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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: 07/10/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0840
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
)
JOSE JESUS RAMIREZ,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)
)

Appeal from the Superior Court in Coconino County

Cause No. S0300CR201100106

The Honorable Dan R. Slayton, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals Section/
Capital Litigation Section
and Myles A. Braccio, Assistant Attorney General
Attorneys for Appellee

H. Allen Gerhardt, Coconino County Public Defender Flagstaff
Attorney for Appellant

H A L L, Judge

¶1 Jose Jesus Ramirez (defendant) appeals from his convictions and the sentences imposed. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 We view the facts in the light most favorable to sustaining the verdicts and resolve all inferences against defendant. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998). The facts relevant to the issues raised on appeal are as follows.

¶3 At approximately one-thirty the morning of August 23, 2010, Officer Paul Lasiewicki of the Flagstaff Police Department stopped the truck defendant was driving after the officer saw the vehicle drift into the bike lane. Upon approaching the vehicle, the officer observed that defendant had bloodshot eyes and a flushed face. Officer Lasiewicki asked for defendant's driver license and defendant admitted that his license was suspended. When Officer Lasiewicki then asked defendant whether he had consumed any alcohol, defendant stated he had "a couple of drinks." During this conversation, the officer noticed that defendant's speech was slurred.

¶4 Thereafter, Officer Lasiewicki called for a back-up unit to assist. When Officer Jerry Rintala arrived at the scene, he began speaking with defendant while Officer Lasiewicki

roused the inebriated, sleeping passengers from the truck and arranged for them to be transported home.

¶15 Officer Rintala observed that defendant slurred his words and smelled of alcohol. He conducted a horizontal gaze nystagmus test and observed six of six cues for impairment. Officer Rintala then asked defendant to participate in additional field sobriety tests, which he refused. At that point, Officer Rintala placed defendant under arrest.

¶16 The officer transported defendant to a police station and, after Officer Rintala obtained a warrant, a phlebotomist conducted a blood draw. Subsequent testing of defendant's blood by the Flagstaff Crime Lab revealed that his blood alcohol content at the time of the draw was .098 and, applying retrograde analysis, his blood alcohol concentration at the time of the stop was within the .12 to .17 range. Defendant's blood also contained metabolites for marijuana and methamphetamine.

¶17 On February 17, 2011, defendant was charged by indictment with one count of aggravated DUI - impaired while driving on a suspended license (Count I), a class four felony, one count of aggravated DUI - .08 or more blood alcohol concentration while driving on a suspended license (Count II), a class four felony, one count of aggravated DUI - drug or drug metabolite in body while driving on a suspended license (Count III), a class four felony, one count of possession or use of

dangerous drugs - methamphetamine (Count IV), a class four felony, one count of possession or use of narcotic drugs - cocaine (Count V), a class four felony, and one count of possession or use of narcotic drugs - oxycodone (Count VI), a class four felony. The State also alleged that defendant had four historical prior felony convictions: (1) possession of drug paraphernalia, committed on April 16, 2002 (CR 2002-20366); (2) aggravated assault, committed on August 30, 2005 (CR 2005-0860); (3) possession of marijuana, committed on October 19, 1999 (CR 2000-0055), and (4) possession of marijuana, committed on December 4, 1999 (CR 1999-90378).

¶18 On October 5, 2011, the State filed a "Notice of Authority Re Proof of Priors," "giv[ing] the Court notice of the legal basis for the State's method of proving the Defendant's prior conviction[s] for enhancement purposes[.]" In the motion, the State explained that it intended to "confront defendant with his prior felony convictions and elicit the dates, cause numbers, and jurisdictions of those offenses," if he chose to testify.

¶19 On October 10, 2011, the day before trial, defendant filed a motion to preclude the State from impeaching him with his prior felony convictions. Specifically, defendant asserted that "the State has provided no notice of its intent to use

[his] prior convictions to impeach him, should he choose to testify."

¶10 The trial court heard argument on defendant's motion the first day of trial. Defense counsel argued that the State's October 5th motion did not provide timely notice of its intent to impeach with prior convictions and, alternatively, that the probative value of defendant's convictions from 1999 did not substantially outweigh their prejudicial effect. Defense counsel also noted that he had not received copies of the certified documents from the December 1999 conviction. In response, the State argued that defendant was given notice of the State's intent to use the priors at trial in the State's Rule 15.1 disclosure statement filed on March 10, 2011. The State acknowledged, however, that it did not possess and had not disclosed certified copies of the December 1999 conviction and therefore "would not use [it] at trial."

¶11 After hearing from both parties, the trial court found that the State provided sufficient notice of its intent to use defendant's prior convictions for impeachment purposes in its Rule 15.1 disclosure statement, but determined the State could not impeach defendant with his convictions from 1999 because the State failed to demonstrate "exceptional circumstances" that would justify using convictions greater than 10 years old. See Ariz. R. Evid. 609(b) (barring the admission of a prior

conviction greater than 10 years old "unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect"). Ultimately, the trial court ruled that the State could impeach defendant with his 2005 and 2002 felony convictions, but ordered the State to sanitize the nature of the convictions to minimize their prejudicial effect.

¶12 At trial, Officer Rintala testified that he conducted a search of defendant's person incident to arrest and discovered an "Altoids tin in [defendant's] left-front pocket." When he opened the tin, the officer observed a "crystal-like substance" that he believed to be methamphetamine, a "softer white powderish substance" that he believed to be cocaine, and "another little tin foil square" that he believed also contained drugs. Subsequent testing of the items in the Altoids tin confirmed that the substances were .23 gram of methamphetamine, .91 gram of cocaine, and two tablets of oxycodone.

¶13 After the State rested, defendant testified. At the outset, defense counsel asked defendant "how many" felony convictions he has and defendant answered "two." Defendant then admitted consuming two beers approximately one hour before the traffic stop, but claimed he was not impaired. He further admitted snorting methamphetamine the day before the traffic

stop and smoking marijuana three days before the stop, but testified that he was not impaired by those substances while he was driving. Defendant acknowledged that his license was suspended on August 23, 2010 and had been for years. Finally, defendant admitted that he has used methamphetamine almost every day for years. He nonetheless testified, however, that he was not carrying the Altoid tin in his pocket and that Officer Rintala did not find the tin on his person during his post-arrest pat-down.

¶14 During cross-examination of defendant, the prosecutor asked to approach the bench and requested that he be permitted to impeach defendant with his 1999 convictions in light of defendant's false testimony that he only has two prior felony convictions. The trial court found that exceptional circumstances had arisen justifying the use of the older convictions because defendant "has raised an issue of the police planting evidence on him." Therefore, "[b]ecause defendant raised the issue that the police . . . planted evidence, and because he has stated he was only convicted of two [felonies]," the trial court modified its previous admissibility ruling and permitted the State "to ask [defendant] about the other two 1999 convictions." Upon continuing cross-examination, the prosecutor confronted defendant with his 1999 convictions and defendant admitted that he was also convicted of two felonies in 1999.

¶15 After a three-day trial, the jury found defendant guilty of the three counts of DUI and not guilty of the three counts of drug possession. At sentencing, the trial court found defendant had three prior felony convictions¹ and sentenced him to presumptive, concurrent terms of 10 years' imprisonment on each count.

¶16 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

¶17 On appeal, defendant contends that the trial court erred by permitting the State to impeach him with four prior felony convictions. Specifically, defendant argues: (1) the State did not timely seek an admissibility ruling from the trial court, (2) his right to due process was violated when the trial court modified its ruling on the admissibility of the prior convictions after defendant relied upon the initial ruling and testified, and (3) the State should not have been permitted to use a prior conviction that it "could not prove." We address each issue in turn.

¹ The Court found defendant had admitted under oath his previous convictions in CR 2005-0860, CR 2002-0366, and CR 2000-0055. The trial court did not make a finding regarding CR 1999-90378, the conviction for which the State had failed to furnish a certified copy.

I. Sufficiency of the Notice

¶18 Defendant first asserts that the State failed to timely request a Rule 609 hearing and therefore should have been precluded from introducing evidence of his prior convictions at trial.

¶19 In its Rule 15.1(b) disclosure, filed on March 10, 2011, the State gave notice of its intent to impeach defendant with felony convictions, including the 1999 convictions, if he testified at trial. The Rule 15.1 disclosure, filed several months in advance of trial, provided defendant ample opportunity to prepare to defend against the allegation of prior felony convictions. See *State v. Ennis*, 142 Ariz. 311, 315, 689 P.2d 570, 574 (App. 1984) (finding that the State provided defendant sufficient notice that his convictions would be offered for impeachment purposes by filing an allegation of prior convictions, although the allegation "did not specifically refer to Rule 609"). Therefore, we find that defendant was given timely and sufficient notice that the prior convictions would be offered for impeachment purposes and the trial court did not err by permitting the State to impeach defendant with his prior felony convictions on that basis.

II. Modification of the Admissibility Ruling

¶20 Defendant next argues that the trial court erred by modifying its initial admissibility ruling after he relied upon it in choosing to testify.

¶21 Pursuant to Rule 609(a), the trial court "shall" admit evidence that a witness has been convicted of a crime "if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect" and if the crime was either punishable by death or imprisonment in excess of one year or involved dishonesty or false statement, regardless of punishment. Subsection (b), however, bars the admission of convictions for which "a period of more than ten years has elapsed . . . unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect."

¶22 We review a trial court's ruling on the admissibility of prior convictions for impeachment purposes for an abuse of discretion. *State v. Green*, 200 Ariz. 496, 498, ¶ 7, 29 P.3d 271, 273 (2001). In deciding whether a prior conviction may be admitted, the trial court may consider numerous factors, including "the impeachment value of the prior, length of time since the prior conviction, the witness' history since the prior conviction, the similarity between the past and present crimes,

the importance of defendant's testimony, and the 'centrality of the credibility issue.'" *Id.* at 499, ¶ 12, 29 P.3d at 274 (quotation omitted).

¶23 In ruling on the admissibility of defendant's priors before trial, the court precluded the State from using defendant's 1999 convictions because more than 10 years had elapsed from the dates of those convictions to the commission of the present offenses. After defendant testified, however, and falsely stated that he had only two prior felony convictions and claimed that the police officers had fabricated the evidence that he possessed drugs, the trial court modified its previous ruling and permitted the State to utilize the 1999 convictions for impeachment purposes because exceptional circumstances had arisen. As the trial court explained, defendant's trial testimony placed credibility as the central issue of the case. In addition, defendant "opened the door" to this evidence by testifying falsely that he only had two prior felony convictions. "When the defendant [] 'opens the door' by denying certain facts which the evidence, previously excluded, would contradict, he may not rely on the previous ruling that such evidence will remain excluded." *State v. Martinez*, 127 Ariz. 444, 447, 622 P.2d 3, 6 (1980). Therefore, we find no abuse of discretion in the trial court's modified ruling permitting the State to impeach defendant with four priors.

III. Lack of Documentary Evidence for the December 1999 Prior Conviction

¶24 Finally, defendant contends that the trial court erred by permitting the State to impeach him with a conviction for which the State neither possessed nor disclosed any documentary evidence.

¶25 Pursuant to Rule 609(a), "evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record." Thus, as argued by the State, no documentary evidence proving the December 1999 conviction needed to be introduced at trial because defendant admitted the prior conviction.

¶26 As defendant points out, however, it is generally "improper to ask a witness if he has a prior felony conviction unless the person asking the question is prepared to prove it after a negative answer." *State v. Thompson*, 110 Ariz. 165, 169-70, 516 P.2d 42, 46-47 (1973). Nonetheless, under the facts of this case "we find no lack of good faith on the part of the [] State or prejudice to the defendant." *Id.* Although the State did not have a certified copy of the conviction, it had the dates of its commission and conviction, the cause number, and the nature of the felony, evidencing a good faith belief that defendant had been convicted of the crime. More importantly, defendant admitted the December 1999 conviction at

trial and does not contend on appeal that he was not convicted of the crime. Therefore, we find no err in the trial court's ruling permitting the State to impeach defendant with his four prior felony convictions.²

CONCLUSION

¶27 For the foregoing reasons, we affirm.

_____/s/_____
PHILIP HALL, Presiding Judge

CONCURRING:

_____/s/_____
ANN A. SCOTT TIMMER, Judge

_____/s/_____
DONN KESSLER, Judge

² In a pro per letter to the court, defendant also contends that the trial court erred by permitting the State to "sever" his convictions from a "consolidated case" for impeachment purposes. Specifically, defendant asserts that the State should not have been permitted to use his convictions from CR 2000-0055 and CR 2002-0366 separately. Contrary to defendant's claim, these convictions did not arise out of a consolidated case. Indeed, defendant was convicted of possession of marijuana in CR 2000-0055 before he committed the crime underlying his conviction in CR 2002-0366. We note, however, that defendant was convicted of possession of marijuana and possession of drug paraphernalia in a consolidated case, CR 99-90378, but, for impeachment purposes, the State used these convictions as a single conviction.