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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JUAN PEDRO DeLEON, JR., Appellant.	)	2 CA-CR 2011-0293 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR201101303

Honorable Joseph R. Georgini, Judge

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz, and
Diane Leigh Hunt
Tucson
Attorneys for Appellee

Harriette P. Levitt
Tucson
Attorney for Appellant

V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, appellant Juan DeLeon was convicted of third-degree burglary and theft. The trial court found DeLeon had two or more prior felony convictions and sentenced him to enhanced, presumptive terms of ten years'

imprisonment, to be served concurrently. As the sole issue on appeal, DeLeon argues the court committed fundamental error in sentencing him as a repetitive offender because the historical prior felony convictions found by the court had not been alleged prior to trial, as required by A.R.S. § 13-703(N). He asks that his sentences be vacated and the case remanded for resentencing.

Facts and Procedural Background

¶2 The following facts are relevant to DeLeon's claim. DeLeon was arrested in connection with a residential burglary that had been discovered on the morning of January 19, 2011. It appears he was indicted originally on the single charge of burglary under a different cause number, but the state dismissed that indictment and, on June 1, 2011, re-indicted DeLeon on charges of burglary and theft in the instant case. On June 7, 2011, the state filed two identical notices of "allegation of aggravating circumstances pursuant to A.R.S. § 13-701." In those notices, the state alleged DeLeon had an unidentified prior felony conviction within ten years immediately preceding the offense, pursuant to § 13-701(D)(11), and also alleged, as "other factor[s]" under § 13-701(D)(24), that DeLeon had "a lengthy criminal record," had "a prior conviction for a similar offense," and previously had been on probation. In addition, the notices stated, "[I]f the defendant has felony convictions that were [sic] not used to enhance the sentence under [A.R.S] § 13-703 or [A.R.S.] § 13-704, the state intends to allege the multiple convictions as an aggravating circumstance." But the state did not file a notice alleging historical prior felony convictions, required for enhanced sentencing as a repetitive offender under § 13-703, and did not cite that statute in DeLeon's indictment.

¶3 Prior to jury selection on the first day of trial, the trial court heard argument on whether DeLeon's prior felony convictions could be used for impeachment purposes if he chose to testify. *See* Ariz. R. Evid. 609. That discussion included the following exchange between the court and DeLeon's trial counsel:

> [DEFENSE COUNSEL]: Judge, what may be helpful, on the State's last filing, which was an amended allegation of defendant's historical prior convictions, I count eight, so I think we're dealing with four that Ms. Hunt is alleging that Mr. Gygax can match fingerprints. There's two additional ones that are on the D.O.C. packet without a match of fingerprints, but then there's going to be two additional from this amended filing.
>
> So, Judge, what may be helpful because I do have some specific argument, if we could go through maybe from that filing and list out which falls into which category.
>
> THE COURT: And you're referring to the filing of March the 24th, 2011?
>
> [DEFENSE COUNSEL]: Correct.
>
> THE COURT: And that was in the prior case, which has been dismissed, but the files are still relative?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: Fair enough. Go ahead.

The parties then reviewed DeLeon's convictions, as they had been listed in the amended allegations of historical prior felony convictions the state had filed under the dismissed cause number, for the purpose of admissibility under Rule 609.

¶4 After returning guilty verdicts, the jury was asked to consider the state's allegations of aggravating circumstances, and the state presented evidence of DeLeon's

prior felony convictions. While the jury deliberated, the state asked the trial court to find, based on the same evidence, that DeLeon had two or more historical prior felony convictions, for sentence enhancement purposes, in order to sentence him as a repetitive offender under § 13-703(J). The court did so, and DeLeon's counsel did not object to the court's finding, either at trial or at sentencing.

Discussion

¶5 Because DeLeon did not object to the state's assertion of historical prior felony convictions in the trial court, he has forfeited appellate review absent fundamental error. *State v. Martinez*, 210 Ariz. 578, ¶ 4 & n.2, 115 P.3d 618, 620 n.2 (2005). Fundamental error is that "'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. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005), *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20.

¶6 On appeal, DeLeon argues his sentence as a repetitive offender constituted fundamental error "because the state did not allege prior convictions for purposes of sentence enhancement at all" in the instant case. He asserts the error was prejudicial, as required to obtain relief on review for fundamental error, because "he should have been sentenced within the sentencing range for a defendant who has no prior convictions, because none were alleged" for enhancement purposes.

¶7 For a defendant to be sentenced to enhanced punishment as a repetitive offender pursuant to § 13-703, allegations of prior convictions must be "charged in the indictment or information and admitted or found by the court." § 13-703(N). Generally, an indictment authorizes an enhanced sentence under § 13-703 by either citing the statute, *see State v. Burge*, 167 Ariz. 25, 27 n.4, 804 P.2d 754, 756 n.4 (1990), or specifically alleging facts justifying enhancement under the statute, *see State v. Tresize*, 127 Ariz. 571, 574, 623 P.2d 1, 4 (1980). The state may amend the indictment by filing an allegation of prior convictions "at any time before the date the case is actually tried unless the allegation is filed fewer than twenty days before the case is actually tried and the court finds on the record that the person was in fact prejudiced by the untimely filing . . . ." § 13-703(N); *see also State v. Kelly*, 123 Ariz. 24, 26, 597 P.2d 177, 179 (1979) ("[T]rial court may, in its discretion, grant a motion to amend to allege a prior conviction anytime before trial."). "The allegation must be made before trial, however, and may not be alleged after the verdict is returned." *State v. Williams*, 144 Ariz. 433, 442, 698 P.2d 678, 687 (1985). And, if such allegations are filed, "the state must make available to the person a copy of any material or information obtained concerning the prior conviction." § 13-703(N).

¶8 The state does not dispute that neither the indictment in this case nor subsequently filed allegations authorized an enhanced sentence. Section 13-703 was not cited in the indictment, and the state did not move at anytime during the pendency of this case to amend the indictment to seek an enhanced sentence under § 13-703. *See* Ariz. R. Crim. P. 13.5(a) (allowing state to "amend an indictment . . . to add an allegation of one

or more prior convictions" for sentencing purposes). Relying on *State v. Logan*, 200 Ariz. 564, ¶ 9, 30 P.3d 631, 632-33 (2001), the state instead maintains DeLeon is not entitled to fundamental error review because he "invited any error" in the state's failure to allege prior convictions pursuant to § 13-703 because he "expressly agreed below that the sentence-enhancement allegation in the previous action was still applicable."

¶9 We will not find reversible error if the complaining party invited the error it asserts. *See Logan*, 200 Ariz. 564, ¶ 9, 30 P.3d at 632-33; *see also State v. Pandeli*, 215 Ariz. 514, ¶ 50, 161 P.3d 557, 571 (2007). The invited error doctrine is designed "to prevent a party from 'inject[ing] error in the record and then profit[ing] from it on appeal.'" *Logan*, 200 Ariz. 564, ¶ 11, 30 P.3d at 633, *quoting State v. Tassler*, 159 Ariz. 183, 185, 765 P.2d 1007, 1009 (App. 1988) (alteration in *Logan*). But, because the doctrine precludes review of even fundamental, prejudicial error, this court has cautioned against its application "unless the facts clearly show that the error was actually invited by the appellant." *State v. Lucero*, 223 Ariz. 129, ¶ 18, 220 P.3d 249, 255 (App. 2009). Thus, "if the party complaining on appeal affirmatively and independently initiated the error," the invited error doctrine precludes review; "[i]f, on the other hand, he merely acquiesced in the error proposed by another, the appropriate sanction should be to limit appellate review to fundamental error." *Id.* ¶ 31.

¶10 Here, DeLeon's counsel suggested that a list of DeLeon's convictions, found in an amended notice of historical prior felony convictions filed in the dismissed action, could be used to aid the court in reviewing convictions the state wished to admit, pursuant to Rule 609, Ariz. R. Evid., to impeach DeLeon if he chose to testify at trial.

Counsel's affirmative response, when the court asked if "the files are still relative," seems to us to signify nothing more than his agreement that the list was an adequate starting point for discussion of the state's Rule 609 motion. The error in this case occurred because DeLeon was sentenced to an enhanced punishment pursuant to § 13-703, despite the state's failure to allege, at his indictment or anytime thereafter in this case, historical prior felony convictions that would subject DeLeon to punishment under that statute. Although counsel clearly acquiesced in that error, by failing to object to an enhanced sentence at trial or sentencing, he did not "affirmatively and independently initiate[] the error," *Lucero*, 223 Ariz. 129, ¶ 31, 220 P.3d at 258, by suggesting that a list of prior convictions that happened to have been filed in the dismissed action would assist the court in its review for purposes of Rule 609.

¶11 The state next asserts that, even if we review for fundamental error, DeLeon "clearly suffered no prejudice by the arguably deficient *legal* notice of the sentence-enhancement allegation given that, by his own admission on the first day of trial, he had *actual* notice of the allegation." *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. Arizona courts have held that, when no prejudice results, a trial court may permit the state to amend a factually flawed but timely asserted enhancement allegation after trial has commenced. *See State v. Williams*, 144 Ariz. 433, 442, 698 P.2d 678, 687 (1985) (error in permitting post-trial substitution of third felony conviction for one of two historical prior felony convictions alleged before trial found harmless); *State v. Noriega*, 142 Ariz. 474, 482-83, 690 P.2d 775, 783-84 (1984), *overruled on other grounds by Burge*, 167 Ariz. 25, 28 n.7, 804 P.2d at 757 n.7, *disapproved of on other grounds by*

State v. King, 225 Ariz. 87, ¶¶ 9-12, 235 P.3d 240, 242-43 (2010); *State v. Cons*, 208 Ariz. 409, ¶¶ 1-2, 6, 94 P.3d 609, 610-11, 612 (App. 2004).[1]

¶12 In *Noriega*, our supreme court concluded a trial court did not err in granting the state's post-trial motion to amend an indictment to allege enhancement pursuant to former A.R.S. § 13-604.01(A), rather than former § 13-604.01(B), as originally charged.[2] 142 Ariz. at 482-83, 690 P.2d at 783-84. The court concluded "the nonprejudicial misdesignation of a statutory subsection" did not constitute reversible error, reasoning, "If there is an arguably sufficient, but erroneous, allegation in the indictment, the controlling inquiry is whether there was any surprise or prejudice to the defendant from the omission of the enhanced punishment citation." *Noriega*, 142 Ariz. at 483, 690 P.2d at 784. Similarly, in *Cons*, this court found no fundamental error in permitting the state's post-conviction amendment of its allegation of prior convictions "to change the dates of conviction and specify the class of felony," where the defendant "had ample notice of precisely which prior convictions the state was alleging" for enhancement purposes. 208 Ariz. 409, ¶ 6, 94 P.3d at 612.

¶13 But we also have held that the state may not allege, in the first instance, prior convictions that subject a defendant to an enhanced sentence under § 13-703 once

[1]Significant portions of the Arizona criminal sentencing code have been renumbered, effective January 1, 2009. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. Although the cited authorities precede those revisions and refer to earlier versions of sentence enhancement statutes, the relevant charging provisions have remained unchanged. *See id.* § 119 (reorganization "not intended to make any substantive changes to the criminal sentencing laws" with exceptions not relevant here).

[2]*See* 1982 Ariz. Sess. Laws, ch. 322, § 2, now A.R.S. § 13-708.

trial has commenced. *State v. Rodgers*, 134 Ariz. 296, 306-07, 655 P.2d 1348, 1358-59 (App. 1982) (sentence vacated for state's failure to allege, prior to trial, consolidated counts for sentence enhancement); *cf. State v. Sammons*, 156 Ariz. 51, 53-55, 749 P.2d 1372, 1374-76 (1988) (court correctly denied state's post-trial motion to amend allegation of "on parole" status to allege different conviction, committed in different county, as basis for parole); *State v. Guytan*, 192 Ariz. 514, ¶¶ 32-34, 968 P.2d 587, 595-96 (App. 1998) (sentence vacated for failure to allege, "before the jury [was] sworn," gang motivation for purpose of sentence enhancement). And, although we may inquire whether a defendant has been surprised or misled to determine whether he has been prejudiced by "an arguably sufficient, but erroneous, allegation," *Noriega*, 142 Ariz. at 483, 690 P.2d at 784, the state has cited no authority, and we have found none, suggesting a defendant's constructive notice of the state's intent to seek an enhanced sentence, in and of itself, is sufficient to satisfy § 13-703(N)'s authorization for sentence enhancement "if an allegation of prior conviction is charged in the indictment or information" and admitted or found by the court.[3] The state could have complied with § 13-703(N) by citing the enhancement statute in the indictment, by filing allegations of

[3]In *Noriega*, the court considered whether a defendant's due process rights had been violated by the state's delayed amendment of a timely filed allegation of prior convictions. 142 Ariz. at 482-83, 690 P.2d at 783-84; *see also State v. Benak*, 199 Ariz. 333, ¶¶ 14-18, 18 P.3d 127, 131 (App. 2001) (state's allegation of enhancement factors insufficient to afford defendant "fundamental fairness and due process"). Thus, where prior convictions have been charged and, it may be argued, the allegations comply substantially with statutory requirements, courts have inquired whether the statutory notice comports with due process. DeLeon does not argue on appeal that his sentence violated due process, and we need not reach the issue because there is no dispute that prior convictions never have been charged or alleged in this case, as required by § 13-703(N).

prior convictions for enhancement purposes at any time more than twenty days prior to trial, or by seeking leave of court to amend the indictment to include the allegations before the jury was empaneled. Because the state failed to pursue any of these means of charging prior convictions for sentence enhancement under § 13-703, the sentence is not statutorily authorized and is therefore illegal. "Imposition of an illegal sentence constitutes fundamental error." *State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002).

¶14 Under these circumstances, we cannot agree that DeLeon has not been prejudiced by the error. In the absence of historical prior felony convictions "charged in the indictment or information and admitted or found by the court," § 13-703(N), DeLeon would have been subject to sentences within the range of one to 3.75 years' imprisonment, with a presumptive term of 2.5 years, A.R.S. § 13-702(D). Instead, he was exposed to a sentencing range of six to fifteen years and sentenced to concurrent, presumptive, ten-year terms. § 13-703(J). Thus, DeLeon was prejudiced because sentencing him pursuant to § 13-703(J), when the state had failed to comply with § 13-703(N), "mandate[d] a higher sentence" than legally authorized. *Sammons*, 156 Ariz. at 55, 749 P.2d at 1376 (state's belated motion to amend enhancement allegations correctly denied where defendant would be prejudiced by exposure to higher sentence); *cf. Williams*, 144 Ariz. at 442, 698 P.2d at 687 (no prejudice resulted from error allowing post-conviction amendment to allegation of prior convictions where "prior convictions did not enter into the determination of sentence").

Disposition

¶15 For the foregoing reasons, DeLeon's convictions are affirmed; however, his sentences are vacated, and we remand the case for resentencing pursuant to A.R.S. § 13-702.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge