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: 02/11/2010
PHILIP G. URRY,CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	1 CA-CR 09-0022
v.	DEPARTMENT E
KELLY DEAN LAVELLE, Appellant.	**MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-116094-001 SE

The Honorable Edward O. Burke, Judge

AFFIRMED AS MODIFIED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel, Criminal Appeals/ Capital Litigation Section
and Robert A. Walsh, Assistant Attorney General Criminal Appeals Section
Attorneys for Appellee

James Haas, Maricopa County Public Defender — Phoenix
By Stephen R. Collins, Deputy Public Defender
Attorney for Appellant

H A L L, Judge

¶1 Defendant, Kelly Dean Lavelle, appeals from his sentences for one count of possession of dangerous drugs for sale pursuant to

Arizona Revised Statutes (A.R.S.) section 13-3407(A)(2) (Supp. 2008), a class two felony, one count of possession or use of marijuana pursuant to A.R.S. § 13-3405(A)(1) (Supp. 2008), a class six felony, two counts of possession of drug paraphernalia pursuant to A.R.S. § 13-3415 (2001), a class six felony, and two counts of misconduct involving weapons pursuant to A.R.S. § 13-3102(A)(4) (Supp. 2008), a class four felony. For the reasons set forth below, we affirm the sentences.

FACTS AND PROCEDURAL HISTORY

¶2 The Maricopa County Grand Jury issued an indictment on April 4, 2008, charging defendant with the offenses listed above and one additional count of possession of burglary tools pursuant to A.R.S. § 13-1505 (Supp. 2008), a class six felony. On May 28, 2008, the State electronically filed two virtually simultaneous amendments[1] to the indictment alleging prior convictions for the purpose of sentencing enhancements.

¶3 One amendment alleged the following historical non-dangerous felony convictions pursuant to A.R.S. § 13-703(C) (Supp. 2009)[2]: (1) a 2004 third-degree burglary, a class four felony (the

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[1] Each amendment is stamped as being filed on "05/28/2008 7:27:31 AM."

[2] Effective December 31, 2008, significant portions of the Arizona criminal sentencing code were reorganized. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. This renumbering included no

2004 offense); (2) a 2001 theft of a means of transportation, a class three felony (the 2001 offense); and (3) a 1993 theft, a class six felony (the 1993 offense).

¶4 The other amendment alleged convictions pursuant to A.R.S. § 13-702.02 (2001),[3] that were "multiple offenses not committed on the same occasion and . . . [were] not historical prior felony convictions under [A.R.S. § 13-703(C)]." This amendment alleged convictions for the 2001 and 1993 offenses. The amendment noted that "if Defendant is convicted of these crimes, [he] shall be sentenced pursuant to A.R.S. § 13-702.02."

¶5 On October 17, the court held a settlement conference attended by both parties. At the settlement conference, the court and defense counsel (Ms. Engineer) discussed the defendant's knowledge of his prior felonies:

> THE COURT: Okay. And your client has three allegeable historical prior felony convictions.
>
> MS. ENGINEER: Yes, your honor.
>
> THE COURT: Which puts him – he realizes that, by proceeding to trial, if he is convicted of

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substantive changes. *See id.* § 119. Thus, for ease of reference, we refer when possible to the most current section numbers for sentencing statutes rather than those in effect when the offenses were committed.

[3] As part of the sentencing code reorganization, A.R.S. § 13-702.02 was combined with the former § 13-604 to create A.R.S. § 13-703 (Supp. 2009).

> any of the counts, he will face, in all likelihood, a sentencing range for that classification with two prior felony convictions?
>
> MS. ENGINEER: Yes, your honor. I did advise him that it's anywhere from, from what I was able to calculate, 10.5 years and, if there's aggravating, it could go to 35 years.

Defense counsel also stated these facts in a settlement conference memorandum submitted the day before the conference.

¶6 Under direct examination at trial, defendant admitted to three prior convictions—the 2001 and the 2004 convictions, and one for theft, a class 6 felony, which occurred in 1998 (the 1998 offense). On cross-examination, the defendant testified that he did not remember the 1993 offense. At the conclusion of trial, the court dismissed the possession of burglary tools charge, and the jury convicted defendant of the remaining six charges.

¶7 At a combined hearing on the priors and sentencing, the State presented certified copies of the minute entry orders for each of defendant's prior convictions, including the 1998 offense, which had not been alleged by the State as a historical prior felony conviction (HPFC). The State also presented a certified copy of the Arizona Department of Corrections' "pen-pack" for defendant listing defendant's four prior felony convictions, and including his vital statistics, picture, criminal history, and fingerprints.

¶8 Based on this evidence and defendant's testimonial admissions, the State argued that defendant's first two felony convictions, the 1993 and 1998 offenses, automatically conferred HPFC status on his last two convictions, for the 2001 and 2004 offenses, pursuant to A.R.S. § 13-105(22)(d) (Supp. 2009) (defining one category of HPFC as "any felony conviction that is a third or more prior felony conviction"). When asked if there was an objection to this conclusion, defense counsel argued only that "there was some issue about [the 1993 offense] being too old to even be counted." The State agreed that the 1993 offense was not a historical prior, but reiterated that the 1993 and 1998 offenses made the two more recent felony convictions automatically historical. The trial court did not make specific findings on the priors but moved on to the sentencing portion of the hearing.

¶9 Both the prosecutor and defendant's counsel made sentencing arguments premised on defendant having two HPFCs. In its oral pronouncement, the court did not state that it was imposing sentences based on defendant having two HPFCs. Moreover, the sentencing minute entry does not reference defendant's prior convictions and each offense is marked as being "non-repetitive." However, the sentences imposed by the court for each offense were consistent with the range of sentence applicable for twice-repetitive offenses. For example, the court imposed a "mitigated"

sentence of 12.5 years for possession of dangerous drugs for sale, a class two felony, which corresponds to a mitigated sentence for a class two felony with two HPFCs. Likewise, the court imposed what it characterized as "presumptive" sentences for the remaining offenses, which were class four and six felonies, corresponding to presumptive sentences for those felonies when the person being sentenced has two HPFCs. *See* A.R.S. §§ 13-703(C) (Supp. 2009) (defining a category three repetitive offender as having two or more HPFCs) and -703(J) (sentencing table for category three offenders).

¶10 Defendant timely appealed. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031, and -4033(A) (Supp. 2008).

DISCUSSION

¶11 Defendant argues on appeal that he is entitled to be resentenced as a non-repetitive offender because the State failed to properly allege two HPFCs before trial and the trial court failed to make specific rulings on which prior convictions, if any, qualified as historical felony convictions. We disagree.

¶12 Because defendant did not raise these issues in the trial court, he has forfeited appellate review of these claims absent fundamental error. *State v. Martinez*, 210 Ariz. 578, 580 n.2, ¶ 4, 115 P.3d 618, 620 n.2 (2005) (explaining that a defendant who fails

to object at trial does not "waive" the claim; rather it is forfeited unless defendant can prove fundamental error occurred). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (quotation omitted). The defendant bears the burden of persuasion in a fundamental error review. *Id.* (quotation omitted). Therefore, to prevail under this standard of review, a defendant must establish that error occurred, that the error was fundamental, and that the error resulted in prejudice. *Id.* at ¶ 20, 115 P.3d at 1067. We conclude that no error occurred, let alone error that was both fundamental and prejudicial.

¶13 We find no merit in defendant's claim that the State "abandoned" its amendment alleging the 2001 offense as an HPFC by simultaneously filing another amendment pursuant to A.R.S. § 13-702.02 alleging that the 2001 offense was "non-historical." Under the circumstances, it is clear that the State intended these amendments as alternative punishment enhancement allegations.

¶14 Relying on *State v. Benak*, 199 Ariz. 333, 18 P.3d 127 (App. 2001), defendant also claims that he did not know the full range of punishment that he faced if he chose to proceed to trial

because the State did not allege the 1998 offense as an HPFC. In *Benak*, we rejected the State's claim that it was not required to give Benak pretrial notice that he was ineligible for mandatory probation pursuant to A.R.S. § 13-901.01 because he had a prior conviction for a "violent crime." *Id.* at 337, ¶ 14, 18 P.3d at 131 (holding that "fundamental fairness and due process require that allegations that would enhance a sentence be made before trial so that the defendant can evaluate his options"). The due process concerns underlying *Benak* are not implicated here because the State's amendment provided notice to defendant that he faced enhanced punishment because his 2001 and 2004 offenses were HPFCs. Defendant cites no authority for the proposition that the State was required to formally "allege" the 1998 offense as a predicate offense nor does he claim that the existence of that offense was not disclosed to him before trial. Moreover, the record pertaining to the settlement negotiations shows that defendant was fully knowledgeable of the potential sentence he faced based on the State's punishment allegations should he be convicted following trial. *Supra* ¶ 5.

¶15 Finally, defendant contends that the trial court erred by failing to make express findings on the record of any HPFCs. "When a defendant's sentence is enhanced by a prior conviction, the existence of the conviction must be found by the court." *State v.*

Morales, 215 Ariz. 59, 61, ¶ 6, 157 P.3d 479, 481 (2007); A.R.S. § 13-703(N) (Supp. 2009); *see also* Ariz. R. Crim. P. 19.1(b)(2). Generally, sentencing courts do this by holding a hearing in which the state offers evidence of the prior conviction. *Id.* at 61, ¶¶ 6-7, 157 P.3d at 481. But the defendant's admission of three prior convictions at trial (he testified that he did not remember being convicted for the 1993 offense) rendered such a hearing unnecessary as to those convictions. *See id.*

¶16 At the sentencing hearing, the State submitted pen-packs and the certified copies of the minute entries of the convictions reflecting defendant's convictions for all four offenses. The court failed to make a specific finding that the State had proved the 1993 offense. Nonetheless, it is clear from the statements made by counsel and the sentences imposed by the court that the court implicitly found that the 1993 offense had been proven and that defendant was being sentenced as a repetitive offender with two HPFCs pursuant to A.R.S. § 13-105(22)(d). Under these circumstances, the court did not commit fundamental error when it failed to make a specific on-the-record finding regarding the 1993 offense.[4]

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[4] We also note, as argued by the State on appeal, that defendant's 2001 offense, a class three felony, and his 2004 offense, a class four felony, each constituted HPFCs regardless of whether he had any previous felony convictions. *See* A.R.S. § 13-

CONCLUSION

¶17 For the foregoing reasons, we affirm defendant's sentences as modified.[5]

/s/
PHILIP HALL, Judge

CONCURRING:

/s/
SHELDON H. WEISBERG, Presiding Judge

/s/
JOHN C. GEMMILL, Judge

105(22)(b) (providing that a class three felony is an HPFC if committed within ten years before the present offense), -105(22)(c) (same for a class four felony committed within five years before the present offense).

[5] We correct the sentencing minute entry so that defendant's offenses are designated as "repetitive" rather than "non-repetitive."