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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 12/18/2012  
RUTH A. WILLINGHAM,  
CLERK  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 11-0825  
)  
Appellee, ) DEPARTMENT C  
)  
v. ) MEMORANDUM DECISION  
)  
JOSEPH CARBAJAL, ) (Not for Publication -  
) Rule 111, Rules of the  
Appellant. ) Arizona Supreme Court)  
)  
)

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Appeal from the Superior Court in Maricopa County

Cause No. CR2010-155739-001

The Honorable Edward Bassett, Judge

**CONVICTION AND SENTENCE AFFIRMED; INCARCERATION CREDIT MODIFIED**

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Attorneys for Appellee

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**T H U M M A**, Judge

¶1 This appeal was timely filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), following Joseph Carbajal's conviction of one count of burglary in the second degree, a Class 3 felony. Carbajal's counsel advised this court that after a diligent search of the entire record he found no arguable question of law, and asked this court to review the record for fundamental error. Carbajal filed a supplemental brief raising several issues, including the question of whether the superior court properly found that the prior felony convictions to which Carbajal admitted fell within the definition of historical prior felony convictions for sentence enhancement purposes. This court ordered additional briefing on that issue pursuant to *Penson v. Ohio*, 488 U.S. 75 (1988). After considering the parties' *Penson* briefs and reviewing the entire record for fundamental error, Carbajal's conviction and sentence are affirmed, but his presentence incarceration is modified to reflect credit for 94 days served.

## FACTS AND PROCEDURAL HISTORY<sup>1</sup>

¶2 Just after noon on October 17, 2010, Carbajal looked into an open residential garage in Phoenix while riding past on his bicycle. Carbajal immediately returned on foot, entered the garage and carried out a full black bag. After leaving the black bag a few houses away, Carbajal went back into the garage and carried out two sets of golf clubs. A witness observed these actions and called 911. Police detained Carbajal, who was carrying a black bag, near the scene. After the victim identified the contents of the bag as her property, Carbajal was arrested and charged with burglary of a residential structure.

¶3 During Carbajal's initial trial, three witnesses overheard another witness's testimony in violation of the rule of exclusion of witnesses. Carbajal moved for a mistrial and, without objection from the State, the court granted a mistrial "not to be interpreted as any wrongdoing by the state" and set the case for retrial.

¶4 Upon retrial, a jury found Carbajal guilty as charged. Pursuant to the terms of a plea agreement in a separate case, Carbajal formally admitted two prior felony convictions: a Class

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<sup>1</sup> Upon review, this court considers the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Carbajal. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

5 felony committed May 16, 2003 and a Class 4 felony committed February 6, 2006. The superior court sentenced Carbajal as a category 3 repetitive offender to a presumptive term of 11.25 years' incarceration, with credit for 93 days served.

¶15 Carbajal timely appealed. This court has jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1), 13-4031 and -4033.<sup>2</sup>

## DISCUSSION

### I. Historical Prior Felony Convictions

¶16 Carbajal argues the superior court improperly enhanced his sentence because the 2003 Class 5 felony to which he admitted is too remote in time to be a historical prior felony conviction. Under A.R.S. § 13-105(22)(c), a Class 5 felony qualifies as a historical prior felony conviction if "committed within the five years immediately preceding the date of the present offense," excluding time spent incarcerated. Carbajal admitted to committing the 2003 felony on May 16, 2003. Carbajal committed the current offense on October 17, 2010, seven years, five months and one day after the prior offense. Given the five-year requirement of § 13-105(22)(c), the 2003 conviction does not qualify as a historical prior felony conviction unless

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<sup>2</sup> Absent material revision after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

Carbajal was incarcerated for at least two years, five months and one day in the interim.

¶7 Because Carbajal failed to object before the superior court, Carbajal bears the burden on appeal to prove fundamental error. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Although misusing a conviction as a historical prior felony conviction for sentence enhancement is fundamental error, to prevail on appeal Carbajal must demonstrate that he was *not* incarcerated for the two years, five months and one day necessary to bring the 2003 felony within the five years preceding the current offense. *State v. Avila*, 217 Ariz. 97, 99, ¶¶ 8, 10, 170 P.3d 706, 708 (App. 2007).

¶8 As the State points out, the court considered a presentence report reflecting that Carbajal was sentenced on February 20, 2004 to one year in prison and on November 28, 2006 to three years in prison. These four years well exceed the two years, five months and one day necessary to bring the 2003 offense to within five years preceding the present offense. Although the record does not include Carbajal's actual release dates for a precise calculation of time incarcerated, the presentence report reasonably supports a finding that the 2003 offense qualified as a historical prior felony conviction. *Id.* at 100, ¶ 12, 170 P.3d at 709. Carbajal has thus failed to establish that the superior court fundamentally erred by

considering the 2003 conviction a historical prior felony conviction to enhance Carbajal's sentence.

## **II. Issues Raised By Carbajal**

### **A. Prosecutorial Misconduct**

¶9 Carbajal argues the prosecutor violated his constitutional right to a fair trial by (1) expressing a personal belief in Carbajal's guilt during opening statements, (2) shifting the burden of proof during rebuttal closing by improperly attacking defense witnesses with evidence of prior bad acts, (3) using a presentence report as evidence during the guilt phase of the trial and (4) "ambush[ing] [Carbajal] with a theory of culpability that was never defined in advance." A claim of prosecutorial misconduct warrants reversal only if "(1) misconduct is indeed present[,] and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial." *State v. Moody*, 208 Ariz. 424, 459, ¶ 145, 94 P.3d 1119, 1154 (2004).

¶10 Here, the prosecutor expressed no personal belief in Carbajal's guilt, but rather indicated the State would, at the close of evidence, "ask you [the jury] to find the defendant guilty of burglary."

¶11 Similarly, the prosecutor did not shift the burden of proof in rebuttal closing by arguing that defense witnesses' prior convictions impeached their credibility. Certain prior

convictions are admissible to attack a witness's credibility. Ariz. R. Evid. 609(a), (b). The court here properly allowed the defense witnesses' convictions in sanitized form, the prosecutor complied with that order and the court further instructed the jury to "consider this evidence only as it may affect the witness' believability." The prosecutor's argument that the defense witnesses' prior convictions undermined their credibility was not improper.

¶12 Next, the record reflects no use of a presentence report as evidence at trial. Indeed, no presentence report was prepared until after the jury returned a guilty verdict.

¶13 Finally, the record provides no support for Carbajal's argument that the State "ambush[ed]" him with a never-before-defined theory of culpability. The State never amended the initial charge against Carbajal -- burglary in the second degree (residential structure) -- and at trial the State argued, the court instructed and the jury convicted Carbajal as charged. None of these actions by the prosecutor constitute misconduct.

#### **B. Jury Instructions**

¶14 Carbajal next argues the court incorrectly instructed the jury on the elements of the offense and that the court's failure to give unspecified Revised Arizona Jury Instructions (RAJIs) "lessened the State's burden of proof." Contrary to Carbajal's claim, the court properly instructed the jury that

"The crime of burglary in the second degree requires proof that the defendant: One. Entered or remained unlawfully in or on a residential structure; and Two. Did so with the intent to commit any theft therein." See A.R.S. § 13-1507(A) ("A person commits burglary in the second degree by entering or remaining unlawfully in or on a residential structure with the intent to commit any theft or any felony therein."). Additionally, the court properly instructed the jury that Carbajal is presumed innocent, that Carbajal need neither testify nor produce evidence of any kind, and on the State's burden of proof and the definition of reasonable doubt. The court did not err in instructing the jury.

### **C. Sentencing Issues**

¶15 Carbajal argues that the State failed to prove his prior felony convictions, contending specifically that Carbajal's own testimony admitting the prior convictions was "immaterial and irrelevant" and that the State improperly used Carbajal's guilty plea in a separate case "to delimit the nature of a prior conviction." Carbajal's admission to having been convicted of the 2003 felony and the 2006 felony is relevant to establishing his prior felony convictions (and historical prior felony convictions) for sentencing purposes. Additionally, it was not the documents accompanying Carbajal's plea deal in a separate case that established the nature of his prior



convictions; Carbajal's admission through testimony in open court as to the cause number, class, date of commission and date of conviction of his prior felonies establish their nature.

¶16 Carbajal next argues the court failed to conduct a proper colloquy pursuant to Arizona Rule of Criminal Procedure 17.6 before accepting Carbajal's admission of two prior felony convictions. The court, however, properly "advise[d] [Carbajal] of the nature of the allegation, the effect of admitting the allegation on [Carbajal's] sentence, and [Carbajal's] right to proceed to trial and require the State to prove the allegation." *State v. Anderson*, 199 Ariz. 187, 194, ¶ 36, 16 P.3d 214, 221 (App. 2000); see also Ariz. R. Crim. P. 17.2, 17.6.

¶17 Carbajal also argues the superior court impermissibly "double counted [the admitted prior convictions] to sustain concurrent terms" of imprisonment imposed in this case and the different case in which Carbajal entered a guilty plea. Carbajal was sentenced to concurrent terms of imprisonment pursuant to the plea agreement in the separate case, and Carbajal by pleading guilty waived his right to appeal. See A.R.S. § 13-4033(B); Ariz. R. Crim. P. 17.1(e). In any event, the imposition of concurrent (as opposed to consecutive) sentences is beneficial rather than prejudicial to Carbajal.

¶18 Carbajal further argues that, because he presented evidence of mitigating circumstances, the court erred by failing

to find mitigating circumstances. “[A] sentencing court is not required to find that mitigating circumstances exist merely because mitigating evidence is presented; the court is only required to give the evidence due consideration.” *State v. Cazares*, 205 Ariz. 425, 427, ¶ 8, 72 P.3d 355, 357 (App. 2003). Here, the court heard the evidence in mitigation offered on Carbajal’s behalf but nevertheless explicitly found no mitigating circumstances. The court did not err.

¶19 A defendant is entitled to presentence incarceration credit for all time spent in custody pursuant to an offense. A.R.S. § 13-712(B). Carbajal was in custody from October 17, 2010 to November 2, 2010 and again from August 17, 2011 until sentencing on November 2, 2011. He therefore is entitled to 94 days of presentence incarceration credit, and the judgment is modified accordingly.

### **III. Fundamental Error Review**

¶20 The record reflects Carbajal received a fair trial. The proceedings against him were conducted in compliance with the Arizona Rules of Criminal Procedure, Carbajal was present and represented by counsel at all stages of the proceedings against him, the State presented both direct and circumstantial evidence sufficient to allow the jury to convict and the sentence imposed was within the statutory limits.

¶21 Upon the filing of this decision, defense counsel is directed to inform Carbajal of the status of his appeal and of his future options. Defense counsel has no further obligations unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. See *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Carbajal shall have 30 days from the date of this decision to proceed, if he desires, with a pro se motion for reconsideration or petition for review.

**CONCLUSION**

¶22 Carbajal's conviction and sentence are affirmed, and his presentence incarceration credit modified to reflect 94 days served.

/s/\_\_\_\_\_  
SAMUEL A. THUMMA, Judge

CONCURRING:

/s/\_\_\_\_\_  
PHILIP HALL, Presiding Judge

/s/\_\_\_\_\_  
PETER B. SWANN, Judge