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



DIVISION ONE  
FILED: 05/17/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, )  
 ) No. 1 CA-CR 11-0482  
 )  
 Appellee, )  
 )  
 v. ) DEPARTMENT E  
 )  
 ) MEMORANDUM DECISION  
 GARY LAVAR KING, )  
 )  
 ) (Not for Publication -  
 Appellant. ) Rule 111, Rules of the  
 ) Arizona Supreme Court)  
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Appeal from the Superior Court in Maricopa County

Cause No. CR2009-158869-001

The Honorable Maria del Mar Verdin, Judge

**CONVICTION AFFIRMED; SENTENCE AFFIRMED AS MODIFIED**

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by Kent E. Cattani, Chief Counsel,  
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And  
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H A L L, Judge

¶1 A jury found defendant guilty of one count of aggravated taking of the identity of another, a class 4 felony, for having used the victim's Social Security number without his permission, to obtain a credit card from GE Money Bank. In his timely appeal, defendant asks us to determine whether the trial court (1) abused its discretion by admitting irrelevant and prejudicial evidence; (2) committed fundamental error when it accepted his stipulation to two prior felony convictions; and (3) committed fundamental error by not granting the full amount of presentence incarceration credit due him. For the reasons stated below, we affirm defendant's conviction and sentence as modified.

*Admission of Evidence*<sup>1</sup>

¶2 The victim discovered the fraudulent use of his Social Security number when he obtained a credit report prior to purchasing a home. The credit report listed several addresses and several bank accounts located in Chandler attributed to his Social Security number under the name of "Gary King." The victim, who had never been to Arizona, telephoned Chandler Police Officer Jared Zygowicz and made an identity theft report, faxing Zygowicz a copy of his credit report. Using the credit

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<sup>1</sup> We view the facts in the light most favorable to sustaining the jury's verdict and resolve all reasonable inferences against defendant. *State v. Vendever*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 n.2 (App. 2005).

report, Zygowicz traced one of the accounts, the one at GE Money Bank, to defendant. Defendant had used the victim's Social Security number on an on-line application to secure a credit card associated with that account and had subsequently used the credit card to pay for, among other things, utility and cell phone bills and tax services. This information formed the basis of the single charge against defendant.

¶13 Prior to trial, defendant moved *in limine* to preclude the State from presenting evidence that defendant "had numerous past personal residence addresses at the time of the investigation." According to defendant, evidence of the other addresses was irrelevant to the single offense with which he was charged. He also argued admission of the evidence would be unduly prejudicial because it could only serve to permit the jury to infer guilt because he was "somehow engaged in criminal activity." The State responded that it did not intend to use the evidence to argue guilt but only to explain the officer's investigation and to counter any implication that the officer had "arrested the first Gary King he found." The trial court denied defendant's motion, but limited the scope of the questioning to "what the officer did to conduct his investigation."

¶14 Before trial, defendant also made an oral motion to preclude the State from referring to a "Navy Federal Credit

Union account" that also appeared on the victim's credit report that ended up being a "dead end" during the investigation. The State argued that the information was relevant to show the officer had done a full investigation, including eliminating certain accounts that did not lead to defendant. The trial court ruled that the evidence was "relevant and not unduly prejudicial" and therefore admissible. The court also noted that defendant would be able to fully cross-examine the officer.

¶15 On appeal, defendant argues generally that it was error for the trial court to permit the State to present evidence of more than one account using the victim's Social Security number. He argues that the evidence created unfair prejudice because it "misle[d] the jury into believing that they could consider the evidence of the other accounts in arriving at a guilty verdict."

¶16 A trial court's decision to admit or exclude evidence is left to its sound discretion. *State v. Aguilar*, 209 Ariz. 40, 49, ¶ 29, 97 P.3d 865, 874 (2004); *State v. Murray*, 162 Ariz. 211, 214, 782 P.2d 329, 332 (App. 1989). When reviewing a trial court's decision, "[t]his court views the evidence in the light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect." *State v. Harrison*, 195 Ariz. 28, 33, ¶ 21, 985 P.2d 513, 518 (App. 1998) (internal citation and quotations omitted). For this court to

reverse on appeal, "there must be a reasonable probability that the verdict would have been different had the evidence not been admitted." *State v. Lacy*, 187 Ariz. 340, 349, 929 P.2d 1288, 1297 (1996).

¶17 Relevant evidence is evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Ariz. R. Evid. 401. Relevant evidence may be excluded if its probative value is "substantially outweighed by the danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury[.]" Ariz. R. Evid. 403.

¶18 Here, the trial court committed no error in admitting the evidence. First, the evidence of the multiple addresses and accounts was relevant to prove that the victim had indeed suffered identity theft as the State alleged. The victim testified that "noticing all the additional accounts" and the "extra addresses" on his credit report was what first alerted him to the fact that something was wrong. Second, the evidence was relevant to counter defendant's arguments that he was totally unaware that the victim's Social Security number appeared on his on-line credit card application and the fact that it did was wholly attributable to an inputting "glitch" or error on the part of GE Money Bank. As the State notes, the

fact that the victim's credit report contained numerous unauthorized accounts made it more probable that the victim's Social Security<sup>2</sup> number was compromised and less probable that its appearance on defendant's credit card application was due to bank processing error. Ariz. R. Evid. 401.

¶9 Nor was the probative value of the evidence "substantially outweighed" by the danger of unfair prejudice or juror confusion between the charged offense and uncharged offenses. The State did not use the evidence to argue or imply that defendant was in any way associated with the other accounts, but focused solely on the credit card account at GE Money Bank. Officer Zygowicz testified that he went through the "other" Gary Kings and eliminated them and that the only account tied to defendant was the GE Money Bank account. Moreover, if anything, the evidence of the other addresses was beneficial to defendant's defense, which was that the fact that defendant had used his true name and business address in his credit card application was not the act of someone trying to use a false Social Security number to hide a fraudulent act.

¶10 In support of his prejudice argument, defendant notes that after defense counsel cross-examined the victim about the

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<sup>2</sup> Furthermore, the evidence showed that defendant's Social Security number and the victim's Social Security number are not similar, making it highly unlikely that the error was typographical in nature.

Chandler addresses, two jurors submitted questions, one asking "what type" and "how many" accounts were opened using the victim's Social Security number, and the other asking how many accounts were opened. However, defense counsel asked for and received a limiting instruction before the victim responded to the questions:

Ladies and gentlemen, there are some questions that have been made of this witness. I need to indicate to you that we are only here on the accusations that have been made against [defendant] with respect to the GE account. So if you hear other information, it may not be relevant to the issue for which [defendant] is here today.

Defendant argues on appeal that the curative instruction did not "alleviate the danger of prejudice" because the fact that the court also stated that the other information "may not be relevant" left it "up to the jury to decide whether to use the information in any way they chose."

¶11 Preliminarily, we note that defendant did not question the trial court's instruction at the time it was given or ask the court for a clarification or modification. He has therefore waived his objection to the limiting instruction on appeal. *State v. Lucero*, 223 Ariz. 129, 140, ¶ 38, 220 P.3d 249, 260 (App. 2009). Moreover, we do not find the court's statement to be erroneous. The court properly limited the jury's attention to the account involved in the actual charge. However, as

mentioned above, evidence of the other accounts and addresses was relevant to the jury's determination whether the victim's identity had been appropriated. It therefore was also relevant to the jury's evaluation of defendant's claim that the entry of the victim's Social Security number was simply a bank processing error, and the trial court properly left to the jury to decide what weight, if any, to give the evidence when assessing the charge against him.

¶12 For these same reasons, the trial court also did not abuse its discretion when it denied defendant's motion for mistrial. See *State v. Bailey*, 160 Ariz. 277, 279, 772 P.2d 1130, 1132 (1989) (we reverse trial court's decision denying mistrial only if trial court clearly abused its discretion).

¶13 The trial court did not abuse its discretion in admitting the evidence of the other accounts and did not err in giving its limiting instruction to the jury. The trial court also properly denied defendant's motion for mistrial. We therefore affirm defendant's conviction.

#### *Prior Felony Convictions*

¶14 Before trial, the State alleged that defendant had two historical felony convictions for forgery and theft of a means of transportation, both in 2006. The State also alleged that defendant committed the present offense while on probation from the historical priors.



¶15 Once the jury rendered its guilty verdict on the offense and its guilty verdicts on two aggravating factors, defense counsel informed the trial court that defendant would stipulate to the priors and the fact that he committed the present crime while on release. The trial court then held a hearing at which defendant formally admitted both priors and the fact that he was on release from those priors when he committed the aggravated identity theft.

¶16 On appeal, defendant argues that his sentence should be vacated because the trial court violated Arizona Rules of Criminal Procedure (Rule) 17.6 and committed fundamental error when it accepted his admissions. See *State v Henderson*, 210 Ariz. 561, 567, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (defendant who fails to object to alleged trial error forfeits right to relief unless he can show that fundamental error occurred). Specifically, defendant claims that the trial court erred because it "failed to advise him of the increased sentencing range he faced by his admission to two prior felony convictions." Defendant maintains that we must therefore remand this matter to the trial court for an evidentiary hearing. We disagree.

¶17 The purpose of Rule 17 is to ensure that an admission by a defendant of a prior conviction "is voluntary and intelligent." *State v. Morales*, 215 Ariz. 59, 60, ¶ 1, 157 P.3d

479, 480 (2007). Before a court may accept a plea, it "shall address a defendant personally in open court" to ensure that he or she understands "the nature of the charge," "*the nature and range of possible sentence for the offense*," the constitutional rights renounced by entering into a plea agreement, that he or she has a right to plead not guilty, and that pleading to an offense waives the right to a direct appeal of that conviction. Ariz. R. Crim. P. 17.2 (emphasis added). Rule 17.6 expressly makes Rule 17 applicable to a defendant's admission of a prior conviction. See Ariz. R. Crim. P. 17 ("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."). Thus, before a trial court may accept a defendant's stipulation to a prior conviction, it must engage the defendant in a full Rule 17 plea-type colloquy to ensure that the admission is voluntary and intelligently made. *Morales*, 215 Ariz. at 61, ¶ 7, 157 P.3d at 481.

¶18 The record shows, and the State does not dispute, that when the trial court went through the Rule 17 colloquy with defendant, it did not inform him of the manner in which his admission to priors would impact the nature and range of the possible sentence. Our normal course in such an event would be to remand the sentencing for a hearing at which defendant would

have the opportunity to demonstrate prejudice. See, e.g., *State v. Carter*, 216 Ariz. 286, 290, ¶ 21, 165 P.3d 687, 691 (App. 2007) (citing cases). But we need not remand when the record establishes that a defendant was not prejudiced by the lack of full compliance with Rule 17. See *Morales*, 215 Ariz. at 62, ¶ 13, 157 P.3d at 482 (remand not necessary when the record reveals that defendant was not prejudiced by failure to fully comply with Rule 17).

¶19 Such is the case here. As in *Morales*, defendant here does not contest the accuracy or existence of his two prior convictions or the fact that he was on probation at the time he committed the current offense. Instead, his sole argument is that he would not have stipulated to the priors had he been apprised of the increased sentencing range he faced by his admissions. The record on appeal establishes, however, that the trial court informed defendant of the possible sentencing range at the motion in limine hearing held 13 days before defendant admitted his priors. Thus, defendant cannot show he was prejudiced by the error and remand for re-sentencing is not required.

*Presentence Incarceration Credit*

¶20 Defendant next argues that the trial court committed fundamental error when it failed to give him the entire amount of presentence incarceration credit to which he was due. See

*Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. Failure to award full credit for time served in presentence incarceration is fundamental error that may be raised at any time. *State v. Cofield*, 210 Ariz. 84, 86, ¶ 10, 107 P.3d 930, 932 (App. 2005).

¶21 The record shows that defendant was taken into custody on April 22, 2010, the date of the jury's guilty verdict. The trial court originally set sentencing for May 25, 2010, but continued it to July 13, 2010, at defendant's request.

¶22 At the time of sentencing on July 13, 2010, the trial court granted defendant 35 days of presentence incarceration credit based on a calculation of the time due contained in the presentence incarceration report, which anticipated sentencing would take place on May 24, 2010. Neither party challenged the amount of credit due at sentencing. As defendant correctly notes, however, the amount of credit the trial court awarded did not include the additional time that defendant spent incarcerated until actual sentencing on July 13.

¶23 The State acknowledges there is no "affirmative indication in the record that defendant was released from custody between May 24, 2010, and July 13, 2010," and concedes that defendant may have been short-changed by as much as 50 days' time. It requests that we "remand for the limited purpose of re-assessing the court's conclusion." However, the State did not contest the 35 days' credit due as of May 24 at sentencing

and has not filed a cross-appeal challenging the calculation. Therefore, we decline the State's request that we remand for possible defects in the calculation of the 35 days' credit. See *State v. Dawson*, 164 Ariz. 278, 286, 792 P.2d 741, 749 (1990) (declining correction of legally lenient sentence in the absence of proper appeals or cross-appeals by State).

¶24 The record establishes that between May 24 and July 13, defendant served an additional 50 days in custody. Because July 13, the day the sentence was imposed, counts toward the sentence but not the presentence incarceration time, that day does not count toward the calculation of the presentence incarceration credit. *State v. Hamilton*, 153 Ariz. 244, 245-46, 735 P.2d 854, 855-56 (App. 1997). By our calculation, defendant is entitled to an additional 49 days' credit. We therefore amend defendant's sentence to reflect that he is entitled to a total of 84 days of presentence incarceration credit. Ariz. Rev. Stat. (A.R.S.) § 13-4037 (2010).

**CONCLUSION**

¶25 For the foregoing reasons, we affirm defendant's conviction and sentence as modified.

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\_ /s/ \_\_\_\_\_  
PHILIP HALL, Judge

CONCURRING:

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

\_\_\_\_\_  
\_ /s/ \_\_\_\_\_  
DIANE M. JOHNSEN, Judge