

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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



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FILED: 03/01/11
RUTH WILLINGHAM,
ACTING CLERK
BY: DLL

STATE OF ARIZONA,)
) 1 CA-CR 09-0598
)
 Appellee,) DEPARTMENT E
)
 v.) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 111, Rules of the
) Arizona Supreme Court)
)
 CESAR DANIEL VASQUEZ-MORALES,)
)
 Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-180701-004 DT

The Honorable George H. Foster, Jr., Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Angela Kebric, Assistant Attorney General
Attorneys for Appellee

Maricopa County Public Defender Phoenix
by Karen M. Noble, Deputy Public Defender
Attorneys for Appellant

I R V I N E, Judge

¶1 Cesar Daniel Vasquez-Morales timely appeals from his convictions and sentences for two counts of armed robbery, class

2 dangerous felonies. The sole issue on appeal is whether the trial court erred by allowing testimony from an officer that ski masks and weapons not used in the crime were found in the getaway vehicle. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On December 28, 2008, Morales and an accomplice robbed a store at gunpoint. They fled to a getaway truck waiting for them behind the store, and the accomplice jumped into the back. Vasquez-Morales threw something into the cab of the truck, but was arrested before he could get in.

¶3 The State charged Vasquez-Morales with two counts of armed robbery and two counts of misconduct involving weapons. At trial, the State called Officer D.M. as a witness. The following colloquy occurred.

[Prosecutor]: Did you find some evidence in that truck?

[Officer D.M.]: I did. In the middle of the truck, in the console between the driver's seat and passenger seat, there was some shotgun shells, and there was the black sweatshirt that I saw the defendant throw in the truck. It was sitting on the passenger floorboards, I believe. It had the white writing on it. And inside one of the pockets were some cotton gloves, black cotton gloves. Inside another pocket was, like a six-inch knife inside of—inside of, like, a sheath.

In the back of the truck was a backpack, along with some more—there was like, ski masks, some other gloves, several

items in there that were possibly used in a crime or could be used in a crime.

[Defense counsel]: Objection to the last part, Judge. It's not relevant.

The Court: I take it there is a motion to strike.

[Defense counsel]: Yes.

The Court: Sustained. Whether it could have been used in a crime is stricken.

[Prosecutor]: The items that you found, and I'm referring to the gloves and masks, were those suspicious to you?

[Officer D.M.]: Yes, sir.

[Prosecutor]: You said you found a couple of ski masks?

[Officer D.M.]: Correct.

[Defense Counsel]: Objection as to relevance as to this case.

The Court: Overruled.

Photographs of the ski masks and weapons found in the back of the truck were later admitted into evidence without objection.

¶14 A jury convicted Vasquez-Morales of two counts of armed robbery, both class 2 dangerous felonies, and found additional aggravators. Vasquez-Morales received slightly

aggravated sentences of twelve years' imprisonment on each count, concurrent with all other sentences.¹ He timely appeals.

DISCUSSION

¶15 Vasquez-Morales contends that the trial court erred by failing to preclude "the evidence of other ski masks and weapons found in [the] truck." He argues that this was evidence of "other crimes" that was improperly admitted under Arizona Rule of Evidence ("Rule") 404(b).

¶16 The record shows, however, that Vasquez-Morales did not object at trial to the testimony based on Rule 404(b). His two general objections based on "relevance" did not preserve the Rule 404(b) issue for appeal.² See *State v. Hamilton*, 177 Ariz.

¹ On the second day of trial, Vasquez-Morales pled guilty to the two counts of misconduct involving weapons, class 4 felonies. The trial court imposed 4.5 year prison terms for each count, to be served concurrently with the sentences for armed robbery.

² Even assuming that Vasquez-Morales had properly preserved a Rule 404(b) objection, we find no error. By its terms, Rule 404(b) only prevents the use of "other crimes, wrongs, or acts" as character evidence to prove that a defendant has the propensity to commit the culpable conduct charged. Rule 404(b) further provides an exception for evidence of other acts offered to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." See also *State v. Torres*, 162 Ariz. 70, 73, 781 P.2d 47, 50 (App. 1989) (holding evidence is admissible under Rule 404(b) "[i]f it establishes guilt in some other way" than to show the defendant's character disposition for committing the crime).

In this case, the evidence of ski masks and weapons found in the getaway truck was not character evidence of "other crimes, wrongs, or acts," but physical evidence probative of

403, 408-09, 868 P.2d 986, 991-92 (App. 1993) (“[A]n objection to the admission of evidence on one ground will not preserve issues relating to the admission of that evidence on other grounds.”). Accordingly, we review for fundamental error. *Id.* at 409, 868 P.2d at 992.

¶7 To prevail under fundamental error review, Vasquez-Morales must first show that error occurred, and that it was fundamental and prejudicial. *State v. Edmisten*, 220 Ariz. 517, 522, ¶ 11, 207 P.3d 770, 775 (App. 2009). In this case, we find no error, let alone fundamental error.

¶8 Generally, evidence is admissible if it is relevant. Ariz.R.Evid. 402. “Relevant evidence” is defined as, “[E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” Ariz.R.Evid. 401. Relevant evidence may be excluded, however, “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Ariz.R.Evid. 403.

Vasquez-Morales’s intent to commit armed robbery. Therefore, Rule 404(b) did not apply. Assuming that it did, however, the evidence was still admissible under Rule 404(b) as proof of Vasquez-Morales’s intent.

¶19 We disagree with Vasquez-Morales that the testimony that ski masks and weapons found in the getaway truck "had no relevance to the armed robbery allegations tried." At trial, Vasquez-Morales raised mere presence and lack of culpable mental state as defenses. His counsel argued in opening that Vasquez-Morales "was intending to buy some cigarettes and some sodas" when someone else suddenly produced a shotgun. His counsel added that Vasquez-Morales "never went there to rob anybody" and that "he was in the wrong place, at the wrong time with the wrong individuals."

¶10 Consequently, Officer D.M.'s testimony that he found these items in the getaway truck and that they were suspicious was relevant to rebut the defenses and his counsel's assertions that Vasquez-Morales was merely present and lacked the requisite intent. Because ski masks and weapons are items commonly used to commit armed robbery, circumstantial evidence that they were in his constructive possession at the time of the offense is probative of his intent to commit armed robbery of the store when he entered.

¶11 Vasquez-Morales argues the trial court failed to weigh the prejudicial effect of the evidence under Rule 403. Because he failed to object based on Rule 403 at trial, however, this issue is also waived on appeal. *State v. Montano*, 204 Ariz. 413, 425, ¶ 58, 65 P.3d 61, 73 (2003). Nonetheless, we find that the

prejudicial effect did not outweigh the probative value of the proffered evidence under Rule 403. In admitting the evidence, the trial court properly struck the portion of the testimony opining that the items "were possibly used in a crime or could be used in a crime." In doing so, the court prevented the jury from considering any other, unspecified crime.

¶12 We also find that Vasquez-Morales has failed to demonstrate prejudice for the purposes of fundamental error review. He has not challenged the sufficiency of the evidence on appeal, and reasonable evidence supports his convictions, even if the challenged portions of Officer D.M.'s testimony had been precluded.

¶13 To the extent Vasquez-Morales argues that the jury was prejudiced because it had "openly discussed whether [he] was a prohibited possessor due to his status as an illegal alien and convicted felon," we agree with the State that the claim is speculative and unsubstantiated by the record. *See State v. Munniger*, 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006) (concluding defendant's argument was speculative because he failed to show prejudice in the record). Vasquez-Morales concedes that the trial court admonished the jury not to consider the two counts of misconduct involving weapons, answered the jury's questions on the matter, and properly explained the law.

