DIVISION ONE
FILED: 03/15/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 11-0158
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
JOHNNY SHANE MCNEEL,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2010-141491-001DT

The Honorable Steven P. Lynch, Judge *Pro Tem*

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Adriana M. Zick, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Margaret M. Green, Deputy Public Defender
Attorneys for Appellant

D O W N I E, Judge

¶1 Johnny Shane McNeel appeals from the sentence imposed after his conviction for misconduct involving weapons. For the following reasons, we affirm

FACTS AND PROCEDURAL HISTORY

¶2 A jury found McNeel guilty of misconduct involving weapons, a class 4 felony. The State had originally alleged that McNeel had seven prior felony convictions. At sentencing, though, only two prior convictions were at issue.[1] The following exchange occurred:

> THE COURT: . . . [W]e set aside time to [sic] a trial on the priors. Is that something you'd like to proceed with, or make an admission on the priors?
>
> [DEFENSE COUNSEL]: Your Honor, based on the conversation in chambers, Mr. McNeel is prepared to admit to two prior historical felonies.
>
> THE COURT: Okay. Great. Sir, come on up.
>
> . . . .
>
> THE COURT: . . . This is the time set for your sentencing on Count I, misconduct involving weapons as a Class 4 felony that was based on a conviction at trial. . . .
>
> My understanding is today you have the right to make the State prove your prior felony convictions, but after discussing your

[1] McNeel admitted prior convictions for possession of drug paraphernalia, a class 6 felony, and possession of dangerous drugs, a class 4 felony.

> options with your attorney, my understanding is that you would like to admit to having at least two felony convictions; is that correct?
>
> [MCNEEL]: Yes, sir.
>
> . . . .
>
> THE COURT: Okay. And sir, before I ask you the ultimate question, you need to understand that by admitting the priors, as I've explained to you, it puts you in a higher sentencing range. But if you elected to have the priors trial and I found that the State proved them, you'd still go into that higher sentencing range.
>
> [MCNEEL]: Yes, sir.
>
> THE COURT: And do you feel like you agree that you have those two prior felony convictions and that when you had those prior felony convictions you were actually represented by an attorney?
>
> [MCNEEL]: Yes, sir.
>
> THE COURT: Okay. And your decision is that you want to admit to those two prior felony convictions?
>
> [MCNEEL]: Yes, sir.

¶3 The court found that McNeel had knowingly, voluntarily, and intelligently admitted the two prior convictions. It sentenced him to a slightly aggravated prison term of ten years and one month.

¶4 McNeel filed a timely notice of appeal. He does not challenge the underlying conviction, but argues only that the court failed to conduct a proper colloquy regarding the prior

convictions. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031 and -4033.

DISCUSSION

¶5 "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. ("Rule") 17.6. We have interpreted "the procedures of this rule" to refer to the procedures articulated in Arizona Rule of Criminal Procedure ("Rule") 17.2 for acceptance of a guilty plea. *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, 225 P.3d 1129 (2010). Failing to conduct a Rule 17.6 colloquy constitutes fundamental error when a defendant fails to object to the error at trial. *State v. Morales*, 215 Ariz. 59, 61-62, ¶ 10, 157 P.3d 479, 481-82 (2007); *see also State v. Thues*, 203 Ariz. 339, 340, ¶ 4, 54 P.3d 368, 369 (App. 2002) (sentence must be vacated where court erroneously used prior conviction to enhance sentence).

¶6 The State concedes that the trial court engaged in an "incomplete colloquy." It argues, though, that McNeel was not prejudiced because he was aware of and knowingly and intelligently waived his constitutional rights. *See, e.g.*, *State v. Alvarado*, 121 Ariz. 485, 490, 591 P.2d 973, 978 (1979)

(though defendant not fully advised of constitutional rights, no reversible error because record showed he was aware of waived rights).

¶7 Rule 17.2 requires the trial court to ensure that a defendant understands the nature and range of his possible sentence. *See* Rule 17.2(b); *see also State v. Delgado*, 119 Ariz. 24, 25, 579 P.2d 62, 63 (App. 1978) (citation omitted) (Rule 17.2(b) requires court to tell defendant the minimum and maximum sentence he could receive upon admission). Informing McNeel that admitting two prior convictions would put him "in a higher sentencing range" is insufficient.

¶8 Additionally, the court did not advise McNeel of certain constitutional rights he was foregoing by admitting the prior convictions. We are unpersuaded by the State's suggestion that, having sat through his criminal trial, McNeel must necessarily have known that, at a trial on prior convictions, the State would have the burden of proof beyond a reasonable doubt, the defense would be entitled to cross-examine witnesses, and the privilege against self-incrimination would apply. We are even less impressed with the contention that McNeel should have gleaned these rights from having heard the preliminary and final instructions read to the jury in his underlying trial.

¶9 Nevertheless, we disagree with McNeel that a remand is required to allow him to demonstrate the requisite prejudice.

In *Morales*, our supreme court explained that where the record includes evidence conclusively proving a defendant's prior convictions, remand is unnecessary. 215 Ariz. at 62, ¶ 13, 157 P.3d at 482 (remand not required because documentation of prior convictions was admitted at pretrial hearing and neither side challenged its authenticity); *see also Carter*, 216 Ariz. at 291, ¶ 22, 165 P.3d at 692 (citation omitted) (remand unnecessary where record contains sufficient evidence to disprove prejudice); *State v. Hauss*, 140 Ariz. 230, 231, 681 P.3d 382, 383 (1984) (citations omitted) (sufficient evidence includes certified copies of minute entries reflecting prior convictions).

¶10 The trial court here admitted certified documentation of McNeel's prior convictions at the sentencing hearing. McNeel has not challenged the authenticity of these documents, and both prior convictions occurred in the Maricopa County Superior Court, where he was sentenced for the current offense. Thus, evidence conclusively proving McNeel's two prior convictions is

in the record, and remand is unnecessary.

CONCLUSION

¶11 For the reasons stated, we affirm McNeel's sentence.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
PATRICIA K. NORRIS, Presiding Judge

/s/
MAURICE PORTLEY, Judge