

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA)	
)	
Appellee,)	2 CA-CR 2008-0248
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
REFUGIO RINCON, aka ARTURO)	Rule 111, Rules of
MARTINEZ,)	the Supreme Court
)	
Appellant.)	
)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200500945

Honorable Boyd T. Johnson, Judge

AFFIRMED AS CORRECTED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Amy M. Thorson

Tucson
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ESPINOSA, Judge.

¶1 After a jury trial, appellant Refugio Rincon was convicted of one count each of theft of a means of transportation, misconduct involving weapons, and possession of marijuana. The trial court sentenced him to a combination of consecutive and concurrent prison terms totaling seven years. On appeal, he contends the indictment as to count two for possession of a prohibited weapon was not legally sufficient and constitutes fundamental error. For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 On appeal, we view the facts in the light most favorable to sustaining the verdict. *See State v. Cruz*, 218 Ariz. 149, n.1, 181 P.3d 196, 202 n.1 (2008). Late one evening in May 2005, Gila River police officer James Zarzyczny responded to a domestic disturbance call. Upon arriving at the scene, he saw a Jeep Wrangler parked in front of the residence with Rincon in the driver's seat. He approached Rincon, who asserted the Jeep was his and that he did not have any weapons or drugs. Zarzyczny noticed the steering column was broken and suspected the Jeep was stolen. He then ran a license plate check, which showed the plate was invalid, and he placed Rincon under arrest. Zarzyczny searched the vehicle and found a shotgun with a shortened barrel and a marijuana cigarette.

¶3 Rincon was indicted on charges of theft of a means of transportation, possession of a prohibited weapon, and possession of marijuana. He was convicted and sentenced as outlined above, and this appeal followed.

Discussion

¶4 Rincon's sole argument on appeal is that the indictment for possession of a prohibited weapon was legally insufficient because it did not detail why the shotgun was prohibited. He maintains that a legally sufficient indictment would have specified that the shotgun's barrel measured less than the legal limit of eighteen inches. *See* A.R.S. § 13-3101(A)(8)(a)(iv).¹ As the state points out, however, Rincon's challenge is waived because he failed to object before trial. *See* Ariz. R. Crim. P. 13.5(e), 16.1(c) (challenge to indictment must be raised in pretrial motion).

¶5 Under Rule 13.5(e), any issue regarding a defect in the charging document must be raised at least twenty days before trial. *See also* Ariz. R. Crim. P. 16.1(b). And untimely motions are precluded under Rule 16.1(c). *State v. Anderson*, 210 Ariz. 327, ¶ 17, 111 P.3d 369, 378 (2005) (pretrial objections to an indictment permit remedying alleged defects before trial). Moreover, although Rincon contends the claimed defect constituted fundamental error, it is well established that defects as to an indictment's form are cured by the jury's verdict. *State v. Atwood*, 171 Ariz. 576, 607, 832 P.2d 593, 624 (1992), *overruled on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001); *see also State v. Fullem*, 185 Ariz. 134, 136, 912 P.2d 1363, 1365 (App. 1996) (refusing to consider claim raised for first time on appeal that indictment failed to contain information regarding charged offense). Accordingly, we do not further consider Rincon's arguments on this issue.

¹The statute under which Rincon was convicted was recently amended changing the numbering but not the substance of this provision. *See* 2008 Ariz. Sess. Laws, ch. 274 § 1. For ease of reference, we refer to the statute currently in effect.

¶6 Rincon also points out that the sentencing minute entry contains a typographical error that should be corrected. Because the obvious mistake in the minute entry, and carried into the judgment, renders it nonsensical, we correct it on appeal. *State v. Rockerfeller*, 9 Ariz. App. 265, 267, 451 P.2d 623, 625 (1969) (reviewing court should interpret the record in its entirety, giving effect to all and resolving deficiencies using the complete record). In both its pronouncement of judgment and corresponding sentencing minute entry, the trial court appears to order the sentence in count three to be served consecutively with itself. It is clear from the context, however, that the court misspoke and intended counts one and two to be served consecutively and count three to be concurrent with count two. We also note the state does not dispute this interpretation of the record.

Disposition

¶7 Rincon's convictions and sentences are affirmed with the correction to his sentence on count three as noted above.

PHILIP G. ESPINOSA, Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

JOHN PELANDER, Chief Judge