

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JESUS ADAN AGUAYO-RUIZ,
Appellant.

No. 2 CA-CR 2013-0415
Filed April 4, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pinal County
No. S1100CR201300310
The Honorable Boyd T. Johnson, Judge

AFFIRMED

COUNSEL

Thomas C. Horne, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Alan L. Amann, Assistant Attorney General, Tucson
Counsel for Appellee

Lyle D. Riggs, Maricopa
Counsel for Appellant

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MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Kelly and Judge Espinosa concurred.

ECKERSTROM, Judge:

¶1 Following a jury trial, appellant Jesus Aguayo-Ruiz was convicted of misconduct involving weapons and two counts of disorderly conduct. He was sentenced to concurrent prison terms, the longest of which is four years. On appeal, he argues his conviction for misconduct involving weapons should be set aside because he should not be classified as a prohibited possessor. For the following reasons, we affirm.

Factual and Procedural Background

¶2 The jury found Aguayo-Ruiz guilty of possession of a deadly weapon by a prohibited possessor, in violation of A.R.S. § 13-3102(A)(4), based on his status as an undocumented alien and possession of a handgun. *See* A.R.S. § 13-3101(A)(7)(e). He was sentenced to an enhanced minimum prison term of four years for this offense. Aguayo-Ruiz now appeals, claiming his conviction under these statutes violated his right to equal protection under the Fourteenth Amendment. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).

Discussion

¶3 Aguayo-Ruiz implicitly claims §§ 13-3101(A)(7)(e) and 13-3102(A)(4) violate his right to equal protection because they deprive him of the right to bear arms, a fundamental right, based on his status as an undocumented alien, and are not narrowly tailored to serve a compelling government interest. Aguayo-Ruiz never raised this claim before the trial court and has therefore forfeited review for all but fundamental, prejudicial error. *See State v.*

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Henderson, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005).¹ Aguayo-Ruiz has not argued fundamental error and has therefore waived this issue. See *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008). Although we will not ignore fundamental error when we find it, *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007), nothing in Aguayo-Ruiz’s brief, or the record before us, suggests fundamental error occurred.

¶4 Aguayo-Ruiz has not directed us to, and we have not found, any authority holding that the Second Amendment right to bear arms applies to undocumented aliens. See *United States v. Carpio-Leon*, 701 F.3d 974, 982 (4th Cir. 2012) (holding “Second Amendment right to bear arms does not extend to *illegal* aliens”), *cert. denied*, ___ U.S. ___, 134 S. Ct. 58 (2013); *United States v. Huitron-Guizar*, 678 F.3d 1164, 1167-69 (10th Cir. 2012) (listing reasons for and against finding such a right and ultimately declining to decide issue), *cert. denied*, ___ U.S. ___, 133 S. Ct. 289 (2012); *United States v. Flores*, 663 F.3d 1022, 1023 (8th Cir. 2011) (per curiam) (agreeing with Fifth Circuit that Second Amendment does not apply to undocumented aliens); *United States v. Portillo-Munoz*, 643 F.3d 437, 442 (5th Cir. 2011) (“[P]hrase ‘the people’ in the Second Amendment . . . does not include aliens illegally in the United States . . .”). Accordingly, in the absence of any clear authority supporting that an undocumented alien possesses any rights under the Second Amendment, and in the absence of any arguments provided to the

¹Aguayo-Ruiz asserts, relying on *State v. Ochoa*, 189 Ariz. 454, 459, 943 P.2d 814, 819 (App. 1997), he does not have to demonstrate fundamental error because he is raising a constitutional challenge to a statute. However, *Ochoa* was decided before *Henderson* and is likely no longer the applicable standard. See *State v. Lowery*, 230 Ariz. 536, ¶ 11, 287 P.3d 830, 834 (App. 2012) (reviewing for fundamental error defendant’s equal protection challenge to statute raised for first time on appeal). Even were we to apply *Ochoa*, that standard provides “discretionary authority” to consider an issue not raised in the trial court, and, in our discretion, we would decline review. 189 Ariz. at 459, 943 P.2d at 819.

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trial court on this claim, we find nothing in the record establishing there was error here, fundamental or otherwise.

¶5 The convictions and sentences are affirmed.