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

DIVISION ONE
FILED: 04-15-2010
PHILIP G. URRY, CLERK
BY: GH

STATE OF ARIZONA, Appellee, v. ABELARDO RIVERA, JR.,[1] Appellant.	)	1 CA-CR 09-0192 DEPARTMENT E MEMORANDUM DECISION (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)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 2007-117883-001 SE

The Honorable Teresa A. Sanders, Judge

AFFIRMED

Terry Goddard, Attorney General
by Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee — Phoenix

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

W E I S B E R G, Judge

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[1]Defendant's name appears elsewhere in the record as "Abelardo Jr. Rivera" and "Abelardo Rivera, Jr." He signed the supplemental opening brief "Abelardo Rivera, Jr." and it appears that the latter is correct.

¶1 Abelardo Rivera, Jr. ("Defendant") appeals from his convictions and sentences imposed after a jury trial. Defendant's 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). Finding no reversible error, we affirm.

¶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).

FACTS

¶3 We review the facts in the light most favorable to sustaining the verdicts. *State v. Stroud*, 209 Ariz. 410, 412, ¶ 6, 103 P.3d 912, 914 (2005). Defendant was indicted for aggravated driving while under the influence of intoxicating liquor ("DUI"), a class 4 felony, and two counts of aggravated assault, class 3 felonies. The State alleged six prior felony convictions and several aggravating factors. The following evidence was presented at trial.

¶4 On March 17, 2007, J. was driving with her teenage son, and stopped at a Circle K for gas. They heard a crash, a "screeching of tires" and "glass break" and thought that "somebody had a wreck" or "somebody hit somebody." They saw Defendant's truck "flying into the parking lot," stop and then exit the lot. They observed that the truck had a broken windshield.

¶5 J. followed Defendant's truck, which eventually slowed down and began to roll. J. told her son to dial 911. J. told the 911 operator what she observed and that she was following Defendant because she thought "there was probably a victim of a hit-and-run." Defendant stopped his truck, got out and approached J.'s vehicle with a baseball bat in his hands. J. was afraid Defendant was going to smash her car and then attack her. As Defendant approached the driver's side of J.'s vehicle, he was yelling and appeared angry. J was afraid he would smash her head. She continued describing the situation to the 911 operator.

¶6 J. became "hysterical." To take attention off J., her son got out of the car and walked toward Defendant. Defendant threatened J.'s son, saying he was going to "get" him, and raised the baseball bat above his head as if he were going to strike. They exchanged words as Defendant "brandished the bat." J's son said he was "bracing [him]self for being hit." At some point, Defendant turned around, got back into his truck, and left. J.

followed him a bit farther in her vehicle until Defendant stopped and was contacted by Mesa police.

¶7 Officer Hibbing approached Defendant's truck and observed an open beer can on the center console. He asked Defendant if he had been drinking and Defendant responded, "hell, yeah." When asked how much he had to drink, Defendant said, "Too many to count." When the officer inquired about his broken windshield, Defendant told him he had smashed it with the bat. The officer reported that he could smell alcohol on Defendant's person.

¶8 Officer Southard, who assisted Officer Hibbing, also smelled alcohol on Defendant and observed that he had bloodshot and watery eyes. Because Defendant was combative, the officer was unable to do field sobriety tests. Defendant admitted he was drunk and that he threatened two people with a baseball bat. After running a driver's license check, Defendant admitted that he knew his license had been revoked. Defendant was taken to the police station and consented to have his blood drawn. He told Officer Southard that he had been drinking light beer in his truck, had consumed fifteen cans of beer over the course of the day and previous day and had consumed two beers in the last hour before he was arrested.[2]

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[2]Officer Southard inadvertently started to testify that Defendant told him he had a prior DUI conviction. Defendant moved for a mistrial, but the court denied the motion. The court found that the prosecutor did not elicit the testimony, and because of the overwhelming evidence against Defendant, the jurors would not be influenced by the inadmissible evidence.

¶9 The toxicologist who tested Defendant's blood samples testified that Defendant's blood alcohol concentration within two hours of driving was .132 percent. She also testified that there is a consensus in the scientific community that a person was a blood alcohol concentration of .08 percent is "impaired to safely operate a motor vehicle." A custodian of records of the Arizona Motor Vehicle Division testified that on the date of the offenses, Defendant's driver's license was both suspended and revoked and that notices of the status of his license were mailed to him at his last known address by first class mail.

¶10 The jury found Defendant guilty of aggravated DUI, one count of the lesser-included offense of disorderly conduct as to J., a non-dangerous offense, and one count of the lesser-included offense of disorderly conduct as to J.'s son, a dangerous offense. The jury was unable to reach a unanimous decision as to the aggravating factors.

¶11 At sentencing, the State proved Defendant had six prior felony convictions by introducing as exhibits a Department of Corrections pen pak and certified copies of judgments of conviction. Defendant admitted to the two most recent prior felony convictions, one for aggravated assault committed on September 25, 1983, and another for aggravated DUI committed on May 26, 1994, which the court treated as two historical prior felony convictions. The court imposed concurrent, presumptive sentences of 10 years for

aggravated DUI, 3.75 years for disorderly conduct as to J. (non-dangerous, but repetitive) and 2.25 years for disorderly conduct as to J.s' son (dangerous, but non-repetitive) with 328 days of presentence incarceration credit. Defendant timely appealed.

DISCUSSION

¶12 Defendant argues in his supplemental opening brief that the prior felony convictions used to enhance his sentences were too old and should not have been used to increase the sentencing ranges on the instant convictions. He also claims his counsel was ineffective for failing to object to the use of these "old prior convictions" and advising him to admit to two of them. However, under former A.R.S. § 13-604(W)(2)(d) (2007), an historical prior felony conviction includes "any felony conviction that is a third or more prior felony conviction," without regard to when it was committed. Here, Defendant had six prior felony convictions. The trial court properly used the two most recent ones, which were his fifth and sixth prior felony convictions, to enhance his sentences under A.R.S. § 13-604(W)(2)(d). *See State v. Decenzo*, 199 Ariz. 355, 356, ¶ 1, 18 P.3d 149, 150 (App. 2001)(interpreting former A.R.S. § 13-604(V)(1)(d)) and use of third or more prior felony convictions as historical priors).[3] Thus, trial counsel was not

[3]Under former A.R.S. § 13-604(W)(2)(b), any class 2 or 3 felony can only be enhanced with a prior felony offense committed within ten years preceding the date of the present offense. Under former A.R.S. § 13-604(W)(2)(c), any class any class 4, 5 or 6 felony can only be enhanced with a prior felony offense committed within five years preceding the date of the present offense.

ineffective in failing to object to their use as sentence enhancements or in advising Defendant to admit to the priors.[4]

CONCLUSION

¶13 We have read and considered counsel's brief and have searched the entire record for reversible error. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find none. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. So far as the record reveals, Defendant was represented by counsel at all stages of the proceedings, and the sentences imposed were within the statutory limits and that there was sufficient evidence for the jury to find that the offenses were committed by Defendant.

¶14 After the filing of this decision, counsel's obligations pertaining to Defendant's representation in this appeal have ended. Counsel need do no more than inform Defendant of the status of the appeal and of Defendant's future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, Defendant has thirty days from the date of this decision to

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[4]We note that Defendant states in his conclusion that he must be resentenced without regard to the historical prior felony convictions "as aggravating factor[s]." The court, however, imposed presumptive sentences on all counts and did not use the prior felony convictions to aggravate his sentences.

proceed, if he desires, with a motion for reconsideration or petition for review *in propria persona*.

¶15 Accordingly, we affirm Defendant's convictions and sentences.

_/S/_____
SHELDON H. WEISBERG,
Presiding Judge

CONCURRING:

_/S/_____
PHILIP HALL, Judge

_/s/_____
JOHN C. GEMMILL, Judge