DIVISION ONE
FILED: 09/20/2011
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 10-0560
	)	DEPARTMENT E
v.	)	**MEMORANDUM DECISION**
DARYL EDWARD ANTON, Appellant.	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-121098-001 SE

The Honorable Lisa M. Roberts, Judge *Pro Tempore*

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Spencer D. Heffel, Deputy Public Defender
Attorneys for Appellant

J O H N S E N, Judge

¶1 Daryl Edward Anton appeals his conviction of armed robbery, a Class 2 felony, and the resulting sentence. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 The meat manager at a Mesa grocery store noticed Anton and another man "throwing food into a grocery basket at random."[1] Suspecting the two men were shoplifting, the meat manager and the store manager followed as they left the store without paying for the groceries. In the parking lot, they saw Anton putting the groceries into a white car. As Anton got into the car, one of the managers grabbed his wrist and told him he was "under arrest for shoplifting." This prompted Anton to reach beneath the car seat and pull out what the manager believed was a handgun. When Anton lifted the weapon, it hit the steering wheel and fell down to the floor. Anton then yelled to his companion, "Strap him man, strap him."[2] The companion lifted up his shirt "as if he was going to reach in for something," at which point the manager backed away quickly and let the shoplifters leave.

¶3 Approximately 15 minutes later, the police located the white car parked in an apartment complex less than a mile away. The officer saw two men who matched the descriptions of the

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[1] Upon review, we view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Rodriguez. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

[2] An officer testified that the phrase "strap him" is "street slang or lingo that's used to refer to someone having a gun, being strapped with a gun or weapon. Typically refers to someone having a gun in their waistband."

shoplifters standing in an open garage near a maroon car. While waiting for backup, the responding officers watched Anton as he "seemed to be getting a little antsy." A few minutes later, Anton left the garage and closed the door behind him, at which point the police arrested him and the other man. After securing the suspects, the police searched the maroon car; in the trunk they found a gun case containing two handguns and a camouflaged assault rifle.

¶4 Before trial, Anton moved *in limine* to preclude evidence of the guns found in the maroon car, arguing no evidence linked the guns to the crime. The superior court denied Anton's motion, and a police officer testified that the trunk of the maroon car contained "an open rifle box, an AR15 style camouflage rifle" and two pistols. A photograph of the guns lying in the trunk of the car also was admitted. The jury convicted Anton of one count of armed robbery; he was sentenced to a term of 15.75 years.

¶5 Anton timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010) and -4033(A)(1) (2010).[3]

[3] Absent material revisions after the date of an alleged offense, we cite a statute's current version.

DISCUSSION

¶6 The superior court's decision to admit evidence will not be disturbed on appeal absent a clear abuse of discretion. *State v. Hensley*, 142 Ariz. 598, 602, 691 P.2d 689, 693 (1984). The court "abuses its discretion when it misapplies the law or predicates its decision upon irrational bases." *State v. Fields*, 196 Ariz. 580, 582, ¶ 4, 2 P.3d 670, 672 (App. 1999) (quoting *Blazek v. Superior Court*, 177 Ariz. 535, 537, 869 P.2d 509, 511 (App. 1994)).

¶7 Anton argues the superior court abused its discretion by admitting evidence of the guns found in the maroon car. He contends the guns were not relevant to the charge against him because they were found in a car that undisputedly was not used in the robbery. The State argues the guns were relevant because the jury could reasonably infer that Anton or his accomplice put one or more of the guns in the maroon car after using them in the robbery.

¶8 We hold the guns were relevant to the charged crime because the jury could conclude Anton and his accomplice used them in the crime. "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or may admit it subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." Ariz. R. Evid. 104(b). In determining whether

evidence of a conditional fact pursuant to Rule 104(b) sufficiently supports the relevancy of other evidence, we ask "whether evidence in the record . . . would permit a reasonable person to believe" the conditional fact exists. *State v. Plew*, 155 Ariz. 44, 50, 745 P.2d 102, 108 (1987) (quoting *State v. LaGrand*, 153 Ariz. 21, 28, 734 P.2d 563, 570 (1987)); *see also State ex. rel. McDougall v. Superior Court*, 172 Ariz. 153, 156, 835 P.2d 485, 488 (App. 1992).

¶9 In *Plew*, the defendant claimed he shot the victim in self-defense because the victim had become hostile and aggressive after ingesting cocaine. 155 Ariz. at 48, 745 P.2d at 106. The superior court refused to allow the defendant to call an expert witness to testify that cocaine intoxication often makes people aggressive and able to sustain severe bodily injuries without feeling pain. *Id.* at 46, 48-49, 745 P.2d at 104, 106-07. The supreme court reversed, concluding that testimony that the victim was under the influence of cocaine at the time of the shooting (the conditional fact) sufficiently supported admission of the expert's testimony regarding the behavioral effects of cocaine on the user (the relevant evidence). *Id.* at 50, 745 P.2d at 108.

¶10 In the same fashion, notwithstanding Anton's assertions that the State offered no evidence linking him to the guns in the maroon car, one of the store managers testified

Anton pulled what looked like a gun from beneath the seat of the car in the store parking lot. Moreover, in the 15 minutes between the robbery and the officer's arrival at the apartment complex, Anton had time to transfer a gun or guns used in the robbery from the white car to the maroon vehicle, and one responding officer testified that Anton was aware of the officer's presence at the apartment complex and attempted to conceal the guns by closing the garage door.

¶11 Based on this evidence, a reasonable juror could believe Anton used a gun or guns in the robbery and attempted to hide them by placing them in the maroon vehicle after the crime. *See Plew*, 155 Ariz. at 49, 745 P.2d at 107. That is, testimony regarding the existence of guns at the robbery sufficiently supported the conditional fact (Anton used a gun to commit the robbery) that made evidence of the guns in the maroon car relevant. Accordingly, the superior court did not abuse its discretion by concluding evidence of the guns in the maroon car were relevant to the charge against Anton. *See* Ariz. R. Evid. 104(b); *Plew*, 155 Ariz. at 50, 745 P.2d at 108; *see also State v. Gonzales*, 181 Ariz. 502, 511, 892 P.2d 838, 847 (1995) (discrepancy in evidence goes to the weight of the evidence not its admissibility).[4]

[4] Although the store manager testified the suspect pulled a handgun and not a rifle, Anton did not specifically ask the

¶12 Anton cites *People v. Henderson*, 129 Cal. Rptr. 844 (App. 1976), for the proposition that evidence of weapons unconnected to the charged crime are not admissible. The defendant in *Henderson* was convicted of assault with a deadly weapon; the appellate court held evidence of a gun not used in the crime "leads logically only to an inference that defendant is the kind of person who surrounds himself with deadly weapons — a fact of no relevant consequence to determination of the guilt or innocence of the defendant." *Id.* at 851. In that case, there was no contention that the gun at issue was used in the charged offense. *Id.* at 850. By contrast, as we have explained, the evidence in this case gave rise to an inference that a gun or guns found in the maroon car were used in the grocery robbery.[5]

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court to exclude evidence of the rifle found in the trunk of the maroon car. Instead, his oral motion *in limine* addressed the general topic of "the weapons" found in the trunk. On appeal, he does not suggest that the superior court should have treated evidence of the rifle found in the trunk of the maroon car any differently than it treated evidence of the handguns found there.

[5] Anton also cites *State v. Poland*, 132 Ariz. 269, 281, 645 P.2d 784, 796 (1982), *People v. Archer*, 99 Cal. Rptr. 2d 230, 238 (App. 2000), *Fortt v. State*, 767 A.2d 799, 805 (Del. 2001), and *Commonwealth v. Robinson*, 721 A.2d 344, 351 (Pa. 1998). But in none of these cases was the evidence at issue linked to the crime. *Poland*, 132 Ariz. at 281, 645 P.2d at 796 (weapon inadmissible because the prosecution did not connect weapon to the crime); *Archer*, 99 Cal. Rptr. 2d at 238 (knives not linked to crime were not admissible); *Fortt*, 767 A.2d at 805 (admission of gun was error due to lack of "satisfactory predicate

¶13 Anton's Rule 403 argument likewise fails. Under Rule 403, relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Ariz. R. Evid. 403. Anton contends that because the guns were not linked to him, admission of the evidence was overly prejudicial. As discussed above, however, the jury reasonably could find that Anton used a gun or guns found in the maroon car to rob the grocery store. *See Plew*, 155 Ariz. at 49, 745 P.2d at 107. Accordingly, admission of the evidence did not violate Rule 403.

¶14 To the extent that Anton argues the State's evidence did not specifically connect the assault rifle with the crime, we conclude that the testimony of the victim and the police officers, combined with the discovery of the two handguns, precludes us from holding that there was a reasonable probability that the verdict would have been different had evidence of the assault rifle not been admitted. *State v. Hoskins*, 199 Ariz. 127, 142-43, ¶ 57, 14 P.3d 997, 1012-13 (2000) ("We will not reverse a conviction based on the erroneous admission of evidence without a 'reasonable probability' that the verdict would have been different had the evidence not been admitted.") (citation omitted).

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testimonial or other evidentiary link"); *Robinson*, 727 A.2d at 351 (photo of defendant with gun not relevant because gun was not one of the four possible makes used in the murder).

CONCLUSION

¶15 For the reasons stated above, we affirm Anton's conviction and sentence.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
PATRICIA A. OROZCO, Judge

/s/
PHILIP HALL, Judge