DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. MANUEL HERNANDEZ, Appellant.	)	1 CA-CR 09-0627 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-005855-001DT

The Honorable Joseph C. Welty, Judge

AFFIRMED, SENTENCE MODIFIED

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K E S S L E R, Presiding Judge

¶1 Defendant Manuel Hernandez ("Hernandez") filed an *Anders* appeal[1] from his conviction and sentence of five counts: Count 1, aggravated assault; Count 2, aggravated assault, a dangerous felony; Count 3, assisting a criminal street gang; Count 4, threatening or intimidating to further the interests of a criminal street gang; and Count 5, misconduct involving weapons. Counsel for Hernandez filed a brief in accordance with *Anders*, 386 U.S. at 746, and *State v. Leon*, 104 Ariz. 297, 298, 451 P.2d 878, 879 (1969). Finding no arguable issues to raise, counsel requested that this Court search the record for fundamental error. Hernandez was given the opportunity to, but did not file, a supplemental brief *in propria persona*. Our review of the record revealed a possible non-frivolous argument that the superior court may have fundamentally erred in failing to conduct a colloquy upon defense counsel's stipulation to the existence of Hernandez's prior felony conviction pursuant to Rule 17.6, Arizona Rules of Criminal Procedure ("Ariz. R. Crim. P."). *See State v. Morales*, 215 Ariz. 59, 60, ¶ 1, 157 P.3d 479, 480 (2007). Pursuant to *Penson v. Ohio*, 488 U.S. 75, 83 (1988), we ordered the parties to file supplemental briefs on the colloquy issue and whether it amounted to invited error by defense counsel. *State v. Logan*, 200 Ariz. 564, 565-66, ¶ 9, 30 P.3d 631, 632-33 (2001).

[1] *Anders v. California,* 386 U.S. 738, 746 (1967).

¶2 After further review of the record and in light of the supplemental briefs filed on the colloquy issue, we affirm Hernandez's convictions and sentences, finding no reversible error. However, we modify Hernandez's presentence incarceration credit to reflect 447 days applied to Count 1 rather than the 437 days credited to him by the superior court. Arizona Revised Statutes ("A.R.S.") Section 13-712(B) (2010).[2]

FACTUAL AND PROCEDURAL HISTORY

¶3 A grand jury indicted Hernandez on five counts arising from an incident in which Hernandez and three accomplices went to the victims' home in retaliation for an earlier gang-related drive-by shooting. In May, 2008, Orlando B., his wife Summer M., and Everisto R. drove by the home of Diana V. where her nephew, Angel V., and Hernandez were standing outside. Shots were fired, but it was disputed which group fired shots at the other first, and a crime scene was never secured at that location. Minutes later, Diana V. drove Hernandez, Angel V., and two others to the home of Orlando B.'s grandfather, victim Guadalupe B. Guadalupe B. testified that the group was dressed in red. Detective D.M. of the State Gang Task Force testified that the color red is a symbol associated with the United Nortenos Gang.

[2] We cite to the most current version of the statute when it has not been substantively revised since the date of the underlying conduct.

¶4 Hernandez exited the vehicle and yelled, "Let's handle this," "Let's box," and "This is Norte." Guadalupe B. was assaulted by the group. A witness from a neighboring house testified that he saw Hernandez beating Guadalupe B. An unknown individual then opened fire and Hernandez was shot in the stomach. Shots were fired back from the direction of the pile of people attacking Guadalupe B. Victim Matilda B. testified that she went running when she heard the gunshots, but the only gun she saw was in Hernandez's hands. She suffered gunshot wounds to her abdomen and upper thigh. Hernandez and the others fled the scene until they were pulled over in a felony stop.

¶5 The jury found Hernandez guilty of the crimes in all five counts. The jury's aggravation verdict included a finding that the State proved beyond a reasonable doubt that the offenses in Counts 1 through 4 involved the presence of an accomplice (A.R.S. § 13-701(D)(4) (2010)); the offenses in Counts 1 and 2 involved the victims suffering emotional or financial harm (A.R.S. § 13-701(D)(9)); and the offenses in Counts 1, 2 and 4 were committed with the intent to assist any criminal conduct by a criminal street gang, a finding that

enhanced the sentences imposed for those counts (A.R.S. § 13-709.02(C) (2010)).[3]

¶6 Hernandez filed a timely notice of appeal. This Court has jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. § 12-120.21(A)(1) (2003); 13-4031, -4033(A)(1) (2010).

ANALYSIS

¶7 This Court has reviewed the entire record for fundamental error. *State v.* Barraza, 209 Ariz. 441, 447, ¶ 19, 104 P.3d 172, 178 (App. 2005). Fundamental error is error that reaches "the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To prevail under this standard of review, the defendant must also demonstrate that the error caused him prejudice. *Id.* at ¶ 20. On review, this Court examines the evidence in the light most favorable to sustaining the verdict and resolves all inferences against the defendant. *State v. Rienhardt*, 190 Ariz. 579, 588-89, 951 P.2d 454, 463-64 (1997).

[3] "Any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be presented to a jury . . . ." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

I. Prior Conviction Stipulation

¶8 Prior to trial, the State amended its indictment to allege that Hernandez had one historical prior felony conviction. On the second day of trial, defense counsel urged the State to stipulate to the existence of the prior felony conviction to mitigate its prejudicial effect and for judicial efficiency. The parties agreed to the stipulation on the fifth day of trial, but the court failed to conduct a colloquy with Hernandez. The written stipulation was entered into evidence and read to the jury the following day.

¶9 In response to our request for supplemental briefs, the State argued that defense counsel invited any Rule 17.6 error by affirmatively and independently initiating the stipulation; in the alternative, even under a fundamental error analysis, the State argues that Hernandez cannot meet his burden of proving prejudice. *See Morales*, 215 Ariz. at 62, ¶ 13, 157 P.3d at 482. Hernandez argued that the error was not invited, but was fundamental. However, he concedes that the lack of colloquy probably did not create any prejudice because based on the defense argument at trial, "it appears that Appellant would have admitted to his prior conviction had the Rule 17.6 colloquy been given, and therefore, he was not prejudiced by the trial court's error".

¶10 We do not decide whether defense counsel's offer to stipulate amounted to invited error as to the colloquy. Rather, we conclude, in light of Hernandez's concession, that if there was any error, there was no prejudice.

¶11 Arizona Rule of Criminal Procedure 17.6 establishes a colloquy requirement when the court accepts a defendant's admission of a prior conviction: unless admitted while testifying on the stand, an admission of a prior conviction "by the defendant shall be accepted only under the procedures of this rule." Our state's supreme court interpreted Rule 17.6 to apply equally to "a stipulation by defense counsel to the existence of a prior conviction." *Morales*, 215 Ariz. at 61 ¶ 9, 157 P.3d at 481.

¶12 A trial court's failure to conduct a colloquy upon counsel's stipulation is reviewed for fundamental error. *Id.* at 61, ¶ 10, 157 P.3d at 481; *See Henderson*, 210 Ariz. at 567, ¶ 19-20, 115 P.3d at 607 (2005). The absence of a colloquy may constitute fundamental error because, like an admission, a stipulation eliminates the necessary formal proof of the prior conviction, waives the defendant's constitutional rights and results in an enhanced sentence. *Morales*, 215 Ariz. at 61, ¶ 9, 157 P.3d at 481. Without a colloquy, there is no assurance that the admission was made voluntarily and intelligently in

preservation of the defendant's due process rights. *Id.* at ¶ 8; *see also Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969).

¶13 Here, the superior court did not engage Hernandez in a plea-type colloquy when it accepted his counsel's stipulation for admission of the prior conviction for use at trial. The use of the prior conviction affected Hernandez's sentence on counts 1 and 5.[4]

¶14 We need not discuss whether the failure to conduct a colloquy in this context was error because even if it was, there was no prejudice to Hernandez. This kind of error does not automatically invoke resentencing of the defendant. *State v. Carter*, 216 Ariz. 286, 290, ¶ 18, 165 P.3d 687, 691 (App. 2007). Rather, the defendant bears the burden of persuasion in showing that the error caused him prejudice: that he "would not have

[4] The prior conviction enhanced Hernandez's sentence as a repeat offender on all counts. While the jury found that Counts 1, 2, and 4 were committed in promotion of a criminal street gang, the prior conviction increased the enhancement of Count 1 beyond the enhancement for gang promotion. Hernandez was sentenced to nine years on Count 1, a class four felony. Had he been sentenced as a first time offender, his sentence would have ranged from a minimum of 1.5 years to a maximum of three years, with an enhancement of three years for promoting a criminal street gang. A.R.S. § 13-702(D), - 709.02(C)(2010). While, the gang promotion enhancement was not found as to Counts 3 and 5, Hernandez's sentence of 6.5 years for Count 3, a class three felony, enhanced by the prior conviction was within the possible range of 2.5 to seven years had he been sentenced as a first time offender. A.R.S. § 13-702(D), 13-703(I). However, absent the prior conviction, Hernandez's 4.5 year sentence under Count 5, a class four felony, would not have been enhanced and he would have been sentenced as a first-time offender under A.R.S. § 13-702(A) to a maximum of three years.

admitted the fact of the prior conviction had the colloquy been given." *Morales*, 215 Ariz. at 61-62, ¶ 10-11, 157 P.3d at 481-82; *See Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607.

¶15 The State argued that Hernandez is unable to carry his burden of proving that he suffered prejudice from the court's failure to conduct the colloquy, thereby rendering remand futile. The State analogizes the facts here, in which it made an offer of proof regarding the evidence it would have introduced to prove the prior conviction,[5] to those in *Morales* in which copies of the defendant's prior convictions were admitted at a pretrial hearing, and thus established a lack of prejudice in the record. *Morales*, 215 Ariz. at 62, ¶ 13, 157 P.3d at 482. Under those circumstances, there would be no point in remanding for a hearing merely to again admit the conviction records. *Id.* The State also contends the statements made by Hernandez's counsel acknowledging the existence of the prior conviction are evidence of a lack of prejudice.

¶16 We need not address the State's first argument concerning the offer of proof because Hernandez concedes in his

[5] The State's offer of proof included proffered testimony from a detective who took Hernandez's fingerprints at trial the previous day and gave them to the police department's latent print examiner. The State also offered alleged evidence of Hernandez's pen pack including fingerprints, testimony by a Department of Corrections representative to lay the appropriate foundation for the pen pack, and testimony from the print examiner that the two sets of prints matched.

supplemental brief that based on the defense counsel's arguments in the trial record, Hernandez would have stipulated to the prior if a colloquy had been given and thus suffered no prejudice from the lack of a colloquy. In the trial court, defense counsel conceded that the State would be able to prove the prior conviction.

II. Presentence Incarceration Credit

¶17 At sentencing, the superior court gave Hernandez credit for 437 days time served applied to Count 1. The record indicates that Hernandez is entitled to ten additional days of credit. Therefore, Hernandez's sentence should be modified to reflect this credit of 447 days applied to Count 1. *See* A.R.S. § 13-712(B); 13-4037(A) (2010); *State v. Ritch*, 160 Ariz. 495, 499, 724 P.2d 234, 238 (App. 1989).

III. Sufficiency of the Evidence

¶18 We find that the evidence in the record was sufficient for the jury to conclude that Hernandez committed the offenses charged in all five counts.

A. Count 1: Aggravated Assault

¶19 As charged, aggravated assault under Count 1 required the State to prove that Hernandez: (1) committed the crime of assault by intentionally, knowingly or recklessly causing physical injury to Guadalupe B., and (2) the assault caused

Guadalupe B. temporary but substantial disfigurement. A.R.S. §§ 13-1203 (2010), -1204(A)(3) (Supp. 2010).

¶20 The evidence supports the jury's conviction of Hernandez on this count. The physical injuries suffered by Guadalupe B. were stipulated to by the parties through the introduction of medical records and established that the assault caused Guadalupe B. temporary but substantial disfigurement. There is also sufficient evidence in the record supporting the jury's verdict that Hernandez intentionally caused the injuries. Hernandez arrived at Guadalupe B.'s home with an intent to fight; Stephanie R. testified that he yelled, "Come out, come out. I want to fight one-on-one." Other witnesses also testified that they saw Hernandez beat Guadalupe B. Furthermore, even if Hernandez did not directly cause the injuries suffered by Guadalupe B., he is held accountable by aiding in committing the offense under the jury's finding of accomplice liability as to this count. A.R.S. § 13-301(2) (2010). That finding is supported by witness testimony including testimony by Matilda B. that Hernandez was among the pile of people attacking Guadalupe B. Thus, the record supports the jury's verdict finding Hernandez guilty of aggravated assault as to Guadalupe B.

B. Count 2: Aggravated Assault, a Dangerous Felony

¶21 As charged, aggravated assault under Count 2 required the State to prove that Hernandez: (1) committed the crime of assault by intentionally, knowingly or recklessly causing physical injury to Matilda B., and (2) the assault was committed with the use of a deadly weapon or dangerous instrument. A.R.S. §§ 13-1203, -1204(A)(2).

¶22 The evidence in the record supports the jury's conviction of Hernandez on this count, including a finding of dangerousness because the offense included the use of a deadly weapon. A.R.S. § 13-105(13) (2010). The parties stipulated to the introduction of medical records to establish Matilda B.'s injuries. Although there was no direct evidence that Hernandez shot Matilda B., circumstantial evidence was introduced from which the jury could reasonably find that Hernandez recklessly caused those injuries. Witnesses testified that out of everyone present at the scene, Hernandez was the only one seen with a gun. In addition, Detective D.J. testified that Hernandez had injuries to his hands consistent with those incurred from shooting a semi-automatic weapon.

C. Count 3: Assisting a Criminal Street Gang

¶23 As charged, assisting a criminal street gang under Count 3 required the State to prove that: (1) Hernandez exhibited two of seven criteria establishing membership in a

criminal street gang; and (2) he committed a complete offense in association with a criminal street gang to assist the gang's criminal conduct. A.R.S. § 13-105(9)(a)-(g), -2321(4) (2010).

¶24 There is sufficient evidence in the record for the jury to have reasonably concluded Hernandez was a member of the United Nortenos Gang. His membership was established through witness testimony describing Hernandez and his accomplices and through Detective D.M.'s testimony explaining the significance of those descriptions. Detective D.M. testified that wearing red symbolizes one's membership in the Nortenos gang. A.R.S. § 105(9)(f). He testified that the tattoo reading "UNG" across Hernandez's chest stood for the "United Nortenos Gang," and the numbers one and four tattooed on each of Hernandez's shoulders represented the fourteenth letter of the alphabet, the letter "N." A.R.S. § 105(9)(e).

¶25 There was also sufficient evidence for the jury to conclude that Hernandez's assault of Guadalupe B. and Matilda B. were committed to assist the Nortenos. The likelihood that this incident occurred in retaliation for the earlier drive-by shooting provided evidence for the jury to find that the crimes were committed in promotion of Hernandez's gang. Several witnesses testified that Hernandez came onto the scene after the drive-by and yelled, "This is Norte," took off his shirt and exposed his tattoos; the accomplices were also all wearing red

and shouting "Norte." The record therefore supports the jury's guilty verdict on this count.

D. Count 4: Threatening or Intimidating to Further the Interests of a Criminal Street Gang

¶26 As charged, threatening or intimidating under Count 4 required the State to prove that Hernandez threatened or intimidated by word or conduct to cause a physical injury to another person to promote, further, or assist in the interest of a criminal street gang. A.R.S. § 13-1202(A)(3) (2010).

¶27 There is sufficient evidence in the record supporting the jury's conviction of Hernandez under this count. Diana V. testified that she permitted her nephew, Norte gang member Angel V., and Hernandez to accompany her to Guadalupe B.'s home after the drive-by to resolve the underlying rivalry. She testified that Hernandez exited her car and yelled, "Who wants to box?" His words and conduct including exhibiting his tattoos support a finding that Hernandez threatened or intimidated to promote the Nortenos. Detective D.M. testified that such threats and intimidation helps a gang "show that they are pretty much the baddest in the area, trying to show that they don't like being disrespected. If you do, that there is going to be some consequences." Thus, the jury was reasonable in finding Hernandez guilty of threatening or intimidating to assist the interests of the Nortenos.

E. Count 5: Misconduct Involving Weapons

¶28 As charged, misconduct involving weapons under Count 5 required the State to prove that Hernandez: (1) knowingly possessed a deadly weapon,[6] and (2) was prohibited from possessing a weapon at the time the offense was committed.[7] A.R.S. § 13-3101(A)(1), -(7)(b), -3102(A)(4) (Supp. 2010). The jury was reasonable in convicting Hernandez of misconduct involving weapons. Hernandez was the only person that several testifying witnesses saw with a gun at the scene. In addition, Hernandez's stipulated prior felony conviction established the second element that he was a prohibited possessor, and a colloquy was not required when his counsel stipulated to this element of the offense. *See State v. Allen*, 223 Ariz. 125, 129, ¶ 22, 220 P.3d 245, 249 (2009).

¶29 In comparing the evidence in the record to the elements in the statutes, there was sufficient evidence to support the jury's conviction of Hernandez on all five counts.

[6] A deadly weapon is anything that is designed for lethal use, including a firearm; a firearm includes any loaded or unloaded handgun. A.R.S. § 13-3101(1), (4) (2010).

[7] A prohibited possessor includes any person who has been convicted of a felony and whose civil right to possess or carry a gun or firearm has not been restored. A.R.S. § 13-3101(7)(b).

CONCLUSION

¶30 For the foregoing reasons, we affirm all of Hernandez's convictions and sentences but modify his presentence incarceration credit on count 1 to 447 days.

/s/
DONN KESSLER, Presiding Judge

CONCURRING:

/s/
DANIEL A. BARKER, Judge

/s/
JON W. THOMPSON, Judge