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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

NICHOLAS MIGUEL BACA, *Appellant*.

No. 1 CA-CR 16-0609
FILED 11-21-2017

Appeal from the Superior Court in Maricopa County
No. CR2015-154192-002
The Honorable George H. Foster, Jr., Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Tucson
By Tanja K. Kelly
Counsel for Appellee

Ballecer & Segal LLP, Phoenix
By Natalee E. Segal
Counsel for Appellant

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MEMORANDUM DECISION

Judge Jennifer B. Campbell delivered the decision of the Court, in which Presiding Judge Michael J. Brown and Judge Margaret H. Downie (retired) joined.

C A M P B E L L, Judge:

¶1 Nicholas Miguel Baca appeals his conviction and sentence for misconduct involving weapons. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND¹

¶2 On November 26, 2015, A.Z. (“Victim”) noticed one of his home security cameras was missing. He viewed his stored surveillance footage and saw a white Ford Ranger parked in front of his neighbor’s house. He observed the driver exit the vehicle, take the security camera, get back in the truck and leave. Not recognizing the driver or the truck, Victim asked his neighbor to come over and view the footage. The neighbor likewise did not recognize the driver or the vehicle, but he assured Victim he would “keep an eye out” for the truck.

¶3 Victim and his roommate decided to drive around the neighborhood looking for the truck. Before long, they came upon the neighbor, who waived them down and explained that he had spotted the Ford Ranger in the area. Within moments, Victim saw the truck approaching and maneuvered his vehicle behind the Ranger.

¶4 While following the truck, Victim called 9-1-1 and reported he was following the man—later identified as Arturo Fimbres—who had stolen his property. Disregarding the emergency operator’s instruction to cease pursuit, Victim followed the truck until it stopped in front of a park. Once the truck stopped, Victim got out and approached Fimbres. He informed Fimbres that he had a surveillance video showing Fimbres stealing his security camera, but Fimbres drove off to a nearby house. Again, Victim pursued in his vehicle. When Fimbres got out, Victim confronted him a second time. In response to Victim’s accusations, Fimbres

¹ We view the facts in the light most favorable to sustaining the verdict. *State v. Payne*, 233 Ariz. 484, 509, ¶ 93 (2013).

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brandished a knife and ran toward Victim. Meanwhile, Victim's roommate got out of the vehicle to warn Victim that a man carrying a gun had come out of the house. Victim looked up and confirmed that a man—later identified as Baca—was in fact in front of the house holding a black gun. Fearing for his life, Victim fled the scene. Subsequently, they flagged down a patrol officer who was responding to Victim's 9-1-1 call.

¶5 Victim returned to the scene with the officer. The officer did not initially see a weapon and ordered Baca and Fimbres to walk toward him. Rather than comply, Baca and Fimbres turned and "scurr[ied]" inside the house. As the men turned toward the door, the officer "clearly" saw a gun underneath Baca's arm.

¶6 After Baca and Fimbres entered the house, other officers arrived and established a perimeter. A sergeant then telephoned the house's landline, spoke with Baca's girlfriend, and demanded the men come out. Approximately 30 minutes after he entered the home, Fimbres emerged. After a second officer spoke with Baca's girlfriend, Baca emerged. He was immediately arrested and handcuffed.

¶7 Later that afternoon, officers executed a search warrant in the house. They seized a knife from Baca's bedroom, picked open a locked gun safe in Baca's mother's bedroom, and seized two firearms from the safe. The State charged Baca with one count of misconduct involving weapons and alleged a prior felony conviction, aggravating circumstances, and that Baca was on probation.²

¶8 At trial, Baca's girlfriend testified she witnessed the events through the window of the house and saw Baca carry only a phone outside. She also testified that she owns the gun safe found in Baca's mother's bedroom, as well as the seized guns. She explained she is the only person in possession of a key to the safe, which she keeps at her separate residence at all times. She denied that Baca held a gun on the day in question, and claimed he never entered his mother's bedroom after he re-entered the home.

¶9 Taking the stand in his own defense, Baca explained that Fimbres frantically called him on the day in question and explained that some men had followed him to the house. Concerned he may need to call for police assistance, Baca carried a phone as he walked outside to meet

² The State charged codefendant Fimbres with one count of aggravated assault and one count of theft.

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Fimbres. Baca denied possessing any weapon at any time during these events. He claimed he did not know where the key to the gun safe was and therefore had no way to access its contents.

¶10 After several days of trial, a jury found Baca guilty as charged. At sentencing, the trial court imposed a presumptive four and one-half years' term of imprisonment.

DISCUSSION

I. Sufficiency of the Evidence

¶11 Baca argues the State presented insufficient evidence to sustain his conviction. Focusing on the State's theory of constructive possession, Baca asserts he had no access to the guns stored in the safe, and therefore the State failed to prove the requisite elements of the offense.

¶12 We review a claim of insufficient evidence *de novo*. *State v. West*, 226 Ariz. 559, 562, ¶ 15 (2011). Sufficient evidence may be direct or circumstantial and is such proof that "reasonable persons could accept as adequate" to "support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Borquez*, 232 Ariz. 484, 487, ¶¶ 9, 11 (App. 2013) (citations omitted). In evaluating the sufficiency of the evidence, we "do not reweigh the evidence to decide if [we] would reach the same conclusions as the trier of fact." *Id.* at 487, ¶ 9 (internal quotation omitted).

¶13 As charged in this case, a person commits misconduct involving weapons by knowingly possessing "a deadly weapon or prohibited weapon if such person is a prohibited possessor." A.R.S. § 13-3102(A)(4) (Supp. 2016). A "prohibited possessor" is a person who has been convicted 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) (Supp. 2016).

¶14 During his trial testimony, Baca admitted he was convicted of a felony less than two months before the underlying events occurred and acknowledged his right to possess a firearm had not been restored. A defendant who presents a defense "waives any error if his case supplies evidence missing in the state's case." *State v. Bolton*, 182 Ariz. 290, 308 (1995). In such circumstances, we consider all the evidence presented at trial. *Id.* Therefore, the only contested elements were whether Baca (1) knowingly (2) possessed (3) a gun.

¶15 "Possession may be actual or constructive." *State v. Gonsalves*, 231 Ariz. 521, 523, ¶ 9 (App. 2013); A.R.S. § 13-105(34) (Supp. 2016)

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(“‘Possess’ means knowingly to have physical possession or otherwise to exercise dominion or control over property.”). Thus, the State may prove misconduct involving weapons by showing a defendant exercised either “direct physical control” or “dominion or control” over a deadly weapon. *Gonsalves*, 231 Ariz. at 523, ¶ 9.

¶16 At trial, the State presented dual theories of possession, arguing Baca had (1) actual physical possession of a gun while standing in front of his house, and (2) constructive possession of the two guns seized from the gun safe. Contrary to Baca’s claims, these dual theories were neither inconsistent nor mutually exclusive. Rather, the State theorized that Baca held a gun while standing in front of his house and, during the 45 minutes police waited for him to exit the house, he placed that gun in the safe.

¶17 Four witnesses, including Victim and the first responding officer, saw Baca holding a gun while he stood in front of his house. Indeed, the officer testified he had an unobstructed view of Baca and “clearly” saw him carrying a gun. The officer also refuted any suggestion that the object he saw could have been a phone. While it is true Baca denied carrying a gun and testified he was holding a phone, he admitted he initially told police he had carried a flashlight outside. Given the strength of the eyewitness testimony and Baca’s contradictory statements to police, there was sufficient evidence from which a reasonable jury could find Baca knowingly and actually possessed a gun.

¶18 Because the State presented sufficient evidence to support a conviction based on actual possession, it did not need to prove constructive possession. *See Payne*, 233 Ariz. at 508, ¶ 81 (explaining “as long as only one charge is alleged in a count of an indictment,” the State may introduce “evidence of several acts, each of which might satisfy the charge, . . . [and] jurors may ‘reach a verdict based on a combination of alternative findings’” (citations omitted)). Nonetheless, sufficient evidence also supports a finding that Baca exercised dominion or control over the guns seized from the safe. After he displayed a gun in front of his house, Baca retreated into his residence and remained inside for over 40 minutes. When police officers later executed a search warrant, the only guns found were inside the safe. Although Baca and his girlfriend both claimed that Baca had no access to the safe, the jurors were free to disregard this testimony and believe the eyewitness testimony that one of the guns inside the safe resembled the gun Baca brandished. Therefore, under either theory, the State presented sufficient evidence to support Baca’s conviction for misconduct involving weapons.

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II. Admission of Guns Seized from Safe

¶19 Baca argues the trial court improperly admitted evidence of the guns seized from the safe. Specifically, he contends the evidence was irrelevant and more prejudicial than probative.

¶20 We review the admission of evidence for an abuse of discretion, *State v. Montano*, 204 Ariz. 413, 425, ¶ 55 (2003), and defer to the trial court's determination of relevance, *State v. Chappell*, 225 Ariz. 229, 238, ¶ 28 (2010). In general, “[a]ll relevant evidence is admissible.” Ariz. R. Evid. 402. Evidence is relevant if it has “any tendency” to make a fact of consequence in determining the action “more or less probable than it would be without the evidence.” Ariz. R. Evid. 401. Nonetheless, even relevant evidence may be excluded “if its probative value is substantially outweighed by a danger of unfair prejudice.” Ariz. R. Evid. 403.

¶21 At trial, the prosecutor showed Victim a picture of a gun seized from the gun safe and, without objection, asked him to describe it. He responded that the picture depicted “[a] gun similar to the one” Baca held. The prosecutor then presented Victim with a picture of a different gun and asked if he recognized the gun in the picture. Defense counsel objected and asked to approach the bench. During the bench conference, defense counsel argued the photograph of the second gun was irrelevant because Victim had only claimed to see Baca hold one gun, and had already identified the first gun as consistent with the gun he saw. In response, the prosecutor explained that she sought to introduce the second gun to show Victim could identify a gun and thereby rebut Baca’s claim that the eyewitnesses had mistakenly identified a phone as a gun. The prosecutor also noted that the State alleged Baca constructively possessed both weapons found in the safe, though he was seen holding only one. The trial court overruled the objection, and Victim testified that he did not recognize the second gun. The court admitted pictures of both guns into evidence. When asked whether the guns resembled a phone, Victim answered they did not and refuted the notion that he could have mistaken a phone for a gun.

¶22 To prove misconduct involving weapons under its theory of constructive possession, the State needed to demonstrate that Baca exercised dominion or control over a deadly weapon. Notwithstanding his claim that he had no access to the gun safe, evidence that two guns were found in the safe—and that one of the seized guns resembled the weapon he displayed—tended to show that Baca had access to the guns and thereby exercised dominion and control over them. Although Baca correctly notes

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this evidence was prejudicial to his defense, it did not suggest that the jurors should determine his guilt on an improper basis. *See State v. Mott*, 187 Ariz. 536, 545 (1997) (explaining unfairly prejudicial evidence suggests jurors render a “decision on an improper basis, such as emotion, sympathy or horror”). Moreover, to the extent Baca argues this evidence had little probative value because the eyewitnesses did not positively identify either gun as the weapon he displayed, but instead stated one of the guns resembled the gun he carried, any uncertainty in the identification went to the weight of the evidence and not its admissibility. *See State v. Rodriguez*, 186 Ariz. 240, 250 (1996) (“The inability of a witness to positively identify an item in evidence goes to the weight of the evidence, not its admissibility.”). Therefore, the trial court did not abuse its discretion in admitting the evidence by finding it was both relevant and more probative than prejudicial.

III. Prosecutorial Misconduct

¶23 Next, Baca contends the prosecutor engaged in misconduct by vouching for a witness and presenting an argument that was not reasonably supported by the evidence. He did not object on these bases in the trial court, and we therefore review only for fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 19-20 (2005). Under this standard of review, a defendant must first prove that misconduct actually occurred. *State v. Edmisten*, 220 Ariz. 517, 524, ¶ 23 (App. 2009). Then, the defendant must demonstrate “that the prosecutor’s misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *State v. Roque*, 213 Ariz. 193, 228, ¶ 152 (2006). “Reversal on the basis of prosecutorial misconduct requires that the conduct be so pronounced and persistent that it permeates the entire atmosphere of the trial.” *Id.* (internal quotations omitted).

¶24 Prosecutorial misconduct is not “merely the result of legal error, negligence, mistake, or insignificant impropriety.” *Pool v. Superior Court*, 139 Ariz. 98, 108 (1984). Rather, viewed in its entirety, it is “intentional conduct” that the prosecutor “knows to be improper and prejudicial, and which he pursues for any improper purpose.” *Id.* at 108-09.

A. Alleged Vouching

¶25 “There are two types of prosecutorial vouching: (1) when the prosecutor places the prestige of the government behind its witness, and (2) where the prosecutor suggests that information not presented to the jury supports the witness’s testimony.” *State v. Duzan*, 176 Ariz. 463, 467 (App.

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1993) (internal quotation omitted). Baca argues the prosecutor engaged in the latter form of vouching when she attempted to bolster Victim's gun identification testimony by introducing evidence of the guns seized from the safe.

¶26 Nothing in the record substantiates Baca's claim. The prosecutor never suggested that evidence unknown to the jury supported Victim's identification testimony. Instead, the prosecutor engaged Victim in identification exercises, before the jury, to demonstrate he could distinguish between guns and phones.³ Because she did not suggest that outside information supported Victim's testimony or the State's theory of the case, the prosecutor did not engage in improper vouching.

B. Alleged Unsupported Argument

¶27 "Prosecutors have 'wide latitude' in presenting their arguments to the jury" and may argue all reasonable inferences from the evidence. *State v. Morris*, 215 Ariz. 324, 336, ¶ 51 (2007). A prosecutor may not, however, "make insinuations that are not supported by the evidence." *Id.* (internal quotation omitted). Baca contends the prosecutor made unsupported assertions during closing argument, claiming: (1) eyewitnesses identified a gun seized from the safe as the gun Baca displayed in front of his home, and (2) Baca demonstrated his intentional possession of a gun by stating "*who wants to get shot*" while holding it.

a. Gun Identification Argument

¶28 When defense counsel objected to the admission of the second gun evidence, the prosecutor avowed she would "never refer" to the second gun as "the gun." During her closing argument, however, the prosecutor referred to eyewitness testimony that one of the guns seized from the safe resembled the gun Baca displayed and incorrectly referenced the second gun in making this argument: "[T]hey did a search warrant and they found not just any weapon. But a weapon that each person identified as being the one that looked like because there's different types of weapons, chrome, etc., and it is this weapon that is in evidence, 44." Although the record reflects the eyewitnesses identified Exhibit 42, not Exhibit 44, as resembling the gun Baca held, nothing in the record suggests the prosecutor's

³ To the extent Baca's argument can be framed as a claim of impermissible "bolstering," such a claim, likewise, is not borne out by the record. The prosecutor did not introduce evidence regarding Victim's reputation or character. *See Ariz. R. Evid. 608.*

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misidentification was intentional or prejudicial. Moreover, contrary to Baca's argument, the prosecutor did not claim the eyewitnesses positively identified either gun as the weapon Baca displayed.

b. Intentional Possession Argument

¶29 During his direct testimony, Victim claimed he heard Baca threaten, "Do you want me to shoot you. You want to get shot." The prosecutor relied on this testimony to demonstrate Baca's intent to possess a gun, stating: "The State has proven that the defendant intentionally possessed it. Not just knowing that he possessed it, but who wants to get shot when he held it." Because evidence supported this argument, the prosecutor's statements were not improper.

¶30 Furthermore, the trial court instructed the jury that the lawyers' arguments were not evidence to be considered in reaching their conclusions, and we presume jurors follow the court's instructions. *Morris*, 215 Ariz. at 336-37, ¶ 55. Therefore, even if the prosecutor's comments were improper, the trial court's final instructions "negated their effect" and there was no resulting prejudice. *Id.*

CONCLUSION

¶31 For the foregoing reasons, we affirm Baca's conviction and sentence.



AMY M. WOOD • Clerk of the Court
FILED: AA