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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

ROBERT AMARILLAS HERNANDEZ, *Appellant*.

No. 1 CA-CR 15-0374
FILED 8-9-2016

Appeal from the Superior Court in Maricopa County
No. CR2014-134169-001
The Honorable Sam J. Myers, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Eric K. Knobloch
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Rena P. Glitsos
Counsel for Appellant

MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Patricia A. Orozco and Judge Jon W. Thompson joined.

S W A N N, Judge:

¶1 Robert Amarillas Hernandez ("Defendant") appeals from his convictions for armed robbery, unlawful flight from law enforcement vehicle and cruelty to animals. He contends that the trial court erred in admitting as evidence a knife found in Victim's vehicle. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Well after dark, Victim stopped his truck at a water vending machine to fill up empty bottles. He parked a few feet away and walked over to the machine with the bottles, leaving the keys in his truck. As he was getting water, Victim heard the engine turn over and saw the lights come on. Victim saw a man, later identified as Defendant, in his truck, and as Victim tried to stop him, he saw Defendant holding what Victim believed to be a "bright and black" gun. Defendant fled in the truck, and Victim called 9-1-1.

¶3 Officer Davidge, who responded to the emergency call and spoke to Victim, later saw a vehicle matching the description from the Victim on the road. When the officer attempted to pull the truck over, Defendant accelerated and tried to flee. He led several officers on a high-speed pursuit for a few miles on surface streets until the officers stopped because Defendant crossed the center median and drove toward oncoming traffic. The officers spotted the truck again a few minutes later and were able to end the pursuit. When Defendant exited the truck, he struggled with the officers, grabbed a police dog's leash (leading the dog to bite him), and was Tased multiple times.

¶4 After police recovered Victim's truck, they brought Victim in for an interview. He identified Defendant from a photographic lineup as the man who took his truck. Police conducted a search of the truck with Victim's permission. Among other items, they found a "folding [B]uck knife" in the center console, the only item Victim stated did not belong to him. The police did not find a gun on the suspect or in the truck.

¶5 The state charged Defendant with armed robbery, theft of means of transportation, unlawful flight from law enforcement vehicle and cruelty to animals. The court later dismissed the theft charge on the state's motion. Defendant was indicted by a grand jury. The grand jurors asked Detective Durham several questions about the gun Victim reportedly saw and the role of the knife in the alleged robbery. Though the detective testified that the Victim believed he saw a gun, the detective did not rule out the possibility that Defendant was holding the knife during the incident.

¶6 Defendant filed a motion in limine asking the court to preclude the knife as irrelevant or unduly prejudicial under Ariz. R. Evid. 403. The court denied the motion and allowed the state to introduce the knife into evidence, finding that "there is some probative value to the knife. It was accessible or at least would not indicate that it hadn't been accessed," and that while the knife was prejudicial, it was not so prejudicial as to outweigh its probative value. At trial, the jury found Defendant guilty on all counts. Defendant appeals.

DISCUSSION

¶7 Defendant contends that the court erred by admitting the knife at trial because Victim only claimed to have seen a gun. He maintains that the state told the grand jurors that the knife was not used in the robbery, and therefore the state should have been estopped from claiming that the knife was relevant at the trial; he also maintains that admission of the knife allowed conviction on an uncharged offense. In the alternative, Defendant argues that if the knife was relevant, it was unduly prejudicial and constituted impermissible evidence of another bad act.

¶8 Defendant was charged with armed robbery. A person commits armed robbery by committing robbery as defined in A.R.S. § 13-1902[1] when he or she "[i]s armed with a deadly weapon or a simulated deadly weapon" or "[u]ses or threatens to use a deadly weapon or dangerous instrument or a simulated deadly weapon." A.R.S. § 13-1904(A). A deadly weapon is "anything designed for lethal use," A.R.S. § 13-105(15), and a dangerous instrument is "anything that under the circumstances in which it is used, attempted to be used or threatened to be used is readily

[1] "A person commits robbery if in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property." A.R.S. § 13-1902(A).

capable of causing death or serious physical injury," A.R.S. § 13-105(12). The presence of a deadly weapon at the scene was therefore relevant. We review the court's determination of the admissibility of evidence for abuse of discretion. *State v. Rutledge*, 205 Ariz. 7, 10, ¶ 15 (2003).

¶9 As a preliminary matter, we note Defendant's claims that "the grand jurors were specifically and unequivocally informed that the knife played **no role** in the theft" and that "the knife was not alleged to have been used in the commission of the charged offenses" are incorrect. During the grand jury testimony, the prosecutor questioned Det. Durham about the knife:

> [Prosecutor]: There's no thought . . . that this pocketknife that was found has anything to do with any of the incidents we're talking about, is there?
>
> [Detective]: That's unknown. It's unknown if that's what [Defendant] was holding.
>
> [Prosecutor]: There was no pocketknife used by the suspect to get the truck from [Victim] or anything of that kind?
>
> [Detective]: No.

¶10 At best, the detective's statements were ambiguous or contradictory. When a juror later asked about Victim's statements concerning the handgun, the prosecutor asked Det. Durham to clarify what Victim said he saw:

> [Detective]: He believed it to be a black semiautomatic handgun[,] and that's what he described to us.
>
> . . .
>
> [Detective]: But he stated that he didn't know for sure if it was a black semiautomatic handgun. He believed it was.

¶11 Another juror asked whether Victim was certain about the gun:

> [Juror]: . . . When you questioned [Victim] after you got the suspect, he said he wasn't sure about the gun? I heard something.

> [Detective]: Yes. [Victim] said -- he initially when he spoke to officer, he was adamant that it was a black semiautomatic. When I did a secondary interview with him going over the facts of everything that had occurred, he said that [Defendant] reached into his waistband . . . and produced what he believed was a black object. He believed it was a black semiautomatic handgun. . . . But [Victim] said: I can't tell you for sure if it was a gun or not. I just know it was a black object of some type. [Victim] assumed it was a gun.

¶12 Finally, Victim testified at trial that "[i]n my mind, I saw a gun," but "I didn't know if it was real or not." Contrary to Defendant's claims, neither the state nor the victim "took a definite position" concerning the knife's use in the robbery either during the grand jury testimony or the trial. Thus, even if the doctrine of judicial estoppel could apply in such a case, it would not apply here. *See State v. Towery*, 186 Ariz. 168, 182-84 (1996) ("This court has long recognized that '[a]s a general rule, a party who has assumed a particular position in a judicial proceeding is estopped to assume an inconsistent position in a subsequent proceeding involving the same parties and questions.'" (citation omitted)).

¶13 Defendant's belief that "a knife is so dissimilar as to not be mistaken for a firearm" does not preclude the jury from finding that a pocketknife was used as, or used to simulate, a deadly weapon or dangerous instrument. Neither the grand jury testimony nor the trial testimony eliminated the possibility that Defendant pointed the pocketknife at Victim to simulate a gun. The presence of the knife goes to an element of the charged crime and is therefore relevant. *See* A.R.S. § 13-1904. The court acknowledged that the knife could be prejudicial but found the probative value was not substantially outweighed by that danger. On these facts, we cannot say that the court abused its discretion by allowing the knife into evidence.

CONCLUSION

¶14 For the foregoing reasons, we affirm Defendant's convictions.

Ruth A. Willingham · Clerk of the Court
FILED: AA