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



DIVISION ONE  
FILED: 06/26/2012  
RUTH A. WILLINGHAM,  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) Nos. 1 CA-CR 11-0092  
)  
Appellee, ) DEPARTMENT E  
)  
v. ) **MEMORANDUM DECISION**  
)  
CAROLOS P. ROBLES, ) (Not for Publication -  
) Rule 111, Rules of the  
Appellant. ) Arizona Supreme Court)  
)  
)

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Appeal from the Superior Court in Maricopa County

Cause No. CR 2010-006222-003 DT

The Honorable John R. Hannah Jr., Judge

**AFFIRMED**

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by Kent E. Cattani, Chief Counsel,  
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Capital Litigation Section  
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Attorneys for Appellee

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Attorneys for Appellant

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**H A L L**, Judge

¶1 Carlos P. Robles (defendant) appeals from his convictions and the sentences imposed. For the following reasons, we affirm.

#### FACTS AND PROCEDURAL BACKGROUND

¶2 The facts relevant to the issues raised on appeal are not disputed. On June 24, 2010, defendant was charged by indictment with one count of attempted second-degree murder (Count I), a class two dangerous felony, two counts of armed robbery (Counts II and III), class two dangerous felonies, one count of conspiracy to commit armed robbery (Count IV), a class three dangerous felony, two counts of aggravated assault (Counts V and VI), class three dangerous felonies, and one count of misconduct involving weapons (Count VIII), a class four dangerous felony.<sup>1</sup> The State also alleged that defendant had two historical prior felony convictions: (1) theft, a class four felony, committed on November 5, 2004 (CR 2004-005191); and (2) misconduct involving weapons, a class four felony, committed on November 25, 2005 (CR 2005-139166).

¶3 A jury convicted defendant as charged and also found two aggravating factors. The trial court found defendant had two prior felony convictions and sentenced him to an aggravated term of 20 years' imprisonment on Count I, a presumptive term of

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<sup>1</sup> Count VII of the indictment related only to co-defendant Andrew Gonzalez.

15.75 years' imprisonment on Count II, a presumptive term of 15.75 years' imprisonment on Count III, a presumptive term of 15.75 years' imprisonment on Count IV, a presumptive term of 11.25 years' imprisonment on Count V, a presumptive term of 11.25 years' imprisonment on Count VI, and a presumptive term of 10 years' imprisonment on Count VIII. The trial court ordered that Counts I, II, IV, V, VI, and VIII be served concurrently and that Count III be served consecutive to the other counts.

¶14 This appeal followed. 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, and -4033(A)(1) (2010).

#### DISCUSSION

¶15 As his first issue on appeal, defendant contends the trial court committed reversible error when it issued its final instructions to the jury. Specifically, defendant asserts that the trial court made a statement to the jury that was "of such a nature as to indicate the court's opinion that [defendant] was guilty."

¶16 Defendant did not object to the jury instructions at trial. Therefore, we review for fundamental error. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To obtain relief under fundamental error review, a defendant must prove that the trial court erred, that the error

was fundamental, and that the error caused him prejudice. *Id.* at 567, ¶ 20, 115 P.3d at 607. "To establish fundamental error, [a defendant] must show that the error complained of goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *Id.* at 568, ¶ 24, 115 P.3d at 608. "To establish that a fundamental error is also prejudicial, a defendant must show that, but for the error, a reasonable fact-finder 'could have reached a different result.'" *State v. Joyner*, 215 Ariz. 134, 144, ¶ 31, 158 P.3d 263, 273 (App. 2007) (quoting *Henderson*, 210 Ariz. at 569, ¶ 27, 115 P.3d at 609)).

¶7 As set forth in Article 6, Section 27, of the Arizona Constitution, "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." "To violate Arizona's constitutional prohibition against commenting on the evidence, the court must express an opinion as to what the evidence proves." *State v. Rodriguez*, 192 Ariz. 58, 63, ¶ 29, 961 P.2d 1006, 1011 (1998). "The constitution prohibits the sort of judicial comment upon the evidence that would interfere with the jury's independent evaluation of the evidence." *Id.* "[I]n order to determine whether a statement by the court is a comment upon the evidence[, ] the statement should be examined in light of the circumstances and context in which

it was made." *Patania v. Silverstone*, 3 Ariz.App. 424, 429, 415 P.2d 139, 144 (1966).

¶18 In the course of providing the jurors with their final instructions, the trial court stated, in relevant part:

Should any of you, or the jury as a whole, have a question for me during your deliberations, or wish to communicate with me on any other matter, please utilize the jury question form that we will provide you.

. . . .

Your question or message must be communicated to me in writing and must be signed by you or the presiding juror. And a number is fine, I don't really need your name.

In any event, I will consider your question or note and, if necessary, consult with counsel before answering in writing. I will answer as quickly as possible.

Please do not tell anyone, including me, how you stand numerically or otherwise until after you've reached a verdict or have been discharged.

In other words, *I don't want to know there are 10 of us voting for guilty and two for not guilty*, or whatever the case might be. Please do not tell me that. Whatever you tell me, do it without giving me any numbers about how many of you are one side or the other, or who is where, for reasons that I won't go into with you. That creates a bunch of problems that we don't need so please just don't do that. (Emphasis added).

¶19 Defendant argues that the portion of the trial court's statement italicized above "could reasonably be interpreted to suggest that the trial court believed most of the jurors would

inevitably find [him] guilty," thus depriving him of his due process right to a fair trial. We disagree.

¶10 In reviewing the entirety of the trial court's statement, we conclude that no reasonable juror could have inferred that the trial court was offering its opinion as to the weight of the evidence or implying that most jurors would determine defendant was guilty. Rather, the trial court was admonishing the jurors that, should they need to communicate with the court during their deliberations, they were not to inform the court of their vote count. In context, it is clear that the statement at issue was intended to be illustrative in the event the jurors did not understand the court's preceding sentence: "Please do not tell anyone, including me, how you stand numerically or otherwise until after you've reached a verdict or have been discharged." That the statement was intended simply to be explanatory is further evidenced by the introductory phrase "[i]n other words" and the concluding phrase "whatever the case might be." Thus, we conclude that no reasonable juror could have interpreted the trial court's admonition as a comment on the weight of the evidence or defendant's guilt or innocence, and the court therefore did not commit error, much less fundamental error, in instructing the jury.

¶11 Defendant next argues that the trial court erred by "sentencing [him] as a category three repetitive offender because the State failed to argue any specifics or circumstances upon which a second historical prior felony could be found and because the trial court failed to make any findings regarding the alleged second historical felony."

¶12 At trial, defendant stipulated that he committed the crime of misconduct involving weapons, a class four felony, on November 25, 2005, and that he was convicted of that crime in CR 2005-139166 on March 13, 2006. Before accepting the stipulation, the trial court informed defendant that, among other things, the stipulation could be used to increase his sentence without the State presenting any additional evidence. Defendant affirmed that he understood the possible consequences of the stipulation and the court accepted the stipulation into evidence.

¶13 At the sentencing hearing, the State presented two exhibits: (1) defendant's trial stipulation, and (2) a certified Department of Corrections pen pack "show[ing] [the] conviction in CR 2005-139166 for misconduct involving weapons." As explained by the prosecutor, "another prior [] is [also] referenced in the pen pack." The trial court accepted the two

exhibits into evidence without objection.<sup>2</sup> The prosecutor then stated, "I believe that's enough proof. If the court needs additional evidence, we can present it, but I think given the stipulation and the certified DOC pack, [there] is sufficient proof." The court asked defense counsel whether he wished to present anything for the court's consideration and he declined. The trial court then found that defendant "was previously convicted in CR 2005-139166. That was a felony conviction, and it does qualify as a statutory aggravating factor given the circumstances and the date of the conviction." Although the trial court did not specifically mention the other alleged historical prior felony conviction at the sentencing hearing, the court expressly found both alleged prior felony convictions in the sentencing minute entry<sup>3</sup> and enhanced defendant's sentences based on the two prior felony convictions.<sup>4</sup>

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<sup>2</sup> Although admitted into evidence, the exhibits are not part of the appellate record. See n.5, *infra*.

<sup>3</sup> To the extent defendant argues that the trial court's express finding of a second historical prior felony conviction in the sentencing minute entry is insufficient because the court did not make a corresponding oral pronouncement at the sentencing hearing, we find such claim to be without merit.

<sup>4</sup> The sentencing minute entry states that the sentence in Count III is based on one prior felony conviction, but the sentence imposed corresponds to a class two felony with two prior felony convictions.



¶14 The State must prove a prior conviction for sentence enhancement purposes by clear and convincing evidence. *State v. Cons*, 208 Ariz. 409, 415, ¶ 15, 94 P.3d 609, 615 (App. 2004). "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." *Id.* at 415, ¶ 16, 94 P.3d at 615. Because defendant did not contend there was insufficient evidence to prove his second historical prior conviction in the trial court, he has forfeited the claim absent fundamental, prejudicial error. See *State v. Robles*, 213 Ariz. 268, 272, ¶ 12, 141 P.3d 748, 752 (App. 2006) (citing *Henderson*, 210 Ariz. at 567, ¶¶ 19-20, 115 P.3d at 607).

¶15 We find no error here, fundamental or otherwise. Defendant does not dispute the State's description of the pen-pack as "including information regarding Maricopa County Superior Court cause numbers for [defendant's] convictions, as well as the dates of the offenses, convictions, and sentences, a physical description of [defendant], and [defendant's] photograph, fingerprints, date of birth and social security number."<sup>5</sup> Instead, defendant argues that the State needed to

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<sup>5</sup> In any event, we presume that missing portions of the trial record support the trial court's findings. See *State v. Mendoza*, 181 Ariz. 472, 474, 891 P.2d 939, 941 (App. 1995) ("When matters are not included in the record on appeal, the

present argument rather than rely solely on documentary evidence. This claim is without merit. A certified copy of the convictions and proof that defendant is the person to whom the documents refer is all that is required. *Cons*, 208 Ariz. at 415, ¶ 16, 94 P.3d at 615. Here, the identifying information contained within the pen-pack, in combination with defendant's trial stipulation that he committed one of the two prior felonies documented in the pen-pack, sufficiently demonstrated that defendant was the person referenced in the documents. Therefore, the trial court did not err by enhancing defendant's sentences based on two historical prior felony convictions.<sup>6</sup>

¶16 Finally, defendant argues that his sentences "should be remanded for clarification or resentencing" because the trial court's sentences are "clearly ambiguous."

¶17 In the sentencing minute entry, the trial court expressly found that "[d]efendant has two (2) prior felony convictions." The court also noted that the State "elects to have the Court treat the offenses as non-dangerous with two

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missing portion of the record is presumed to support the decision of the trial court.").

<sup>6</sup> As noted by the State, defendant's further contention that his conviction in CR 2004-005191 could not be used to enhance his sentence because it was committed more than five years preceding the date of the present offense is groundless. Defendant committed the theft on November 15, 2004 and the present offense on July 11, 2009. Thus, less than five years elapsed between the commission of the two crimes.

prior convictions for sentencing purposes." The trial court then sentenced defendant to an aggravated or presumptive sentence on Counts I, II, IV, V, VI, and VIII based on two prior felony convictions. As to Count III, the sentencing minute entry states that the offense is a "Class 2 FELONY WITH ONE PRIOR FELONY CONVICTIONS," but the term of imprisonment imposed, 15.75 years, is the presumptive sentence for a class two felony with two prior felony convictions.<sup>7</sup>

¶18 We conclude that a remand for clarification is unnecessary because the trial court's intent is clear from the record. See *State v. Bowles*, 173 Ariz. 214, 216, 841 P.2d 209, 211 (App. 1992). The trial court expressly found defendant has two historical prior felony convictions. The court also explained in its sentencing minute entry that the State elected to have the court treat the offenses as non-dangerous with two prior felonies. Moreover, the sentence the court imposed for Count III, as stated at the sentencing hearing and as set forth in the sentencing minute entry, corresponds to a class two felony with two prior felony convictions. Therefore, because the trial court's intent to sentence defendant, on all counts,

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<sup>7</sup> At the sentencing hearing, the trial court set forth the term of imprisonment for each count, but did not specifically address whether it was sentencing defendant as a category two or a category three repetitive offender.

as a category three repetitive offender is clear from the record, we affirm the sentences.

**CONCLUSION**

¶19 For the foregoing reasons, we affirm.

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

CONCURRING:

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

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