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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Plaintiff/Appellee*,

v.

SHANE E. TYREE, *Defendant/Appellant*.

No. 1 CA-CR 18-0837
FILED 12-12-2019

Appeal from the Superior Court in Maricopa County
No. CR2017-150962-001
The Honorable Monica Garfinkel, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Casey D. Ball
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Mark E. Dwyer
Counsel for Appellant

STATE v. TYREE
Decision of the Court

MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge Samuel A. Thumma and Judge Jennifer M. Perkins joined.

M c M U R D I E, Judge:

¶1 Shane Tyree appeals his conviction and sentence for one count of misconduct involving weapons, a Class 4 felony under Arizona Revised Statutes (“A.R.S.”) section 13-3102(A)(4). He claims the superior court committed fundamental error by permitting the State’s expert to opine on an ultimate issue of whether the item he possessed was designed for lethal use. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND¹

¶2 A Mesa police officer stopped Tyree for riding his bike at night without a reflector. The officer discovered Tyree was a convicted felon and asked if he had any weapons on him. Tyree said he did not, but later removed from his pocket brass knuckles with “tips that were spiked” and “a knife that extended out of one end.” Tyree told the officer that he used the weapon for personal protection. Tyree was arrested and charged with misconduct involving weapons.

¶3 During the trial, the State called Officer Richard Bates to testify as an expert on edged weapons, specifically knives. Bates testified about his decades of martial arts training, extensive background collecting and studying knives, and experience as a witness being asked to examine and determine the deadliness of confiscated knives and edged weapons. Bates then examined an exhibit of a dagger in court and testified that a dagger is a fighting knife “designed to stab, to kill, to inflict lethal penetrative injury . . . [to] the enemy” based on the blade’s size and pointed tip. The testimony then turned to trench knives, which have dagger blades. Bates detailed how trench knives were developed during trench warfare

¹ We view the facts in the light most favorable to upholding the verdict and resolve all reasonable inferences against Tyree. *State v. Harm*, 236 Ariz. 402, 404, ¶ 2, n.2 (App. 2015).

STATE v. TYREE
Decision of the Court

and used during World War I for “close-quarters combat” to “kill the enemy.” He explained trench knives are “designed to beat, pummel, or stab your enemy to death” and is “a stabbing knife . . . a lethal instrument, combined with features that, regardless, I can put it in the hand of anybody and say, hey, just attack that person.” He also stated that generally, a blade of approximately four inches was ideal for inflicting lethal injury, but that a blade less than four inches in length could still inflict serious lethal injuries if it were able to penetrate a vulnerable area like a major artery.

¶4 Bates examined Tyree’s weapon and identified several features that, in his opinion, made it designed for lethal use. He noted that the weapon was a trench knife and had a dagger blade. The weapon had brass knuckles with spikes on the outside, called striking barbs, and a striking pommel. He stated that the striking barbs allowed the user to “cut, scrape, [and] create an open wound,” and pommels are generally “used for striking the skull to disorient[] [and] incapacitate.” He went on to explain that brass knuckles and pommels reduce the surface area that a user’s hand strikes with and allows a user to “hit harder . . . without feeling so much force back on [the user].” Bates explained that the brass knuckles’ finger rings serve as a grip enhancement, which prevents the user from losing their grip while stabbing, allowing for greater ease when stabbing. Bates also described that the weapon had a liner lock, which keeps the dagger blade sturdy and locked in place. Tyree did not object to Bates’ testimony regarding the weapon.

¶5 The jury found Tyree guilty as charged. The court sentenced Tyree to a mitigated term of six years’ imprisonment with credit for 370 days of presentence incarceration. Tyree appealed and we have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031 and -4033(A)(1).

DISCUSSION

¶6 Tyree argues that the superior court committed reversible fundamental error by allowing Bates to opine on the “ultimate issue” which was (1) unhelpful and prejudicial to the jury; and (2) a legal conclusion that stripped the decision from the jury. The alleged errors occurred when Bates: (1) called Tyree’s knife a “[d]eadly weapon. . . [d]esigned to kill the enemy” based on his “training and experience both as an officer and a martial arts knife expert”; (2) answered “no” to the prosecutor’s question if ordinary brass knuckles qualified as deadly weapons under Arizona law; and (3) answered “yes” to the prosecutor’s question if the defense’s exhibits of various pictures of knives were all deadly weapons under Arizona law based on Bates’ opinion.

STATE v. TYREE
Decision of the Court

¶7 We review the admissibility of expert testimony for an abuse of discretion. *State v. Williams*, 132 Ariz. 153, 160 (1982), *abrogated on other grounds by State v. Carson*, 243 Ariz. 463, 465, ¶ 10 (2018). Because Tyree did not object at trial, “we will not reverse unless the court committed error that was both fundamental and prejudicial.” *State v. Escalante*, 245 Ariz. 135, 140, ¶ 12 (2018). “A defendant establishes fundamental error by showing that (1) the error went to the foundation of the case, (2) the error took from the defendant a right essential to his defense, or (3) the error was so egregious that he could not possibly have received a fair trial.” *Id.* at 142, ¶ 21. To establish fundamental error, Tyree “must first prove error.” *State v. Henderson*, 210 Ariz. 561, 568, ¶ 23 (2005). Tyree has shown no error, much less fundamental error.

A. Bates Was Permitted to Testify About the Characteristics of Deadly Weapons Because it was Helpful to the Jury.

¶8 Tyree argues Bates’ characterization concerning Tyree’s weapon and the weapons depicted in his exhibits as deadly weapons “was an obvious ploy to inappropriately influence or even supplant the jury’s decision” because the phrase “‘deadly weapon’ is well within the scope of the average juror.” The superior court has broad discretion to determine the admissibility of evidence. *State v. Campoy*, 214 Ariz. 132, 133, ¶ 5 (App. 2006). “A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if . . . [such testimony] will help the trier of fact to understand the evidence or to determine a fact in issue” Ariz. R. Evid. 702(a). An expert may testify when a subject “is beyond the common experience of most persons and the opinion of an expert will assist the trier of fact.” *Williams*, 132 Ariz. at 160. *But see Pincock v. Dupnik*, 146 Ariz. 91, 96 (App. 1985) (expert testimony was not necessary when “no special knowledge [wa]s required” and the testimony was “within the knowledge and experience of the [average] juror[]”). An expert’s testimony should be excluded if the jury’s common knowledge and experience make it equally capable of reaching “a conclusion as intelligently” as the one purported by the expert. *State v. Dixon*, 153 Ariz. 151, 155 (1987); *Williams*, 132 at 160. “Deciding whether expert testimony will aid the jury and balancing the usefulness of expert testimony against the danger of unfair prejudice are generally fact-bound inquiries uniquely within the competence of the trial court.” *State v. Moran*, 151 Ariz. 378, 381 (1986).

¶9 Here, Bates stated that Tyree’s knife is a deadly weapon because it is designed to kill. Bates previously explained that the deadliness of a knife was determined by its design, which included: the shape and size

STATE v. TYREE
Decision of the Court

of the blade, a liner lock, grip enhancements preventing slippage, and additive features like striking pommels and barbs. Bates based his testimony on his training, experience, and knowledge of knives. Generally, “[a] knife is a deadly weapon,” *State v. Williams*, 110 Ariz. 104, 105 (1973), which may render expert testimony on the subject unnecessary if it were unhelpful to the jury. Under the circumstances of this case, it was not unreasonable for the court to allow expert testimony because Tyree’s weapon was unusual and not obviously deadly.

¶10 Tyree’s weapon was a contraption involving brass knuckles attached to a retractable blade. The blade was smaller than the handle and folded into itself like a pocketknife, and measured roughly 3.75 inches. Bates testified that a blade typically needs to be four inches or larger to cause deadly injury. Bates needed to elaborate on how this unusual weapon could be dangerous, which he did by opining on the specific features of the weapon like the striking barbs and pommel, liner lock, grip enhancements, and a dagger blade. Bates’ testimony was helpful to give the jurors context beyond a layperson’s knowledge. *See Williams*, 132 Ariz. at 160 (admitting evidence about the deadly nature of a three-foot stick with a pointed tip sharpened by the defendant). We cannot say that the court abused its discretion by allowing the testimony.

B. Bates’ Opinion About the Deadly Nature of Tyree’s Weapon Embraced the Ultimate Issue but Was Not a Legal Conclusion Depriving the Jury of Its Decision.

¶11 Tyree argues the prosecutor erred by asking Bates to form a legal conclusion about whether Tyree’s weapon was deadly, effectively telling the jury how to decide the case. He claims error because neither Bates nor the prosecutor clarified “whether that testimony was as to a definition in fact or at law” and the use of “under Arizona law” regarding the deadliness of Tyree’s various exhibits was “so egregious that he could not possibly have received a fair trial” because it deprived him of a “meaningful jury decision.”

¶12 An expert’s opinion “is not objectionable just because it embraces an ultimate issue.” Ariz. R. Evid. 704(a). An ultimate issue is one that is to be decided by the trier of fact. *Webb v. Omni Block, Inc.*, 216 Ariz. 349, 353, ¶ 12 (App. 2007). An opinion on an ultimate issue is impermissible when it goes beyond helping the trier of fact and instead is “couched in legal conclusions that simply opine ‘how juries should decide cases.’” *Id.* (quoting Ariz. R. Evid. 704 cmt. to 1977 rule); *see also id.* at 354, ¶ 22 (expert testimony that apportioned percentages of fault to the parties constitutes

STATE v. TYREE
Decision of the Court

inadmissible legal conclusions by improperly invading the province of the jury). Opinions “are not within the spirit of the [evidence] rules” when a “witness is actually being asked his opinion of whether the defendant was guilty.” *Fuenning v. Superior Court*, 139 Ariz. 590, 605 (1983).

¶13 The State charged Tyree, a prohibited possessor, with misconduct involving weapons. Under A.R.S. § 13-3102(A)(4), “[a] person commits misconduct involving weapons by knowingly . . . [p]ossessing a deadly weapon or prohibited weapon if such person is a prohibited possessor.” A “deadly weapon” is defined as “anything that is designed for lethal use.” A.R.S. § 13-3101(A)(1). The State was required to prove each element of the misconduct with weapons charge beyond a reasonable doubt. Just because Tyree claims that the only contested issue at trial was whether the weapon was deadly does not render Bates’ opinion a legal conclusion regarding guilt. *See State v. Welch*, 236 Ariz. 308, 315, ¶ 25 (App. 2014) (an expert’s factual assertion that images “could not be downloaded without an operator’s affirmative action” was permitted because the expert did not testify that the defendant himself had downloaded the files, only that “somebody” intentionally downloaded them and the testimony assisted the jury in deciding whether it had been the defendant).

¶14 Although Bates’ testimony about the deadly design of the weapon embraced an issue to be decided by the jurors, it did not equate to a statement about his guilt. *See State v. Fornof*, 218 Ariz. 74, 79–80, ¶¶20–21 (App. 2008) (expert allowed to opine whether the defendant possessed drugs “for sale,” even though this testimony embraced an ultimate issue). *Compare State v. Sosnowicz*, 229 Ariz. 90, 97, ¶¶ 19–25 (medical examiner’s classification of the death as a homicide was improper because he based this opinion on the circumstances described to him, and thus was in no better position to opine on this issue than was the jury), *with Williams*, 132 Ariz. at 160 (expert allowed to opine that a sharpened stick was a “dangerous instrument” and inflicted “serious bodily injury” because it was information helpful to the jury). Bates’ testimony on the design and history of various weapons helped assist the jurors in determining whether Tyree’s unique weapon was a “deadly weapon.” Bates did not express an opinion regarding Tyree’s guilt, tell the jury how it should decide the case, nor did Tyree object to the testimony. Accordingly, we find the superior court did not err by failing to strike the testimony.

STATE v. TYREE
Decision of the Court

CONCLUSION

¶15 We affirm Tyree's conviction and sentences.



AMY M. WOOD • Clerk of the Court
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