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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 11/29/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 10-0753
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
RONALD LEE LARSH, JR.,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-175914-001 SE

The Honorable Karen L. O'Connor, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Linley Wilson, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
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Attorneys for Appellant

O R O Z C O, Judge

¶1 Ronald Lee Larsh, Jr. (Defendant) appeals his
convictions for armed robbery, a class two dangerous felony,

misconduct involving weapons, a class four dangerous felony, and the sentences imposed. Defendant argues the trial court erred in refusing his request to instruct the jury that a CO2 cartridge must be present with a pellet gun for the gun to be considered a deadly weapon. For the following reasons, we affirm the convictions and sentences.

FACTS AND PROCEDURAL BACKGROUND

¶2 Defendant and Lisa T. entered a store in Mesa at approximately 8:15 p.m. Video surveillance captured Defendant and Lisa shopping for 2.5 hours. Defendant was in the sporting goods section at 9:36 p.m. "looking at the back wall, which contained BB guns, rifles, [and] air soft rifles," and as he was walking away, it appeared in the video that Defendant had an object in his hand. Defendant and Lisa then went to the household items section and remained there for approximately thirty minutes. Defendant exited the aisle with a large object "consistent with a comforter" in his cart. Defendant and Lisa continued shopping until they arrived at the registers at 10:47 p.m.

¶3 Just after 11:00 p.m., Lisa set off the EIS alarm system as she passed through two posts near the exit on a motorized shopping cart. Betty J., the store "people greeter," told Lisa to go "back through the gates" and asked to see Lisa's receipt. Betty checked the items in the cart against what was on

the receipt; the receipt showed that Reese's cups, Dr. Pepper, chocolate milk, and a king-sized comforter had been paid for. Betty asked to inspect the package containing the comforter, but Lisa insisted she had a plate in her back that set off the alarm. To verify this claim, Betty asked Lisa to leave the cart and walk through the gates. The alarm did not sound when Lisa walked through without her merchandise. Betty then carried the comforter through the gates herself and the alarm sounded.

¶14 Betty set the comforter on the ground and began to unzip the bag when Defendant approached her and tried to prevent her from unzipping it. Defendant appeared upset and argued he and Lisa had paid for everything. Defendant started pushing against Betty's hand and would not let her finish unzipping the bag, so Betty "tore the thing open." Betty saw that other items in addition to the comforter had been stuffed inside the bag, so she called for security. Defendant pushed Betty back, trying to get the bag away from her, and when she came forward again, she saw a gun in her face. Betty described the gun as a black "Dick Tracy gun," similar to a semiautomatic handgun. When Betty saw the gun, she backed up, and Defendant picked up the comforter and exited the building.

¶15 Officer Lee of the Mesa Police Department responded to a robbery in progress call. Officer Lee subsequently found Defendant standing near a gas station across the street from the

store. Officer Lee drew his weapon and asked Defendant to show his hands, and Defendant complied. After Defendant was taken into custody by other officers, Officer Lee found "a comforter still in [its] packaging" on the other side of a retaining wall where Defendant was apprehended.

¶16 After taking Defendant into custody, Officer Christopher assisted in searching Defendant. He found a video camera, two cell phones, "two cables for connecting either cell phones or the video camera," vacuum cleaner belts, and "a small tin of copperhead 100's Crossman pellets."¹ Police spent approximately two hours searching for a gun but never found one.

¶17 The following day, Stephen C., a member of the store's loss prevention team, inspected the bedding aisle. He found opened packaging for a pellet gun, with both the gun and the CO2 cartridges missing.² The packaging was "stuffed behind some comforters . . . so anyone that was walking down the aisle wouldn't see it." Based on the packaging, Stephen testified that

¹ Officer Christopher also testified that he found "at least one CO2 cartridge . . . that is typically used in CO2 BB guns" on Defendant's person, but no cartridges were in the property bag admitted at trial.

² At trial, the gun packaging was admitted in evidence and was shown to the jurors. Additionally, Detective Fresquez of the Mesa Police Department explained to the jury how pellet guns that use CO2 cartridges operate. He testified that "CO2 is a compressed gas, which is in a metal canister. When the trigger is pulled, there's a burst of air releasing the gas propelling the pellet out of the barrel."

the missing gun was an all-black, Crossman brand, Pro 78 or 788 model BB gun with a "blow back feature to simulate a real gun, so when the trigger was pulled, the slide would actually pull to the rear to simulate discharging of a casing."

¶18 On December 14, 2009, Defendant was charged by information with armed robbery and misconduct involving weapons. Both offenses were alleged to be dangerous because they involved the use or threatening exhibition of a handgun.

¶19 During trial, the State and Defendant disagreed about jury instructions, specifically whether a pellet gun would be a deadly weapon as defined by statute if it was not accompanied by its CO2 cartridge. Defendant argued that the CO2 cartridge is "the only thing that makes it a deadly weapon." The trial court denied Defendant's request for a jury instruction stating a CO2 cartridge must be present with the pellet gun for the gun to be considered a deadly weapon. Instead, the trial court instructed the jurors that "[d]eadly weapon means anything designed for lethal use" and "includes a firearm." Jurors were also instructed that "[f]irearm means any loaded or unloaded handgun, pistol, revolver, rifle, shotgun or other weapon which will or is designed to or may readily be converted to expel a projectile by the action of expanding gases, except that it does not include a firearm in permanently inoperable condition."

¶10 The jury found Defendant guilty as charged and found both offenses to be dangerous in nature. The jury also found an aggravating circumstance of emotional harm to the victim, Betty J. Defendant received an aggravated sentence of fifteen years' imprisonment for armed robbery and an aggravated sentence of seven years' imprisonment for misconduct involving weapons, ordered to be served concurrently.

¶11 Defendant filed a timely notice of appeal. We have jurisdiction pursuant to Article VI, 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).

DISCUSSION

¶12 "We evaluate the trial court's denial of a proposed jury instruction for abuse of discretion, but review de novo whether a jury instruction correctly states the law." *State v. Cox*, 217 Ariz. 353, 356, ¶ 15, 174 P.3d 265, 268 (2007). Reversible error occurs only if it is reasonable to assume the jury instructions, taken as a whole, misled the jurors. *State v. Dann*, 220 Ariz. 351, 367, ¶ 81, 207 P.3d 604, 620 (2009).

¶13 Defendant argues the trial court committed reversible error when it refused his proposed jury instruction stating that a pellet gun must have a CO2 cartridge to be considered a deadly weapon. Although he concedes a pellet gun that uses CO2 cartridges qualifies as a deadly weapon, Defendant claims a

spring-powered pellet gun would not meet the statutory definition. He asserts that because the police never recovered a gun or a CO2 canister, the jury was entitled to know there is a difference between a gun powered by a CO2 canister and a spring-powered gun.

¶14 The purpose of a jury instruction is to inform the jury about the applicable law. *State v. Noriega*, 187 Ariz. 282, 284, 928 P.2d 706, 708 (App. 1996). The defendant is entitled to any jury instructions reasonably supported by the evidence, but the instructions must not mislead the jury. *Id.*; *State v. Rodriguez*, 192 Ariz. 58, 61, ¶ 16, 961 P.2d 1006, 1009 (App. 1998).

¶15 A "deadly weapon" is defined in A.R.S. § 13-105.15 (2011)³ as "anything designed for lethal use, including a firearm." A "firearm" is "any loaded or unloaded handgun, pistol, revolver, rifle, shotgun, or other weapon that will or is designed to or may readily be converted to expel a projectile by the action of expanding gases, except that it does not include a firearm in permanently inoperable condition." A.R.S. § 13-105.19.

¶16 Even assuming there is a meaningful difference, for purposes of the "firearm" definition, between a pellet gun that uses CO2 canisters and a spring-powered pellet gun, Defendant's

³ We cite the current version of applicable statutes when no revisions material to this decision have since occurred.

argument that the jury was entitled to an instruction that distinguishes between the two is unsupported by the evidence. No evidence was presented at trial indicating the gun used in the robbery may have been spring-powered. Nor was any evidence presented showing a pellet gun that normally uses CO2 cartridges transforms into a spring-powered pellet gun if the CO2 cartridge is missing. In fact, the only evidence provided at trial was that the gun used by Defendant was a CO2-powered model.

¶17 Stephen C. testified that he found packaging for a pellet gun, with the gun and CO2 cartridges missing, stuffed behind comforters in the bedding aisle where Defendant had remained for thirty minutes before security cameras captured him emerging with a comforter. Based on the packaging, Stephen determined the gun was an all-black, Crossman brand, Pro 78 or 788 model BB gun with "a blow back feature to simulate a real gun." Consistent with this description, Betty J. testified that Defendant pointed a black "Dick Tracy gun," similar in appearance to a semiautomatic handgun, at her. Officer Christopher testified that he found "at least one" CO2 cartridge on Defendant when he searched his person, and Detective Fresquez testified about how a pellet gun that uses a CO2 cartridge works. The cumulative testimony permits an inference that the gun Defendant used in the robbery uses expanding gases to expel pellets and therefore falls within the statutory definition of a firearm, and

therefore is a deadly weapon.⁴ Accordingly, the record contains sufficient evidence in support of the jury's finding that the pellet gun used in the robbery is a deadly weapon.

¶18 Furthermore, whether the gun contained a CO2 cartridge at the time of the armed robbery is irrelevant. Although firearms in "permanently inoperable condition" are excluded from the statutory definition of "firearm," this court has repeatedly rejected arguments that firearms in inoperable condition at the time of the offense necessarily fall within the exception. See *Cordova*, 198 Ariz. at 243, ¶ 5, 8 P.3d at 1157 ("It is irrelevant whether the pellet gun was operable at the time of the armed robbery, so long as it was not permanently inoperable."); *State v. Young*, 192 Ariz. 303, 307, ¶ 14, 965 P.2d 37, 41 (App. 1998) (holding that the jury could have reasonably concluded that the defendant's disassembled shotgun was not permanently inoperable when it "could be easily reassembled by readjusting a bolt" and

⁴ In *State v. Cordova*, 198 Ariz. 242, 243-44, ¶¶ 4-5, 8 P.3d 1156, 1157-58 (App. 1999), this court found substantial evidence supported the jury's conclusion that a pellet gun is a deadly weapon for purposes of an aggravated assault conviction and dangerous nature findings. Defendant attempts to distinguish *Cordova* by pointing out the jury in that case was able to examine the actual gun police recovered from the defendant's bedroom and police gave testimony about the operation of that specific gun, whereas in this case no gun or CO2 cartridges were found; thus, the jury did not have the opportunity to examine the gun and police were not able to provide particularized testimony about the gun but instead provided general testimony about pellet guns that use CO2. We find these differences insignificant.

made operable by constructing a homemade firing pin); *State v. Spratt*, 126 Ariz. 184, 186, 613 P.2d 848, 850 (App. 1980) (holding that a gun missing its firing pin was only temporarily, not permanently, inoperable); *State v. Fisher*, 126 Ariz. 50, 612 P.2d 506 (App. 1980) (same).

¶19 Even if no CO2 cartridge was present, the gun was only temporarily inoperable and could easily have been made operable by simply inserting a CO2 cartridge. On the evidence presented, the jury reasonably could have concluded that the pellet gun, without a CO2 cartridge, still falls within the definition of "firearm."

CONCLUSION

¶20 The trial court correctly instructed the jury on the definitions of "firearm" and "deadly weapon." The court did not abuse its discretion in denying Defendant's proposed jury instruction that was not supported by the evidence or the relevant case law. Therefore, we affirm Defendant's convictions and sentences.

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

DIANE M. JOHNSEN, Presiding Judge

/S/

LAWRENCE F. WINTHROP, Judge