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

DIVISION ONE
FILED: 04-27-2010
PHILIP G. URRY, CLERK
BY: GH

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. ERNIE JESUS LOPEZ, Appellant.	)	1 CA-CR 08-0421
	)	DEPARTMENT E
	)	MEMORANDUM DECISION (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court of Maricopa County

Cause No. CR 2006-163205-001DT

The Honorable Edward O. Burke, Judge

CONVICTION AFFIRMED;
REMANDED FOR RESENTENCING

Terry Goddard, Attorney General
by Kent E. Cattani, Chief Counsel/Capital Litigation Section
Suzanne M. Nicholls, Assistant Attorney General
Attorneys for Appellee Phoenix

James Haas, Maricopa County Public Defender
by Eleanor S. Terpstra, Deputy Public Defender
Attorneys for Appellant Phoenix

W E I S B E R G, Judge

¶1 Ernie Jesus Lopez ("Defendant") appeals from the conviction and sentence imposed after a jury trial. His counsel

has filed a brief in accordance with *Anders v. California*, 386 U.S. 738, 744 (1967), and *State v. Leon*, 104 Ariz. 297, 299, 451 P.2d 878, 880 (1969), advising this court that after a search of the entire record on appeal, she finds no arguable ground for reversal. This court granted Defendant an opportunity to file a supplemental brief, which he has done. Counsel now requests that we search the record for fundamental error. *Anders*, 386 U.S. at 744; *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999).

¶2 We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001), and 13-4033 (A) (2001). We view the facts in the light most favorable to sustaining the verdict. *See State v. Stroud*, 209 Ariz. at 410, 412, ¶ 6, 103 P.3d 912, 914 (2005).

BACKGROUND

¶3 Defendant was indicted and charged with one count of forgery, a class 4 felony after he attempted to cash a check written on his former employer's account. The State alleged that Defendant was on release when he committed this offense, that he had two historical prior felony convictions, and that there were aggravating circumstances other than prior convictions.

¶4 A jury trial took place on April 2 and 3, 2008. M.C., a Wells Fargo Bank teller, testified that on October 9, 2006 Defendant presented a check written on the account of Ardavin

Builders, Inc. Because the check number was out of sequence from others recently deposited or cashed by Ardavin, the teller called Ardavin's payroll department, and as a result, did not cash the check. The bank branch manager called police.

¶5 J.B., a general manager of Ardavin, testified that he had hired Defendant in April 2005, but because Defendant was not reliable, let him go. J.B. said that Defendant never complained that he had not been fully paid, that Defendant would have filled out a weekly time card, and to J.B.'s knowledge, Defendant worked a total of 42.5 hours in the two weeks he was employed.

¶6 K.O., Ardavin's controller, testified that she received a call on October 9, 2006 to verify a payroll check. The check number was a higher number than she was currently using, and K.O. told the bank not to honor the check. Although the check was dated October 6, 2006 and payable to Defendant, he was not on the payroll at that time. Furthermore, Defendant's name was in upper and lower case rather than all upper case; the amount stated should have been "one thousand five hundred thirty-five dollars" rather than "fifteen hundred thirty-five dollars"; Ardavin's address on the check was incorrect; and the vice-president's signature was not in ink and did not have two prominent dots over two letters "i" in his name as it should. K.O. testified that in 2005, Defendant had received two payroll checks, one for $181.01 and one for $368.47, but Ardavin had not issued the October 6, 2006 check to Defendant.

¶7 Officer J.F. testified that he had been called to Wells Fargo Bank and had received a description of Defendant, whom he identified in the courtroom. When Defendant told J.F. that the check was for his last week of work and that he had earned $13 or $14 per hour, the amount of the check seemed incorrect. After calling K.O. at Ardavin and hearing that the check had not been issued to Defendant, J.F. arrested Defendant for forgery and advised him of his *Miranda* rights. Defendant informed J.F. that he had been employed by Ardavin for three months, had never been paid for some of his work, and that when he called Ardavin, a woman told him that he would receive a check in the mail. Following this testimony, the State rested

¶8 Defendant called his girlfriend, T.M., who testified that the check had come in the mail and that she had accompanied Defendant to the bank. T.M. said that she believed the check was payment for work Defendant had done in the past. She stated that neither she nor Defendant received any money from the check.

¶9 Defendant took the stand and said that he could read a little and could do multiplication of small numbers only. He said that he was paid twice while working for Ardavin but that he had worked an additional four weeks before being fired.

¶10 After his termination, Defendant said that he had called Ardavin to ask for payment and that in October 2006 he had received a check in the mail, which looked like his other checks and seemed

about the right amount. He denied that he had done anything wrong and said that the paycheck stub had been in the envelope that he took to the bank. On cross-examination, Defendant admitted that he had been convicted of a felony committed on June 25, 1997 and for which he was sentenced on August 21, 1998.

¶11 During closing, defense counsel argued that the State failed to call the only person who could say that he did not issue, sign, or authorize anyone to digitally scan his signature: the vice president of Ardavin, Ron Ricci. Nevertheless, the jury found Defendant guilty and found as an aggravating circumstance that he had committed the offense with an expectation of receipt of something of pecuniary value.

¶12 The court sentenced Defendant to a mitigated term of eight years with two historical prior felony convictions[1] and awarded forty-four days of presentence incarceration credit. The court also assessed a $10 probation surcharge and ordered Defendant to make restitution to Ardavin Builders in the amount of $1,535, but it later vacated the restitution order as erroneous.

[1]The minute entry incorrectly states that the offense is non-dangerous and non-repetitive. The latter is erroneous, but we anticipate it will be corrected upon resentencing.

DISCUSSION

A. The Jury Questionnaire

¶13 In his supplemental brief, Defendant argues that the jury questionnaire form placed undue emphasis on the possibility that a potential juror might be Hispanic and thus "negatively affected [Defendant], who is Hispanic." Before trial began, defense counsel objected to the form, which stated: "Please indicate your race below" from among the following choices: "Black/African American, White, Native Hawaiian/Pacific Islander, Asian, and Other." The next question asked, "Are you Hispanic/Latino?" and asked for a "Yes" or "No" response.

¶14 Counsel asserted that the form was racist and would intimidate jurors and cause them to feel that they would be singled out for an affirmative response to the second question. The court responded that the form had been in use since February 2006 and had been revised at the request of defense lawyers for Hispanic clients who contended that a proportionate number of Hispanic jurors were not being summoned. The court added that Hispanic/Latino heritage is not a racial category but an ethnic group, that the form used the same categories as federal census forms, and that it was to permit the jury commissioner to show that he had called a proportionate number of Hispanic jurors.

¶15 Defense counsel then asked for a stay in order to seek special action relief, which the court denied. Counsel argued that

the form illegally called attention to his client's ethnicity, denied Hispanic persons equal protection, would deny Defendant a fair trial, and improperly implied that those who checked the Hispanic/Latino box would be investigated by law enforcement agencies. Although defense counsel said that he would seek a continuance, voir dire began later in the day.

¶16 Before beginning jury selection, the court addressed the venire and explained that the form had been approved by our Supreme Court and that "state and federal law require that jury panels be representative of the racial and ethnic populations in our communities. The court administrators use the racial and ethnic categories . . . to make sure we're in compliance with the law when individuals are summoned for jury duty." The court noted that the form had been revised to reduce confusion over racial categories and that the present form was similar to that used by the census bureau. The court then asked if anyone felt that he or she could "not be fair and impartial as a juror in this case because of any issue you may have with the biographical form?" No one responded affirmatively.

¶17 Defense counsel later asked if anyone felt "pressure" to answer the question about Hispanic/Latino. Two jurors said that questions about gender and race should be unnecessary, and one said that she wondered "if it was another way for the State . . . to try

to pinpoint people that they might eventually want to track."[2] The other said it made her "guess that it was going to be [a] Latino" on trial. A third juror said that the question "makes it seem like there's something very significant about that yes or no question which to me is inappropriate."[3] A fourth juror said that she wondered but assumed there must be a reason, "like maybe in choosing jurors you want to be sure that you're not prejudiced against somebody and that you choose people that belong to that ethnicity or something." When asked, no one stated that he or she could not be fair and impartial. Before the attorneys completed their strikes, the court referred to the form and said that "nobody keeps a record on who signed what. We just keep the gross numbers." The court added that there had been a lawsuit about proportional representation and "this helps us to respond to [that], so there's really no evil intent."

¶18 After both counsel passed the panel for cause, they asked to speak to the court in chambers. The prosecutor contended that the juror's statement that she expected that the defendant would be Hispanic had tainted the entire panel by suggesting that the State had brought the charges because of Defendant's ethnicity. Defense

[2]The jury pool was so large that this juror was not considered.

[3]The jury pool was so large that neither this nor the fourth juror were considered.

counsel joined in the objection and urged the court to grant a mistrial. The court denied the motion because defense counsel had "dragged the information out of the jurors," the question was on the form because of defense attorneys' concerns, and the juror who said that the question bothered her had been struck.

¶19 Defendant concedes that no state or federal law requires "a representative proportional Hispanic population in jury pools" but still argues that the form denied him a fair trial and asks this court to order full briefing on the issue. We decline this invitation. Defendant has had an opportunity to brief this issue and admits there is no requirement that the jury pool reflect the proportion of Hispanics in the community. There was no reversible error.

B. Sufficiency of the Evidence

¶20 Defendant next argues that insufficient evidence supported his conviction because the State failed to call Ron Ricci, the person who signed all checks issued by Ardavin. Nevertheless, K.O. testified that Ricci's signature on the check at issue was not in ink but was either computer-generated or a copy and lacked the two prominent dots over each "i," which were unique and something that Ricci always did. The State used this testimony to satisfy its burden of proving that Defendant knowingly presented a check that had been falsely made, completed, or altered or which contained false information and that he did so with intent to

defraud. *See* A.R.S. § 13-2002 (2001). The jury was instructed that to falsely make a check "means to execute a check which appears or purports to be genuine but is not because the person who appeared to have executed it did not authorize the execution of such check." K.O.'s testimony, if believed, was sufficient to establish that the check was not genuine because Ricci had not authorized its execution. We find no reversible error.

C. Standard of Proof for Prior Convictions

¶21 Defendant contends that the superior court erroneously applied a preponderance of the evidence standard in finding proof of the prior felony convictions. Although the correct standard is "clear and convincing," *State v. Cons*, 208 Ariz. 409, 415-16, ¶ 15, 94 P.3d 609, 615-16 (App. 2004), Defendant did not object to the court's statement. Thus, he forfeited his right to relief absent fundamental prejudicial error. *State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 19, 20, 115 P.3d 601, 607 (2005); *State v. Martinez*, 210 Ariz. 578, 580, n. 2, 115 P.3d 618, 620 n. 2 (2005). Fundamental error goes to the foundation of the case, takes a right essential to the defense, or deprives the defendant of a fair trial. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. But to prevail, "a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id*. at ¶ 20.

¶22 *Henderson* held that use of a standard of review less than that constitutionally required to find facts for enhancing a defendant's sentence constituted fundamental error. *Id*. at 568, ¶ 25, 115 P.3d at 608. Accordingly, fundamental error occurred here. Nevertheless, Defendant has not established resulting prejudice.

¶23 To enhance a sentence, the State must "submit positive identification establishing that the accused is the same person who previously was convicted, as well as evidence of the conviction itself." *Cons*, 208 Ariz. at 415, ¶ 16, 94 P.3d at 615. "Although the preferred method . . . is submission of certified conviction documents bearing the defendant's fingerprints, courts may consider other kinds of evidence." *State v. Robles*, 213 Ariz. 268, 273, ¶ 16, 141 P.3d 748, 753 (App. 2006) (citation omitted). *See also State v. Nash*, 143 Ariz. 392, 403, 694 P.2d 222, 233 (1985) (upholding acceptance of pen pack); *State v. Baca*, 102 Ariz. 83, 87, 425 P.2d 108, 112 (1967) (certified prison records with fingerprint card adequate). Thus, *Robles* held that Department of Corrections records showing prior convictions accompanied by testimony that linked the records to the defendant were sufficient. 213 Ariz. at 273, ¶ 17, 141 P.3d at 753.

¶24 Here, Defendant informed the court of his birth date and name. The State introduced without objection certified copies of the minute entries for two felony convictions in CR 96-08105 and

CR-98-07209[4] and a certified copy of a DOC "pen pack," which listed these two and two other felony convictions. The pen pack contained other information indicating its reliability including Defendant's name and birth date, photographs, and fingerprints; it also listed the prior felony conviction that Defendant had admitted on the stand, which further confirmed that the records belonged to him.

¶25 Moreover, an expert testified that the fingerprints taken from Defendant in court matched the fingerprints in the pen pack. Because Defendant accepted the authenticity of the pen pack and the minute entries showing his convictions, evidence conclusively proving those prior convictions was in the record. *State v. Morales*, 215 Ariz. 59, 62, ¶ 13, 157 P.3d 479, 482 (2007). Accordingly, no reasonable judge, applying the clear and convincing standard of proof, "could have reached a different result." *See Henderson*, 210 Ariz. at 569, ¶ 27, 115 P.3d at 609. Instead, the record contains clear and convincing evidence that Defendant had at least two prior historical felonies, which is all that the court needed to impose an enhanced but mitigated sentence in this case.

---

[4]The State argued that it was unable to produce certified copies of all four convictions because on the day before sentencing, the fingerprint analyst who had examined the prints on the minute entries informed the prosecutor of a medical condition that prevented her from testifying.

D. Failure to Impose Exceptionally Mitigated Sentence

¶26 Defendant's final contention is that the superior court committed fundamental error in finding that it could not impose any sentence less than eight years in light of his two prior felony convictions. He argues that the court's finding of "no less than six mitigating factors" rendered him eligible for a super-mitigated term. At sentencing, however, the court stated that "the best [it] could do under the terms of the law" was to impose an eight year term and asked defense counsel to tell Defendant's family that it was the best the court could do.

¶27 This court ordered both sides to file supplemental briefing on this issue, and the State has conceded that because the court failed to recognize that it had discretion to impose a supermitigated term, we should remand for resentencing. As our supreme court held in *State v. Garza*, 192 Ariz. 171, 176, ¶ 17, 962 P.2d 898, 903 (1998), "[e]ven when the sentence imposed is within the trial judge's authority, if the record is unclear whether the judge knew he had discretion to act otherwise, the case should be remanded for resentencing." Because the court stated its desire to impose a lesser sentence and apparently was unaware that it could have done so, we remand for the court to reconsider the sentence imposed.

CONCLUSION

¶28 In light of our conclusion above, we affirm the conviction but order that this case be remanded for the court to reconsider the sentence imposed.

/s/_____
SHELDON H. WEISBERG, Judge

CONCURRING:

/s/_____
DONN KESSLER, Presiding Judge

/s/_____
LAWRENCE F. WINTHROP, Judge