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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JESUS O. MCCORMICK, Appellant.	)	2 CA-CR 2012-0309 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20100274002

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

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E S P I N O S A, Judge.

¶1 Following a jury trial, appellant Jesus McCormick was convicted of possession of a deadly weapon by a prohibited possessor.[1] The trial court sentenced him to a presumptive ten-year prison term.[2] On appeal, McCormick argues fundamental error occurred when the court admitted a photograph showing him holding what appears to be a handgun, and asks that we vacate his conviction for prohibited possession and remand for a new trial. For the following reasons, we affirm.

¶2 We review the facts in the light most favorable to sustaining the jury's verdict. *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). A search warrant served on a Tucson residence ("the Iowa house") in March 2008 yielded various items, including two "Ruger" handguns along with "ammunition, high-capacity magazines with ammunition in them," and documents specifically belonging to McCormick, described as court and medical paperwork, and a police citation or ticket, as well as documents belonging to other individuals that were not of a "personal" nature like the ones belonging to McCormick. "[E]ight or ten" people, including McCormick, were at the Iowa house when the warrant was executed; all of the items related to McCormick,

[1]Although McCormick and seven other codefendants originally were charged in a thirty-nine count indictment in 2010, McCormick ultimately was tried in 2012 only on the weapons misconduct count now before us on appeal. "A person commits misconduct involving weapons by knowingly . . . [p]ossessing a deadly weapon or prohibited weapon if such person is a prohibited possessor." A.R.S. § 13-3102(A)(4).

[2]McCormick also pled guilty to the sale of a dangerous drug, and received a concurrent, eight-year prison term for that offense.

including the handguns, were found in one of the bedrooms labeled "Room F."[3] The police were unable to find any fingerprints on the guns found in Room F.

¶3 Officers also found two photographs in Room F (the "photographs"): one depicted McCormick seated in a vehicle, and a second showed him wearing the same clothing, apparently still seated in the vehicle, while holding what appears to be a handgun. During a police interview at the Iowa house,[4] McCormick indicated the first photograph of the individual in the car was him, but "initially stated [the photograph with the gun] was not him." When the interviewing detective "pointed out" to McCormick that the individual in the second photograph, which appeared to have been taken at the same time, "was obviously him," McCormick responded, "Dude, that was three or four months ago."

¶4 One detective testified that the two handguns found in Room F were Ruger handguns and looked like the "same kind of gun" as the one McCormick was holding in the photograph. The detective also testified that he is familiar with replica or "Airsoft" guns, and that it can be difficult to determine from a photograph whether a gun is a replica or real.

[3]For purposes of this appeal, we discuss only the items found in Room F.

[4]Although one of the interviews with McCormick was recorded, this one was not. However, during the interviewing detective's testimony at trial, he noted he had documented the interview in a written report, which he referred to during his testimony.

¶5 Before the trial started, McCormick filed a motion in limine arguing, inter alia, that the photograph of him "holding [a] weapon or simulated weapon" should be precluded because

> it is unclear whether it is a real weapon; it is unclear whether it is the same type of weapon as that found in room "F"; there will be no evidence that it is the same weapon as in room "F"; and balancing of probative value versus undue prejudice weighs in favor of preclusion.

Determining the photograph was relevant and "that the probative value outweighs the damage of unfair prejudice," the trial court denied McCormick's motion. The court further noted that "I guess both counsel agree" the gun in the photograph "looks similar" to the one found in Room F.

¶6 At trial, a detective read a portion of the transcript from a recorded telephone conversation between McCormick and his mother which took place while McCormick was in jail awaiting trial in this matter. McCormick's portion of the conversation follows:

> See, and with me they have nothing. All they have is a photo of—that I had a gun, but I did not live in that house, you see? That's—that is going to be the—will be your testimony. I don't know if you will say he lived with me and he would only go visit his brother or . . . that he lived with . . . his girlfriend. . . . I don't know if you want to say that I lived with you or that I lived with my girlfriend. You tell me what you want to say. . . . Think about it, and let me know on . . . Tuesday when you come . . . . You know what, you tell them that you lived over there, it will be fine. That's what I'm going to say. . . . And you will also say the same thing that I am going to say, you see?

¶7 McCormick testified he had intended only to "refresh" his mother's memory, and that he did not mention during the conversation that the gun in the photograph was not real because his mother remembered he had an "Airsoft pistol."[5] McCormick also testified he had been at the Iowa house during a prior police encounter in October 2007, approximately five months before the warrant was executed in March 2008. He stated he did not live at the Iowa house, and although his official address was his mother's home on West Tucker, he stayed at his mother's, sister's, and girlfriend's homes. McCormick claimed he had never been in Room F, nor did he know the Ruger handguns were in that room or who owned them. Additionally, McCormick testified he had prior felony convictions, and although he understood he was a prohibited possessor when the photograph was taken, he did not own any real guns at that time; the Ruger gun in the photograph was a replica. And, in contrast to the detective's testimony that McCormick had denied he was the individual in the photograph with the gun, McCormick instead testified he had not denied he was in the photograph and he had told the detective the gun in the photograph was an Airsoft gun. Finally, McCormick acknowledged at trial that he had given the police information that was not "correct" on two occasions.

¶8 In closing argument, the state pointed out the similarities between the pattern on the handle of the gun in the photograph and the patterns on the handles of the guns found in Room F. The prosecutor then asked, "Does that look like the same gun

[5]McCormick described an "Airsoft pistol" at trial as a replica of a real gun that used "little orange pellets" for recreational purposes.

that's found in the bedroom?" Drawing the jury's attention to photographs of other Ruger handguns found in different rooms in the Iowa house, the handles of which had distinct patterns from the ones found in Room F, the state argued "there are differences between . . . the way Rugers can look." In McCormick's closing argument, defense counsel pointed out the state had not shown that the gun in the photograph was a "real Ruger," but nonetheless acknowledged, "There is no doubt [the gun in the photograph with McCormick] looks like a Ruger handgun."

¶9 On appeal, McCormick argues the trial court abused its discretion by admitting the photograph, and asserts it was irrelevant and more prejudicial than probative. He further contends the photograph was improperly admitted as a prior bad act under Rule 404(b), Ariz. R. Evid., asserting the admission of the photograph permitted the jury "to infer that if he possessed a gun at some point in the past, then he must have possessed the two Rugers." He maintains that, assuming the court believed the gun in the photograph was not real, it was irrelevant "to whether he possessed the two Rugers found in Room F." On the other hand, McCormick asserts, assuming the court believed the gun in the photograph was real, it nonetheless was inadmissible as a prior bad act under Rule 404(b) as "it had no bearing on whether he knowingly possessed the two Rugers located in Room F."

¶10 Acknowledging that he did not raise an argument based on Rule 404(b) below, thereby waiving all but fundamental error, McCormick asserts "the admission of the photograph, which is clearly a prior bad act for which there is no proper purpose, is

fundamental error." He argues, "without the photograph, the evidence was equally compelling that any one of the individuals with paperwork in the room had possession of the Rugers," pointing out that, other than the telephone call with his mother, the state had offered no evidence that he lived at the Iowa house or that Room F was his bedroom.

¶11 We review rulings by the trial court regarding admission of evidence for an abuse of discretion. *State v. Tucker*, 215 Ariz. 298, ¶ 58, 160 P.3d 177, 193 (2007). Generally, evidence is admissible if it is relevant. Ariz. R. Evid. 402. "Relevant evidence" is that having "any tendency to make a fact more or less probable than it would be without the evidence," a "fact . . . of consequence in determining the action." Ariz. R. Evid. 401. Rule 403, Ariz. R. Evid., allows a court to exclude relevant evidence "if its probative value is substantially outweighed by a danger of . . . unfair prejudice," meaning "'an undue tendency to suggest decision on an improper basis.'" *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993), *quoting* Fed. R. Evid. 403 advisory committee note. "Because the trial court is best situated to conduct the Rule 403 balance, we will reverse its ruling only for abuse of discretion." *State v. Cañez*, 202 Ariz. 133, ¶ 61, 42 P.3d 564, 584 (2002).

¶12 We disagree with McCormick that the photograph was not relevant; it was relevant to refute McCormick's claim that he did not own or possess the guns found in Room F because it connected the gun in the photograph with the ones found in Room F and suggested they were the same. And, once properly admitted as relevant evidence, it was up to the jury to determine whether the gun in the photograph was real and whether it

was one of the guns found in Room F. Although the state's evidence in this regard may have been less than compelling, it was up to the jury, as the fact finder, to assess the credibility of the witnesses. *State v. Williams*, 209 Ariz. 228, ¶ 6, 99 P.3d 43, 46 (App. 2004).

¶13 And notably, not only did McCormick place his own credibility at issue by testifying he had not been forthright during his initial interview with the police, but the jury also was presented with evidence of a taped telephone conversation that could be construed as McCormick instructing his mother how to testify and acknowledging the state had a photograph of him with a "gun." In addition, in contrast to McCormick's testimony, an officer testified that McCormick had *not* told him the gun in the photograph was a replica. Accordingly, a reasonable jury could have disbelieved McCormick's assertion that the gun in the photograph was not real, thus concluding the guns discovered in Room F, which resembled the one in the photograph, belonged to him. Nor do we agree with McCormick that the prejudicial effect of the photograph outweighed its probative value under Rule 403. In this context, the photograph "was not unfairly prejudicial," but "was adversely probative in the sense that all good relevant evidence is." *Schurz*, 176 Ariz. at 52, 859 P.2d at 162.

¶14 Moreover, as McCormick has acknowledged, he objected to the admission of the photograph based on relevance, and not on Rule 404(b) grounds. His general objection based on relevance was thus insufficient to preserve the Rule 404(b) issue. *See State v. Rutledge*, 205 Ariz. 7, ¶¶ 29-30, 66 P.3d 50, 56 (2003) (requiring objection on

specific legal ground to preserve issue for appeal); *State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008) ("objection on one ground does not preserve the issue [for appeal] on another ground"). Accordingly, we review solely for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Id.*, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20.

¶15 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 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." In this case, the photograph was not offered as character evidence of "other crimes, wrongs, or acts" under Rule 404(b), but instead as evidence to rebut McCormick's claim that the seized guns were not his; by showing a photograph with McCormick holding a gun that looked like the guns found in Room F, the state suggested the guns were the same. The evidence the state offered was not true other-act evidence governed by Rule 404(b). *Cf. State v. Connor*, 215 Ariz. 553, ¶¶ 29, 33, 161 P.3d 596, 605, 606 (App. 2007) (evidence defendant suspected of burglarizing victim's

apartment offered to rebut defendant's testimony he and victim were friends "not true other-act evidence as contemplated by Rule 404(b)"). Because the photograph was not offered for an impermissible purpose under Rule 404(b), the rule was not implicated. *See State v. Wood*, 180 Ariz. 53, 62, 881 P.2d 1158, 1167 (1994) (list of permissible uses under Rule 404(b) is "merely illustrative, not exclusive"). Accordingly, we find no error, much less fundamental error.

¶16 McCormick's conviction and sentence are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge