IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

FRANK MARIANO GONZALES JR.,
Appellant.

No. 2 CA-CR 2019-0194
Filed April 19, 2021

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NOT FOR PUBLICATION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 Pima County
No. CR20173116001
The Honorable Gus Aragón, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
By Casey D. Ball, Assistant Attorney General, Phoenix
Counsel for Appellee

Law Offices of Thomas Jacobs, Tucson
By Thomas Jacobs
Counsel for Appellant

MEMORANDUM DECISION

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

V Á S Q U E Z, Chief Judge:

¶1 After a jury trial, Frank Gonzales Jr. was convicted of possession of a deadly weapon by a prohibited possessor, and the trial court sentenced him to nine years' imprisonment. On appeal, he contends the court improperly instructed the jury that the state could prove constructive possession by presenting evidence that he did so knowingly rather than intentionally. He maintains the court erred in denying his motion for a directed verdict because the state failed to present substantial evidence of the required intent.[1] For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict. *State v. Pena*, 235 Ariz. 277, ¶ 5 (2014). In June 2017, Tucson police executed a search warrant[2] at the residence Gonzales shared with his girlfriend. Before searching, police asked the girlfriend if there were any weapons in the home, and she said no. When police separately asked Gonzales—a prohibited possessor—whether there were any weapons in the house, he said there were, but they were his girlfriend's. After allowing Gonzales and his girlfriend to speak privately, police questioned them together about the weapons. The girlfriend now stated that she did have guns in the house, including an AR-15 rifle. When she was unable to provide other details about the guns, Gonzales interrupted and provided

[1] In his opening brief, Gonzales also argued that the trial court erroneously precluded him from introducing evidence of a text message he had sent his girlfriend. But after the state pointed out that the message was later admitted, Gonzales conceded that the issue is moot and withdrew it.

[2] Police obtained the search warrant after Gonzales's thirteen-year-old niece reported that he had forced her to have sexual intercourse. By stipulation, the jury was told only that police were at the residence pursuant to a lawful search warrant.

them, including their location and the types of weapons that were there, including a .357 revolver and a nine-millimeter semi-automatic handgun.

¶3 When police searched the home, they found the AR-15 rifle, .357 revolver, and nine-millimeter semi-automatic where Gonzales had described. A detective later interviewed the girlfriend about the guns, and although she again claimed she owned the guns, she incorrectly stated there were two guns. When asked about the caliber of the rifle, she stated, "I don't know, I'm sorry, I don't know anything about the gun." Finally, she stated that the guns operated "fine," and when she was confronted with the fact that one of them was jammed, she had no explanation for how that had occurred.

¶4 A grand jury indicted Gonzales for possession of a deadly weapon by a prohibited possessor.[3] He was tried, convicted, and sentenced as described above. This appeal followed. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶5 Gonzales contends the trial court erroneously instructed the jury that a prohibited possessor's constructive possession of a weapon need only be knowing, rather than intentional. Gonzales acknowledges "that the trial court's instruction appears consistent with" *State v. Cox*, 217 Ariz. 353, ¶¶ 10-21 (2007), in which our state supreme court interpreted the statutory definition of possession in the context of a similar claim of error involving the possession jury instruction. *See also* A.R.S. § 13-105(34) ("possess" means to "knowingly" have possession); § 13-105(35) ("possession" means a "voluntary act if the defendant knowingly exercised dominion or control over property"). But he argues that under *Henderson v. United States*, 575 U.S. 622 (2015), the United States Supreme Court subsequently stated that "constructive possession requires proof of intent to exercise dominion and control." He suggests that because *Cox* is "in conflict with" *Henderson*, the instruction here was improper.

¶6 Gonzales concedes he did not raise this issue in the trial court. We therefore review the issue for fundamental, prejudicial error only. *See State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018). "[T]he first step in fundamental

---

[3]Gonzales was also indicted for three counts of sexual conduct with a minor. After Gonzales filed a motion to sever, the state agreed to try the prohibited possessor count separately. Only the prohibited possessor count is at issue in this appeal.

error review is determining whether trial error exists." *Id.* ¶ 21. If error exists, the defendant shows that the error is fundamental "by showing that (1) the error went to the foundation of the case, (2) the error took from the defendant a right essential to his defense, *or* (3) the error was so egregious that he could not possibly have received a fair trial." *Id.* An additional showing of prejudice is required to obtain relief from the first two types of error. *Id.*

¶7 Here, Gonzales fails to clear the initial hurdle of showing error. As he acknowledges, *Henderson* analyzed a different statutory offense than the one at issue here. The offense at issue in *Henderson*, established in 18 U.S.C. § 922(g), did not define possession, and the Court therefore interpreted what the word "possess" meant in the statute. 575 U.S. at 626. It concluded that the term encompassed both actual and constructive possession, and that constructive possession occurred when a person "has the power and intent to exercise control over the object." *Id.* In contrast, Gonzales was convicted of violating A.R.S. § 13-3102(A)(4), which incorporates a statutory definition of "possess": "knowingly to have physical possession or otherwise to exercise dominion or control over property." § 13-105(34). The language of the definition explicitly establishes that knowing exercise of dominion or control is sufficient to constitute possession under our prohibited possessor statute; we need look no further for the applicable mental state than the words in the statute. *See Bilke v. State*, 206 Ariz. 462, ¶ 11 (2003) (if language of statute is clear, court must apply its plain meaning unless doing so would achieve absurd or impossible result).

¶8 The jury instructions on possession issued by the trial court—the standard instructions for criminal possession, *see* Rev. Ariz. Jury Instr. (RAJI) Stand. Crim. 37 (4th ed. 2016)—accurately reflect the definition under § 13-105(34) by stating that possession, whether actual or constructive, need only be knowing. In particular, the court accurately instructed the jury that "'[c]onstructive possession' means the defendant, although not actually possessing an object, knowingly exercised dominion or control over it, either acting alone or through another person." Indeed, the operative language in this instruction, "knowingly exercised dominion or control," is almost identical to language in § 13-105(34). Conversely, Gonzales's proposal of "an instruction requiring the State to prove that [he] intended to exercise dominion and control" would misstate the plain language of the statute.

¶9 In any event, we are bound by the ruling in *Cox*, which similarly rejected a defendant's proposed possession instruction because it

replaced "knowingly" with another culpable mental state. *See* 217 Ariz. 353, ¶¶ 16-17; *see also State v. Long*, 207 Ariz. 140, ¶ 23 (App. 2004) ("This court is bound by decisions of the Arizona Supreme Court and has no authority to overturn or refuse to follow its decisions."). Although Gonzales suggests that *Henderson* has somehow overruled *Cox*, he is mistaken. The United States Supreme Court cannot overrule our supreme court's interpretation of an Arizona statute. *See Johnson v. Fankell*, 520 U.S. 911, 916 (1997). Although Gonzales argues that *Cox* is not dispositive because the proposed instruction included a willful mental state and not an intentional one, *see* 217 Ariz. 353, ¶ 16, we see no meaningful distinction. As in this case, in *Cox* the proposed instruction included a mental state contrary to the applicable statute. The trial court properly instructed the jury that possession need only be knowing, rather than intentional.

¶10 Finally, Gonzales contends that he was entitled to a directed verdict because "there is no way the jury could have inferred [his] intent to use or control the firearms based on the State's evidence." Because we have rejected his premise that the offense required intent to use or control the guns, this argument similarly fails. Gonzales makes no argument that the evidence did not support a conviction for the offense as instructed.

Disposition

¶11 For the foregoing reasons, we affirm Gonzales's conviction and sentence.