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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.34



DIVISION ONE
FILED: 09/14/2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 09-0271
)
Appellee,) DEPARTMENT S
)
v.) **MEMORANDUM DECISION**
)
JOSE ABEL CABRERA-SOMOSA,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-006195-001 DT

The Honorable Peter J. Cahill, Judge

AFFIRMED IN PART, REVERSED IN PART

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Sarah E. Heckathorne, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Eleanor S. Terpstra, Deputy Public Defender
Attorneys for Appellant

T I M M E R, Chief Judge

¶1 Jose Abel Cabrera-Somosa appeals his conviction and sentence for misconduct involving weapons, a class four felony. He argues the trial court erred because the State failed to

present sufficient evidence to support the conviction. The State confesses error, and for the reasons that follow, we agree. We therefore reverse the conviction and sentence for misconduct involving weapons and affirm the convictions and resulting sentences for attempted first-degree murder and aggravated assault.

¶12 On October 14, 2007, Cabrera-Somosa was driving his truck when Phoenix Police Officer B.G. stopped him for running a stop sign. As B.G. approached the driver-side window, he saw that Cabrera-Somosa had a pistol in his right hand. Before B.G. could react, Cabrera-Somosa shot B.G. in the chest and then sped from the scene. Cabrera-Somosa was later apprehended and charged with attempted first-degree murder of a law enforcement officer, a class two dangerous felony (count one), aggravated assault, a class two dangerous felony (count two), and misconduct involving weapons, a class four felony (count three). A jury convicted Cabrera-Somosa on all counts, and the trial court sentenced him to an aggravated term of 20 years' imprisonment for attempted first-degree murder, an aggravated term of 14 years' imprisonment for aggravated assault, and a presumptive term of 2.5 years' imprisonment for misconduct involving weapons. The court ordered the sentences for counts one and three to run concurrently while the sentence for count

two was to be served consecutively. This timely appeal followed.

DISCUSSION

¶13 Cabrera-Somosa argues the trial court erred by convicting and sentencing him for misconduct involving weapons because the State failed to present any evidence that the firearm or ammunition used in the shooting had an interstate or foreign commerce nexus. The State confesses error, responding that Cabrera-Somosa's conviction for misconduct involving weapons should be reversed because the State failed to present sufficient evidence to prove Cabrera-Somosa possessed a firearm or ammunition with an interstate or foreign commerce nexus. This court reviews claims of insufficient evidence "only to determine whether substantial evidence supports the jury's verdict," and in doing so, we view the facts in the light most favorable to upholding the verdict. *State v. Cox*, 217 Ariz. 353, 357, ¶ 22, 174 P.3d 265, 269 (2007) (citing *State v. Roque*, 213 Ariz. 193, 218, ¶ 93, 141 P.3d 368, 393 (2006)). Insufficiency of evidence results in reversible error "only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996).

¶14 Misconduct involving weapons is defined in Arizona Revised Statutes ("A.R.S.") section 13-3102 (2010).¹ The jury found Cabrera-Somosa guilty of misconduct involving weapons on the basis that he was a prohibited possessor in knowing possession of a deadly or prohibited weapon. A.R.S. § 13-3102(A)(4). "'Prohibited possessor' means any person . . . [w]ho is a prohibited possessor under 18 United States Code section 922(g)(5). . . ." A.R.S. § 13-3101(A)(6)(e) (Supp. 2007).

¶15 Section 922(g)(5) of the United States Code states that it is a crime

for any person . . . who, being an alien . . . [and] is illegally or unlawfully in the United States . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition[,] or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(5) (2005). This court has held that because A.R.S. § 13-3101(A)(6)(e) adopted the prohibited possessor definition by specifically referencing subsection(g)(5), both the requirement that the individual be in the country illegally and the requirement that the firearm or ammunition involved have

¹ We cite to the current version of the applicable statute because no subsequent revisions material to this decision have occurred.

an "interstate or foreign commerce nexus" must be proven by the State. *State ex rel. Thomas v. Contes*, 216 Ariz. 525, 528, ¶ 8, 169 P.3d 115, 118 (App. 2007).

¶6 The State presented sufficient evidence to prove Cabrera-Somosa was in the United States illegally. We agree with Cabrera-Somosa and the State, however, that the State did not provide sufficient evidence that the weapon used in this shooting had a nexus to interstate or foreign commerce. Neither party references any evidence presented to support this element of the misconduct involving weapons offense, nor are we unaware of such evidence. As a result, there was a "complete absence of probative facts to support the [misconduct involving weapons] conviction." *Soto-Fong*, 187 Ariz. at 200, 928 P.2d at 624. Because the court based this conviction on insufficient evidence, we reverse Cabrera-Somosa's conviction and sentence for misconduct involving weapons. *Economy v. Frohme*, 13 Ariz. App. 117, 118, 474 P.2d 836, 837 (1970) (holding it is the duty of the court to set aside a verdict against a defendant that is not supported by sufficient evidence). We affirm Cabrera-Somosa's remaining convictions and sentences.

/s/
Ann A. Scott Timmer, Chief Judge

CONCURRING:

/s/
Maurice Portley, Judge

/s/
Patricia A. Orozco, Judge