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: 06-08-2010
PHILIP G. URRY,CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	1 CA-CR 09-0257
Appellee,	DEPARTMENT D
v.	**MEMORANDUM DECISION**
FREDERICK MICHAEL ELLIS,	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)
Appellant.	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-146639-001 DT

The Honorable John R. Hannah, Jr., Judge

CONVICTION AFFIRMED; REMANDED FOR RESENTENCING

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
And Craig W. Soland, Assistant Attorney General
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
Attorney for Appellant

T H O M P S O N, Judge

¶1 Defendant, Frederick Michael Ellis, appeals from his conviction on one count of theft of a means of transportation. He claims that the trial court erred: (1) when it permitted the

state to elicit defendant's statements to police and firefighters; (2) when it admitted testimony regarding defendant's invocation of his right to remain silent and (3) concerning his refusal to cooperate with police; and (4) when it sentenced defendant as a repeat offender without the state proving or defendant admitting two prior felony convictions. For reasons that follow, we affirm.

FACTS[1] AND PROCEDURAL HISTORY

¶2 Jacinto and Luis C.[2] are two brothers who operate a pallet company on Buckeye Road in Phoenix. At approximately 2:00 p.m. on July 24, 2008, Luis temporarily parked the company's 1995 Dodge flatbed truck outside of the company's customer lot while he dealt with a load of pallets. Unfortunately, he left the keys in the ignition, and, when he returned thirty minutes later, the truck was gone. He immediately called the Phoenix Police Department and reported it stolen, providing officers with the vehicle's license plate number.

---

[1] We view the facts in the light most favorable to sustaining the jury's verdict and resolve all reasonable inferences against defendant. *State v. Vendever*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 n.2 (App. 2005).

[2] We use the first initial of the victim's last name to protect his privacy as a victim. *State v. Maldonado*, 206 Ariz. 339, 341 n.1, 78 P.3d 1060, 1062 n.1 (App. 2003).

¶3 Within minutes police received word that the stolen Dodge truck was involved in a four vehicle collision in a construction zone on 75th Avenue and Van Buren. The Dodge flatbed truck had rear-ended a Ford F250 utility truck that was in a line of traffic stopped at a red light. The Ford truck then hit the vehicle in front of it, which in turn caused that vehicle to hit the vehicle in front of it.

¶4 A lineman working at the construction site witnessed the accident and identified defendant at trial as the sole occupant and driver of the Dodge flatbed truck. He observed defendant get out and walk behind the Dodge truck and heard defendant say "what did everybody to do him." The lineman and the driver of the Ford utility truck both watched as defendant left the scene of the collision and were able to inform police of the direction defendant took. Within minutes, police apprehended defendant in some industrial buildings located on the north side of Van Buren and 75th Avenue. Police transported defendant to the site of the collision where firefighters were treating the injured victims. Witnesses at the site identified defendant as the driver of the stolen Dodge truck.

¶5 The state charged defendant with one count of theft of a means of transportation, knowing or having reason to know that the vehicle was stolen, a Class 3 felony. A jury found

defendant guilty of the offense as charged. On March 25, 2009, the trial court sentenced defendant to a mitigated term of ten years in prison.

¶6 Defendant timely appealed. This court has jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(1)(2003), 13-4031 and -4033 (2010).

DISCUSSION

Admission of Defendant's Statements to Officers

¶7 When police located defendant in the industrial area, he claimed that his ankle was broken and he appeared to be "limping very badly." The officer who transported defendant to the site of the collision asked the firefighters at the site to also attend to defendant. However defendant became belligerent as well as "verbally aggressive," and the firefighters were unable to deal with him.

¶8 On the first day of trial, prior to opening argument, defendant moved *in limine* to preclude the state from introducing any mention of defendant's refusal to cooperate with officers the expletives defendant used when approached by police and/or firefighters, arguing that these were hearsay and not relevant. According to defense counsel, the expletives defendant had mouthed "[made] up about 80 percent of the police report," and

counsel maintained that admission of all of them would be "clearly prejudicial." The state maintained that because the statements were those of a party opponent they were not hearsay and they also were relevant to show "consciousness of guilt" as they were "not what a normal person would do if they were in that situation."

¶9 The trial court noted that defendant's motion had been untimely filed. It nonetheless accepted the motion and heard argument on it. The court overruled defendant's hearsay objection but considered defendant's relevance and prejudice arguments. Although the trial court announced that it would defer ruling on the matter until the time of the officer's testimony, it indicated that it was inclined to permit "one or two repetitions" of the statements that the state quoted from the police reports, finding them "relevant and more probative than prejudicial." However, the court also cautioned that it was "not . . . going to permit a 10 minute verbatim recitation of that kind of language." Defense counsel responded, "[t]hat's fair;" and the trial court stated "[s]o that's the Court's ruling on that one."

¶10 Based on the trial court's provisional ruling and without further objection from defense counsel, the prosecutor elicited the following testimony at trial from Officer W., the

officer who transported defendant both to the scene and to the police station, concerning defendant's demeanor and statements on the night of the offense. Officer W. testified that, when firefighters approached defendant at the site of the collision to check his injuries and asked defendant "what's wrong," defendant replied "fuck you mother fuckers, you can all suck my cock." Defendant was "very agitated" and "verbally aggressive" when he tried to speak with him and that "[i]t literally seemed as if every third word was the "F" word at somebody, at something." When Officer W. attempted to read defendant his rights, defendant replied "fuck you, go suck some more dick, mother fucker." According to Officer W., defendant's belligerent behavior continued at the police station, with defendant "yelling and screaming" while in the holding cell. When a sergeant came over to talk to defendant, he "immediately had choice words for her once again."

¶11 On appeal, defendant maintains that the trial court committed reversible error when it permitted the state to introduce these "inflammatory statements" which prejudiced the jury and "tipped the balance" against him. We review a trial court's ruling on the admission of evidence for an abuse of discretion. *State v. Tucker*, 215 Ariz. 298, 314, ¶ 58, 160 P.3d 177, 193 (2007). A trial court is granted broad discretion in

such rulings because it "is in the best position to balance the probative value of challenged evidence against its potential for unfair prejudice." *State v. Connor*, 215 Ariz. 553, 564, ¶ 39, 161 P.3d 596, 607 (App. 2007) (quoting *State v. Harrison*, 195 Ariz. 28, 33, ¶ 21, 985 P.2d 513, 518 (App. 1998)). Absent a clear abuse of that considerable discretion, this court will not second-guess a trial court's ruling on the admissibility or relevance of evidence. *State v. Spreitz*, 190 Ariz. 129, 146, 945 P.2d 1260, 1277 (1977). We find no abuse of discretion.

¶12 Defendant's statements and behavior at the scene of the crime after having been observed by witnesses both in possession of the recently stolen vehicle and fleeing from the scene furnished circumstantial evidence of defendant's consciousness of guilt. It was therefore relevant evidence for the jury to consider. *See State v. Pettit*, 194 Ariz. 192, 197, ¶ 23, 979 P.2d 5, 10, (App. 1998) (it is well established "in civil and criminal cases, that direct and circumstantial evidence have equal probative worth" (citation omitted)). In addition, the trial court took appropriate measures and limited the number and kinds of expletives the state was permitted to elicit, thus further reducing any possibility of unfair

prejudice. *See* Ariz. R. Evid. 403. The trial court committed no abuse of discretion in admitting this evidence at trial.[3]

¶13 The cases that defendant relies on for his arguments, *State v. Salazar*, 181 Ariz. 87, 887 P.2d 617 (App. 1994) and *State v. Coghill*, 216 Ariz. 578, 169 P.3d 942 (App. 2007), are inapposite. In *Salazar*, we found that the trial court erred in permitting the admission of "prior bad acts" in inflammatory detail. 181 Ariz. at 91-92, 887 P.2d at 621-22. Here, the evidence of defendant's conduct was part of his overall conduct the night of the crime in committing of the offense. Furthermore, the trial court took appropriate limiting action to restrict the evidence that was presented to the jury.

¶14 *Coghill* also applies to prior bad act evidence and not intrinsic evidence of the offense. In *Coghill*, we found that, even though evidence of defendant's ability to download adult pornographic videos was relevant to the charge that he copied and possessed child pornography, the trial court erred by not restricting the testimony to defendant's general ability to download and copy computer files without disclosing the specific pornographic nature of the other files. 216 Ariz. at 583, ¶¶

---

[3] We find defendant's motion *in limine* sufficient to preserve this issue for appeal. We therefore need not address the state's fundamental error or invited error arguments. *See State v. Coleman*, 122 Ariz. 99, 101, 593 P.2d 653, 655 (1979) (a properly made motion *in limine* preserves an objection on appeal if it contains specific grounds for the objection).

16-17, 169 P.3d at 947. In reversing the trial court in *Coghill*, we noted the importance of a trial court's role "in removing unnecessary inflammatory detail from other-act evidence before admitting it." *Id.* at ¶ 18. In the present case, the trial court specifically restricted the state to the number of profane statements that it could quote, thus balancing the probative value of the evidence against any potentially prejudicial effects.

¶15 Our holding in *Coghill,* that the error in admitting the evidence was not harmless, was further tempered by our finding that the evidence of defendant's possession of child pornography in that case "was not overwhelming." *Id.* at ¶ 29. Contrary to defendant's argument, we find the evidence of defendant's guilt in this case, where he was identified as the driver of the stolen vehicle within minutes of its theft, to be overwhelming. "Cases in which we have found harmless error in the admission of improper evidence cannot be characterized as close, but have presented us with a body of proof, firmly convincing on the essential facts, that the jury would have convicted even without the error." *State v. Bass*, 198 Ariz. 571, 582, ¶ 45, 12 P.3d 796, 807 (2000). Therefore, even if we were to assume *arguendo* that the evidence was erroneously admitted, we are convinced any error was harmless.

Invocation of Right to Remain Silent

¶16 As noted above, Officer W. testified that, when he attempted to read defendant his rights, defendant told him "quote, 'fuck you, go suck some more dick, mother fucker.'" Officer W. testified that, after this exchange, he simply placed defendant in the back of his police vehicle while he helped out with the investigation of the collision. During rebuttal closing argument, the state referred to this exchange to argue that defendant's belligerence and uncooperativeness were indicative of his guilt, stating "Is that the way a person who was innocent acts, or would that person be more cooperative?"

¶17 On appeal, defendant argues that Officer W. "clearly understood" that his response was his invocation of his right to remain silent, and, therefore, that it was error for the trial court to permit the prosecutor to elicit this testimony and subsequently use it in her argument to the jury. Defendant acknowledges that he did not raise this objection before the trial court and that he has therefore forfeited relief on this issue save in the rare instance that fundamental error occurred. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Furthermore, the burden is on defendant to establish both that fundamental error occurred and that the error caused him prejudice. *Id.* at ¶ 20.

¶18 Before we engage in fundamental error review, however, we must first find that the trial court committed some error. *State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342 (1991). We find the trial court committed no error.

¶19 Neither the officer nor the state's references to defendant's use of profanities were used to draw the jury's attention to defendant's invocation to his right to remain silent or prejudice defendant for exercising that right. Instead, it is apparent from the context in which the testimony was elicited that the prosecutor's question was aimed at eliciting further evidence of defendant's aggressiveness at being arrested in support of the state's theory that that conduct was further evidence of defendant's guilt.

¶20 Nor is it clear, as defendant maintains, that Officer W. "understood" his response to be an invocation of his right to remain silent. It is true that Officer W. testified that the invectives came when he attempted to read defendant his rights. However, it is clear from Officer W.'s testimony that he abandoned any further attempts to speak with defendant, not because he believed defendant invoked his rights, but because Officer W. concluded that those attempts would have been futile in light of defendant's bellicosity. Furthermore, a review of the record establishes that the state never used the testimony

to comment on defendant's invocation of his right to remain silent.

¶21 Defendant has failed to establish that the trial court committed any error, let alone fundamental error, in this case. *See Henderson,* 210 Ariz. at 567, ¶ 20, 115 P.3d at 607. He is not entitled to reversal on this basis.

Refusal to Cooperate with Police

¶22 Reiterating the same arguments made above, defendant next asserts that it was fundamental error for the trial court to allow the state to introduce evidence of defendant's lack of cooperation with police to argue that it was a further indication of defendant's guilt. He maintains that that he has a "constitutional right to refuse to cooperate" and suggests that the use of this evidence was an improper comment on his exercise of that right. We find no error, let alone fundamental error. *See Lavers*, 168 Ariz. at 385, 814 P.2d at 342.

¶23 First, as noted above, there is simply no indication in the record that defendant ever invoked his constitutional right to remain silent or that his actions or words were intended to signify that he was doing so. Furthermore, there is no general "constitutional right" to refuse to cooperate with law enforcement as defendant suggests, and defendant does not point us to any authority that provides otherwise.

¶24 Second, defendant's reliance on *State v. Palenkas*, 188 Ariz. 201, 933 P.2d 1269 (App. 1996) is misplaced. The evidence at trial in *Palenkas* established that defendant spoke with an attorney prior to his arrest and consequently refused to consent to a warrantless search of his vehicle, both of which are actions that involve protected constitutional rights. *See Palenkas,* 188 Ariz. at 212, 933 P.2d at 1280; U.S. Const. amend. IV and VI; Ariz. Const. art. 2, §§ 8 and 14. Under those specific circumstances, this court found that the prosecutor's subsequent argument that the defendant's refusal to permit police officers to search his car without a warrant established his guilt was improper because it violated a prior court order *in limine* and "creat[ed] an inference that defendant's invocation of constitutional rights was evidence of his guilt." 188 Ariz. at 212, 933 P.2d at 1280. As we stated in *Palenkas*, "a defendant's invocation of constitutional rights is probative of nothing except the defendant's awareness of his or her constitutional rights." *Id.*

¶25 Defendant in the present case did not invoke his Fifth Amendment right to remain silent. Thus, the prosecutor's arguments never implied guilt based on an exercise of that right.

Existence of Prior Convictions

¶26 Prior to trial, the state alleged that defendant had previously been convicted of seven felonies in Maricopa County. After the jury returned its guilty verdict, the trial court asked defendant whether he wanted a hearing on the priors or planned to admit them. Defense counsel replied, "Your Honor, [defendant] is not asking for a hearing." The trial court then stated:

> Let me just put this on the record. The defense has indicated that the defendant will not, is not requesting a trial on the prior convictions. If that continues to be his position, the Court will take a formal admission on the priors at the time of sentencing. If [defendant] changes his mind and wants an evidentiary hearing, defense counsel is directed to notify the Court in advance so that we can schedule the hearing on a date when there's time available on the Court's calendar.

¶27 On February 25, 2009, the trial court held a hearing on defendant's motions for new trial and judgment of acquittal. Defendant made no request for an evidentiary hearing on the priors at that time.

¶28 The matter proceeded to sentencing on March 25, 2009. Impliedly proceeding with the understanding that defendant did not desire a hearing on the priors, the trial court sentenced defendant to a mitigated term of ten years in prison, with two prior felony convictions. The trial court never formally asked

defendant to admit the two prior historical felonies and did not conduct a colloquy in accordance with Rule 17.6 of the Arizona Rules of Criminal Procedure.

¶29 On appeal, defendant argues that the trial court's failure to either hold a hearing on the priors or conduct a Rule 17.6 colloquy and obtain a formal admission of them constitutes fundamental error. The state concedes that the court's failure to at least conduct the Rule 17.6 colloquy to establish the voluntariness of defendant's implied admission of the priors is fundamental error that requires remand for resentencing. Under the circumstances of this case, we agree.

¶30 In *State v. Morales*, 215 Ariz. 59, 61, ¶ 6, 157 P.3d 479, 481 (2007), our supreme court held that, when a defendant's sentence is enhanced by a prior conviction, the existence of that prior conviction must be found by the court through a hearing at which the state presents evidence in the form of a certified copy of the conviction and establishes that the defendant is the person to whom the document refers. *Id.* The need for a formal hearing may be obviated if a defendant agrees to admit the prior conviction. *Id.* When a defendant admits a prior conviction, however, the trial court must then conduct a "plea-type" Rule 17.6 colloquy to ascertain that the defendant's admission is voluntarily and intelligently made. *Id.* at ¶¶ 7-8.

This same policy applies when a defense counsel stipulates to the existence of a prior conviction. *Id.* at ¶ 9.

¶31 In *Morales*, our supreme court held that a complete failure to afford a defendant a Rule 17.6 colloquy constitutes fundamental error "because a defendant's waiver of constitutional rights must be voluntary and intelligent." *Id.* at ¶ 10. Thus, the trial court's failure to conduct the Rule 17.6 colloquy in the present case is clearly fundamental error.

¶32 Nonetheless, our supreme court in *Morales* further found that the mere absence of a Rule 17.6 colloquy did not automatically entitle a defendant to a resentencing hearing. *Id.* at ¶ 11. Prejudice, the second prong of fundamental error review, is established if a defendant also shows that he would not have admitted the prior had the colloquy been given, thereby forcing the state to prove its existence. *Id.* Only when a defendant makes such a showing would the matter require a resentencing hearing at which the state was put to the burden of proving the prior conviction. *Id.* at ¶ 13. But even with such a showing, a resentencing may still not be required if the record on appeal contains conclusive proof in the form of certified copies of the prior conviction or convictions the authenticity of which the parties do not contest, as the record apparently did in *Morales*. *Id.*

¶33 Unlike *Morales*, the record here contains no certified copies of defendant's prior convictions. Under these circumstances, we must therefore remand for resentencing.

CONCLUSION

¶34 For the foregoing reasons, we affirm defendant's conviction. We remand for resentencing in accordance with this decision.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

MICHAEL J. BROWN, Presiding Judge

/s/

SHELDON H. WEISBERG, Judge