IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ANTONIO CARLOS S. MARTINEZ JR.,
Appellant.

No. 2 CA-CR 2016-0063
Filed December 22, 2016

Appeal from the Superior Court in Pima County
No. CR20150800
The Honorable Jane L. Eikleberry, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Amy Pignatella Cain, Assistant Attorney General, Tucson
Counsel for Appellee

Dean Brault, Pima County Legal Defender
By Alex Heveri, Assistant Legal Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Howard and Judge Staring concurred.

E S P I N O S A, Judge:

¶1 After a jury trial, Antonio Carlos Martinez Jr. was convicted of possession of a deadly weapon by a prohibited possessor, repetitive with two historical priors, and sentenced to a presumptive ten-year prison term. On appeal, he challenges the sufficiency of the evidence and argues that his sentence was erroneously enhanced by one of the historical priors because the state "failed to timely disclose [his] prior convictions history when he was deciding whether to accept or reject his plea [offer]." For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the conviction. *See State v. Brown*, 233 Ariz. 153, ¶ 2, 310 P.3d 29, 32 (App. 2013). After Martinez was arrested for an unrelated matter, police found a loaded pistol in his vehicle, tucked beside the driver's seat next to his wallet. He told the arresting officer at the scene that he had obtained the pistol from a "kid" in the neighborhood and was planning to "go and check if it works," and, if so, purchase it for $20. At trial, he stipulated that he was a convicted felon and his civil right to possess a firearm had not been restored. Martinez was convicted and sentenced as described above. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Operability of Gun

¶3 Martinez contends there was insufficient evidence to support his conviction because "[t]he state failed to present evidence that the gun [he] possessed was operable, a key element to support a

conviction." We consider sufficiency-of-the-evidence challenges de novo, *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011), reviewing only to determine whether substantial evidence supports the verdicts, *State v. Hausner*, 230 Ariz. 60, ¶ 50, 280 P.3d 604, 619 (2012). "Substantial evidence" is that which reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt. *State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 913-14 (2005).

¶4 Contrary to Martinez's assertions, operability of a firearm is not an element of prohibited possession, *see* A.R.S. §§ 13-3101(A)(1), (4), 13-3102(A)(4), but inoperability is an affirmative defense, *State v. Young*, 192 Ariz. 303, ¶ 16, 965 P.2d 37, 41 (App. 1998); *State v. Berryman*, 178 Ariz. 617, 621, 875 P.2d 850, 854 (App. 1994). As this court has previously observed:

> the burden is upon appellant to come forward with evidence establishing a "reasonable doubt" as to the operability of the firearm. The state is not relieved of proving the elements of the offenses charged; however, the state need not disprove beyond a reasonable doubt appellant's affirmative defense of permanent inoperability of the firearm.

Berryman, 178 Ariz. at 621, 875 P.2d at 854, *quoting State v. Rosthenhausler*, 147 Ariz. 486, 493, 711 P.2d 625, 632 (App. 1985). Thus, the state only needed to respond to any evidence offered by Martinez on the gun's permanent inoperability. And the question for the trier of fact was not whether the state proved that the gun was operable, but whether Martinez presented evidence giving rise to a reasonable doubt about operability. *See Rosthenhausler*, 147 Ariz. at 492, 711 P.2d at 631.

¶5 The only evidence that suggested the gun could be inoperable was Martinez's post-arrest statement to police that he had recently obtained the pistol and was planning to test fire it to see if it worked. But he gave no reason for that doubt except his claimed lack of experience with that particular weapon. Other

evidence at trial supported operability. The arresting officer testified on the basis of his extensive experience with firearms that it "definitely" "looked functional." He also had tested or examined most of the gun's major parts—the slide, the trigger, the magazine seating, and the barrel—and found all in working order. Moreover, the fact that the gun was loaded tended to undercut Martinez's claim that he did not know whether it could be fired. Evaluation of conflicting evidence is within the purview of the fact-finder, *see State v. Williams*, 209 Ariz. 228, ¶ 6, 99 P.3d 43, 46 (App. 2004), and the evidence here was sufficient for the jury to determine that Martinez did not establish a reasonable doubt as to the operability of the gun he possessed, *see Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d at 913-14; *Rosthenhausler*, 147 Ariz. at 492, 711 P.2d at 631.

Prior Convictions

¶6 Martinez next argues that because "[t]he state failed to timely disclose [his] prior convictions history when he was deciding whether to accept or reject his plea," "the trial court erred in failing to preclude use of his 2001 prior for sentencing enhancement" and his resulting sentence was "illegal."

¶7 Months before trial, the state offered Martinez a plea agreement under which he would serve a sentence of 2.25 to 4.5 years' imprisonment. At a *Donald* hearing,[1] the court informed him that if convicted at trial, his sentence would be six to fifteen years and he would not be eligible for probation. The court expressly pointed out that the sentence in the plea offer was "much shorter" than what he could be sentenced to if convicted at trial. Martinez nevertheless rejected the offer.

¶8 At his subsequent priors trial, Martinez moved to preclude one of his two historical convictions on the ground the packet accompanying the state's plea offer did not disclose those

[1]*See State v. Donald*, 198 Ariz. 406, ¶ 14, 10 P.3d 1193, 1200 (App. 2000) (once state engages in plea negotiations, defendant has Sixth Amendment right to be adequately informed of consequences of accepting or rejecting plea offer).

priors and instead included a single minute entry for a different conviction that would not support a sentence enhancement. He argued he had "reasonably relied" on the state's disclosure when assessing the risk of going to trial. The state responded that it had disclosed both prior convictions in Martinez's "pen pack"[2] on March 26, before the plea was offered, and the trial court ruled the state's disclosure had been adequate. In denying Martinez's motion, the court additionally noted that Martinez "would remember" his own prior conviction.

¶9 On appeal, Martinez argues the trial court erred by not precluding the prior conviction because "[i]t is fundamentally unfair to allow the state to present misleading dis[cl]osure on which the defendant and defense counsel rely . . . in deciding whether to accept or reject a plea and then use accurate, late disclosure to enhance a sentence upon conviction." Martinez acknowledges he had notice of the state's intended use of his prior convictions through the indictment, but nonetheless argues he reasonably relied solely upon the state's packet accompanying the plea offer. And he maintains that use of the prior conviction was fundamental error because it resulted in an "illegal sentence." We review both the trial court's decision to allow evidence of prior convictions and a sentence imposed within the statutory range for abuses of discretion. *State v. Newnom*, 208 Ariz. 507, ¶ 3, 95 P.3d 950, 950 (App. 2004) (prior convictions); *State v. Joyner*, 215 Ariz. 134, ¶ 5, 158 P.3d 263, 266 (App. 2007) (sentencing).

¶10 Although there is no constitutional or procedural right to a plea agreement, *State v. Delk*, 153 Ariz. 70, 72-73, 734 P.2d 612, 614-15 (App. 1986), "once the State engages in plea bargaining, the defendant has a Sixth Amendment right to be adequately informed of the consequences before deciding whether to accept or reject the offer," *State v. Donald*, 198 Ariz. 406, ¶ 14, 10 P.3d 1193, 1200

[2]"Pen pack" refers to records kept in compliance with A.R.S. § 31-221, which requires the Arizona Department of Corrections to "maintain a master record file for each person who is committed to the department." *See State v. Trujillo*, 227 Ariz. 314, n.7, 257 P.3d 1194, 1199-1200 n.7 (App. 2011).

(App. 2000). The state is obligated to make all material disclosures at least thirty days before the offer expires and failure by the state to meet this deadline can be grounds for sanctions. Ariz. R. Crim. P. 15.8(a). The state can avoid such sanctions by reinstating the plea offer, but retains sole discretion over the choice to renew the offer or not. Ariz. R. Crim. P. 15.8(c); *see also Rivera-Longoria v. Slayton*, 228 Ariz. 156, ¶¶ 13-16, 264 P.3d 866, 869 (2011). In this case, however, there was nothing to sanction because the state met its obligations by disclosing Martinez's prior convictions over two months before the hearing where he rejected the plea.

¶11 Martinez nevertheless argues that, despite the state's disclosure, he is entitled to relief due to lack of notice because the plea offer packet itself did not contain minute entries for his prior convictions. We reject this argument. As the state points out, Martinez had ample notice of his prior convictions and it was not reasonable for him to rely exclusively on the minute entries in the packet. Martinez was on notice of his priors from the allegation of prior convictions attached to the indictment, and from the state's previous disclosure. Moreover, if he relied on the plea-packet to draw conclusions about the extent of his sentence exposure, he should have recognized its unreliability when he saw that the attached minute entry represented a conviction for a crime he did not commit and it bore the name and date of birth of his son. A complete review of the packet would have alerted him to the correct priors disclosed in the accompanying pen pack.

¶12 Finally, even if Martinez relied solely on the minute entry accompanying the plea-packet when considering the state's plea offer, any miscalculation of exposure was corrected once the court expressly informed him at the *Donald* hearing of the sentencing range he would face upon conviction and explained the difference between that range and the range in the offer. Accordingly, the trial court did not abuse its discretion by declining to preclude the prior convictions and, because Martinez's sentence fell within the statutory range, A.R.S. §§ 13-3102(A)(4), (M), 13-703(C), (J), the court did not impose an illegal sentence.

Disposition

¶13 For the foregoing reasons, Martinez's conviction and sentence are affirmed.