IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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

STATE OF ARIZONA, Appellee, v. TOM ALLEN LACKEY, Appellant.	)	1 CA-CR 09-0510 DEPARTMENT E MEMORANDUM DECISION (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court of Mohave County

Cause No. CR-2008-1199

The Honorable Rick A. Williams, Judge

AFFIRMED

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

Dana P. Hlavac, Maricopa County Public Defender
by Jill L. Evans, Deputy Public Defender
Attorneys for Appellant — Phoenix

W E I S B E R G, Judge

¶1 Tom Allen Lackey ("Defendant") appeals from the conviction and sentence imposed after a jury trial. His 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, but he has not done so. 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).

¶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). On appeal, we view the facts in the light most favorable to sustaining the verdict. *State v. Stroud,* 209 Ariz. at 410, 412, ¶ 6, 103 P.3d 912, 914 (2005).

BACKGROUND

¶3 L.B. testified that on October 22, 2008, she looked out her window and saw three men walking toward her son's mobile home. One of the men was wearing a shirt with stripes or a plaid. L.B. knew that her son was gone, so she walked to his home and saw the back door open and the door frame kicked in and splintered. As she entered, she saw a man standing in the wash room, where her son's television and computers had been placed. The man and L.B. both ran out the house. At trial, L.B. recognized a shirt as that worn by the man in the wash room. L.B. added that the fleeing man was "carrying stuff in both of his arms," that one item looked like a briefcase, and that he threw the items into the back of a pickup truck. She described the truck as a two-door white Chevrolet with tinted windows. She also saw two other men get into the truck.

L.B. and her husband called police. After finding a truck with three men inside nearby, police brought L.B. to see if she could identify them. L.B. could not identify any of the faces but did identify a shirt found with the men.

¶4 Detective Anderson testified that after receiving a call about the incident, he began looking for the truck. He saw a white truck turn into a home approximately one mile from the scene. He identified Defendant as the driver and said that he saw a pillowcase and a fire safe in the truck's bed.

¶5 When interviewed, Defendant told the detective that he knew that his companions were planning to steal from the mobile home, that he had driven down the street to wait for them, and that he had driven back just as the two ran out of the home. One of his companions got into the passenger side and the other jumped into the truck bed. One of the men admitted that he had worn the red plaid shirt L.B. had identified.

¶6 Officer Trebes testified that he found a receipt with the name of L.B.'s son inside the pillowcase. When the officer returned the pillowcase and fire safe to L.B.'s son's home, he noticed some televisions sitting in the hallway near the wash room.

¶7 Defendant was indicted and charged with burglary in the second degree, a Class 3 felony. A jury trial took place on May 18 and 19, 2009, after which the jury found Defendant guilty as charged. The court accepted a stipulation that defendant would

admit a prior conviction from 2006; the court then imposed a presumptive six and one-half year term and credited Defendant with seventy-nine days of presentence incarceration.

¶8 As appellate counsel points out, the trial court may not impose an enhanced sentence due to a prior conviction unless the court has found the conviction's existence, usually through certified copies of the conviction and proof that defendant is the same person as the one previously convicted. *State v. Morales*, 215 Ariz. 59, 61, ¶ 6, 157 P.3d 479, 481 (2007). Thus, before the superior court may accept either an admission or a stipulation to the existence of a prior conviction, it must comply with Rule of Criminal Procedure 17.6[1] and "engage in a plea-type colloquy to ensure that the admission [or stipulation] is voluntary and intelligent." *Id.* at 60, ¶ 1, 157 P.3d at 480. The procedures set out in Rule 17.2 require the court to "advise the defendant of the nature of the allegation, the effect of admitting the allegation on the defendant's sentence, and the defendant's right to proceed to trial and require the State to prove the allegation." *State v. Anderson*, 199 Ariz. 187, 194, ¶ 36, 16 P.3d 214, 221 (App. 2000). Here, as in *Morales*, the defendant did not object to the lack of a colloquy, but the omission of the colloquy is fundamental error and

[1]The Rule states 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."

is preserved even without an objection. *Morales*, 215 Ariz. at 61, 10, 157 P.3d at 481. Nonetheless, to be entitled to reversal, a defendant must show that the error "caused him prejudice." *Id.* Because copies of the prior convictions had been admitted at a pretrial hearing, the *Morales* court concluded that there was no need to remand for an evidentiary hearing on the priors. *Id.* at 62, ¶ 13, 157 P.3d at 482. Similarly, here, evidence of the prior conviction is part of the record. Therefore, no remand for an evidentiary hearing is necessary.

CONCLUSION

¶9 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. Aside from the failure noted above, 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, the sentence imposed was within the statutory limits, and sufficient evidence existed for the jury to find that Defendant committed the offense.

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

¶11 Accordingly, we affirm Defendant's conviction and sentence.

/S/
SHELDON H. WEISBERG,
Presiding Judge

CONCURRING:

/S/
PHILIP HALL, Judge

/S/
JOHN C. GEMMILL, Judge