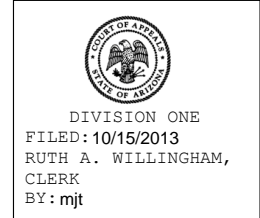


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 12-0531
) 1 CA-CR 12-0572
 Appellee,) 1 CA-CR 12-0574
) 1 CA-CR 12-0577
 v.) (Consolidated)
)
 JOHN GATWICH DAK,) DEPARTMENT A
)
 Appellant.) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 111, Rules of the
) Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause Nos.
CR2011-161764-001
CR2010-108592-001
CR2009-160237-001
CR2010-137399-001

The Honorable Phemonia L. Miller, Judge *Pro Tempore*

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Joseph T. Maziarz, Chief Counsel
Criminal Appeals Section
Aaron J. Moskowitz, Assistant Attorney General
Attorneys for Appellee

James Haas, Maricopa County Public Defender Phoenix
By Margaret M. Green, Deputy Public Defender
Attorneys for Appellant

C A T T A N I, Judge

¶1 John Gatwich Dak appeals from the sentences imposed after a jury found him guilty of four counts of aggravated driving under the influence ("aggravated DUI").¹ Dak argues the superior court committed fundamental error by "imposing an enhanced sentence based on historical prior felony convictions that [were] not proved according to law." For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND²

¶2 In the early morning hours of December 7, 2011, Phoenix Police officers stopped Dak for erratic driving. Dak admitted he had been drinking, and a subsequent blood test determined Dak had a blood alcohol concentration ("BAC") of 0.193. Dak was arrested and charged with four counts of aggravated DUI.

¶3 Before trial, the State alleged Dak had three historical prior felony convictions: (1) CR2009-160237-001:

¹ Dak filed a notice of appeal from his convictions and sentences in 1 CA-CR 12-0531 as well as from the finding of violation and revocation of probation in each of three consolidated cases, 1 CA-CR 12-0572, 1 CA-CR 12-0574, and 1 CA-CR 12-0577. Dak's argument on appeal addresses only the sentences imposed in 1 CA-CR 12-0531. Because Dak raises no independent challenges to the revocation proceedings, we affirm the dispositions of those proceedings.

² We view the evidence in the light most favorable to upholding the jury's verdict. *State v. Chappell*, 225 Ariz. 229, 233 n.1, ¶ 2, 236 P.3d 1176, 1180 n.1 (2010).

aggravated DUI, a Class 4 felony committed September 15, 2009 and convicted April 9, 2010; (2) CR2010-108592-001: criminal trespass, a Class 6 felony committed February 13, 2010 and convicted April 9, 2010; and (3) CR2010-137399-001: criminal trespass and possession or use of marijuana, Class 6 felonies committed July 16, 2010 and convicted November 8, 2010. The State also alleged Dak had committed the 2011 aggravated DUIs while on probation imposed for each of the three alleged historical prior felony convictions.

¶4 A jury found Dak guilty of the four counts of aggravated DUI as charged. After the jury determined guilt, the State presented evidence of Dak's release status at the time of the 2011 aggravated DUIs. Dak's probation officer identified Dak and testified that, as of December 7, 2011, Dak was on felony probation stemming from his convictions in CR2009-160237-001, CR2010-108592-001, and CR2010-137399-001. The probation officer had personally met with Dak on December 1 to review all conditions of probation for each of the three cases. On the defense's motion, the court admitted as evidence certified copies of the sentencing minute entries in CR2009-160237-001, CR2010-108592-001, and CR2010-137399-001. The jury found beyond a reasonable doubt that, at the time of the 2011 aggravated DUIs, Dak was on felony probation in all three prior cases.

¶15 At sentencing for the 2011 aggravated DUIs, the court did not receive additional evidence of Dak's prior convictions, but found "the State proved the allegation that [Dak] had at least two or more prior felony convictions at the time [Dak] committed the offense." The court sentenced Dak as a category three repetitive offender to concurrent, presumptive terms of 10 years' imprisonment for each count of conviction.³ See Ariz. Rev. Stat. ("A.R.S.") § 13-703(C), (J).⁴ The court also revoked probation and ordered terms of imprisonment in the three consolidated cases.

¶16 Dak timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A).

³ As Dak points out, the sentencing minute entry describes the convictions as "non-repetitive." Similarly, at the sentencing hearing the court initially referred to the convictions as "non-repetitive offenses." The court thereafter explicitly found that the State had proven "at least two or more prior felony convictions" and sentenced Dak as a repetitive offender with two or more historical prior felony convictions.

"When a discrepancy between the trial court's oral pronouncement of a sentence and the written minute entry can be clearly resolved by looking at the record, the '[o]ral pronouncement in open court controls over the minute entry.'" *State v. Ovante*, 231 Ariz. 180, 188, ¶ 38, 291 P.3d 974, 982 (2013) (citation omitted). Here, although the written minute entry erroneously refers to the offenses as "non-repetitive," the record is clear that the court found two or more historical prior felony convictions and sentenced Dak accordingly as a category three repetitive offender.

⁴ Absent material revisions after the relevant date, we cite a statute's current version unless otherwise indicated.

DISCUSSION

¶7 Dak argues the superior court imposed an illegal sentence because his historical prior felony convictions were not proven "during a hearing on the priors to the court." Because Dak did not object to the sentence enhancement before the superior court, we review only for fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

¶8 To use a prior conviction as a sentence enhancement, the court must first find the existence of the prior conviction. *State v. Morales*, 215 Ariz. 59, 61, ¶ 6, 157 P.3d 479, 481 (2007). Such proof commonly is presented to the court "through a hearing in which the state 'offer[s] in evidence a certified copy of the conviction . . . and establish[es] the defendant as the person to whom the document refers.'" *Id.* (citation omitted and alterations in original). As described in the Arizona Rules of Criminal Procedure, in general the court makes its factual finding as to existence of prior convictions after a post-trial hearing. *See id.*; *see also* Ariz. R. Crim. P. 19.1(b).

¶9 Dak argues the enhanced sentence is improper because the court never held a dedicated "trial on the priors." After the jury found Dak guilty of the crimes charged, however, the court held a post-guilt-phase evidentiary hearing regarding the State's on-probation allegation. During that hearing, the

parties presented to the jury certified copies of sentencing minute entries reflecting Dak's felony convictions in CR2009-160237-001, CR2010-108592-001, and CR2010-137399-001. Dak's probation officer identified Dak as the individual subject to probation arising from the convictions in CR2009-160237-001, CR2010-108592-001, and CR2010-137399-001. The jury found beyond a reasonable doubt that Dak was on probation in CR2009-160237-001, CR2010-108592-001, and CR2010-137399-001, necessarily as well as expressly finding that Dak had been convicted in all three prior cases. Moreover, Dak did not contest the existence of the prior convictions either at the on-probation hearing or at sentencing. Although the court did not hold a separate evidentiary hearing on prior convictions, the necessary evidence for its finding of two or more historical prior felony convictions was thus already in the record.

¶10 Dak also argues the State failed to prove that the three prior convictions in CR2009-160237-001, CR2010-108592-001, and CR2010-137399-001 were "[h]istorical prior felony conviction[s]" as defined by A.R.S. § 13-105(22). The certified sentencing minute entries, however, support the superior court's finding. Dak's first alleged prior conviction, the aggravated DUI in CR2009-160237-001, qualifies as a "prior felony conviction [that] . . . [i]nvolved aggravated driving under the influence of intoxicating liquor or drugs." A.R.S. § 13-

105(22)(a)(iv). The other alleged prior convictions -- one in CR2010-108592-001 (a Class 6 felony committed February 13, 2010), and two in CR2010-137399-001, (Class 6 felonies committed July 16, 2010) -- occurred within the five years immediately preceding the date of the present offense and thus qualify as prior felonies under A.R.S. § 13-105(22)(c). In light of the record evidence establishing Dak's prior convictions and their historical nature, the superior court did not err by imposing an enhanced sentence on the basis of Dak's historical prior felony convictions. See *Morales*, 215 Ariz. at 62, ¶ 13, 157 P.3d at 482 ("Copies of [defendant's] prior convictions were admitted at a [] pretrial hearing. Neither party challenges the authenticity of these copies, and thus evidence conclusively proving [defendant's] prior convictions is already in the record.").

CONCLUSION

¶11 For the foregoing reasons, we affirm Dak's convictions, sentences, and the consolidated probation revocations.

/S/

KENT E. CATTANI, Judge

CONCURRING:

/S/

MAURICE PORTLEY, Presiding Judge

/S/

JOHN C. GEMMILL, Judge