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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 04/12/2012  
RUTH A. WILLINGHAM,  
CLERK  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 11-0042  
)  
Appellee, ) DEPARTMENT D  
)  
v. ) **MEMORANDUM DECISION**  
)  
) (Not for Publication -  
ROBERT JAMES WHIGAM, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)

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Appeal from the Superior Court in Maricopa County

Cause No. CR2009-178890-002DT

The Honorable Roger E. Brodman, Judge

**CONVICTION AFFIRMED; REMANDED REGARDING SENTENCING**

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By Kent E. Cattani, Chief Counsel,  
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And Linley Wilson, Assistant Attorney General  
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G E M M I L L, Judge

¶1 Robert James Whigam appeals from his conviction and sentence for burglary in the third degree. Whigam's counsel

filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that she has searched the record and found no arguable question of law and requesting that this court examine the record for reversible error. Whigam was afforded the opportunity to file a supplemental brief *in propria persona* but did not do so. See *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999).

¶12 After reviewing the record, we determined that the trial court may have conducted an incomplete colloquy with Whigam, in violation of Arizona Rules of Criminal Procedure 17.6 ("Rule(s)"), in the process of accepting Whigam's stipulation to several prior convictions for sentencing purposes. We asked the parties to provide us with supplemental briefing according to *Person v. Ohio*, 488 U.S. 75 (1988), in order to address the issue of whether the trial court omitted discussion of the constitutional rights Whigam was forgoing by his stipulation and whether the potentially incomplete colloquy constituted fundamental error requiring remand.

¶13 For the following reasons, we affirm Whigam's conviction and remand to the trial court for a determination on whether Whigam suffered prejudice based on the incomplete colloquy.

## FACTS AND PROCEDURAL HISTORY

¶4 "We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the convictions." *State v. Powers*, 200 Ariz. 123, 124, ¶ 2, 23 P.3d 668, 669 (App. 2001).

¶5 In January 2010, Whigam was indicted on one count of burglary in the third degree, a class 4 felony. The State alleged that in December 2009, Whigam and his co-defendant, Annette Brown, entered or remained unlawfully in the fenced backyard of Teresa M.'s house, with the intent to commit a theft or felony therein. Whigam denied the State's allegations and maintained he had license to enter the property pursuant to Brown's employment. A four-day jury trial commenced in September 2010. The following evidence was presented at Whigam's trial.

¶6 Theresa M. testified that she owned the three bedroom house ("house") with her parents, James M. and Mary M. In September 2009, Theresa M. listed the house for sale with a realtor. She moved in with her parents in December 2009, because she was no longer able to make the mortgage payments. Her house was not yet in foreclosure as of December 2009.

¶7 Theresa M. left behind a few belongings at the house, to show the property was not abandoned, including a washer, dryer, wheelbarrow, and patio table that were all in the

backyard. She said she came to the vacant house once a week to check on the property, as she still retained the keys, and hoped to transfer the home by way of a short sale. The house was fully surrounded by a block wall, but had a locked side gate that allowed access to the backyard. A small apartment building and parking lot were located behind the house.

¶18 Theresa M. testified that no one from her bank had contacted her about the need for any kind of inspection to be done on the house. Further, she had never had contact with either of the co-defendants, could not identify either of them in court, and did not give either of them permission to go onto her property or take anything from her backyard.

¶19 In court, Theresa identified an August 2010 statement from her mortgage banker, which indicated her first overdue notice on the home occurred in January 2010. Theresa M.'s Deed of Trust specified that the lender may inspect the property if it is vacant, abandoned or the loan was in default, in order to preserve the property. The document did not have any language regarding removal of personal belongings from the property.

¶10 Detective L., of the Phoenix Police Department, testified as to his surveillance of Brown and Whigam in December 2009. He observed them both, from an unmarked police car, in the front yard of Theresa M.'s property. Detective L. testified that while in the front yard, Brown appeared to be holding a

clipboard and taking notes, while Whigam was looking in and around the property. Whigam then jumped over the block wall, into the backyard, while being observed by the detective.

¶11 After watching Brown and Whigam drive away, Detective L. drove around the block and saw their vehicle parked south of Theresa M.'s house. Detective L. used binoculars to watch Whigam remove a wheelbarrow and a wood table from Theresa M.'s backyard, which were both loaded into the back of their vehicle. After they drove off, a marked police car made a traffic stop of the vehicle Whigam and Brown were in, and the wheelbarrow and table from Theresa M.'s backyard were in the vehicle. Detective L. identified both Whigam and Brown in court, as the people he saw in the truck when it was stopped after leaving Theresa M.'s house.

¶12 After Detective L.'s testimony, the state rested its case and defense counsel moved for acquittal pursuant to Rule 20. The defense argued that the case should be dismissed because the State had not proven the element that the defendants had entered the backyard of Theresa M. unlawfully. The motion was denied.

¶13 Whigam's co-defendant, Brown, was employed by Matthew G. to perform property inspections for mortgage companies. Matthew G. testified that he often hired Brown to visit homes, to determine whether or not they were occupied, and to report on

whether there appeared to be any concerns with the condition of the properties, for foreclosure, re-sale, or legal purposes. Brown's job duties, in performing property inspections, did not include removing anything from the properties. Matthew G. could not positively confirm that he sent Brown to Theresa M.'s house on the day in question, but believed that he had. Whigam was not employed or trained by Matthew G.

¶14 Brown testified for the defense, and stated she worked for Matthew G. as a property inspector. She affirmed that she brought Whigam with her to do the property inspection on Theresa M.'s house on the date in question, because she had been assaulted during a previous property inspection, and felt more comfortable if someone assisted her. Brown acknowledged that Whigam was her fiancé, and that he did not work for Matthew G., but was unemployed at the time.

¶15 Brown stated that she took Theresa M.'s wheelbarrow and table from the backyard of the property, and admitted that it was not a part of her inspection duty to clean up debris on the properties she inspected. She believed the items would have otherwise been thrown away, as the table was "pretty weathered" and the wheelbarrow was located between two garbage cans, and felt she had a right to take the items. Brown stated she had Matthew G.'s permission to remove this type of property, if she determined that it would eventually end up at the dump.

¶16 The jury found Whigam guilty of burglary in the third degree. The court further found Whigam guilty of three prior historical felony convictions, after Whigam stipulated to having five prior felony convictions. Whigam was sentenced as a non-dangerous, category three repetitive offender, to the mitigated sentence of six years imprisonment, with no presentence incarceration credit. His sentence was scheduled to begin after the absolute discharge of a consecutive sentence in companion case CR 2009-144771.

¶17 Whigam timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A)(1) (2010).<sup>1</sup>

#### DISCUSSION

¶18 The State acknowledges that the "trial court did not specifically advise [Whigam] of his constitutional right[s]" before accepting his stipulation to the prior convictions. The State contends however, that Whigam cannot demonstrate fundamental error because the record demonstrates Whigam was aware of the fundamental rights that he was giving up.<sup>2</sup>

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<sup>1</sup> We cite to the current versions of the statutes when no revisions material to this decision have occurred since the date of the alleged offense.

<sup>2</sup> Whigam was tried in a separate case (CR 2009-144771 and now 1 CA-CR 11-0033 on appeal) and found guilty. Whigam was

¶19 “Whenever 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.” Ariz. R. Crim. P. 17.6. Rule 17.2 complements Rule 17.6 procedurally by providing a list for the trial court to advise the defendant of when accepting a stipulation, including the constitutional rights that may be forgone by stipulating to prior convictions. See, e.g., Ariz. R. Crim. P. 17.2(c); *State v. Geeslin*, 221 Ariz. 574, 578, ¶ 13, 212 P.3d 912, 916 (App. 2009), *vacated in part on other grounds* by 223 Ariz. 553, 554, ¶ 1, 225 P.3d 1129, 1130 (2010).

¶20 This record reveals that the trial court did not engage Whigam in a comprehensive dialogue to make sure he was aware of the constitutional rights he was forgoing. See *State v. Carter*, 216 Ariz. 286, 289, ¶¶ 16-17, 165 P.3d 687, 690 (App. 2007) (limited trial court inquiry was insufficient to make defendant aware of his constitutional rights); cf. *State v. Alvarado*, 121 Ariz. 485, 490, 591 P.2d 973, 978 (1979) (concluding defendant was aware of the rights he was giving up even though the Rule 17.6 colloquy was incomplete because those

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sentenced on both cases simultaneously on January 7, 2011. Therefore, the trial court’s colloquy was identical for both sentences. The State, in cause number CR 2009-144771/1 CA-CR 11-0033, conceded that the colloquy was incomplete and suggested remand to determine if Whigam was prejudiced by the omission.



constitutional rights had been explained to defendant). The trial court did not discuss Whigam's right to a jury trial; the right to present evidence on his behalf; the right to testify or not testify; or the right to cross-examine witnesses. Nor did the court explain what happens when Whigam gives up those various rights once a stipulation is accepted and entered.

¶21 Our supreme court has held that a "complete failure to afford a Rule 17.6 colloquy is fundamental error because a defendant's waiver of constitutional rights must be voluntary and intelligent." *State v. Morales*, 215 Ariz. 59, 61, ¶ 10, 157 P.3d 479, 481 (2007). Here, the court conducted a partial colloquy, but the colloquy did not address the constitutional rights that Whigam would be giving up. We conclude, based on our supreme court's *Morales* opinion and Rules 17.6 and 17.2, that not addressing Whigam's constitutional rights constituted fundamental error.

¶22 The State argues that other portions of the record establish that Whigam was already familiar with his constitutional rights. Although we agree that Whigam *probably* was already familiar with his constitutional rights, we perceive that our supreme court imposed the requirements under Rules 17.6 and 17.2 in order to *make sure* that a defendant is aware of his constitutional rights before admitting to prior convictions instead of the State actually proving them.

¶23 Under a fundamental error analysis, Whigam must also make a showing that the incomplete colloquy created prejudice. *Id.* at 62, ¶ 11, 157 P.3d at 482; see also *State v. Henderson*, 210 Ariz. 561, 567, ¶ 20, 115 P.3d 601, 607 (2005) (stating that fundamental error requires the defendant to prove prejudice). “[P]rejudice generally must be established by showing that the defendant would not have admitted the fact of the prior conviction had the colloquy been given.” *Morales*, 215 Ariz. at 62, ¶ 11, 157 P.3d at 482.

¶24 The State acknowledges that if we find fundamental error, the proper remedy is remand for a determination of prejudice and resentencing if appropriate. We agree. A remand is necessary unless the trial record reflects that competent evidence proving Whigam’s prior convictions was admitted in the pretrial or trial phase. See *id.* at ¶ 13 (holding no remand necessary after incomplete colloquy when evidence of prior convictions was entered into evidence during a pretrial hearing). The State further concedes that the record does not contain evidence conclusively proving Whigam’s prior convictions.

¶25 We conclude that Whigam is entitled to remand so that he may demonstrate, if he can, how the incomplete colloquy prejudiced him. We recognize that it may be difficult for Whigam to prove that he was prejudiced. Nevertheless, we deem

it appropriate to return this matter to the trial court in order to safeguard the constitutional protections found within a complete colloquy under Rule 17.6 and Rule 17.2. *Carter*, 216 Ariz. at 291-92, ¶¶ 23-27, 165 P.3d at 692-93; see also *State v. Osborn*, 220 Ariz. 174, 178-79, ¶¶ 10-13, 204 P.3d 432, 436-37 (App. 2009).

¶126 Having further considered defense counsel's brief and examined the record for reversible error, see *Leon*, 104 Ariz. at 300, 451 P.2d at 881, we find no error in the verdict and no error in sentencing other than the incomplete colloquy regarding prior convictions. As far as the record reveals, Whigam was represented by counsel at all stages of the proceedings, there was sufficient evidence to sustain the verdict, and the jury was properly instructed.

#### CONCLUSION

¶127 Based on our review of the record and the parties' supplemental briefing, we affirm Whigam's conviction. Because the trial court committed fundamental error by providing Whigam an incomplete Rule 17.6 colloquy, we remand to the trial court for a determination on whether Whigam suffered any prejudice. If Whigam demonstrates that he suffered prejudice, the trial court should resentence him. However, if Whigam does not demonstrate any prejudice, his sentence is affirmed.

\_\_\_\_\_/s/\_\_\_\_\_  
JOHN C. GEMMILL, Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
MAURICE PORTLEY, Judge

T H O M P S O N, Judge, dissenting.

¶28 I would affirm. The trial court's sentencing decisions are properly based on information in the presentence report and the criminal history listed in the record. *State v. Marquez*, 127 Ariz. 3, 6, 617 P.2d 787, 790 (App. 1980). Whigam did not object to the criminal history which documents his priors. See Rule 26.8, Arizona Rules of Criminal Procedure (parties must object to contents of report before sentencing). Instead, he stipulated to the priors, which the court then appropriately found. Because Whigam's priors are documented in the record, the majority errs in remanding here, as defendant has not been prejudiced by the assertedly inadequate colloquy. See *State v. Morales*, 215 Ariz. 59, 62, ¶ 13, 157 P.2d 479, 482 (2007). Whigam has not even asserted prejudice on appeal. Accordingly, I dissent.

\_\_\_\_\_/s/\_\_\_\_\_  
JON W. THOMPSON, Presiding Judge