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 09-0495
Appellee,	DEPARTMENT A
v.	**MEMORANDUM DECISION**
SIXTO ORTEGA TREVINO,	
Appellant.	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-145635-001 DT

The Honorable Michael W. Kemp, Judge

REMANDED

Terry Goddard, Arizona 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 Christopher V. Johns, Deputy Public Defender
Attorneys for Appellant

B A R K E R, Judge

¶1 Sixto Trevino appeals from his conviction for one count of aggravated domestic violence claiming the trial court erred by accepting his stipulation to two prior convictions without an Arizona Rule of Criminal Procedure 17 colloquy. For the following reasons, we remand to the trial court for a determination of whether Trevino stipulated voluntarily and intelligently.

Facts and Procedural Background

¶2 Trevino and victim had a child together but have not lived together for several years. In the early morning on August 3, 2007, Trevino went to victim's home and an argument ensued. Victim went inside the home, but Trevino continued to yell, pound on the door, and rattle her security window. Victim heard the sound of glass breaking and called the police. Police officers arrived at the house after Trevino had left. Victim told the police Trevino was driving a gray Hyundai Elantra. The officer noticed blood drops in the driveway and followed the blood to a window on the southwest corner of the house that had a softball size hole in the center. Another police officer made a lawful stop of Trevino's vehicle. Trevino's identification was examined, and the officer immediately noticed "that there was blood on the center console, on his shirt, and on his pants; and I noticed his hand was cut, his right hand." An officer

read Trevino his *Miranda*[1] rights, and Trevino agreed to voluntarily speak with the officer. Trevino told the officer he had punched his hand through victim's bedroom window.

¶3 On September 26, 2008, Trevino was indicted for one count of aggravated domestic violence, a class 5 felony and domestic violence offense pursuant to Arizona Revised Statutes ("A.R.S.") section 13-3601.02 (2001). The charge stemmed from alleged criminal damage and two previous city court domestic violence convictions. Trevino rejected the State's plea offer and his case proceeded to trial. After the defense rested, the trial court read the following stipulation to the jury:

> Number one. The defendant committed a domestic violence offense on January 8, 2007. He was convicted of that offense on March 21st, 2008 in Phoenix Municipal Court number 2007-9006501.
>
> Secondly, the defendant committed a domestic violence offense on February 11, 2007. He was convicted on February 11, 2007 in Phoenix Municipal Court number 13618697.

Trevino made no objection to the stipulations at trial, and the court did not perform a colloquy with Trevino to determine if the stipulation was voluntary and intelligent. The jury instructions provided that the crime of aggravated domestic violence requires the following proof:

1. Committed criminal damage; and

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

2. The defendant and the victim resided in the same household or the defendant and the victim have a child in common; and

3. The defendant has been convicted of two or more domestic violence offenses; and

4. All the prior domestic violence convictions occurred within sixty months of the date of the current offense.

The jury found Trevino guilty as to aggravated domestic violence on March 26, 2009.

¶4 Trevino 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 (2010), and 13-4033(A) (2010).

Discussion

¶5 Trevino argues that reversible fundamental error occurred when the trial court accepted the stipulation that Trevino had two previous domestic violence convictions without determining if that stipulation was made voluntarily and intelligently. Here, fundamental error review applies because defense counsel failed to object to the alleged trial error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).

¶6 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. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). In fundamental error review the defendant bears the burden of persuasion. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. This discourages a defendant from "tak[ing] his chances on a favorable verdict, reserving the 'hole card' of a later appeal on [a] . . . matter that was curable at trial, and then seek[ing] appellate reversal." *State v. Valdez*, 160 Ariz. 9, 13-14, 770 P.2d 313, 317-18 (1989), *overruled on other grounds by Krone v. Hotham*, 181 Ariz. 364, 890 P.2d 1149 (1995). To prevail, Trevino must "establish both that fundamental error exists and that the error in his case caused him prejudice." *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607.

¶7 The elements of aggravated domestic violence at issue here are: (1) the defendant has been convicted of two or more domestic violence offenses; and (2) the prior domestic violence convictions occurred within sixty months of the date of the current offense. *See* A.R.S. § 13-3601.02(A); *State v. Newnom*, 208 Ariz. 507, 508, ¶ 5, 95 P.3d 950, 951 (App. 2004) (holding that two prior domestic violence convictions is an element of aggravated domestic violence). At trial, Trevino stipulated to two prior domestic violence offenses without an Arizona Rule of Criminal Procedure 17.6 colloquy to determine if he voluntarily

and intelligently waived his right to have the State prove the prior convictions.

¶8 Rule 17.6 provides that "[w]henever a prior conviction is charged, an admission thereto by the defendant shall be accepted only under the procedures of this rule, unless admitted by the defendant while testifying on the stand." The procedures outlined in Rule 17 require a trial judge to engage in a colloquy with the defendant who has entered into a guilty or no-contest plea or a stipulation to a prior conviction to ensure that the admission is voluntary and intelligent. Ariz. R. Crim. P. 17.2, 17.3, 17.6. Our supreme court has held that this applies in the case of an admission to prior convictions that constitute an element of an offense. *State v. Canaday*, 119 Ariz. 335, 336, 580 P.2d 1189, 1190 (1978). The court stated that "the procedures delineated in [R]ule 17 must be followed whenever a prior conviction is admitted, whether such prior conviction is alleged for the purpose of increasing punishment or as an element of the crime charged, as mandated by the clear language of [R]ule 17.6." *Id.* The comment to Rule 17.6 further supports this conclusion, noting that it "applies only to prior offenses which are an element of the crime." Ariz. R. Crim. P. 17.6 cmt.[2]

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[2] Despite the comment to the rule, *Canaday* clarifies that Rule 17.6 also applies "whether such prior conviction is alleged

¶9 A recent decision by our supreme court is also important to our analysis. In *State v. Allen* (*Allen II*), 223 Ariz. 125, 126, ¶ 6, 220 P.3d 245, 246 (2009), the defendant and the State stipulated that the defendant was a prohibited possessor and that he was in possession of a usable amount of marijuana. The court of appeals held that the stipulation regarding marijuana possession was the "functional equivalent of a guilty plea," and that the trial court committed fundamental error by not "engaging defendant in a Rule 17-type colloquy and ascertaining that he voluntarily and intelligently entered the stipulation regarding the marijuana charge." *State v. Allen* (*Allen I*), 220 Ariz. 430, 435, ¶¶ 21-22, 207 P.3d 683, 688 (App. 2008). The supreme court vacated this decision and held that when a defendant "stipulates to elements of an offense, a trial court need not engage the defendant in a colloquy under *Boykin*[3] or Rule 17." *Allen II*, 223 Ariz. at 129, ¶ 22, 220 P.3d at 249.

¶10 However, the *Allen II* court specifically clarified its holding to not apply where the defendant pleads guilty to an offense, stating: "In the absence of a guilty or no-contest plea *or a stipulation to a prior conviction*, nothing in Rule 17 requires a trial court to engage a stipulating defendant in a

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for the purpose of increasing punishment or as an element of the crime charged." 119 Ariz. at 336, 580 P.2d at 1190.

[3] *Boykin v. Alabama*, 395 U.S. 238 (1969).

formal plea colloquy." *Id.* at 126, 129, ¶¶ 1, 20, 220 P.3d at 246, 249 (emphasis added). Retaining the colloquy requirement under Rule 17.6 for a stipulation to prior convictions is in conformity with *Canaday* and creates a bright line rule for the performance of colloquies. Thus, the trial court may not accept a stipulation to a prior conviction that is an element of a crime without following the procedures outlined in Rule 17. *See* Ariz. R. Crim. P. 17.6; *Allen II*, 223 Ariz. at 129, ¶ 20, 220 P.3d at 249; *Canaday*, 119 Ariz. at 336, 580 P.2d at 1190. A failure to do so constitutes fundamental error.

¶11 Trevino still must establish that he was prejudiced by the failure to comply with Rule 17 before his conviction may be vacated. *See State v. Morales*, 215 Ariz. 59, 62, ¶ 11, 157 P.3d 479, 482 (citing *Henderson*, 210 Ariz. at 568, ¶ 26, 115 P.3d at 608). To establish prejudice on this basis Trevino must show that he "would not have admitted the fact of the prior conviction had the colloquy been given." *Id.* Therefore, we remand to the trial court for a hearing to determine if Trevino was prejudiced by the failure to conduct a Rule 17 colloquy. *See State v. Carter*, 216 Ariz. 286, 292, ¶ 27, 165 P.3d 687, 693 (App. 2007) (remanding to trial court for hearing on prejudice after failure to conduct Rule 17 colloquy). If the court determines that Trevino was prejudiced, his sentence must be vacated and he must be resentenced. At the State's election,

Trevino may be retried on his charge of aggravated domestic violence. *See State v. May*, 210 Ariz. 452, 459, 112 P.3d 39, 46 (App. 2005) (defendant may be retried if conviction reversed for trial error); *see also Burks v. United States*, 437 U.S. 1, 13-14 (1978) (double jeopardy does not preclude a new trial to rectify trial error).

Conclusion

¶12 Accordingly, we remand for further proceedings consistent with this decision.

/s/

DANIEL A. BARKER, Judge

CONCURRING:

/s/

PATRICIA A. OROZCO, Presiding Judge

/s/

LAWRENCE F. WINTHROP, Judge