DIVISION ONE
FILED: 2/12/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. ALFONSO VILLA LOPEZ, Appellant.	)	1 CA-CR 11-0772 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-109453-002

The Honorable Roger E. Brodman, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Angela Corinne Kebric, Assistant Attorney General
Attorneys for Appellee

Bruce Peterson, Legal Advocate — Phoenix
By Kerri L. Chamberlin, Deputy Legal Advocate
Attorneys for Appellant

G E M M I L L, Judge

¶1 Alfonso Villa Lopez appeals his convictions and

sentences for illegally conducting an enterprise and transportation of marijuana for sale in an amount over the statutory threshold. Lopez's sole argument is that the trial court erred by failing to perform a complete colloquy before accepting his admission of three prior convictions. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On February 23, 2011, Highway Patrol Officer F. observed a white Pontiac driving below the speed limit on State Route 85. Officer F. attempted a traffic stop, but the Pontiac accelerated away. A high-speed chase ensued, with the Pontiac exceeding speeds of one hundred miles per hour. The chase lasted between fifteen to twenty minutes before the Pontiac ran out of gas and came to a stop.

¶3 Once stopped, Lopez, a passenger in the Pontiac, jumped out of the front passenger side of the car and escaped down a nearby embankment. Another highway patrol officer gave chase and apprehended Lopez with the assistance of two civilians. Upon inspection, Officer F. detected a strong scent of marijuana emanating from the Pontiac, and he discovered several bales of marijuana inside the car.

¶4 Lopez was subsequently tried and found guilty by a jury of illegally conducting an enterprise and transportation of marijuana for sale in an amount over the statutory threshold.

¶5 At the hearing in September 2011, the trial court addressed the subject of prior convictions and engaged in a colloquy with Lopez. The court asked Lopez if he was of sound mind and whether he intended to admit to the prior convictions of misconduct involving weapons, theft of means of transportation, and possession of dangerous drugs. The court further inquired if Lopez understood that he was giving up the right to have a hearing, cross-examine any witnesses, and present evidence on his own behalf. Lopez answered in the affirmative to all these questions. Following this limited colloquy, Lopez admitted to the three prior convictions.

¶6 At sentencing, the trial court used two of the three prior convictions to classify Lopez as a Category 3 Repetitive Offender, a classification that enhanced his sentences. The court sentenced Lopez to fourteen years for illegally conducting an enterprise and nineteen years for transportation of marijuana over the threshold amount, to be served concurrently.

¶7 We have jurisdiction over Lopez's timely appeal, in accordance with Arizona Constitution Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A)(1) (2010).

DISCUSSION

¶8 On appeal, Lopez argues that the trial court's failure to perform a complete colloquy was fundamental error. He

requests remand for an evidentiary hearing to determine prejudice as it pertains to his sentences. The State, however, contends that the record disproves the existence of prejudice and therefore, remand is unnecessary. We agree with the State.

¶9 The trial court performed an incomplete colloquy before accepting Lopez's admission of prior convictions. In the context of sentencing enhancement, Arizona Rules of Criminal Procedure ("Rule") 17.6 requires that the trial judge conduct a colloquy when the defendant admits or defense counsel stipulates to prior convictions. *State v. Morales*, 215 Ariz. 59, 60, ¶ 1, 157 P.3d 479, 480 (2007). The reason for the colloquy is to ensure that the defendant's admission is made "voluntarily and intelligently." *Id.* at 61, ¶ 8, 157 P.3d at 481.

¶10 Rule 17.6 does not specifically outline the elements required in the colloquy, but Rule 17.2 provides guidance. *State v. Geeslin*, 221 Ariz. 574, 578, ¶ 13, 212 P.3d 912, 916 (App. 2009) (applying the applicable requirements set forth in Rule 17.2 to Rule 17.6) *vacated in part on other grounds by* 223 Ariz. 553, 225 P.3d 1129 (2010). Rule 17.6, as interpreted, requires the court to address the following elements in the colloquy: (1) the nature of the allegation against the defendant, (2) the sentencing range faced by the defendant if he admits or stipulates to prior felonies, (3) the waiver of the defendant's right to require the State prove his prior

convictions, and (4) the defendant's waiver of additional constitutional rights. Ariz. R. Crim. P. 17.2, 17.6; *Geeslin*, 221 Ariz. at 578, ¶ 13, 212 P.3d at 916.

¶11 In the present case, the trial court engaged in a colloquy with Lopez but did not specifically discuss how Lopez's admission of prior convictions would increase the applicable sentencing ranges. The State acknowledges that the trial court did not inform Lopez of his sentencing exposure during the colloquy. The court therefore erred because the colloquy did not fully comply with the requirements of Rule 17.6.

¶12 Lopez, however, failed to object to any deficiencies regarding the colloquy during the sentencing hearing. Therefore, our review is limited to a determination of fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (holding that fundamental error review is appropriate when a defendant fails to object to an error during trial). This court previously found that failure to "obtain an admission pursuant to Rule 17.6, before finding the defendant is a repeat offender, constitutes fundamental error." *Geeslin,* 221 Ariz. at 578, ¶ 14, 212 P.3d at 916.

¶13 Here, after accepting Lopez's admission of prior convictions, the trial court sentenced Lopez as a Category 3 Repetitive Offender based on the finding that two of his three prior convictions qualified as historical priors. Because Lopez

admitted to the prior convictions without the benefit of a complete colloquy, we conclude that this was fundamental error.

¶14 We must next evaluate if the fundamental error resulted in prejudice against Lopez. To prevail on appeal on the basis of fundamental error, a defendant must ordinarily show both fundamental error and that the error caused him prejudice. *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607. A showing of prejudice requires Lopez to demonstrate that he would not have admitted to the prior convictions had the trial judge delivered a complete Rule 17.6 colloquy. *Morales*, 215 Ariz. at 62, ¶11, 157 P.3d at 482. This court has held that, when prejudice cannot be determined on the record, remand to the trial court for an evidentiary hearing is appropriate. *State v. Carter*, 216 Ariz. 286, 291, ¶ 23, 165 P.3d 687, 692 (App. 2007).

¶15 The State argues that remand is inappropriate because the record on appeal disproves prejudice. *See id.* at ¶ 22. Specifically, the State contends there was no prejudice because Lopez was made aware that admission of prior convictions could result in a sentencing enhancement. It points to a pre-trial *Donald*[1] hearing on June 17, 2011, at which Lopez was present. There, the prosecutor described a plea offer and also referred to Lopez's "two prior allegeable felony convictions" before going on to describe the possible minimum, presumptive, and

[1] *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000).

maximum sentencing ranges for the charges of conducting an illegal enterprise and transportation of marijuana for sale in an amount over the statutory threshold.

¶16 The Arizona Supreme Court has recognized that a reversal is not required due to a trial court's failure to inform a defendant of information required under Rule 17.2(b) if the record reveals the defendant was already aware of the information omitted in the colloquy. *See State v. Crowder*, 155 Ariz. 477, 479, 747 P.2d 1176, 1178 (1987). When the entire record shows that a defendant was aware of information omitted from a colloquy, no prejudice will be found. *State v. Alvarado*, 121 Ariz. 485, 490, 591 P.2d 973, 978 (1979); *see also State v. Nieto*, 118 Ariz. 603, 608, 578 P.2d 1032, 1037 (1978) ("[I]f the record reveals that the defendant in fact was aware of his rights, a failure to comply with Rule 17.2(c) will be considered technical, non-reversible error.").

¶17 We conclude that Lopez cannot show prejudice from the trial court's failure to inform him during the stipulation colloquy of the applicable sentencing range because that information had been supplied to him — on the record — at the *Donald* hearing. At the beginning of the *Donald* hearing, the trial court explained to Lopez that the prosecutor was going to inform him of the penalties he would face if he went to trial and asked him to listen to the information:

> Mr. Lopez, the Prosecutor's going to put some information on the record about what your penalties will be and what your sentencing rights will be if you go to trial and you're convicted. He's also going to give you information regarding what the plea offer was in this case. It does expire today. Please listen to that information and then I'll have a question or two for you.

¶18 The prosecutor proceeded, as instructed by the trial court, to provide information regarding the possible sentences:

> Judge, the plea offer was a Class 2 felony with one prior felony conviction capped at the presumptive term of nine and a quarter. If we proceed to trial, the Defendant has two prior allegeable felony convictions. He's charged with two counts. Count I, illegal enterprise. The minimum sentence will be seven and a half, the presumptive term being 10, and the maximum being 25 years.

¶19 Lopez's interpreter interrupted and asked to "hear the penalties again," and the prosecutor obliged and corrected a misstatement about the presumptive term:

> The super mitigated would be seven and a half, presumptive of 11 and a quarter, and the super max of 25. On Count II the super mitigated would be 10 and a half, the presumptive of 15.75, and super max of 35 years. The State's position is they would probably have to run concurrent.

¶20 The trial court then asked Lopez if he understood this information, and he answered, "Yes." The record thus reveals the superior court at the *Donald* hearing informed Lopez that the prosecutor was about to tell him the penalties he faced

(enhanced by the prior convictions) if he went to trial. The prosecutor explicitly told Lopez the penalties, and once the prosecutor had done that, Lopez said that he understood that information. Under these circumstances, Lopez had been informed of the sentencing range he faced if he went to trial. The trial court's error in not covering this information at the stipulation colloquy did not prejudice him.

¶21 Additionally, the record includes the presentence report, and a confidential criminal history is part of that report. The confidential criminal history lists the same three prior convictions that Lopez admitted after the incomplete colloquy. Presentence reports are provided to counsel for defendants, *see* Rule 26.6(a), and the parties are allowed an opportunity to present any objections to the content of the report. *See* Rule 26.8(a). The record in this case does not show any objection by Lopez or his counsel to the contents of the presentence report.

¶22 Finally, we also note that Lopez does not claim on appeal that he would not have admitted the prior convictions if a different colloquy had occurred. Nor does he assert that he did not commit the prior offenses or that the State could not prove that he did. We have recently said that a defendant, in asserting prejudice from an incomplete colloquy, "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). Lopez does not make these minimal assertions.

¶23 For these reasons, we conclude that Lopez has not made a satisfactory showing of prejudice from the incomplete colloquy to warrant remanding for a prejudice hearing. The incomplete colloquy constituted fundamental — but not reversible — error because the record reveals Lopez was not prejudiced.

CONCLUSION

¶24 We affirm Lopez's convictions and sentences.

/s/

_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

/s/
_____
ANDREW W. GOULD, Judge

/s/
_____
RANDALL M. HOWE, Judge