (Counts 4 and 5); and theft of means of transportation, a class 3 felony (Count 7). The indictment also charged Appellant with three counts of misconduct involving weapons, a class 4 felony (Counts 6, 8, and 9).

¶12 At trial, the state presented evidence of the items that the police found in their search of the apartment where Appellant lived with his girlfriend.[2] Much of this evidence consisted of testimony from Officer Travis Lachance, accompanied by photographs of weapons and related objects. Lachance testified, and the photographs showed, that many of the weapons were displayed on the apartment walls as a "collection."

¶13 Police found: several knives; several hand-held swords; swords that can be strapped to a person's arms; a cane that breaks down into a sword; a loaded shotgun; a cattle prod; a "tazer"; throwing stars; an axe; a BB gun that looked like a semiautomatic handgun; an archery bow; a magazine containing .45 caliber ammunition for use with a semiautomatic handgun; a box containing handgun magazines, parts, and accessories; ammunition for a shotgun, a handgun, and a rifle; primers for making ammunition; a blow-dart gun; a crossbow; a rifle mounted on the wall; a weapon "you swing around and club someone with the end

[2] Some of this evidence (e.g., pornographic wall posters and Axe Body Spray) was meant to establish that Appellant was in fact living there.

of it"[3]; and the "upper components" of an AR–15 rifle. The firearms and the firearm-related items were admitted as physical evidence.

¶14 All of the weapon-related evidence was admitted with only one objection. Jeriha objected when the prosecutor asked Lachance whether the primers could be used to make ammunition for a semiautomatic handgun. The objection was overruled after the prosecutor reminded the court that a semiautomatic handgun was allegedly used in the robbery.

¶15 After the state rested, the prosecutor conceded that he had presented no evidence supporting an element of Count 9: that the shotgun was a "prohibited weapon." Consequently, the trial court ordered that count dismissed. The trial court also granted Appellant's motion for judgment of acquittal on Counts 6 and 8, which charged him with being a "prohibited possessor."

¶16 A jury convicted Appellant on Counts 1 and 2, the armed robbery charges, and on Counts 4 and 5, the kidnapping charges. It found that all four offenses were dangerous and that all involved as an aggravating circumstance the "infliction o[r] threatened infliction of serious physical injury." The jury acquitted him on Count 3, aggravated assault, and Count 7, theft of means of transportation.

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[3] In his opening brief, Appellant suggests that "flail" is the most accurate term to describe the weapon.

¶17 On May 28, 2010, the trial court imposed the presumptive sentence of 10.5 years in prison for each conviction, ordering that the sentences be served concurrently. Appellant filed a timely notice of appeal from the judgment and sentence. He argues that the trial court's admission of "extensive testimony about the arsenal of weapons" was reversible error. This Court has jurisdiction under A.R.S. §§ 12–120.21(A)(1), 13–4031 and –4033(A).

STANDARD OF REVIEW

¶18 On appeal, Appellant concedes that during the trial he did not object to the evidence about the weapons that were found at his girlfriend's apartment. In Arizona law, it is well established that an "asserted error in the admission of evidence cannot be raised for the first time on appeal unless the error was fundamental." *State v. Tacho*, 113 Ariz. 380, 384, 555 P.2d 338, 342 (1976). *See also State v. Moody*, 208 Ariz. 424, 441, ¶¶ 39-40, 94 P.3d 1119, 1136 (2004). It is equally well established that "[t]he scope of review for fundamental error is limited." *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Within that scope of review, reversal is proper only if the trial court's admission of the weapons-related evidence was "error going to the foundation of the case, error that takes from [Appellant] a right essential to his defense, and error of such magnitude that [Appellant] could not

possibly have received a fair trial." *Id.* (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)).

DISCUSSION

¶19 For Appellant to prevail under the fundamental error standard of review, he must establish two things: "that fundamental error exists and that the error in his case caused him prejudice." *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607 (citation omitted). Most of Appellant's argument focuses on the first of these requirements. He argues that the court, in admitting evidence of the "arsenal" in the apartment, violated Arizona Rules of Evidence 402, 403 and 404. But if the court did err in admitting the weapons evidence (a question we do not need to resolve), Appellant is not entitled to relief unless he can show that the admission caused him prejudice. *Id.* at 568, ¶ 26, 115 P.3d at 608.

¶20 Appellant tries to establish that prejudice by arguing that the weapons evidence had the effect of "painting the picture of [Appellant] as a dangerous man" and that it "injected into the whole trial the image of him as a dangerous individual." A review for fundamental error "involves a fact-intensive inquiry," and so "the showing required to establish prejudice . . . differs from case to case." *Id.* Here, two facts militate against concluding that the weapons evidence prejudiced Appellant's trial: the prosecutor never emphasized

that evidence and the jury did not convict him of every dangerous crime with which Appellant was charged.

¶21 If the prosecutor had somehow emphasized the wide array of weapons, that emphasis might have helped Appellant argue that he had been prejudiced by the admission of the weapons evidence. *Cf. State v. Sharp*, 193 Ariz. 414, 422, 973 P.2d 1171, 1179 (1999) (stating that improperly admitted evidence created "no actual prejudice because the prosecution did not emphasize this evidence at trial"). But Appellant does not point us to any particular passage in which the prosecutor goes out of his way to comment on the number of weapons that were found in the apartment. The weapons evidence was introduced in the general context of describing what had been found at the girlfriend's apartment when the police served the search warrant. During Lachance's testimony and the presentation of the exhibits, none of the "collectible" weapons -- e.g., the crossbow and the sword cane -- were singled out as especially lethal or indicative that their owner was an inherently dangerous person. And in the prosecutor's closing argument, no mention was made of the apartment's weapons.[4]

[4] In his rebuttal, the prosecutor did mention the ammunition: "And then you were asked to believe, well, there was no weapon seized so, therefore, I haven't proven that a gun was used. Well, what about all the ammo that was found in that apartment? The last time I checked, you didn't just kind of throw ammo at people."

¶22 Further, when a jury acquits a defendant of some charges, that acquittal refutes the notion that the jury has been improperly inflamed by evidence presented at trial. *State v. Stuard*, 176 Ariz. 589, 600, 863 P.2d 881, 892 (1993) (stating that the decision to acquit defendant of certain charges helped "demonstrate the jury's careful and proper consideration of the evidence"); *see also State v. Bocharski*, 200 Ariz. 50, 57, ¶ 34, 22 P.3d 43, 50 (2001) (stating that a conviction on a lesser included offense showed that the jury's decision was not "attributable to outrage or emotion"). Here, the jury acquitted Appellant on two charges: the car theft charge and the assault charge. Appellant's argument that the weapons evidence improperly influenced the jury to convict him for being a "dangerous individual" is unavailing in light of those acquittals.

¶23 Appellant's convictions for kidnapping and armed robbery were therefore not the result of any prejudice caused by a fundamental error in the admission of the weapons evidence.

CONCLUSION

¶24 We affirm Appellant's convictions and his sentences.

/s/
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PETER B. SWANN, Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Presiding Judge

/s/
_____
DONN KESSLER, Judge