IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 08/24/2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

STATE OF ARIZONA,	)	1 CA-CR 09-0200
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	
	)	(Not for Publication –
PAUL MICHAEL ADAMS,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-006781-001 DT

The Honorable Janet E. Barton, Judge

CONVICTIONS AFFIRMED; REMANDED FOR HEARING

Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
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Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
by Karen M. Noble, Deputy Public Defender
Attorneys for Appellant

P O R T L E Y, Judge

¶1 Defendant Paul Michael Adams appeals his convictions and sentences for third-degree burglary and possession of

burglary tools. For the reasons that follow, we affirm his convictions, but remand for a hearing on whether he would have admitted his prior convictions had he been informed of their effect on his sentences.

FACTS AND PROCEDURAL BACKGROUND[1]

¶2 A police officer responded to a silent alarm at a downtown building in the pre-dawn hours of April 19, 2008. Defendant was found walking a bicycle with a cart attached, away from a broken window in the rear of the facility.

¶3 When Defendant started pedaling away, the officer drew his gun, pointed it at Defendant, and ordered him to the ground. The officer asked Defendant if anyone else was inside the building, and Defendant responded, "No, it is just the two of us." The officer handcuffed and arrested Defendant. Shortly afterward, another officer arrested another suspect found hiding behind a dumpster.

¶4 The jury convicted Defendant of third-degree burglary and possession of burglary tools. After Defendant admitted two prior felony convictions, the trial court sentenced him to concurrent, exceptionally mitigated terms, the longest of which was six years imprisonment for the burglary conviction.

[1] We view the evidence in the light most favorable to upholding the jury's verdict. *State v. Moody*, 208 Ariz. 424, 435 n.1, 94 P.3d 1119, 1130 n.1 (2004).

Defendant timely appealed. 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

A. Admission of Statement

¶5 Defendant first argues that the trial court erred in denying his motion to suppress his statement at trial. Specifically, he contends he had not waived his *Miranda*[2] rights and the statement was involuntary because the officer was pointing a gun at him when he made the admission.

¶6 Before trial, Defendant had challenged the admission of his statement on the ground that it was given in violation of *Miranda*. After a hearing, the trial court denied Defendant's challenge because the statement was admissible under the public safety exception to *Miranda*. Defendant did not, however, argue that his statement was involuntarily given at gunpoint until after the officer testified at trial. After the voluntariness issue was raised, the court found the statement voluntary.[3]

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[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[3] The court instructed the jury on voluntariness in the final jury instructions.

¶7 We review the trial court's ruling admitting a defendant's statements over his objections for abuse of discretion. *State v. Ellison,* 213 Ariz. 116, 126, ¶ 25, 140 P.3d 899, 909 (2006). Ordinarily, we review only the evidence presented at the suppression hearing. *Id.* We may, however, consider trial testimony in evaluating the voluntariness of the statement because a defendant is deprived of due process if the evidence at any stage of the proceeding demonstrates conclusively that the statement was involuntary. *See State v. Strayhand*, 184 Ariz. 571, 582 n.3, 911 P.2d 577, 588 n.3 (App. 1995). The inquiry into an alleged violation of *Miranda* is distinct from the inquiry into the voluntariness of the statement. *State v. Montes,* 136 Ariz. 491, 494, 667 P.2d 191, 194 (1983).

¶8 The arresting officer was the only witness who testified at the suppression hearing.[4] He testified that when he arrived at the scene, another officer advised him to watch the southwest end of the building because police had not yet secured it. It was dark, and he could not see any of the other officers who were present. When he got to the southwest end of the building, he noticed that one of the several large glass windows was broken out; that an individual was walking a bicycle away

[4] Defendant was not at the hearing; his presence was waived by counsel.

from the window; and that there was a crowbar at the base of the broken window.

¶9 Defendant was about 15 feet away from the broken window when the officer "placed him at gunpoint and commanded him to the ground . . . [and] put him in handcuffs." He asked Defendant "if anyone else was with him," or "if there's anyone else in the building." Defendant responded, "Yes, just the two of us."

¶10 The officer testified that when he asked the question, he was primarily concerned about his safety and the safety of the other officers, and whether there were any other suspects inside the building. At the time, he was alone and yelling for the assistance of another officer. The officer, however, did concede that, in defense counsel's words, he was also "trying to trip him up to get him to say he had been in the building."

¶11 The court did not abuse its discretion in admitting the statement under the public safety exception to *Miranda*.[5] A public safety exception is warranted because "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule

[5] Police are required to obtain a waiver of *Miranda* rights for custodial interrogation. *See Rhode Island v. Innis,* 446 U.S. 291, 300-01 (1980); *Oregon v. Mathiason,* 429 U.S. 492, 495 (1977). The State does not dispute that the officer's question constituted interrogation because Defendant was in custody at the time.

protecting the Fifth Amendment's privilege against self-incrimination." *New York v. Quarles,* 467 U.S. 649, 655-57 (1984); *see also State v. Ramirez,* 178 Ariz. 116, 123-24, 871 P.2d 237, 244-45 (1994) (applying an exception to a statement made in response to police questions aimed at determining what they would encounter when they proceeded further into apartment, past a body on the floor).

¶12 Here, the officer was confronted with the possibility that another person might have still been at the scene, might confront him from behind the broken window, or pose a danger to police who would search the building. The imminent danger to safety justified the officer posing the question without taking the time to obtain a waiver of *Miranda* rights. *See Quarles,* 467 U.S. at 655-57. Accordingly, we find no abuse of discretion.

¶13 Defendant also argues that the trial court abused its discretion in finding that his statement was voluntary. To be admissible, a statement must not only comply with *Miranda*, but it must also be voluntary, meaning "not obtained by coercion or improper inducement." *Ellison*, 213 Ariz. at 127, ¶ 30, 140 P.3d at 910. The public safety exception to *Miranda* only applies to the admission of otherwise voluntary statements. *See Quarles*, 467 U.S. at 654-55 ("In this case we have before us no claim that respondent's statements were actually compelled by police conduct which overcame his will to resist.").

¶14 The State has the burden of proving by a preponderance of the evidence that a statement was voluntary. *State v. Amaya-Ruiz*, 166 Ariz. 152, 164, 800 P.2d 1260, 1272 (1990). In evaluating voluntariness, the court "must look to the totality of the circumstances surrounding the confession and decide whether the will of the defendant has been overborne." *State v. Lopez,* 174 Ariz. 131, 137, 847 P.2d 1078, 1084 (1992). Coercive police activity is a necessary predicate to a finding that a statement is involuntary. *State v. Smith,* 193 Ariz. 452, 457, ¶ 14, 974 P.2d 431, 436 (1999) (quoting *Colorado v. Connelly*, 479 U.S. 157, 167 (1986)). A statement is not involuntary unless there exists "both coercive police behavior and a causal relation between the coercive behavior and the defendant's overborne will." *State v. Boggs*, 218 Ariz. 325, 336, ¶ 44, 185 P.3d 111, 122 (2008). "The state 'meets its burden when the officer testified that the confession was obtained without threat, coercion or promises of immunity or a lesser penalty.'" *Id.* (quoting *State v. Jerousek*, 121 Ariz. 420, 424, 590 P.2d 1366, 1370 (1979)).

¶15 The court did not abuse its discretion in ruling that the statement was voluntary. No evidence suggested that the officer pointed the gun at Defendant as a means to extract a confession. The officer testified, in fact, that he had not threatened Defendant in any way, or made any promises, but had

simply pointed the gun at him when he took him into custody. On this record, the officer's conduct was neither improper nor coercive. *See Turner v. State,* 738 N.E.2d 660, 662 (Ind. 2000) (holding that the presence of guns at scene of arrest was not evidence of coercion "but merely cautious police procedure"); *State v. Watson,* 114 Ariz. 1, 7, 559 P.2d 121, 127 (1976) (holding that the consent to search was voluntary notwithstanding evidence that five officers had guns drawn when consent was given). Accordingly, we conclude that the court did not abuse its discretion.

B. Admission of Prior Historical Convictions

¶16 Defendant next argues the trial court erred when it allowed him to admit two historical prior felony convictions based on the misunderstanding that the State would not seek to enhance his sentences with the convictions, and without advising him of the effect the admission would have on the range of his sentences. Because Defendant did not object at sentencing to the error he now urges on appeal, we review for fundamental error only. *See State v. Henderson,* 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Defendant accordingly bears the burden of establishing that the trial court erred, that the error was fundamental, and that the error caused him prejudice. *Id.* at 568, ¶ 22, 115 P.3d at 608.

¶17 A trial court may not accept a stipulation to a prior conviction charged for purposes of sentencing enhancement without following the procedures outlined in Arizona Rule of Criminal Procedure 17. *State v. Morales*, 215 Ariz. 59, 60, ¶ 1, 157 P.3d 479, 480 (2007). Pursuant to Rule 17, before accepting a defendant's admission "a trial court must advise the defendant of the nature of the allegation, the effect of admitting the allegation on the defendant's sentence, and the defendant's right to proceed to trial and require the State to prove the allegation." *State v. Anderson,* 199 Ariz. 187, 194, ¶ 36, 16 P.3d 214, 221 (App. 2000); *see also* Ariz. R. Crim. P. 17.2, 17.6. A complete failure to engage in the colloquy constitutes fundamental error. *See Morales*, 215 Ariz. at 61, ¶ 10, 157 P.3d at 481.

¶18 Before trial, the State alleged the existence of four historical prior felony convictions. At the beginning of the sentencing hearing, the court was advised that "the State has agreed to drop the allegation of two of the priors if [Defendant] is willing to admit to two of the priors." The court subsequently confirmed with both Defendant and his lawyer that the agreement was that the State would not allege the prior felony convictions for enhancement if Defendant would admit to them. The judge then engaged Defendant in a Rule 17 colloquy about the various constitutional rights he was waiving by

admitting the priors. At one point during the colloquy, the court advised Defendant that he was waiving his right to have the State prove these prior convictions as *aggravating* factors. The court did not, however, advise Defendant about the sentencing consequences that could follow from the admission.

¶19 After the colloquy, the court found that Defendant had voluntarily and knowingly waived trial of his priors, and then asked, "So, as far as sentencing then, the State's agreeing not to allege these for enhancement purposes?" Defense counsel stated, "Actually, your Honor, I think they're alleging them for enhancement, not for aggravation purposes." The court subsequently imposed super-mitigated sentences enhanced by the two historical prior felony convictions.

¶20 By failing to advise Defendant of the effect of admitting the prior convictions on his sentence and by incorrectly informing him that the prior convictions would not be used to enhance his sentence, the court erred, and the error is fundamental. *See id.*; *Anderson,* 199 Ariz. at 194, ¶ 36, 16 P.3d at 221.

¶21 The State argues that Defendant had been informed of the sentencing consequences of two priors at a settlement conference five months earlier. Although Defendant was advised of the sentencing range for two priors, the judge only explained the sentencing consequences of the proffered plea agreement and

not the indicted charges. Similarly, we are not persuaded that Defendant knew the sentencing range from the State's sentencing recommendation attached to the presentence report.[6] Instead, the record reveals that Defendant admitted the convictions under a misunderstanding that they would not be used to enhance his sentence. Because the court did not advise him how his priors would affect his sentence, we cannot conclude Defendant was adequately advised on the record.

¶22 To prove the prejudice necessary for reversal on fundamental error review, Defendant must show that he would not have admitted the convictions had he known that they would be used to enhance his sentences, if at all, and by how much. *Morales*, 215 Ariz. at 62, ¶ 11, 157 P.3d at 482. Accordingly, we remand this case to the trial court for a hearing if Defendant wants to attempt to demonstrate that he was prejudiced. *See State v. Carter*, 216 Ariz. 286, 290-92, ¶¶ 20-28, 165 P.3d 687, 691-93 (App. 2007).

CONCLUSION

¶23 We affirm Defendant's convictions but remand the matter to the trial court for a hearing on whether Defendant was prejudiced by the error at sentencing. Should Defendant prove

[6] The State's sentencing recommendation simply noted that he had the prior convictions and provided the applicable sentencing range without explanation of what the range would be without the prior convictions.

prejudice, the sentence must be vacated and Defendant must be resentenced.

/s/
_____
MAURICE PORTLEY, Judge

CONCURRING:

/s/
_____
PATRICIA A. OROZCO, Presiding Judge

/s/
_____
DIANE M. JOHNSEN, Judge