

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
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 09-0480
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
)
VALERIE THERESA CHASE,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-115605-001 DT

The Honorable Steven K. Holding, Judge Pro Tem
The Honorable Lisa Ann Vandenberg, Judge Pro Tem

AFFIRMED

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

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

G E M M I L L, Judge

¶1 Valerie Theresa Chase was convicted of theft with two or more historical prior felony convictions. On appeal, Chase does not contest the sufficiency of the evidence to support her

conviction or otherwise challenge her conviction; she contends she received insufficient notice the State would seek to enhance her sentence with two or more prior convictions. For the reasons that follow, we affirm Chase's conviction and sentence.

FACTUAL AND PROCEDURAL HISTORY

¶12 Chase stole more than \$4,000 from the department store where she worked by performing fraudulent returns. She confessed to the theft when confronted by store representatives and when questioned by police. She was convicted of one count of theft after a two-day trial carried out in absentia. Once re-apprehended, Chase was sentenced to a stipulated, minimum sentence of ten years' imprisonment. See Arizona Revised Statutes ("A.R.S.") section 13-604(D)(2007) (minimum sentence for a class 3 felony with two or more historical prior felony convictions is ten years). Chase appealed, and we have jurisdiction pursuant to Arizona Constitution, Article 6, Section 9, and A.R.S. §§ 12-120.21(A)(2003), 13-4031 (2010) and 13-4033 (2010).

ANALYSIS

¶13 Chase contends she was not given sufficient notice of the State's intent to enhance her sentence with two or more prior felony convictions rather than one prior conviction. Some four-and-a-half months before trial, the State filed an allegation of historical priors for purposes of sentence

enhancement. The allegation alleged "the following historical non-dangerous felony conviction:"

On December 15, 2005, Defendant committed the crime of Three Counts of Possession of a Forgery Device, a Class 6 Felony, and Defendant was convicted for that crime on 12/27/07, such conviction arising in the Superior Court, Maricopa County, State of Arizona, in Cause Number CR 2007-123799-001 DT.

¶14 Chase now argues that, despite the reference to "Three Counts," the allegation alleged only a single prior conviction due to its use of "conviction," "crime" and "felony" in the singular and because it referenced a single date of commission. Because the issue was preserved by Chase's unsuccessful motion in limine, we review for abuse of discretion. *State v. Superior Court (Gretzler)*, 128 Ariz. 583, 585, 627 P.2d 1081, 1083 (1981).

¶15 An allegation of prior convictions for purposes of sentence enhancement may be made at any time before the case is actually tried, unless the allegation is filed less than twenty days before trial and the court makes a finding that the defendant was prejudiced. A.R.S. § 13-604(P)(2007). Sufficient notice of the State's intent to enhance provides a defendant the opportunity to know the full range of potential punishment upon conviction, to evaluate any potential sentence and to evaluate any other available options. *State v. Benak*, 199 Ariz. 333, 336-337, ¶ 14, 18 P.3d 127, 130-131 (App. 2001). Sufficient

notice requires that the defendant not be "misled, surprised or deceived in any way by the allegations' of prior convictions." *Benak*, 199 Ariz. at 337, ¶ 16, 18 P.3d at 131 (quoting *State v. Bayliss*, 146 Ariz. 218, 219, 704 P.2d 1363, 1364 (App. 1985)).

¶6 Sufficient notice of the State's intent to enhance with prior convictions is, however, not limited solely to the information contained in the allegation of priors. A defendant is not prejudiced by the State's failure to fully comply with A.R.S. § 13-604(P) regarding the allegation of priors so long as the defendant is on notice before trial that the State will seek to enhance pursuant to A.R.S. § 13-604. *State v. Williams*, 144 Ariz. 433, 442, 698 P.2d 678, 687 (1985)(addressing A.R.S. § 13-604(K), subsequently renumbered as A.R.S. § 13-604(P)). Sufficient notice can be satisfied by an allegation of prior non-dangerous felonies coupled with the disclosure of materials related to those prior felonies. *Benak*, 199 Ariz. at 337, ¶ 17, 18 P.3d at 131. See also *State v. Bernal*, 137 Ariz. 421, 424, 671 P.2d 399, 402 (1983) (no prejudice resulted from late allegation of priors where intent to enhance with prior convictions was made known through discovery materials filed two months prior to trial).

¶7 Accordingly, we find no error. The record shows Chase had more than sufficient notice prior to trial that the State would seek to enhance her sentence with two or more prior felony

convictions. In addition to the imprecisely worded allegation of priors, the State disclosed the December 27, 2007 sentencing minute entry for the cause number identified in the allegation of priors more than two months before trial. The minute entry shows that the single cause number corresponded to convictions on three separate counts of possession of a forgery device and that each offense was committed on a separate date.¹

¶18 In addition to the disclosure of the minute entry, Chase was put on notice of the State's intent at the settlement conference. The commissioner informed Chase at the beginning of the conference of the State's allegation of "one, maybe three, prior felony convictions." When the commissioner addressed the prior convictions, she told Chase, "Your attorney says it's only one; the State says it's three prior felony convictions. So I will go over the ranges for both, if it's one prior felony conviction or if it's two or more prior felony convictions." As the commissioner explained the ranges of available sentence based on the different numbers of prior convictions, she clearly stated, "[a]nd, again, the State has alleged that you have three prior felony convictions." During the explanation, the

¹ At a hearing on the prior convictions and at the sentencing hearing, the parties noted the sentencing minute entry in the prior case contained a typographical error regarding the date on which one of the prior offenses was committed. The parties stipulated to correct that date for purposes of sentencing in this matter. Even with the typographical error, however, the sentencing minute entry showed each offense was committed on a different date.

commissioner again told Chase what the range of sentence would be "if [she] lost at trial and the State proved their allegation [of] at least two or more prior felony convictions."

¶9 Chase told the commissioner she understood the available range of penalties based on the existence of one prior felony conviction and two or more prior felony convictions. The commissioner noted the State's offer was much lower than would be available if Chase was convicted and the State was able to prove two or more prior felony convictions. Chase again stated she understood. Moreover, defense counsel informed the commissioner that he had already explained the available sentencing ranges to Chase based on the existence of a single prior conviction as well as the range if "the State is successful" in establishing two or more priors. Chase ultimately refused the State's offer.

¶10 The State's intent, and Chase's knowledge of that intent, was again made evident a few weeks after the settlement conference. Twenty-one days prior to trial, the State disclosed a "pen pack" from the Arizona Department of Corrections which showed Chase had three prior convictions for possession of a forgery device committed on three different dates. Chase filed a motion in limine to preclude admission of the pen pack for sentencing purposes. Chase argued the pen pack was untimely and should be excluded due to the "misleading language" in the

State's allegation of priors. Her motion acknowledged the State's consistent position that Chase had three historical prior felony convictions for sentencing purposes. It further acknowledged Chase knew "the State was planning on 'proving up' three prior felonies" and that the State "may be correct" in its assertion that Chase had three prior felony convictions for sentencing purposes. Finally, Chase conceded that she had been aware of the State's position since the initial plea negotiations.

¶11 At the hearing on the motion in limine, defense counsel explained to the trial court:

Yes, Your Honor and we do not dispute the fact that notice had been provided. There was a great deal of discussion, not only between myself and [the prosecutor], but also myself and Ms. Chase, as to an ongoing debate as to whether or not at sentencing the three prior felonies of which Ms. Chase was convicted, would under case law of this state, amount to a same or similar incident in which these matters could be consolidated for the purpose of one prior. Or whether or not case law would suggest that the State of Arizona would treat these as three independent matters, thus three prior felonies.

Chase did not explain why she believed these three prior felonies committed on three different dates would constitute one historical prior felony conviction for sentencing purposes. The trial court noted the relevant information contained within the pen pack was nearly identical to that contained in the

sentencing minute entry which had been previously disclosed. After taking the matter under advisement, the court ultimately found Chase had sufficient notice and denied the motion in limine.

¶12 The language of the State's allegation does lack the clarity that lawyers and judges should strive to achieve. But the record shows that long before trial, Chase knew the State would seek to enhance the range of sentence based on the existence of two or more prior felony convictions. There is nothing in the record to support her claims that the State misled or deceived her or the commissioner with regard to Chase's priors. We perceive nothing in the record to suggest the priors would have been treated as a single prior conviction for purposes of sentencing, and Chase has not identified any provision of Arizona law to support that belief. Chase's belief that the State would not ultimately be able to prove the existence of two or more priors for purposes of enhancement, a belief she maintained until the timely disclosure of the pen pack, is not a matter of insufficient notice.

¶13 Finally, Chase's reliance on *Benak* is unavailing. More than simply being aware of the existence of prior convictions that could, in theory, be used to enhance her sentence, Chase had notice the State intended to do so. See *Benak*, 199 Ariz. at 337, ¶ 18, 18 P.3d at 131 (defendant's

knowledge that a prior conviction alleged by the State was for a violent crime was not sufficient to excuse the State's failure to allege the offense was a violent crime where the defendant had no reason to believe the State intended to seek enhancement based on the existence of a prior conviction for a violent crime); see also *State v. Guytan*, 192 Ariz. 514, 523, ¶ 37, 968 P.2d 587, 596 (App. 1998)(defendant's knowledge that evidence of gang activity would be introduced at trial was not sufficient to excuse the failure to provide notice the State would seek enhancement based on gang involvement where the defendant had no reason to believe the State would do so). The complete absence of notice and the resulting surprise present in *Benak* and *Guytan* are absent in this case.²

CONCLUSION

¶14 Because we find no error, we affirm Chase's conviction and sentence.

_____/s/_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

_____/s/_____
PATRICIA K. NORRIS, Judge

_____/s/_____
MAURICE PORTLEY, Judge

² Within her argument on this issue, Chase makes a cursory challenge to being tried in absentia. Chase failed to present significant argument supported by appropriate authority and has, therefore, waived any issue in this regard. See *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995).