DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 11-0738
	)	DEPARTMENT E
v.	)	**MEMORANDUM DECISION**
LARRY LAWRENCE, Appellant.	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-007924-001

The Honorable Carolyn K. Passamonte, Judge *Pro Tempore*

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Joseph T. Maziarz, Section Chief Counsel
Alice Jones, Assistant Attorney General
Attorneys for Appellee

Janelle A. McEachern — Chandler
Attorney for Appellant

Larry Lawrence — San Luis
Appellant

J O H N S E N, Judge

¶1 This appeal was timely filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), following Larry Lawrence's convictions of two counts of aggravated assault, Class 6 felonies; one count of resisting arrest, a Class 6 felony; one count of driving or actual physical control while under the influence of intoxicating liquor or drugs ("DUI"), a Class 1 misdemeanor; and one count of criminal damage, a Class 2 misdemeanor. Lawrence's counsel has searched the record on appeal and found no arguable question of law that is not frivolous. *See Smith v. Robbins*, 528 U.S. 259 (2000); *Anders*, 386 U.S. 738; *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Counsel now asks this court to search the record for fundamental error. Lawrence has filed a supplemental brief, which we address below. After reviewing the entire record, we affirm Lawrence's convictions and resulting sentences.

FACTS AND PROCEDURAL HISTORY

¶2 Driving to a doctor's appointment one day in August 2008, Lawrence crashed into a neighbor's wall.[1] According to witnesses, Lawrence immediately ran away, but returned five minutes later with a second car, which he used to tow the first

[1] Upon review, we view the facts in the light most favorable to sustaining the jury's verdicts and resolve all inferences against Lawrence. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

car back to his home. About half an hour later, apparently concerned about his health and wanting his then-girlfriend to take him to the hospital, Lawrence left his home in yet a third car to go to the local elementary school, where his girlfriend was picking up her child.

¶3 Lawrence was unable to find his girlfriend and was returning home when his car experienced engine trouble. As he pushed the car the rest of the way home, he passed the wall he had crashed into earlier, and there encountered police investigating the hit-and-run incident. After Lawrence refused the officers' commands to stop, they followed him back to his home, where he quickly locked himself inside. Outside Lawrence's home, the police heard from an off-duty officer who happened to have been at the elementary school. The off-duty officer said Lawrence may have attempted to assault the school's principal by hitting her with his car.

¶4 The police then approached Lawrence's door and asked him to come out and talk with them. Lawrence refused and became increasingly agitated, yelling at the officers and repeatedly opening and slamming the front door. The third time Lawrence opened the door, the police rushed in and attempted to arrest him. A protracted struggle ensued.

¶5 At trial, Lawrence admitted on cross-examination that he had been convicted of a felony committed in 2004. The jury

convicted Lawrence of five of eleven charges against him. At the sentencing hearing, the superior court accepted Lawrence's admissions to three other prior felonies without conducting a plea-type colloquy required by Arizona Rule of Criminal Procedure 17.6. Based on Lawrence's admissions during trial and at the sentencing hearing, the court found Lawrence had two historical prior felony convictions. *See* Ariz. Rev. Stat. ("A.R.S.") § 13-604(W)(2)(c) (Supp. 2007) (Class 6 felony committed within preceding five years); A.R.S. § 13-604(W)(2)(d) (any third or more prior felony conviction). Accordingly, the court sentenced Lawrence to 3.75 years' incarceration on each of the aggravated assault and resisting arrest convictions, the presumptive sentence for a Class 6 felony with two historical prior felony convictions, all to run concurrently. A.R.S. § 13-604(C) (Supp. 2007).

¶6 We have jurisdiction of Lawrence's timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. sections 12-120.21(A)(1) (West 2013), 13-4031 (West 2013) and -4033(A)(1) (West 2013).[2]

DISCUSSION

A. Issues Raised in Lawrence's Supplemental Brief.

1. Alleged destruction of evidence.

[2] Absent material revisions after the date of the alleged offense, we cite a statute's current version.

¶7 In his supplemental brief, Lawrence argues he was not able to offer in evidence a video recording by his home security system of the scuffle that formed the basis of his aggravated assault and resisting arrest charges. He argues the video was "altered or tampered with" to hide the fact that the police were the true aggressors and that he was prevented from viewing the video once the police seized it.

¶8 While police did seize a tape from Lawrence's home security system the day after the incident, he has directed this court to nothing in the record to support his contention that the police altered or tampered with evidence. To the contrary, a police detective who viewed the video more than two months after the incident testified that the recording was less than 30 seconds and only showed the officers as they entered the house; the video equipment did not record the altercation that took place inside the home. The detective further testified that when he attempted to view the tape again in July 2011, the video "just kept clicking" without showing any picture.

2. Inability to send surveillance video to manufacturer for retrieval.

¶9 Lawrence next argues he was "not allowed" to send the surveillance video to an entity that would be able to "preserve the video." As noted above, however, nothing in the record indicates the video captured any evidence relevant to the

charges against Lawrence.

3. Insufficient evidence to support the DUI conviction.

¶10 Lawrence asserts there is insufficient evidence to support his DUI conviction. Specifically, he argues that drugs were found in his system only because he ingested Percocet and Oxycodone and "smoked half a joint" to calm himself down while he was in his home and police were outside. Lawrence maintains he had taken no drugs prior to operating a vehicle that day.

¶11 "A conviction must be based on substantial evidence, . . . which is proof that reasonable persons could find sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Johnson*, 215 Ariz. 28, 29, ¶ 2, 156 P.3d 445, 446 (App. 2007) (quotation omitted). We will not reverse a conviction for insufficient evidence unless "there is a complete absence of probative facts to support [the jury's] conclusion." *State v. Mauro*, 159 Ariz. 186, 206, 776 P.2d 59, 79 (1988). In other words, to warrant reversal, "it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶12 The record contains more than sufficient evidence to support Lawrence's DUI conviction. Beyond his admission that he ingested various drugs, a police forensic scientist testified

Lawrence tested positive for a number of classes of drugs including benzodiazepines, cannabinoids and opiates. Finally, blood test results indicated he could have ingested the drugs at any point within the six previous hours, which means he could have taken them before he drove home for the last time on the day in question. While Lawrence testified to the contrary, the jury may have found his testimony not credible. Because "[t]he credibility of a witness' testimony and the weight it should be given are issues particularly within the province of the jury," and we view the facts in the light most favorable to sustaining the jury's verdicts and resolve all inferences against Lawrence, we reject Lawrence's contention that insufficient evidence supports his DUI conviction. *See Estate of Reinen v. N. Ariz. Orthopedics, Ltd.*, 198 Ariz. 283, 287, ¶ 12, 9 P.3d 314, 318 (2000) (quotation omitted).

4. Alleged false statements by police officers.

¶13 Lawrence argues police officers falsified their report of the incident and lied during their court testimony. Lawrence maintains the officers lied about how the struggle in his home began, his actions inside the home and the events surrounding his use of one of the officer's Taser. As noted, the credibility of a witness's testimony and the weight to give it are issues particularly within the province of the jury. *Id.* Additionally, this court does not reweigh the evidence. *State*

v. Mincey, 141 Ariz. 425, 432, 687 P.2d 1180, 1187 (1984). Accordingly, we find no merit to Lawrence's contentions that various police officers lied about the evidence.

5. Inability to admit hospital record.

¶14 Lawrence contends that it was error that a four-page hospital report was not admitted in evidence. Lawrence, however, points to nothing in the record indicating that his counsel offered the report in evidence. "We will not consider factual matters not presented to the trial court and not contained in the record." *State v. Hunter*, 5 Ariz. App. 112, 116, 423 P.2d 727, 731 (App. 1967).

6. Other issues.

¶15 In broad, conclusory fashion, Lawrence also touches on a variety of other possible issues, including illegal search, "Rule 602 Need for personal knowledge (Melissa & Jessica Brown)[,] Rule 611 Mode and order of Interrogation and presentation, Rule 613 Witnesses, prior inconsistent statements[.] Also Rules 401, 402, and 403. And Ineffective assistance of Counsel. Lose [sic] of Evedence [sic]/ Tampering of Evedence [sic]." We will not address issues stated in a brief without supporting argument because such issues are waived. *State v. Moody*, 208 Ariz. 424, 459 n.11, 94 P.3d 1119, 1154 (2004).

B. Fundamental Error Review.

1. Failure of the court to engage Lawrence in a colloquy pursuant to Rule 17.6.

¶16 This court ordered additional briefing pursuant to *Penson v. Ohio*, 488 U.S. 75 (1988), on the issue of whether the court's failure to provide Lawrence with a plea-type colloquy prior to accepting his admissions to his prior felonies at his sentencing hearing constituted fundamental error.

¶17 Arizona Rule of Criminal Procedure ("Rule") 17.6 mandates that "[w]henever 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." This means that "Rule 17 requires the judge to engage in a plea-type colloquy with the defendant to ensure that the admission is voluntary and intelligent." *State v. Morales*, 215 Ariz. 59, 60, ¶ 1, 157 P.3d 479, 480 (2007). Rule 17.2 provides:

> Before accepting a plea of guilty or no contest, the court shall address the defendant personally in open court, informing him or her of and determining that he or she understands the following:
>
> a. The nature of the charge to which the plea is offered;
>
> b. The nature and range of possible sentence for the offense to which the plea is offered, including any special conditions regarding sentence, parole, or commutation imposed by statute;
>
> c. The constitutional rights which the

> defendant foregoes by pleading guilty or no contest, including his or her right to counsel if he or she is not represented by counsel; [and]
>
> d. The right to plead not guilty . . . .

¶18 "A complete failure to afford a Rule 17.6 colloquy is fundamental error . . . ." *Morales*, 215 Ariz. at 61, ¶ 10, 157 P.3d at 481. We will reverse a sentence imposed in violation of Rule 17.6, however, only if the defendant proves he was prejudiced by the error. *Id.* at 62, ¶ 11, 157 P.3d at 482 ("The absence of a Rule 17.6 colloquy . . . does not automatically entitle a defendant to a resentencing. [The defendant] must also establish prejudice . . . ."). "[P]rejudice generally must be established by showing that the defendant would not have admitted the fact of the prior conviction had the colloquy been given." *Id.*

¶19 In response to our *Penson* order, Lawrence's counsel filed a brief conceding he was not prejudiced by the violation of Rule 17.6. The brief states, "There is no reason from the record to assume that, even if Mr. Lawrence had stood on his right to have a trial on the priors, the result would have been different." Given that a defendant must "at the very least, assert on appeal that he would not have admitted the prior felony convictions had a different colloquy taken place," *State v. Young*, 230 Ariz. 265, ____, ¶ 11, 282 P.3d 1285, 1289 (App.

2012), we will not vacate Lawrence's sentences for lack of the Rule 17.6 colloquy.

2. *Voir dire*.

¶20 Lawrence's counsel objected to the impaneled jury because the court denied his motion to strike for cause prospective jurors who said during *voir dire* that they possibly would hold it against Lawrence if he did not testify on his own behalf. We review a superior court's refusal to strike jurors for cause for an abuse of discretion. *State v. Cruz*, 218 Ariz. 149, 158, ¶ 28, 181 P.3d 196, 205 (2008).

¶21 In denying the motion to strike, the court noted that during prior questioning of the entire group of prospective jurors, they indicated they understood that a criminal defendant has a right not to testify at trial and that "exercise of that right cannot be considered by the jury in determining guilt or innocence." The court also noted that all the jurors indicated they did not disagree with these principles or think they should not be the law.

¶22 Generally, once a prospective juror admits during *voir dire* to having a preconception not allowed by the law, he or she may not sit on the jury unless he or she has been "rehabilitated" through further questioning following the inappropriate answer. Absent such rehabilitation, the court's refusal to strike the juror for cause constitutes an abuse of

discretion. *See State v. Poland*, 144 Ariz. 388, 398, 698 P.2d 183, 193 (1985) ("Because the record shows the contested jurors were adequately rehabilitated through the voir dire, the trial court did not abuse its discretion in failing to strike them."). In this case, neither the court nor the prosecutor engaged in additional *voir dire* of the contested venirepersons after they gave the objectionable answers.

¶23 While normally the court's denial of a motion to strike the contested venirepersons under such circumstances constitutes an abuse of discretion, "an otherwise valid criminal conviction will not be reversed unless prejudice is shown." *Cruz*, 218 Ariz. at 158, ¶ 29, 181 P.3d at 205 (a defendant's use of a peremptory challenge to remove a juror who should have been excused for cause does not mandate reversal of an otherwise valid criminal conviction unless prejudice is shown). We cannot conclude that Lawrence was prejudiced by the court's refusal to strike the contested jurors, four of whom ultimately sat on the jury. Rather than exercise his right not to testify, Lawrence testified extensively over two days, and his lawyer called no other witness in his defense. Lawrence does not argue he was compelled to testify against his wishes or his lawyer's advice; nor does he argue that his testimony prejudiced his defense. Indeed, we infer from the State's pretrial filing of a motion to limit Lawrence's testimony that Lawrence had made known prior to

trial that he would testify in his own defense. For these reasons, we cannot conclude that Lawrence was prejudiced by the court's impaneling of the jurors who had said they might hold it against him if he did not testify.

3. Other Issues.

¶24 The record reflects Lawrence received a fair trial. He was represented by counsel at all stages of the proceedings against him and was present at all critical stages. The court did not conduct a voluntariness hearing; however, the record did not suggest a question about the voluntariness of Lawrence's statements to police. *See State v. Smith*, 114 Ariz. 415, 419, 561 P.2d 739, 743 (1977); *State v. Finn*, 111 Ariz. 271, 275, 528 P.2d 615, 619 (1974). The State presented both direct and circumstantial evidence sufficient to allow the jury to convict. The jury was properly comprised of twelve members with two alternates.

¶25 The court received and considered a presentence report. A defendant is entitled to presentence incarceration credit for all time spent in custody pursuant to an offense. A.R.S. § 13-712(B) (West 2013). A failure to award the correct amount of presentence incarceration credit constitutes fundamental error. *State v. Ritch*, 160 Ariz. 495, 498, 774 P.2d 234, 237 (App. 1989). Lawrence was awarded 65 days' presentence incarceration credit, but as the record shows Lawrence was only

in custody for 53 days, this court requested that the parties explain whether the superior court's calculation of presentence incarceration credit was correct.

¶26 In response to our order, the State replied that it could not discern from the record why the court awarded Lawrence 65 days of credit instead of 53. Lawrence's counsel, however, argued Lawrence should have been awarded 73 days' presentence incarceration credit. We are unable to discern in the record the basis for his counsel's argument, however. The record reflects that Lawrence was taken into custody on August 12, 2011, the date he was found guilty of the various charged offenses and that he was sentenced on October 4, 2011, 53 days later.

¶27 Because the record does not indicate that the court denied Lawrence presentence incarceration credit to which he was otherwise entitled, we cannot hold that fundamental error occurred when the court awarded Lawrence 65 days of presentence incarceration credit.

CONCLUSION

¶28 We have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. After the filing of this decision, defense counsel's obligations pertaining to Lawrence's representation in this appeal have ended. Defense counsel need do no more than inform

Lawrence of the outcome of this appeal and his future options, unless, upon review, counsel finds "an issue appropriate for submission" to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, Lawrence has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* petition for reconsideration. Lawrence has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* petition for review.

/s/

DIANE M. JOHNSEN, Judge

CONCURRING:

/s/

PATRICIA K. NORRIS, Presiding Judge

/s/

JON W. THOMPSON, Judge