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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
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 09-0387
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
MELISSA ANN LOPEZ,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-129963-001 DT

The Honorable Janet E. Barton, Judge

REMANDED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Liza-Jane Capatos, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Christopher V. Johns, Deputy Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 Melissa Ann Lopez ("Defendant") appeals from her conviction and sentence for theft of means of transportation, a violation of A.R.S. § 13-1814 and a class three felony. For the reasons set forth below, we conclude that the superior court committed fundamental error at sentencing and we remand for a hearing to determine whether Defendant was prejudiced and whether resentencing is required.

FACTS AND PROCEDURAL HISTORY

¶2 In October 2008, a jury found Defendant guilty of theft of means of transportation. In December 2008, the court held a dual sentencing and probation revocation hearing. At the start of the hearing, the court entered judgment on the jury's verdict and found that, by virtue of the conviction, Defendant had violated the terms of her probation for two class six felonies in separate 2005 cases. The court then proceeded to sentencing. Defense counsel stipulated to the existence of two prior felonies and the court accepted the stipulation without inquiry.¹ Accordingly, the court sentenced Defendant to an enhanced presumptive term of 11.25 years of imprisonment for the 2008 offense.² The court revoked Defendant's probation for each

¹ Counsel did not identify the two prior felonies to which she stipulated. On this record, we cannot infer the identities.

² Theft of means of transportation is a class three felony. A.R.S. § 13-1814(D) (Supp. 2009). Generally, the presumptive

of the previously identified 2005 offenses and imposed presumptive one-year terms of imprisonment, to be served concurrently with the sentence for the 2008 offense.

¶13 The hearing reconvened later the same day. The court observed that one of the 2005 offenses, which it had previously characterized as a class six felony, was actually a class one misdemeanor. Accordingly, for that offense only the court vacated its order sentencing Defendant to imprisonment and ordered a terminal disposition for time served. The court did not discuss whether Defendant had any other prior felony convictions and did not revisit the issue of sentencing for the 2008 offense.

¶14 Defendant timely appeals. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2001), and 13-4033(A) (Supp. 2009).

DISCUSSION

¶15 Because Defendant did not object below to the absence of a colloquy, we review only for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).

sentence for a class three felony is 3.5 years of imprisonment. A.R.S. § 13-702(D) (Supp. 2009) (previously A.R.S. § 13-701(C) (Supp. 2008)). But when a defendant has two or more prior felony convictions, the presumptive sentence is enhanced to 11.25 years of imprisonment. A.R.S. § 13-703(C), (J) (Supp. 2009) (previously A.R.S. § 13-604(D) (Supp. 2008)).

Defendant bears the burden to establish both that fundamental error exists and that it caused her prejudice. *Id.* at ¶ 20. On appeal, Defendant contends that the superior court committed fundamental error by accepting her counsel's stipulation to two prior felony convictions without first conducting a colloquy pursuant to Ariz. R. Crim. P. ("Rule") 17.6. Defendant further contends that a remand to the superior court is necessary to determine whether she was prejudiced by the error. The State concedes that the court committed fundamental error but argues that under the facts of this case a remand would be futile.

A. Fundamental Error

¶6 Before a criminal defendant's prior convictions may be considered for purposes of sentence enhancement, the court must find that the convictions exist. *State v. Morales*, 215 Ariz. 59, 61, ¶ 6, 157 P.3d 479, 481 (2007). Generally, the State must present evidence of the convictions at a hearing. *Id.* A hearing is not required, however, if the defendant admits to the convictions or if defense counsel stipulates to the convictions. *Id.* at ¶¶ 7, 9. If the defendant admits or if counsel stipulates, Rule 17.6 requires that the court conduct a plea-type colloquy with the defendant to ensure that the defendant is voluntarily and intelligently waiving her constitutional right

to have the State prove the convictions.³ *Id.* at ¶¶ 7-9. A failure to conduct the colloquy pursuant to the rule constitutes fundamental error. *Id.* at ¶ 10.

¶7 Here, the superior court conducted no colloquy before accepting defense counsel's stipulation to Defendant's prior convictions. The court therefore committed fundamental error.

B. Prejudice

¶8 Fundamental error caused by a court's failure to conduct the Rule 17.6 colloquy will not warrant resentencing unless the defendant establishes prejudice. *Id.* at ¶ 11. Generally, the defendant must show that had the colloquy taken place, she would not have admitted to the prior convictions. *Id.* Because evidence to that effect is not usually found in the record on appeal, a remand to the superior court for a determination of prejudice generally will be the appropriate remedy. *State v. Carter*, 216 Ariz. 286, 291, ¶ 23, 165 P.3d 687, 692 (App. 2007).

¶9 But remand is not required when the record on appeal contains sufficient evidence to establish the prior conviction. *See Morales*, 215 Ariz. at 62, ¶ 13, 157 P.3d at 482. The State apparently contends that because of the dual nature of the hearing, Defendant's complete conviction records in the two 2005

³ The exception to this rule is when the defendant admits to the convictions while testifying. *Id.* at ¶ 7.

cases that gave rise to the probation violations were necessarily before the court. According to the State, those records would reveal a class four felony and a class six undesignated felony conviction in addition to the offenses for which probation violations were found.

¶10 Rule 17.6 does not, however, permit us to reach outside the record before us and take judicial notice of evidence of convictions from different cases. *State v. Geeslin*, 221 Ariz. 574, 578-79, ¶¶ 16-17, 212 P.3d 912, 916-17 (App. 2009). Here, the record does not show whether the court actually had before it at sentencing the conviction records described in the State's appellate brief. Those records are not part of the record before us. At the hearing, the court did not state that it was referring to such records, and we cannot infer that fact from the transcript. Moreover, the court's statements demonstrated its knowledge of only one prior felony conviction - the class six felony for which probation was revoked. On this record, therefore, we cannot conclude that a rehearing would be futile.

CONCLUSION

¶11 We remand to the superior court to permit it to conduct a hearing at which Defendant may demonstrate that she was prejudiced by the court's error. If prejudice is shown,

Defendant's sentence must be vacated and she must be resentenced.

/S/

PETER B. SWANN, Judge

CONCURRING:

/S/

PATRICIA K. NORRIS, Presiding Judge

/S/

DANIEL A. BARKER, Judge