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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 2/7/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 11-0826
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
BRUCE BAKER, III,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-119179-004

The Honorable Joseph C. Welty, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Division Chief Counsel,
Criminal Appeals/Capital Litigation Division
Joseph T. Maziarz, Section Chief Counsel,
Criminal Appeals Section
And Adriana M. Zick, Assistant Attorney General
Attorneys for Appellee

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By Terry J. Adams, Deputy Public Defender
Attorneys for Appellant

K L E I N S C H M I D T, Judge

¶1 Appellant, Bruce Baker III, appeals his sentences for burglary in the third degree and possession of burglary tools.

Appellant argues that the trial court erred in sentencing him as a repetitive offender with two historical prior felony convictions because the State presented insufficient evidence to establish one of those convictions. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY¹

¶2 Appellant was charged with one count of burglary in the third degree, a class 4 felony, and one count of possession of burglary tools, a class 6 felony. See Ariz. Rev. Stat. ("A.R.S.") §§ 13-1505 (West 2012),² -1506. The State alleged two historical prior felony convictions³ and also alleged that the burglary and possession of burglary tools were committed while Appellant was on release from confinement.

¶3 In September 2011, a jury found Appellant guilty as charged of burglary and possession of burglary tools.

¹ We view the facts in the light most favorable to sustaining the verdict, and we resolve all reasonable inferences against Appellant. *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998).

² We cite the current version of the statutes because no revisions material to our analysis have occurred since the relevant date.

³ Specifically, the State alleged that Appellant had convictions for (1) possession of drug paraphernalia, committed on February 13, 2005, for which he was convicted on September 13, 2005, in Maricopa County Superior Court Cause No. CR2005-104798-001, and (2) possession of dangerous drugs, committed on September 26, 2009, for which he was convicted on January 19, 2010, in Maricopa County Superior Court Cause No. CR2009-162810-002.

Subsequently, the trial court held a hearing to determine for sentence enhancement purposes whether Appellant had been convicted in 2005 of possession of drug paraphernalia and in 2010 of possession of dangerous drugs.

¶14 The court concluded that the State had proven the historical priors as well as that Appellant committed his most current crimes while on release from confinement. The court sentenced Appellant to concurrent, presumptive terms of 10 years' imprisonment for the burglary and 3.75 years' imprisonment for possession of burglary tools.

¶15 We have jurisdiction over Appellant's timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033.

ANALYSIS

¶16 Appellant does not challenge his convictions or the court's finding of the 2010 historical prior felony conviction. Instead, the only issue on appeal is whether there was sufficient evidence to prove the historical prior conviction alleged to have been committed in 2005.

¶17 We review the trial court's determinations at sentencing for an abuse of discretion. *State v. Hollenback*, 212 Ariz. 12, 15, ¶ 9, 126 P.3d 159, 162 (App. 2005). When a trial court predicates its decision on an incorrect legal standard, the court commits an error of law and thereby abuses its discretion.

State v. Mohajerin, 226 Ariz. 103, 108, ¶ 18, 244 P.3d 107, 112 (App. 2010).

¶18 At the hearing to establish the priors, Officer Daniel Mellentine of the Chandler Police Department testified that pursuant to court order he had previously personally rolled Appellant's fingerprints - the known prints that were to be used for comparative purposes. A fingerprint examiner, Teresa Busby, testified that she tried to compare the fingerprints taken by Officer Mellentine with the fingerprint on a certified court document evidencing the conviction, suspension of sentence, and placement on probation of one Bruce Baker in 2005 ("the 2005 minute entry").⁴ However, the quality of the fingerprint on the 2005 minute entry was too poor to permit a comparison. Busby did nonetheless note that the 2005 minute entry was certified and listed the defendant in that case as Bruce Baker III, born November 26, 1962, and that the offense had been committed on February 13, 2005.

¶19 Using the information from the 2005 minute entry, Busby searched Opus, the State's master record fingerprint archive, to find the "original arrest fingerprint card" from the case that resulted in the 2005 minute entry. The certified original arrest fingerprint card (from the arrest record of the 2005 crime)

⁴ The conviction was for an amended count of possession of drug paraphernalia.

contained ten fingerprints from a person named Bruce Baker (without the designation "III" after the name), who was born November 26, 1962, and who was arrested for an offense committed on February 13, 2005.⁵ The fingerprints on the 2005 original arrest fingerprint card matched the known fingerprints taken of Appellant for comparative purposes by Officer Mellentine.

¶10 In an effort to bolster its argument that Appellant had a historical prior felony conviction from 2005, the State also questioned Busby about a certified "Automated Summary Record" she had received for review from the Arizona Department of Corrections. The Automated Summary Record documents, known as a "prison pack," provided a summary report relating to a person named Bruce Baker III, born November 26, 1962, who committed a drug paraphernalia offense on February 13, 2005. The prison pack also bore a superior court cause number consistent with the cause number listed on the previously discussed 2005 minute entry, and a 2005 arrest number and social security number consistent with the 2005 original arrest fingerprint card.

¶11 Busby did not fully compare the fingerprints from the prison pack with Appellant's known prints, however, because the prison pack was minimally damaged, as if a small rodent had nibbled on the upper right-hand corner of it. Instead, after

⁵ The original arrest fingerprint card indicated that Bruce Baker was arrested for possession or use of dangerous drugs, a felony offense.

making an "unofficial" comparison of the fingerprints from the prison pack with Appellant's known prints, Busby sent for a replacement certified prison pack and used the fingerprints from that replacement prison pack to compare to Appellant's known prints. Busby testified that the fingerprints on the replacement prison pack matched the fingerprints of Appellant taken by Officer Mellentine. Nevertheless, although the original prison pack was available at the hearing, the replacement prison pack was unavailable. Consequently, the trial court found there was no evidence that the fingerprints from the prison pack available at the hearing matched Appellant's known prints. The court, however, concluded that the identifier evidence from the original prison pack - such as the person's name, date of birth, and cause numbers - was admissible.

¶12 Appellant relies on *State v. Pennye*, 102 Ariz. 207, 427 P.2d 525 (1967), to support his argument that the State presented insufficient evidence to prove his 2005 historical prior in this case. In *Pennye*, a person named E.C. Pennye was charged with a crime in Arizona, and the State alleged a prior conviction from Texas. *Id.* at 208, 427 P.2d at 526. The State presented an exemplified copy of the Texas conviction of an E.C. Pennye for murder that was entered on July 13, 1962, in Midland County, Texas. *Id.* The State also presented a sheriff's report from Midland, Texas, that showed that an E.C. Pennye had been arrested

for murder in March of 1962. *Id.* A comparison of the fingerprints from that arrest matched those of the defendant on trial in Arizona. *Id.*

¶13 The Supreme Court of Arizona concluded that the evidence was insufficient to prove beyond a reasonable doubt that the person on trial in Arizona had been convicted in Texas. *Id.* The court observed that identity of name alone is insufficient for this purpose and that there was nothing to prove the person convicted of murder in Texas was the same man who had been arrested for murder in that state. *Id.*

¶14 We conclude that *Pennye* is distinguishable and that the trial court did not abuse its discretion in determining that the evidence presented by the State in this case was sufficient to prove Appellant had two historical prior felony convictions. We note first that the court in *Pennye* required the State to prove beyond a reasonable doubt that the defendant had prior felony convictions. As this court held in *State v. Cons*, 208 Ariz. 409, 415, ¶ 15, 94 P.3d 609, 615 (App. 2004), however, the standard of proof to be applied in determining whether the State has proven prior convictions is the clear and convincing evidence standard. In so holding, the *Cons* court relied on our legislature's subsequent amendment to former A.R.S. § 13-604(P) (current A.R.S. § 13-703(N)), which now requires the court rather than the trier of fact to decide the issue; the United States Supreme Court's

decision in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), which excepted prior convictions from facts increasing the penalty for a crime beyond the statutory maximum that must be submitted to a jury and proved beyond a reasonable doubt; *Apprendi's* progeny; and our supreme court's statements and reasoning in the pre-*Apprendi* case of *State v. Hurley*, 154 Ariz. 124, 132, 741 P.2d 257, 265 (1987), in which the supreme court, while acknowledging *Pennye*, recognized that it had apparently never analyzed the question of the burden of proof on an allegation of prior convictions. See 208 Ariz. at 412-15, ¶¶ 7-15, 94 P.3d at 612-15. The *Cons* court concluded that "because neither the statute nor *Apprendi* requires a jury trial on the allegation of prior convictions, the heightened burden of proof does not apply but rather prior convictions for sentence enhancement purposes must be established by clear and convincing evidence." *Id.* at 415, ¶ 15, 94 P.3d at 615.

¶15 Relying on *Cons*, we conclude that the trial court did not abuse its discretion in applying the clear and convincing evidence standard to the State's evidence and determining that the State met its burden of proof with regard to the historical prior conviction alleged to have been committed in 2005. Moreover, even if we were to assume *arguendo* that the proper standard to be applied is the beyond a reasonable doubt standard,

we conclude the State presented substantial evidence to meet that higher standard.

¶16 In *Pennye*, the only evidence that linked the defendant with the person convicted of murder in Texas was the identity of names, and there was no indication that the record of the prior conviction listed the defendant's date of birth. 102 Ariz. at 208, 427 P.2d at 526. Here, however, the 2005 original arrest fingerprint card, the 2005 minute entry, and the original prison pack all link the name Bruce Baker with a birth date of November 26, 1962, as well as an offense date of February 13, 2005. It is undisputed that November 26, 1962, is Appellant's date of birth, and Busby (the fingerprint examiner) testified that the fingerprints on the 2005 original arrest fingerprint card matched Appellant's known prints. Moreover, as we have recognized, the original prison pack further serves to link the 2005 original arrest fingerprint card with the 2005 minute entry because the prison pack bears a 2005 arrest number and social security number consistent with the 2005 original arrest fingerprint card and a superior court cause number consistent with the cause number listed on the 2005 minute entry. Given the aforementioned connections, we distinguish the facts of this case from those in *Pennye* and conclude that the trial court did not abuse its discretion in finding there was sufficient evidence to prove the 2005 historical prior felony conviction.

CONCLUSION

¶17 The judgment of the trial court is affirmed.

_____/S/_____
THOMAS C. KLEINSCHMIDT, Judge *Pro Tempore**

CONCURRING:

_____/S/_____
PATRICIA A. OROZCO, Presiding Judge

_____/S/_____
PETER B. SWANN, Judge

*The Honorable Thomas C. Kleinschmidt, Judge *Pro Tempore* of the Court of Appeals, Division One, is authorized by the Chief Justice of the Arizona Supreme Court to participate in the disposition of this appeal pursuant to the Arizona Constitution, Article 6, Section 3, and A.R.S. §§ 12-145 to -147.