

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

NOV 28 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2012-0060
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
JAMES LYLE HOISINGTON,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20110072001

Honorable Jose H. Robles, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and David A. Sullivan

Tucson
Attorneys for Appellee

Nicole Farnum

Phoenix
Attorney for Appellant

ESPINOSA, Judge.

¶1 A jury convicted James Hoisington of one count of theft by control and two counts of third-degree burglary, and the state alleged one historical prior felony

conviction for sentence-enhancement purposes. After a separate bench trial, the trial court found Hoisington's prior felony conviction proven and sentenced him to concurrent, presumptive, 4.5-year prison terms for each burglary conviction, and to time served for the theft conviction. On appeal, Hoisington contends the state failed to present sufficient evidence that he had been convicted of the prior felony and the court therefore erred in imposing enhanced sentences. We affirm.

Factual and Procedural History

¶2 We view the facts in the light most favorable to sustaining the conviction and the trial court's findings, resolving all reasonable inferences against the defendant. *See State v. Karr*, 221 Ariz. 319, ¶ 2, 212 P.3d 11, 12 (App. 2008). On December 22, 2010, a Tucson police officer arrested Hoisington after he was found loading items from the fenced backyard and shed of a private residence into a van. He was charged and convicted as outlined above. A "priors trial" subsequently was held at which the state introduced evidence of a prior conviction for purposes of sentence enhancement pursuant to A.R.S. § 13-703(B)(2), (I). In particular, the state introduced certified Pima County court records pertaining to a 2005 felony conviction for trafficking in stolen property¹ and an Arizona Department of Corrections "PenPak."² Hoisington did not object to the documents' admission, dispute the existence of his prior conviction, or challenge the veracity of the documents during the bench trial. No additional evidence was admitted,

¹Pima County Superior Court Cause Number CR20051398.

²The information contained within the PenPak included Hoisington's height, weight, eye color, hair color, fingerprints, and a black-and-white photograph.

and the trial court sentenced Hoisington as outlined above. This court has jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Discussion

¶3 Hoisington argues his sentence was improperly enhanced because the state did not prove, by clear and convincing evidence, that he was the same individual convicted in the 2005 felony conviction referenced in both the certified court records and PenPak. On appeal, this court reviews claims of insufficient evidence *de novo*. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993).

¶4 Because Hoisington did not argue in the trial court that the evidence was insufficient, he has forfeited any right to appellate relief absent fundamental, prejudicial error. *See State v. Robles*, 213 Ariz. 268, ¶ 12, 141 P.3d 748, 752 (App. 2006), *citing State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005); *see also State v. Martinez*, 210 Ariz. 578, 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.” *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *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. Imposition of an illegal sentence constitutes fundamental error. *Cf. State v. Alvarez*, 205 Ariz. 110, ¶ 18, 67 P.3d 706, 712 (App. 2003) (finding sentence illegal where trial court erroneously considered aggravating

factors). ““Before we may engage in a fundamental error analysis, however, we must first find that the trial court committed some error.”” *See Robles*, 213 Ariz. 268, ¶ 13, 141 P.3d at 752, *quoting State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342 (1991); *see also Henderson*, 210 Ariz. 561, ¶ 23, 115 P.3d at 608. We find no error, let alone fundamental error, here.

¶5 The state must provide clear and convincing evidence of historical prior felony convictions before a trial court may enhance a defendant’s sentence. *State v. Cons*, 208 Ariz. 409, ¶ 15, 94 P.3d 609, 615 (App. 2004); *see also* A.R.S. §§ 13-105(22)(a)(i), (b) (class-three felony conviction is historical prior felony when committed within ten years immediately preceding date of present offense), 13-2307 (second-degree trafficking in stolen property class-three felony). And two facts must be proven: (1) the defendant in the present case and the one in the prior case are the same individual, and (2) there was in fact a prior conviction. *State v. Hooper*, 145 Ariz. 538, 549-50, 703 P.2d 482, 493-94 (1985). “The proper procedure for establishing a prior conviction is for the state to submit a certified copy of the conviction and establish that the defendant is the person to whom the document refers.” *Cons*, 208 Ariz. 409, ¶ 16, 94 P.3d at 615.

¶6 For the trial court to find clear and convincing evidence, it must ““be persuaded that the truth of the contention is highly probable.”” *State v. Roque*, 213 Ariz. 193, ¶ 75, 141 P.3d 368, 390 (2006), *quoting In re Neville*, 147 Ariz. 106, 111, 708 P.2d 1297, 1302 (1985) (internal quotation and citation omitted). Our supreme court has found

that “the similarity of both names and photographs” contained in records of a prior judgment are sufficient to support a finding that the defendant had been convicted of the prior offense because the trier of fact can compare them to the name and appearance of the defendant on trial. *State v. Jones*, 103 Ariz. 580, 581, 447 P.2d 554, 555 (1968), citing *State v. McGonigle*, 103 Ariz. 267, 272, 440 P.2d 100, 105 (1968) (photographs sufficient evidence of prior felony convictions, even where name on prior felony differed from defendant’s name), *rev’d in part on different grounds sub nom. State v. Allen*, 105 Ariz. 267, 463 P.2d 65 (1969). Additionally, the court has held that a matching detailed description of the defendant in the prior case together with matching prison photographs or “mug shots” supported a finding of a prior felony. *See State v. Baca*, 102 Ariz. 83, 87, 425 P.2d 108, 112 (1967).³

¶7 Hoisington contends the documents the state presented are insufficient to prove he is the same person as the defendant listed in the 2005 felony-conviction records. But he did not object to their introduction nor did he contest the veracity of the information contained therein. Further, he did not claim in the trial court, nor does he contend on appeal, that he is not the same person as the defendant named in the prior

³Both *Jones* and *Baca* were decided at a time when Arizona presented questions of prior convictions to a jury and employed a proof beyond a reasonable doubt standard. *Jones*, 103 Ariz. at 581, 447 P.2d at 555; *Baca*, 102 Ariz. at 87, 425 P.2d at 112; *see* former A.R.S. § 13-604(P) (1967). Arizona law now refers questions of prior convictions to the trial judge and employs the lesser standard of clear and convincing evidence. *Cons*, 208 Ariz. 409, ¶ 15, 94 P.3d at 615. Both *Jones* and *Baca* concluded that matching names and photographs of the defendant in the prior case satisfied the higher, beyond a reasonable doubt standard. *Jones*, 103 Ariz. at 581, 447 P.2d at 555; *Baca*, 102 Ariz. at 87, 425 P.2d at 112.

felony records.⁴ He nevertheless argues the state provided no evidence other than a matching name because there was no evidence the fingerprints contained in the court records or PenPak matched his own, nor any evidence that the man in the photograph was him. These contentions are meritless.

¶8 The state presented the trial court with certified court records of the 2005 conviction which matched Hoisington's name and date of birth. The PenPak contained the same information and additionally included a full-page, black-and-white photograph of the defendant's face in the prior case and also listed his date of birth, height, weight, eye color, and hair color. Based on this evidence, the court found Hoisington was the same person as the defendant in the 2005 prior felony conviction. We defer to the trial court's factual findings and will not disturb them so long as they are supported by substantial evidence and not clearly erroneous. *State v. Rodriguez*, 205 Ariz. 392, ¶ 18, 71 P.3d 919, 924-25 (App. 2003). The identifying information contained in the certified court records and the PenPak was ample evidence from which the trial court could find Hoisington the same person as the defendant in the 2005 felony conviction.

¶9 We reject Hoisington's argument that the lack of fingerprint comparison caused the evidence to be insufficient. Our supreme court found this same argument meritless in *Jones*, noting that while a comparison of fingerprints would have provided "additional corroborating evidence of appellant's conviction for a prior crime," the

⁴Accordingly, Hoisington has failed to carry his burden of demonstrating prejudice on appeal. *See State v. Kinney*, 225 Ariz. 550, ¶ 26, 241 P.3d 914, 922 (App. 2010) (on review for fundamental error, defendant bears burden of demonstrating prejudice).

similarity of both names and photographs sufficed to prove he had been convicted of a prior offense. 103 Ariz. at 581, 447 P.2d at 555. Here, such additional evidence was unnecessary and would have been cumulative because the state fulfilled its evidentiary requirements with the certified court records and PenPak. *See Cons*, 208 Ariz. 409, ¶¶ 16-17, 94 P.3d at 615; *Baca*, 102 Ariz. at 87, 425 P.2d at 112.

Disposition

¶10 Because sufficient evidence supported the trial court's finding that Hoisington had been convicted of a historical prior felony, his enhanced sentences are affirmed.

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge