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AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

FRANK DEJUAN GALO, *Appellant*.

No. 1 CA-CR 13-0077

FILED 11-19-2013

Appeal from the Superior Court in Maricopa County

No. CR2012-106024

The Honorable Brian Kaiser, Judge *Pro Tem*

AFFIRMED AS CORRECTED

COUNSEL

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By Michael O'Toole

Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix

By Joel M. Glynn

Counsel for Appellant

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MEMORANDUM DECISION

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

J O N E S, Judge:

¶1 Frank Galo appeals from his conviction and sentences¹ for two counts of aggravated assault on a peace officer and one count of misconduct involving weapons. For the reasons discussed below, we affirm as corrected.

FACTS AND PROCEDURAL BACKGROUND

¶2 Galo was indicted on February 3, 2012, on two counts of aggravated assault (Counts 1 and 2) and one count of misconduct involving weapons (Count 3). The State further alleged Galo had seven historical felony convictions.

¶3 On November 14, 2012, a jury found Galo guilty on all charges. During the jury's deliberation, with Galo present, the State informed the trial court that it would not submit allegations of dangerousness to the jury because it wished to have Galo sentenced as a Category 3 Repetitive Offender. The State explained to the trial court that if the jury returned guilty verdicts, Galo would face a sentencing range of 15.75 to 35 years flat time for Counts 1 and 2. Defense counsel stated she was explaining this information to Galo.

¶4 On November 15, 2012, an aggravation hearing was held. Before it began, the trial court addressed a question Galo had regarding the State's decision not to submit allegations of dangerousness to the jury. The trial court explained it was the State's option to allege dangerousness in the first instance, and even if the allegation was initially made, the State was able to later decide not to submit the allegation to the jury. The trial court then explained different sentencing statutes apply under different situations, and a defendant with prior felony convictions faces a steeper

¹ Galo's arguments on appeal relate solely to his sentences. Therefore, we limit our discussion to his sentences.

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sentencing range than a defendant merely convicted of a dangerous offense. The trial court also noted the State wanted the higher sentencing range applied to Galo. Galo echoed the trial court's explanation, stating "[t]hat enhances my sentencing." Galo then stated he disagreed with the decision not to designate his offense as dangerous and wanted that disagreement on the record.

¶5 Following that discussion and prior to his sentencing hearing, Galo wrote a letter to the trial court asking again for an explanation of why his offenses were not being designated as dangerous for sentencing purposes. This letter asserted Galo believed his attorney was allowing the State to drop the allegations of dangerousness in an effort to enhance his sentence.

¶6 The sentencing hearing took place on January 4, 2013. Prior to the State introducing evidence of Galo's prior convictions, defense counsel informed the trial court that Galo would admit to all seven of his prior felony convictions. After defense counsel recited the case number and date of sentencing or date of conviction for each prior offense, the trial court conducted a colloquy. The trial court asked Galo if he intended to admit each prior conviction, to which he replied, "Yes. Yes, I do." The trial court then inquired if Galo understood that he is not required to do so and that he has the right to require the State to prove each prior conviction. Galo responded in the affirmative.

¶7 Following this exchange, the trial court again asked Galo if he was waiving his right to have the State prove his prior convictions. At this time, Galo once more expressed confusion concerning the State's decision not to submit allegations of dangerousness to the jury. He also questioned the effect admitting his prior convictions would have on his ability to have his offenses designated as dangerous. After defense counsel stated she had already explained the dangerousness issue to Galo and the trial court again explained the issue, the trial court asked Galo if he understood he had the right to require the State to prove the prior convictions and if he was going to waive that right. Galo replied he understood his right, he was waiving it, and told the trial court "you don't have to prove that I got them. They're there."

¶8 Galo was sentenced to a maximum term of 28 years on Counts 1 and 2 and a maximum term of 12 years on Count 3, to be served concurrently. Galo timely appeals. We have jurisdiction pursuant to

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Arizona Revised Statutes (A.R.S.) sections 12-120.21(A) (2012), 13-4031 (2012), and 13-4033(A)(1) (2012).

DISCUSSION

I. Rule 17.6 Colloquy

¶9 Galo contends the trial court committed fundamental error when it accepted his admission to seven prior felony convictions without conducting a complete colloquy as required by Arizona Rules of Criminal Procedure 17. Specifically, Galo argues that the trial court erred by failing to advise him of the consequences his admission would have on his possible prison sentences and failing to ensure that his admission was made voluntarily and intelligently.² He requests a remand to the trial court for an evidentiary hearing to determine whether he understood the sentencing consequences of his admission and whether his admission was free from coercion, threats or promises. Because Galo did not raise these objections to the trial court, we review solely for fundamental error. *State v. Morales*, 215 Ariz. 59, 61, ¶ 10, 157 P.3d 479, 481 (2007).

¶10 Arizona Rules of Criminal Procedure 17.6 makes Rule 17's colloquy requirement for accepting plea agreements applicable to admissions of prior convictions. The purpose of Rule 17 is to ensure that an admission of prior convictions by a defendant is voluntary and intelligent. *See* Ariz. R. Crim. P. 17.1(b); *Morales*, 215 Ariz. at 60, ¶ 1, 157 P.3d at 480. Prior to accepting a plea, a court must inform the defendant of, and ensure the defendant understands: 1) the nature of the charge, 2) the nature and range of possible sentences, including any special conditions regarding the sentences, 3) the constitutional rights he or she is waiving by entering a plea, and 4) he or she has the right to plead not guilty. Ariz. R. Crim. P. 17.2. In addition, a court must determine the defendant wishes to forego his or her constitutional rights and "the plea is made voluntarily and not the result of force, threats or promises." Ariz. R. Crim. P. 17.3.

² Galo also argues that the court erred by never formally accepting his admission. The sentencing transcript, however, demonstrates the trial court did in fact accept Galo's admission. The trial court responded to Galo's admission by saying, "Thank you, sir. All right." The trial court then proceeded to sentence Galo as a non-dangerous repetitive offender, which it could have done only if it had accepted Galo's admission.

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¶11 Here, the record shows an incomplete Rule 17 colloquy was given to Galo. The trial court did ask if Galo understood his right to have the State prove each prior conviction and if he wanted to waive that right. The trial court did not, however, specifically address how Galo's admission of prior convictions would increase the applicable sentencing ranges. See *State v. Anderson*, 199 Ariz. 187, 194, ¶¶ 36-37, 16 P.3d 214, 221 (App. 2000) (finding error where the trial court failed to advise the defendant of the effect an admission would have on his sentence and determine if he knew the consequences of his admission). Further, the trial court failed to ensure Galo's admission was free of any threats, coercion or promises. See Ariz. R. Crim. P. 17.3; *State v. Bunting*, 226 Ariz. 572, 576-77, ¶ 11, 250 P.3d 1201, 1205-06 (App. 2011) ("[T]he trial court's failure to conduct a colloquy . . . to ascertain whether [the defendant's] submission on the record was freely, intelligently, and voluntarily made constitutes fundamental error."). Because Galo admitted to the prior convictions without the benefit of a complete Rule 17 colloquy, we conclude this was error. See *State v. Geeslin*, 221 Ariz. 574, 578, ¶ 14, 212 P.3d 912, 916 (App. 2009), *vacated in part on other grounds*, 223 Ariz. 553, 225 P.3d 1129 (2010) (stating a failure to obtain an admission pursuant to Rule 17.6 is fundamental error).

¶12 However, an inadequate colloquy does not automatically invoke resentencing of the defendant. *State v. Young*, 230 Ariz. 265, 269, ¶ 11, 282 P.3d 1285, 1289 (App. 2012) (citing *State v. Carter*, 216 Ariz. 286, 290, ¶ 18, 165 P.3d 687, 691 (App. 2007)). Under fundamental error analysis, Galo bears not only the burden of demonstrating that fundamental error occurred, but also that it caused him prejudice. *State v. Henderson*, 210 Ariz. 561, 568, ¶ 20, 115 P.3d 601, 608 (2005). Prejudice is established by showing the defendant would not have made the admission had he received a complete Rule 17 colloquy. *Morales*, 215 Ariz. at 62, ¶ 11, 157 P.3d at 482; *Young*, 230 Ariz. at 269, ¶ 11, 282 P.3d at 1289. When the existence of prejudice cannot be determined from the record, remand to the trial court for an evidentiary hearing is the appropriate remedy. *State v. Carter*, 216 Ariz. 286, 291, ¶ 23, 165 P.3d 687, 692 (App. 2007). Remand is unnecessary, however, if the record contains evidence that conclusively proves a defendant's prior convictions. *Morales*, 215 Ariz. at 62, ¶ 13, 157 P.3d at 482 (finding no need for an evidentiary hearing when copies of defendant's prior convictions are in the record); *Carter*, 216 Ariz. at 291, ¶ 22, 165 P.3d at 692.

¶13 The State initially argues an absence of prejudice as the record demonstrates Galo was aware of the sentencing information

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omitted from the colloquy. See *State v. Alvarado*, 121 Ariz. 485, 490, 591 P.2d 973, 978 (1979) (finding no reversible error where the record illustrated the defendant was previously aware of constitutional rights he was not advised of during the colloquy). The State points to the above referenced letter Galo wrote to the trial court stating “[m]y [a]ttorney is siding with the prosecutor [sic] to enhance my sentencing by dropping the [d]angerous [n]ature of the crime” as proof he understood he would be receiving a greater sentence if treated as a repetitive offender. Also, the record illustrates the trial court informed Galo prior to the aggravating circumstances hearing that someone with prior felony convictions faces a “stiffer, a steeper sentencing range than someone who has merely been convicted of a dangerous offense.”

¶14 Rule 17.2(b), however, requires the trial court inform the defendant of the nature and range of any possible sentence for an offense. Although there is evidence Galo was advised repetitive offenders receive enhanced sentences, the potential presumptive, maximum and aggravated sentencing terms Galo faced if he admitted two or more historical prior convictions were not explained to him.³ The sentencing range applicable to class 2 felonies for first time dangerous offenders is a presumptive term of 10.5 years and a maximum term of 21 years; for a class 4 felony, the presumptive term is 6 years and the maximum term is 8 years. A.R.S. § 13-704(A) (2012). By admitting to his prior convictions, Galo qualified himself as a Category 3 Repetitive Offender. A.R.S. § 13-703(C) (2012). His Category 3 Repetitive Offender status increased the applicable sentencing range for Counts 1 and 2, class 2 felonies, to presumptive terms of 15.75 years, maximum terms of 28 years, and aggravated terms of 35 years, and increased the sentencing range for Count 3, a class 4 felony, to a presumptive term of 10 years, a maximum term of 12 years, and an aggravated term of 15 years. A.R.S. § 13-703(J). These specific ranges were never explained to Galo, and the trial court did not ensure that Galo understood the specific enhancement his admission would have on the applicable sentencing ranges. Therefore, solely on this ground, the record does not demonstrate Galo had sufficient knowledge of the sentencing information omitted from the colloquy to conclusively find he was not prejudiced.

³ The jury found aggravating circumstances under A.R.S. § 13-1204(C) (2012), making the presumptive term the minimum sentence the trial court could impose upon Galo.

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¶15 However, while we conclude the information provided to Galo was insufficient to disprove prejudice on that ground, the State also argues prejudice is disproved because the record contains evidence of Galo's prior convictions. We agree. Even when a Rule 17 colloquy is omitted in its entirety—including information regarding sentencing ranges—remand is unnecessary if evidence of the defendant's prior convictions is in the record. *Morales*, 215 Ariz. at 61-62, ¶¶ 10, 13, 157 P.3d at 481-82. In this case, the record includes a presentence investigation report containing a confidential criminal history summary listing the same seven prior convictions Galo admitted at the sentencing hearing. It also contains sentencing orders from each conviction affixed with Galo's fingerprint.⁴ Presentence investigation reports are given to defense counsel, and each party is allowed the opportunity to object to the contents of the report. Ariz. R. Crim. P. 26.6(a), 26.8(a). The record does not show any objection by Galo or his counsel to the contents of the presentence report. In fact, Galo acknowledges on appeal that the presentence investigation report contains detailed information about his prior convictions and periods of incarceration.

¶16 Additionally, this Court has held that when a defendant asserts prejudice from an incomplete colloquy, the defendant must, at the very least, claim that he would not have admitted the prior felony convictions had a complete colloquy taken place. *Young*, 230 Ariz. at 269, ¶ 11, 282 P.3d at 1289. Galo has not made such an assertion, either in the trial court or on appeal. Nor did he claim, in the trial court or on appeal, he did not commit the prior offenses or the State would not have been able to, or could not now, prove the priors.

¶17 For these reasons, the incomplete colloquy constitutes fundamental, but not reversible, error because the record disproves Galo was prejudiced by the incomplete colloquy.

II. Sentencing Minute Entry Errors

¶18 Galo asserts that the sentencing minute entry contains several errors that should be corrected on review. First, Galo argues that

⁴ While evidence regarding the existence of Galo's fingerprint on the documents was not testified to, a forensic scientist was present and prepared to testify in that regard at Galo's sentencing hearing when Galo admitted the priors, thereby making the taking of the testimony unnecessary.

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the sentencing minute entry should be modified to reflect that he was sentenced as a Category Three Repetitive Offender under A.R.S. § 13-703(J). We agree. Currently, the minute entry states Counts 1 and 2 are “Dangerous pursuant to A.R.S. § 13-704 – Repetitive” and Count 3 is “Non-Dangerous – Repetitive.” It is clear from the record the trial court sentenced Galo under A.R.S. § 13-703(J) as a Category 3 Repetitive Offender. The trial court stated during sentencing that the minimum/presumptive sentence it could impose was 15.75 years and actually imposed maximum prison terms of 28 years for Counts 1 and 2, class 2 felonies, and 12 years for Count 3, a class 4 felony. These are the exact sentencing terms found in A.R.S. § 13-703(J) for class 2 and class 4 felonies. Therefore, we correct the sentencing minute entry to demonstrate Galo was sentenced as a non-dangerous, repetitive offender under A.R.S. § 13-703(J), and not A.R.S. § 13-704, for all three counts.

¶19 Second, Galo argues the sentencing minute entry should be corrected to designate Counts 1 and 2 as “Non-Dangerous” because the jury was not asked to make a separate finding of dangerousness by the State. We disagree.

¶20 A separate, specific finding of dangerousness by a jury is not needed if an element of the charged offense requires proof of the dangerous nature of the offense. *State v. Smith*, 146 Ariz. 491, 499, 707 P.2d 289, 297 (1985); *State v. Gatliff*, 209 Ariz. 362, 364, ¶ 12, 102 P.3d 981, 983 (App. 2004) (stating that no separate finding is required if “‘dangerousness’ is inherent in [the] conviction”). An offense is dangerous if it involves the “discharge, use or threatening exhibition of a deadly weapon or dangerous instrument.” A.R.S. § 13-105(13) (2012).

¶21 Here, the jury instructions stated the crime of aggravated assault against a peace officer required proof of two elements: 1) “the defendant committed an assault and the defendant knew or had reason to know that the person assaulted was a peace officer performing official duties,” and 2) “the defendant used a deadly weapon or dangerous instrument.” Thus, the jury’s guilty verdicts on Counts 1 and 2 necessarily included a finding of dangerousness.

¶22 Although the trial court chose to sentence Galo as a non-dangerous repeat offender, the offense still remains a dangerous offense that can affect any future sentence. *State v. Sammons*, 156 Ariz. 51, 55, 749 P.2d 1372, 1376 (1988); *State v. Trujillo*, 227 Ariz. 314, 321-22, ¶¶ 33, 37, 257

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P.3d 1194, 1201-02 (App. 2011). Accordingly, the sentencing minute entry was not in error to designate Counts 1 and 2 as dangerous felonies.

¶23 Third, Galo argues the sentencing minute entry should specifically list the two qualifying historical prior felony convictions the trial court used to qualify him to be sentenced under A.R.S. § 13-703(J). We note Galo cites no authority supporting any such requirement, and we disagree with his argument.

¶24 Ariz. R. Crim. P. 26.16(b) requires the trial court to enter the exact terms of a defendant's judgment and sentence in the court's minutes. Here, the sentencing minute entry satisfies Rule 26.16(b). It contains Galo's guilty judgments as well as the prison sentence he received for all three counts, including whether each sentence was to be served as flat time or was 85% eligible. Moreover, A.R.S. § 13-703(C) only requires a defendant to have "two or more historical prior felony convictions." A conviction qualifies as a historical prior felony if it is the defendant's third or more felony conviction. A.R.S. § 13-105(22)(d). Galo admitted to, and the sentencing minute entry lists, seven prior felony convictions. This means five of Galo's felony convictions qualified as historical prior felony convictions. Which two historical prior felony convictions the trial court decided to use for sentencing enhancement purposes is irrelevant to the terms of defendant's sentences.

CONCLUSION

¶25 For the foregoing reasons, we affirm Galo's conviction and sentences with the sentencing minute entry correction noted above.



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.