DIVISION ONE
FILED: 09/30/2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 09-0653
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
ANDRE VALENTINO GALLEGOS,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Yuma County

Cause No. S1400CR200900015

The Honorable John P. Plante, Judge

REVERSED AND REMANDED

Terry Goddard, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

Michael Breeze, Yuma County Public Defender, — Tucson
By Edward F. McGee, Deputy Public Defender
Attorney for Appellant

D O W N I E, Judge

¶1 Andre Valentino Gallegos appeals his convictions for attempted manslaughter and aggravated assault, both class 3 felonies and dangerous offenses. Gallegos argues that the trial court erred by admitting evidence that he was a convicted felon. For the following reasons, we agree.

FACTS AND PROCEDURAL HISTORY

¶2 Gallegos was indicted on one count of attempted first-degree murder and one count of aggravated assault stemming from an altercation during which Gallegos stabbed his uncle with a knife. The State later amended the indictment to allege, for sentence enhancement purposes, that Gallegos had two historical felony convictions from California.

¶3 At trial, Gallegos presented a justification defense, claiming he acted in self-defense after his uncle attacked him. As to the attempted murder count, the jury found Gallegos guilty of the lesser-included offense of attempted manslaughter. It found him guilty as charged of aggravated assault and also found the offenses to be dangerous.[1] A hearing was scheduled on the allegation of prior felony convictions, but the State dismissed

[1] The verdict form signed by the jury and the minute entry from July 21, 2009 (the day the verdict was rendered) both state that the offenses were found to be dangerous. The sentencing minute entry, however, erroneously states that the offenses were non-dangerous. We amend the August 19, 2009 sentencing minute entry to reflect that the jury found both offenses to be dangerous in nature.

that allegation. The trial court sentenced Gallegos to two concurrent mitigated five-year prison terms, with credit for 233 days of presentence incarceration.

¶4 Gallegos timely appealed. 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 (2010) and -4033(A)(1) (2010).

DISCUSSION

¶5 In addition to alleging prior historical felony convictions, the State gave notice of its intent to impeach Gallegos with the felony convictions if he took the stand. Gallegos did not testify at trial, but he introduced an audio/video recording of his interview by the police. During that interview, Gallegos repeatedly told officers that he feared for his life and used the knife to defend himself only after being choked and pummeled by his uncle, who was almost a foot taller and weighed about twice as much as him. Gallegos also denied being in trouble in California, being in prison, or being a member of a gang.

¶6 The State sought to impeach Gallegos's interview statements by presenting evidence of prior felony convictions, time in prison, and gang membership. The trial court ruled that the State could introduce evidence that Gallegos had been convicted of a felony, but it precluded evidence about time in

prison or gang membership. Thereafter, over Gallegos's objection, the court allowed a detective to testify that he had viewed a printout of a computer criminal history with Gallegos's name on it that stated he had a felony conviction from California.

¶7 The next day, Gallegos filed a motion to dismiss. He expanded on his hearsay objection and added a claim that the evidence violated his confrontation rights under the Sixth Amendment and Article 2, Section 24 of the Arizona Constitution. The trial court denied the motion.

¶8 Gallegos concedes that by introducing the recording of his police interview, he opened the door for the State to present evidence impeaching his credibility. *See State v. Hernandez*, 191 Ariz. 553, 557, ¶ 9, 959 P.2d 810, 814 (1998) (holding non-testifying defendant who offers exculpatory recorded statement is subject to impeachment); Ariz. R. Evid. 806 (permitting impeachment of declarant of hearsay or other out-of-court statement admitted pursuant to Ariz. R. Evid. 801(d)(2)(C), (D), or (E) in same manner as if declarant testified). One method of impeaching credibility is with evidence of a felony conviction. Ariz. R. Evid. 609; *see also State v. Malloy*, 131 Ariz. 125, 127, 639 P.2d 315, 317 (1981) ("[A]ll felonies have some probative value in determining a witness' credibility upon the theory that a major crime entails

such an injury to and disregard of the rights of other persons that it can reasonably be expected the witness will be untruthful if it is to his advantage.").

¶9 When the prosecution seeks to establish a prior conviction, "it must prove two facts: (1) that the defendant in the present case and the one convicted in the prior case are the same individual, and (2) that there was in fact a prior conviction." *State v. Nash*, 143 Ariz. 392, 403, 694 P.2d 222, 233 (1985). Absent an admission by the defendant, prior convictions are proven by extrinsic evidence, such as a certified copy of a judgment of conviction or minute entry, expert comparison of a fingerprint card with a fingerprint on the sentencing minute entry, or photographs of the defendant. *Id.* A prior conviction from another state may also be proven with certified copies of public records from that state that have the same name, physical description and date of birth as the defendant. *State v. Van Adams*, 194 Ariz. 408, 419, ¶¶ 36-37, 984 P.2d 16, 27 (1999).

¶10 We review a trial court's rulings on evidentiary issues for an abuse of discretion. *State v. Jones*, 197 Ariz. 290, 308, ¶ 47, 4 P.3d 345, 363 (2000). An abuse of discretion occurs in an evidentiary ruling when the decision is clearly untenable, legally incorrect, or amounts to a denial of justice.

State v. Arellano, 213 Ariz. 474, 478, ¶ 14, 143 P.3d 1015, 1019 (2006).

¶11 Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ariz. R. Evid. 801(c). Hearsay is not generally admissible. Ariz. R. Evid. 802. The rationale for the general rule is that it is not possible to cross-examine hearsay. *State v. Allen*, 157 Ariz. 165, 172, 755 P.2d 1153, 1160 (1988). "Without the testing of cross-examination, it is often impossible to assess the weight reasonably to be attached to evidence. And a trier without guidance in the record or in common experience for evaluating the evidentiary worth of particular statements is a trier too free to act at will." 1 Morris K. Udall et al., *Arizona Practice: Law of Evidence* § 121, at 235 (3d ed. 1991).

¶12 The detective's testimony about Gallegos's prior felony conviction was not based on first-hand knowledge, but was derived from viewing an out-of-court statement to that effect and was specifically offered by the State to prove the truth of that matter. The testimony was thus inadmissible unless an exception to the hearsay rule applies. *State v. Bass*, 198 Ariz. 571, 577, ¶ 20, 12 P.3d 796, 802 (2000).

¶13 The State contends the testimony was admissible under the public records exception to the hearsay rule. Rule 803

defines public records or reports falling under this exception, in pertinent part, as including "records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . matters observed pursuant to [a] duty imposed by law as to which matters there was a duty to report." Ariz. R. Evid. 803(8). The State argues that the criminal history report was collected and maintained by the Arizona Department of Public Safety pursuant to a statutory duty and that it is therefore a public record. *See* Ariz. Rev. Stat. § 41-1750(A) (Supp. 2009)[2] ("The department is responsible for the effective operation of the central state repository in order to collect, store and disseminate complete and accurate Arizona criminal history records and related criminal justice information.").

¶14 The flaw in the State's argument is that nothing in the record establishes the requisite foundation for the computerized criminal history report as a "public record." There is no evidence as to who collected the information in the report, the source of the information collected, or the manner in which it was collected. The only description of the document provided by the detective was that "it's a computer printout of

[2] We cite to the current version of statutes when no revisions material to this decision have since occurred.

a person's criminal history." Nothing in the record supports the State's claim that the criminal history report was obtained from the Arizona Department of Public Safety. Because the record does not establish that the criminal history report satisfied the requirements for a public record under Rule 803(8)(B), the contention that it is admissible under this exception fails. *See State v. Walker*, 181 Ariz. 475, 482, 891 P.2d 942, 949 (App. 1995) (holding mere avowal by prosecutor that fingerprint card was a business record of police department was not sufficient to support admission as public record or business record.)

¶15 Moreover, the public and business records exceptions provide only for introduction of the record into evidence. They do not allow a witness to testify as to what the record states. *State v. Ceja*, 113 Ariz. 39, 41, 546 P.2d 6, 8 (1976). "One having no independent knowledge cannot establish by oral testimony facts contained in a written record." *Id.* Having the detective testify about the contents of the criminal history report was hearsay upon hearsay. Multiple hearsay is not admissible, unless each part of the combined statements meets a recognized exception. *State v. McGann*, 132 Ariz. 296, 298 n.1, 645 P.2d 811, 813 n.1 (1982); *see also* Ariz. R. Evid. 805 (permitting hearsay within hearsay where each part conforms with an exception to the hearsay rule). The State does not claim

that any hearsay exception applies to the detective's testimony about the contents of the criminal history report.

¶16 When we find error in the admission or exclusion of evidence, we must further determine whether that error was harmless. *State v. Anthony*, 218 Ariz. 439, 445-46, ¶¶ 38-39, 189 P.3d 366, 372-73 (2008); *see also State v. Doerr*, 193 Ariz. 56, 64, ¶ 33, 969 P.2d 1168, 1176 (1998) ("[T]his court will not reverse a conviction if an error is clearly harmless."). Error is harmless only if we can say, beyond a reasonable doubt, that it "did not contribute to or affect the verdict." *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). "The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Id.* (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)).

¶17 Gallegos's justification defense depended on the jury believing statements he made in the police interview about the altercation with his uncle. His credibility was crucial to his defense. Introduction of hearsay evidence that he was a convicted felon clearly could have undercut his credibility in the eyes of the jury. Given the facts of this case, we cannot say beyond a reasonable doubt that the erroneous admission of the hearsay evidence had no impact on the verdicts. *See State*

v. Green, 200 Ariz. 496, 501, ¶ 22, 29 P.3d 271, 276 (2001) (holding that improper admission of prior conviction evidence was reversible error when defendant's credibility was at issue).

CONCLUSION

¶18 We reverse Gallegos's convictions and sentences and remand for a new trial.[3]

/s/
MARGARET H. DOWNIE, Judge

CONCURRING

/s/
MAURICE PORTLEY, Presiding Judge

/s/
JOHN C. GEMMILL, Judge

[3] Based on our determination that the evidence was improperly admitted, we need not separately address Gallegos's contention that it also violated his right of confrontation under the Sixth Amendment and Article 2, Section 24 of the Arizona Constitution.