

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10-19-2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 09-0147
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ANASTACIO JAMES RAMIREZ,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2007-134181-001 DT

The Honorable Robert L. Gottsfield, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals & Capital Litigation Section
And Michael J. Mitchell, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Edith M. Lucero, Deputy Public Defender
Attorneys for Appellant

B R O W N, Judge

¶1 Anastacio James Ramirez ("Ramirez") appeals from his conviction and sentence for misconduct involving weapons. He

challenges the trial court's decision admitting a pen pack in evidence and the court's decision to sua sponte instruct the jury on the circumstances in which a weapon is "permanently inoperable." For the following reasons, we affirm.

BACKGROUND

¶2 In May 2007, police officers stopped Ramirez for traffic violations. The officers asked him and his passengers to exit the vehicle and Ramirez consented to a search of the car. As one of the officers leaned inside the car to begin the search, he saw "a silver handgun tucked in between the two front seats."

¶3 Ramirez was charged with knowingly possessing a deadly weapon as a prohibited possessor based on a prior felony conviction from January 12, 2005. He failed to appear at trial and was tried in absentia. The jury found Ramirez guilty and the trial court issued a bench warrant for his arrest. The court later sentenced Ramirez to ten years imprisonment to be served concurrently with sentences in two other cases. Ramirez filed a timely notice of appeal.

DISCUSSION

I. Admission of Pen Pack¹

¶4 Ramirez argues that the trial court erred in allowing a pen pack into evidence because it was unduly prejudicial. We review evidentiary rulings for abuse of discretion. *State v. Davolt*, 207 Ariz. 191, 208, ¶ 60, 84 P.3d 456, 473 (2004). An abuse of discretion occurs when “the reasons given by the court for its action are clearly untenable, legally incorrect, or amount to a denial of justice.” *State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983).

¶5 To convict Ramirez of misconduct involving weapons, the State was required to prove he knowingly possessed a deadly weapon as a prohibited possessor in violation of Arizona Revised Statutes (“A.R.S.”) section 13-3102(A)(4) (2010). A prohibited possessor is any 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)(b) (2010). Evidence is relevant if it has the tendency to make a material fact more or less probable. Ariz. R. Evid. 401. Even relevant evidence may

¹ “Pen pack” refers to certain prison records kept in compliance with state law. A.R.S. § 31-221(A) (2010) (“The state department of corrections shall maintain a master record file on each person who is committed to the department[.]”); see *State v. Thompson*, 166 Ariz. 526, 527, 803 P.2d 937, 938 (App. 1990) (describing some of the contents of the automated summary report “pen pack”).

be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Ariz. R. Evid. 403.

¶16 Prior to jury selection, counsel and the court discussed Ramirez's motion in limine to preclude the State from introducing Ramirez's Arizona Department of Corrections ("ADOC") pen pack. The State argued that admitting the pen pack was necessary to identify Ramirez and to prove he had a prior felony conviction because the sentencing order itself did not contain a legible fingerprint. Defense counsel objected, indicating his concern about the potential prejudice of the ADOC heading at the top of the first page of the pen pack. The State countered that the heading was necessary to prove the pen pack was a document kept in the ordinary course of business and was certified. The State agreed, however, to redact some of the information from the pen pack, including the unrelated prior felony convictions, the nature of the conviction establishing that Ramirez was a prohibited possessor, the amount of time he served in prison, and his parole status.

¶17 The court then discussed its inclination to allow the pen pack, unless "the defense is going to stipulate" that Ramirez was a prohibited possessor. Defense counsel responded that he could not "stipulate to anything without the defendant." A short time later, in support of his contention that trial should not proceed in absentia, defense counsel stated his

belief that if Ramirez were present, he would probably stipulate to his prior felony conviction, but without a stipulation, "the pen pack has to come in, with all the inherent prejudice of the jury knowing that he went to prison."² The court later determined that the pen pack, with redactions as suggested by the State, would be admitted.

¶18 We conclude that the trial court did not err in allowing the State to introduce the pen pack in evidence. As we have previously recognized, *State v. Rangel*, 12 Ariz. App. 172, 175, 468 P.2d 623, 626 (App. 1970), the State may properly rely on prison records to meet its burden of proving a prior conviction:

The prison record admitted here has the secretary's certification and contains nothing which the secretary is not required to keep. It includes a photo of the defendant, his fingerprints, and a history of his distinguishing marks, all of which go to accurately describing him. The prison record also includes copies of . . . judgment and commitment records as well as . . . prior convictions. We therefore conclude proof of [a] defendant's prior convictions can be based on a prison secretary's certification . . . of those convictions.

² Ramirez did not attend the trial and therefore he could not stipulate to his status as a prohibited possessor. The State argues, however, that Appellant's counsel could have stipulated on his behalf, citing *State v. Allen*, 223 Ariz. 125, 126, ¶ 9, 220 P.3d 245, 246 (2009). We disagree that *Allen* would permit such a stipulation by counsel without informed consent, as a defendant's admission of a prior conviction must be knowing and voluntary. See *id.* at 129, ¶ 18, 220 P.3d at 249.

Id. (citation omitted); accord *State v. Robles*, 213 Ariz. 268, 273, ¶ 17, 141 P.3d 748, 753 (App. 2006) (ADOC records showing prior convictions accompanied by testimony that linked the records to the defendant constituted sufficient proof); *State v. Black*, 16 Ariz. App. 587, 588, 494 P.2d 1332, 1333-34 (1972) (certified copy of fingerprint card in state prison records sufficient to show prior convictions).

¶19 As in *Rangel*, admission of the pen pack here was for identification purposes and to prove an element of the crime. The State was required to prove that Ramirez was the person who was driving the car in which the weapon was located and that he was a prohibited possessor. As such, the trial court could not preclude the jury from hearing evidence that identified Ramirez and established his prior felony conviction. See *State v. Geschwind*, 136 Ariz. 360, 363, 666 P.2d 460, 463 (1983) (concluding that when a prior conviction is an element of the crime charged, it must be proven by the prosecution and the evidence related thereto "cannot be precluded as irrelevant or unfairly prejudicial"). The ADOC heading on the first page of the pen pack was part of an official record required to be maintained by that agency. The trial court properly redacted unnecessary details from the document, but allowed the heading to remain as a source identifier. Ramirez would have had the

option of seeking a stipulation to prevent the need for providing the pen pack to the jury; however, he failed to appear for trial and thus he has no legitimate complaint that he was prejudiced by the State's efforts to prove its case by introducing the pen pack. Therefore, we find no abuse of discretion.

II. Jury Instructions

¶10 Proving that a firearm is permanently inoperable is a statutory and affirmative defense to a charge of prohibited possession. A.R.S. § 13-3101(A)(4) ("Firearm does not include a firearm in permanently inoperable condition."); *State v. Berryman*, 178 Ariz. 617, 621, 875 P.2d 850, 854 (App. 1994) (permanent inoperability is an affirmative defense). Ramirez raised the defense and elicited testimony concerning the inoperability of the weapon.

¶11 At the close of evidence, the trial court sua sponte proposed two jury instructions relating to whether a weapon is permanently inoperable. After discussion with counsel, the court gave Instruction 19-B as follows: "[A] [d]isassembled or broken weapon is not permanently inoperable if it can be made operable with reasonable preparation, including addition of readily replaceable parts or accomplishment of a quickly effective repair." The court also gave Instruction 19-C, which

stated that “[a] weapon with a missing but replaceable firing pin is only temporarily, not permanently inoperable.”

¶12 Ramirez argues that the trial court erred in giving 19-B and 19-C because they impermissibly restricted the meaning of “permanently inoperable” and therefore invaded the province of the jury. We review de novo whether instructions to the jury properly state the law. *State v. Johnson*, 212 Ariz. 425, 431, ¶ 15, 133 P.3d 735, 741 (2006). We generally review the court’s decision to give a particular jury instruction for an abuse of discretion. *State v. Johnson*, 205 Ariz. 413, 417, ¶ 10, 72 P.3d 343, 347 (App. 2003). We review the adequacy of jury instructions in their entirety to determine if they accurately reflect the law. *State v. Hoskins*, 199 Ariz. 127, 145, ¶ 75, 14 P.3d 997, 1015 (2000).

¶13 Because Ramirez did not object to jury instruction 19-B, we review the giving of that instruction for fundamental error only. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Ramirez therefore bears the burden of establishing that the trial court erred, that the error was fundamental, and that the error caused him prejudice. *Id.* at 568, ¶ 22, 115 P.3d at 608.

¶14 The language of 19-B is quoted almost verbatim from *State v. Young*, 192 Ariz. 303, 306-07, ¶ 11, 965 P.2d 37, 40-41 (App. 1998). The definition of permanently inoperable, however,

was not an issue we considered in *Young*. Instead, we addressed whether the evidence presented at trial was sufficient to uphold the jury's determination that the weapon was not permanently inoperable. *Id.* at 307, ¶ 14, 965 P.2d at 41. In any event, we need not decide here whether 19-B accurately defined "permanently inoperable," because Ramirez has not shown he was prejudiced by the trial court's decision to give that instruction.

¶15 The only evidence presented concerning operability came from defense expert John Knell, a forensic scientist with the Phoenix Police Department. Knell testified that he had examined the handgun in question and that it was obviously missing the safety lever, firing pin, firing spring, and grip panels. He explained that a firing pin strikes the back of the cartridge, hits the primer, and initiates the cartridge firing, meaning that without a firing pin, the gun would not fire. By the design of this particular gun, a firing spring would also be necessary, or even a firing pin would be "useless." He further opined that this type of gun could probably be made to fire with a missing safety lever after some manipulation of the parts. Knell stated that the "gun will not fire in its current state." On cross-examination, however, he acknowledged that although the gun was not capable of firing currently, "it's not permanently

inoperable." He further explained that in "order for a firearm to be permanently inoperable, it's not repairable."

¶16 Consistent with the instructions given at trial, Ramirez had the burden of proving by a preponderance of the evidence that the gun was permanently inoperable. See *Young*, 192 Ariz. at 307, ¶ 16, 965 P.2d at 41. Not only did he fail to meet that burden, the evidence presented on the issue leads to only one reasonable conclusion—that the gun could have been repaired and was therefore not permanently inoperable. See *State v. Fisher*, 126 Ariz. 50, 50-51, 612 P.2d 506, 506-07 (App. 1980) (upholding conviction because trial testimony provided that gun could easily be made operable with insertion of firing pin or even a nail); *State v. Spratt*, 126 Ariz. 184, 186, 613 P.2d 848, 850 (App. 1980) (affirming conviction based on court's finding that a missing pin rendered the weapon, at most, temporarily inoperable). Thus, to the extent any error occurred, it was not fundamental.

¶17 With regard to 19-C, also taken from *Young*, Ramirez's counsel did object at trial, arguing that the language in question was not the holding of *Young* and that the instruction invaded the province of the jury. We agree that the language of 19-C, which focused only on the absence of a firing pin, may have been misleading to the jury because the jury heard evidence that the weapon was missing several additional parts.

Therefore, the court's instruction directing the jury's attention solely to the missing firing pin was not an accurate reflection of the facts. See *State v. Doerr*, 193 Ariz. 56, 64, ¶ 35, 969 P.2d 1168, 1177 (1998) ("A trial court should instruct on any theory reasonably supported by evidence.") (internal quotation and citation omitted).

¶18 Assuming the trial court erred in giving 19-C, however, we will nonetheless affirm if the error was harmless. Error is harmless if we can say, "beyond a reasonable doubt, that the error did not contribute to or affect the verdict." *State v. Anthony*, 218 Ariz. 439, 446, ¶ 39, 189 P.3d 366, 373 (2008) (quoting *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993)). "The State has the burden of convincing us that any error was harmless." *Id.* We can determine that an error is harmless "when the evidence against a defendant is so overwhelming that any reasonable jury could only have reached one conclusion." *Id.* at ¶ 41. Based on the overwhelming evidence presented by Knell that the gun was not permanently inoperable, we find that the trial court's decision to give 19-C did not affect the jury's verdict and therefore the error was harmless beyond a reasonable doubt.

CONCLUSION

¶19 Based on the foregoing, we affirm Ramirez's conviction and sentence.

/s/

MICHAEL J. BROWN, Judge

CONCURRING:

/s/

DIANE M. JOHNSEN, Presiding Judge

/s/

JOHN C. GEMMILL, Judge