

NOTICE: NOT FOR PUBLICATION.
UNDER ARIZ. R. SUP. CT. 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

JOHNNY LEE TREMBLE, JR., *Appellant*.

No. 1 CA-CR 12-0743
FILED 12-3-2013

Appeal from the Superior Court in Maricopa County
No. CR2011-159225-002
The Honorable Jo Lynn Gentry-Lewis, Judge

REMANDED WITH INSTRUCTIONS

COUNSEL

Arizona Attorney General's Office, Phoenix
By Andrew Reilly

Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Kathryn L. Petroff

Counsel for Appellant

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MEMORANDUM DECISION

Judge Sally Schneider Duncan delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Kenton D. Jones joined.

D U N C A N, Judge:

¶1 Johnny Lee Tremble, Jr. appeals his sentence¹ for possession of marijuana with two prior felony convictions.² Tremble first argues that the superior court did not comply with Rule 17.6 of the Arizona Rules of Criminal Procedure when it accepted defense counsel's stipulation to his prior felony convictions and sentenced him without engaging in the required colloquy. He also argues the superior court did not properly grant him pre-incarceration credit. As we explain below, we agree with Tremble and therefore remand to the superior court for proceedings consistent with this decision.

FACTS AND PROCEDURAL BACKGROUND

¶2 Tremble was on probation when he was convicted and sentenced for possession of marijuana. After defense counsel stipulated to two prior felony convictions,³ Tremble was sentenced to a period of incarceration of three years for the possession offense and a concurrent sentence of one year for a probation violation. The amount of pre-incarceration credit to be given to Tremble was not stated on the record.

¹ Tremble states in his notice of appeal and opening brief that he appeals both his conviction and sentence; however, his arguments on appeal relate solely to his sentence, and our discussion is therefore also limited to his sentence.

² We note the sentencing minute entry incorrectly states that Tremble was sentenced with one prior felony conviction. Tremble was actually sentenced with two prior felony convictions. We therefore correct the minute entry to reflect two convictions pursuant to A.R.S. § 13-4037.

³ The State alleged nine prior felony convictions.

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DISCUSSION

I. Rule 17.6 Colloquy At Sentencing

¶3 When a defendant admits or stipulates to the existence of a prior conviction, he waives certain constitutional rights and becomes eligible for an enhanced sentence without the requirement for formal proof by the State. *State v. Morales*, 215 Ariz. 59, 61, ¶¶ 8-9, 157 P.3d 479, 481 (2007). But unless the defendant admits the existence of the prior felony convictions while testifying on the stand, the court is required to engage in a colloquy to determine if the defendant's admission is voluntary and intelligent.⁴ Ariz. R. Crim. P. 17.2; Ariz. R. Crim. P. 17.6; *Morales*, 215 Ariz. at 60, ¶ 1, 157 P.3d at 480.

¶4 Tremble argues that the superior court failed to engage in the colloquy required by Rule 17.6 after accepting defense counsel's stipulation to his prior felony convictions. Tremble did not object at sentencing, and therefore, we review solely for fundamental error. *Morales*, 215 Ariz. at 61, ¶ 10, 157 P.3d at 481 (citing *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005)). "A complete failure to afford a Rule 17.6 colloquy is fundamental error because a defendant's waiver of constitutional rights must be voluntary and intelligent." *Morales*, 215 Ariz. at 61, ¶ 10, 157 P.3d at 481. Here, the superior court neither advised Tremble of his constitutional rights nor discussed the consequences of defense counsel's stipulation to the prior felony convictions. The State also does not dispute that the court failed to engage in the required colloquy. Because we have no way of knowing whether Tremble's waiver of his constitutional rights by defense counsel's stipulation was voluntary and intelligent, we conclude that the error is fundamental.

⁴ The superior court must address the defendant personally in open court to ensure the defendant understands the nature of the charge, the range of possible sentences, the constitutional rights the defendant forgoes as a result of the admission, and the right to deny the charges. Ariz. R. Crim. P. 17.2(a)-(d); Ariz. R. Crim. P. 17.6. The colloquy is required whether the defendant admits to the prior felony convictions or defense counsel stipulates to the convictions. *Morales*, 215 Ariz. at 60, ¶ 1, 157 P.3d at 480.

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¶5 Next we turn our attention to whether Tremble has met his burden of persuasion to show that the error caused him prejudice. “[P]rejudice generally must be established by showing that the defendant would not have admitted the fact of the prior conviction had the colloquy been given.” *Id.* at 62, ¶ 11, 157 P.3d at 482. Evidence that the defendant would not have stipulated to the prior conviction had the colloquy taken place is unlikely to be in the record on appeal. *State v. Carter*, 216 Ariz. 286, 291, ¶ 23, 165 P.3d 687, 692 (App. 2007).

¶6 Although Tremble does not dispute the accuracy or existence of his prior felony convictions, the record does not reflect whether he would not have admitted the fact of prior convictions had he been informed of the constitutional rights he was waiving or the consequences of that waiver. The State argues that Tremble was not prejudiced by the superior court’s failure to engage in the Rule 17.6 colloquy because Tremble made a strategic decision to stipulate to the prior felony convictions and he received a shorter sentence as a result. While that may be true, it is not conclusive as to whether he would not have stipulated to the prior felony convictions had the colloquy occurred.

¶7 The record is sufficient to disprove the existence of prejudice if there is conclusive proof of the convictions, such as certified copies of the convictions. *See Morales*, 215 Ariz. at 62, ¶ 13, 157 P.3d at 482. Here, the record does not contain certified copies of Tremble’s prior felony convictions and it is not otherwise conclusive that there was no prejudice. Although Tremble admitted to the existence of four of his prior felony convictions on the record at the sentencing hearing, he was not under oath at the time. The record does not establish that there was no prejudice and the admission itself does not satisfy Rule 17.6. Ariz. R. Crim. P. 17.6; *see also State v. Hauss*, 140 Ariz. 230, 231, 681 P.2d 382, 383 (1984) (“[T]here is no need to prove a prior conviction by extrinsic evidence where the accused has, under oath, admitted it.”); *Morales*, 215 Ariz. at 61, ¶ 7, 157 P.3d at 481 (need for hearing obviated if defendant admits to the prior conviction).

¶8 If the record on appeal is insufficient to disprove the existence of prejudice, the defendant is generally entitled to a hearing on remand to determine whether such prejudice exists. *Carter*, 216 Ariz. at 290-91, ¶¶ 21-22, 165 P.3d at 691-92. We therefore remand to the superior court for a determination of whether Tremble was prejudiced by the superior court’s failure to conduct the required Rule 17.6 colloquy. If

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Tremble demonstrates prejudice, his sentence must be vacated and he must be resentenced.

II. Pre-Incarceration Credit

¶9 Tremble also argues that his pre-incarceration credit was calculated incorrectly. Failure to award full credit for time served is fundamental error that may be raised at any time. *State v. Cofield*, 210 Ariz. 84, 86, ¶ 10, 107 P.3d 930, 932 (App. 2005). Although Tremble and the State dispute the number of days Tremble is entitled to, we need not resolve the issue because the superior court did not announce the amount of time credited against his sentence on the record. See Ariz. R. Crim. P. 26.10(b)(4). At the sentencing hearing, the superior court stated Tremble would “be given credit for time served, whatever that is.” This statement is not sufficient for the superior court to fulfill its “duty and responsibility of computing and pronouncing the presentence custody credit at the time of sentence in the presence of the defendant.” *State v. Nieto*, 170 Ariz. 18, 19, 821 P.2d 285, 286 (App. 1991); A.R.S. § 13-603(H) (2010); Ariz. R. Crim. P. 26.10(b)(4). On remand, the superior court shall calculate and determine the amount of pre-incarceration credit to which Tremble is entitled.

CONCLUSION

¶10 For the foregoing reasons, we remand to the superior court for a determination of prejudice and resentencing if appropriate. On remand, the court shall also specify the amount of pre-incarceration credit to which Tremble is entitled. We also correct the sentencing minute entry to reflect two prior felony convictions.



Ruth A. Willingham - Clerk of the Court
FILED: mjt

*The Honorable Sally Schneider Duncan, Judge Pro Tempore of the Court of Appeals, Division One, is authorized by the Chief Justice of the Arizona Supreme Court to participate in the disposition of this appeal pursuant to Article 6, Section 3, of the Arizona Constitution and A.R.S. §§ 12-145 to -147.