

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ANTONIO EUGENE LILLARD,
Appellant.

No. 2 CA-CR 2016-0407
Filed April 12, 2018

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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Cochise County
No. CR201500572
The Honorable John F. Kelliher Jr., Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Robert A. Walsh, Assistant Attorney General, Phoenix
Counsel for Appellee

Janelle A. Mc Eachern, Chandler
Counsel for Appellant

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MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Espinosa and Judge Eppich concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Following a jury trial, appellant Antonio Lillard was convicted of aggravated harassment and weapons misconduct.¹ The trial court sentenced him to enhanced, presumptive, concurrent prison terms, the longer of which was 4.5 years. Counsel filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530 (App. 1999), stating she had reviewed the record and “found no arguable question of law” to raise on appeal. In our search of the record pursuant to *Anders*, however, we discovered a non-frivolous claim requiring further briefing by counsel. See *Person v. Ohio*, 488 U.S. 75, 83-84 (1988). We ordered counsel “to address whether the trial court properly instructed the jury on weapons misconduct consistent with the defendant’s constitutional rights and this court’s decision in *State v. Kelly*, 210 Ariz. 460, 112 P.3d 682 (App. 2005).”

¶2 To establish that a defendant has committed weapons misconduct under A.R.S. § 13-3102(A)(4), the state must prove that the defendant knowingly “[p]ossess[ed] a deadly weapon or prohibited weapon if such person is a prohibited possessor.” A “[p]rohibited possessor” is defined, inter alia, as a person “[w]ho has been convicted . . . of a felony . . . and whose civil right to possess or carry a gun or firearm has not been restored.” A.R.S. § 13-3101(A)(7)(b). In *Kelly*, this court addressed the allocation of the burden of proof “with respect to the restoration of [the] right to carry a firearm” in the definition of prohibited possessor. 210 Ariz. 460, ¶ 2. We held that a defendant “has the burden of persuading the trier of fact by a preponderance of the evidence that his civil rights have been restored.” *Id.* ¶ 15. We distinguished between the burden of going forward and the burden of persuasion as to the restoration provision of the statute defining a “prohibited possessor,” and concluded that if a defendant “fails to produce any admissible evidence that his right to carry firearms has been

¹Pursuant to a plea agreement, Lillard was also convicted of forgery.

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restored, the state will prevail on the issue without being required to present any evidence of nonrestoration.” *Id.* ¶ 13.

¶3 The trial court in this case instructed the jury on weapons misconduct as follows:

In a weapons misconduct case in which it is alleged that the defendant was a prohibited possessor at the time of the offense, the defendant has the burden of proving, by a preponderance of the evidence, that he was not a prohibited possessor at the time of the offense. If the defendant fails to produce any admissible evidence that he was not a prohibited possessor at the time of the offense, the State is deemed to have prevailed, without being required to present any evidence on this issue.

¶4 Because Lillard did not object to the instruction, we review the instruction for fundamental error. *See State v. Jensen*, 153 Ariz. 171, 176-77 (1987); *see also Rose v. Clark*, 478 U.S. 570, 576-80 (1986) (reviewing erroneously burden-shifting instruction for harmless error); *State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005). The state concedes the instruction was erroneous because it misapplied the “holding in *Kelly* and therefore unconstitutionally shifted to Lillard the burden of proof as to” whether he was a prohibited possessor. Indeed, the trial court’s instruction conflates the requirement that the state prove the defendant was a prohibited possessor with the defendant’s burden to show he falls into the exception to the definition of a prohibited possessor set forth in § 13-3101(A)(7)(b). It improperly shifted the burden of the former requirement to Lillard.

¶5 To be entitled to reversal under the fundamental error standard, however, Lillard must show not only error, but resulting prejudice. *See Henderson*, 210 Ariz. 561, ¶ 20. Lillard contends he was prejudiced because the jurors “may have been confused on what exactly the instruction required of them” and asserts “[h]ad he been allowed to make [a] showing” that “his right to possess and carry a firearm had been restored,” he might not have been convicted. But nothing in the record suggests Lillard was in any way prevented from showing his rights had been restored. As the state points out, he did not contest the existence of the felony convictions. The state presented certified copies of the court records showing Lillard’s convictions, along with testimony from the clerk

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of the superior court that nothing in the court's records showed his right to possess a firearm had been restored. Thus, on the record before us, no reasonable juror could have concluded Lillard was not a prohibited possessor; he has therefore failed to establish prejudice. *See State v. Ruggiero*, 211 Ariz. 262, ¶ 27 (App. 2005), *abrogated on other grounds by State v. Carson*, 243 Ariz. 463, ¶ 10 (2018).

¶6 Furthermore, viewed in the light most favorable to sustaining the verdict, the evidence was sufficient to otherwise support the jury's findings of guilt. *See State v. Delgado*, 232 Ariz. 182, ¶ 2 (App. 2013). The evidence presented at trial established that the victim had obtained a restraining order against Lillard, who had been acting erratically and making threats; that he was seen in a vehicle down the street from a house she had been frequenting; and that he got out and followed her up to the house when she arrived there on the day of his arrest. Lillard also possessed a handgun, which was found in his vehicle. We also conclude the sentences imposed are within the statutory limits. *See* A.R.S. §§ 13-703(B), (I), 13-2921(A)(4), 13-2921.01(A)(1), (C), 13-3101(A)(7)(b), 13-3102(A)(4), (M).

¶7 In sum, we conclude the trial court erred in instructing the jury on the weapons misconduct count, but reversal is not required because Lillard has not met his burden to establish prejudice. Pursuant to our obligation under *Anders*, we have searched the remaining record for fundamental, reversible error and have found none. Therefore, we affirm Lillard's convictions and sentences.