IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 09/27/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

STATE OF ARIZONA,	)	No. 1 CA-CR 10-0174
	)	DEPARTMENT B
Appellee,	)	
	)	**MEMORANDUM DECISION**
v.	)	(Not for Publication –
	)	Rule 111, Rules of the
RAYNON JERMAINE BLACKSHIRE,	)	Arizona Supreme Court)
	)	
Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause Nos. CR2008-147550-001 SE

The Honorable Robert L. Gottsfield, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division
And Myles A. Braccio, 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 Raynon Jermaine Blackshire ("Defendant") appeals from his convictions and sentences for aggravated assault, a class 3 dangerous felony; misconduct involving weapons, a class 4

felony; and unlawful flight from police, a class 5 felony. Defendant contends that the trial court committed reversible error because it (1) did not adhere to the protocol of *Boykin*[1] and Ariz. R. Crim. P. Rule 17.6 (before finding that he was on probation at the time of the offenses, and (2) "impermissibly burdened" his due process right to testify on his own behalf by allowing the state to establish his prior felony convictions through Rule 609 impeachment and his admissions at trial. For reasons recited below, we affirm.

FACTS[2] *AND PROCEDURAL HISTORY*

¶2 On July 28, 2008, Defendant and the victim, N.M.,[3] spent a good part of the day together driving around in Defendant's Lexus SUV, going by mutual friends' homes, stopping at Defendant's mother's or grandmother's house, eating at a fast-food restaurant and generally "hanging out" as they had done many times before. As they were driving around, Defendant told N.M. that he was having financial problems and N.M. confided that he himself was "going through the same thing, like

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[1] *Boykin v. Alabama*, 395 U.S. 238 (1969).

[2] We view the evidence in the light most favorable to sustaining the convictions and resolve all reasonable inferences against defendant. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

[3] We use the victim's initials to protect his privacy as a victim. *State v. Maldonado*, 206 Ariz. 339, 341, ¶ 2 n.1, 78 P.3d 1060, 1062 n.1 (App. 2003).

everybody else." That is why, when Defendant dropped N.M. off outside the entrance to his gated apartment complex in Chandler, N.M. offered Defendant $100 to defray the cost of the gasoline they had used driving around in the SUV that day.

¶3 When N.M. handed Defendant the gas money, he saw Defendant reach over toward the driver's side of the SUV. N.M. turned to get out; when he turned back to say good-bye, he saw a gun pointed at his face. N.M. said, "no," pushed the SUV door open, and started to run. As he fled the car, Defendant shot him in the back. N.M. knew that he had been shot because he could see blood and because he felt "very, very weak."

¶4 While they were parked outside the entrance, another vehicle activated the electronic gate, and the gate remained open. N.M. ran from the car through the open gate and into the apartment complex. N.M then saw Defendant drive his SUV through the gate. Defendant began chasing N.M. through the apartment complex.

¶5 N.M. cut through areas of the complex that he knew Defendant could not traverse in his SUV and began knocking on apartment doors asking for help. Some residents who were barbecuing on their back patio eventually took him in and called the police.

¶6 Minutes after the shooting, a Chandler police officer stopped Defendant's SUV when he observed the vehicle speeding

out of the apartment complex. After initially stopping for the police officer, Defendant sped off in his vehicle toward a nearby mall. In the process, Defendant hit a curb and blew out both tires on the passenger side of his vehicle. Chandler police officers arrested him as he attempted to walk away from the vehicle.

¶7 Defendant was interviewed by two Chandler police detectives on the night of the crime. Defendant admitted fleeing from the police officer who initially stopped him, but attributed it to the fact that he had become frightened when he saw the officer had drawn his gun. Defendant also admitted being with N.M. when he was shot, but initially denied knowing who had shot him. Later in the interview Defendant told the detective that N.M. had been "shot by a man named Philly," but that he did not know who "Philly" was.[4] Defendant also mentioned that he thought it might have been "a drug deal gone bad."

¶8 While the interview was in progress, a K9 unit located a semi-automatic handgun in the strip mall where Defendant was apprehended. A cartridge found in the gun appeared to match a spent cartridge located on the driver's side floorboard of the SUV. When the detective told Defendant during the interview that N.M. had identified him as the shooter and that the police

[4] Testimony at trial established that "Philly" was N.M.'s nickname and the nickname by which Defendant called him.

had located a weapon at the strip mall, Defendant stated "I'm stuck." The detective asked Defendant what he meant by that, and Defendant replied, "[W]ell you've got me and you've got the gun."

¶9 Defendant told a second detective who interviewed him that "Philly" drove around with them in their travels, sitting in the back seat of the SUV. He also admitted knowing there was a gun in the car and that "maybe" he threw it out the window. Defendant admitted to this detective as well that he fled from police, but attributed the flight to the fact that he "panicked" when he noticed the gun on the back seat. He admitted throwing the gun out the window.

¶10 Defendant told this detective that N.M. was a "major drug dealer,"[5] that the incident was a "drug deal gone bad," and that he was only the "middle man" and had nothing to do with the shooting. Defendant subsequently drove with the detective to the mall and indicated where he had thrown the weapon, which was the spot where officers had previously located it.

¶11 A hospital report established that N.M. had sustained a gunshot wound to his back. The state charged Defendant with Count 1, attempted murder, a class 2 dangerous felony; Count 2,

[5] Based on this information, officers executed search warrants on N.M.'s house and apartment in the early morning hours following the shooting. They found no drugs, weapons or large sums of money, as Defendant suggested they would, in either location.

aggravated assault with a deadly weapon, a class 3 dangerous felony; Count 3, misconduct involving weapons, while being a prohibited possessor, a class 4 felony; and Count 4, unlawful flight from a law enforcement vehicle, a class 5 felony.

¶12 At trial, N.M. testified that the bullet remained in his body and was lodged above his liver. He identified Defendant as the shooter and testified that he was completely "surprised" by the incident because he and Defendant had "never had an argument . . . everything was fine . . . [they] didn't have any beef," and he did not owe Defendant anything nor did Defendant owe him anything.

¶13 Defendant testified on his own behalf and maintained that he had tried to sell N.M. two kilos of cocaine, but that N.M. had instead robbed him of it at gunpoint. N.M. was shot by accident when the two of them wrestled over N.M.'s gun while they were both inside the SUV. According to Defendant, after he was shot, N.M. had "grabbed" the bag containing the cocaine and run off into the apartment complex. The only reason he had driven after N.M. was to try and retrieve the drugs, not to harm N.M. in any way.

¶14 Defendant explained that he fled from the traffic stop only when he noticed N.M.'s gun on the floor of the passenger side of the SUV, where it had dropped. He stated that he had "panicked" because he was "a felon" and had never had a gun. He

did not want to get caught by police with N.M.'s gun in his vehicle because he feared that they might think that the gun was his and that he had tried to rob N.M. Defendant also explained that he had lied to police about his role in the incident because he did not want them to know that he was a drug dealer. He further lied to them about N.M. being a "big drug dealer" because he wanted the police to go to N.M.'s apartment and find the drugs N.M. had stolen from him.

¶15 The jury acquitted Defendant of the attempted murder offense but found him guilty as charged of all of the other crimes. On February 8, 2010, the trial court sentenced Defendant to a aggravated prison term of 11.25 years on the aggravated assault, a presumptive prison term of 10 years for misconduct involving weapons, and a presumptive prison term of 5 years for unlawful flight. The court ordered all the sentences to run concurrently.

¶16 Defendant timely appeals. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031 and -4033.

DISCUSSION

I. FAILURE TO ADHERE TO BOYKIN AND ARIZ. R. CRIM. P. 17.6

¶17 Defendant contends that the trial court committed reversible error when it accepted without engaging in a full *Boykin* and Rule 17.6 colloquy the parties' "stipulation" that he was on probation at the time he committed the misconduct

involving weapons offense. Relying on *State v. Morales*, 215 Ariz. 59, 61, ¶ 10, 157 P.3d 479, 481 (2007), Defendant maintains that the court's failure to engage in the Rule 17 colloquy when the prior was "established by admission" was fundamental error.

¶18 Defendant failed to raise this issue before the trial court. He has therefore forfeited his right to appellate relief on this issue unless he can "establish both that fundamental error exists and that the error in his case caused him prejudice." *State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 19-20, 115 P.3d 601, 607 (2005). The burden rests with Defendant to do both. *Id*. at 567, ¶ 19, 115 P.3d at 607. However, before we engage in fundamental error review on appeal, we must first find that the trial court committed some error. *State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342 (1991). Defendant has proven no error on the trial court's part.

¶19 *Boykin* recognizes that several federal constitutional rights are waived whenever a defendant enters a plea of guilty in a criminal case, including the right against compulsory self-incrimination, the right to a trial by jury, and the right to confront one's accusers. 395 U.S. at 243. It therefore requires that a trial court conduct an "on the record examination" of a defendant to assure that the defendant has a full understanding of what the plea connotes and of its

consequences "before accepting a *guilty plea*." *Id*. at 243-44 nn. 5, 7 (emphasis added). Rule 17.2 of our Criminal Rules incorporates the *Boykin* safeguards and requires that Arizona judges advise defendants of their rights and the consequences of pleading guilty, admitting guilt or submitting on the record, and determine that they understand those rights "[b]efore accepting a plea of guilty or no contest." Ariz. R. Crim. P. 17.2. Rule 17.6 extends that requirement to defendants' admissions of prior felony convictions by providing that, "[w]henever a prior conviction is charged, an admission thereto by the defendant shall be accepted only under the provisions of this rule, *unless admitted by the defendant while testifying on the stand*." (Emphasis added.)

¶20 Defendant maintains that his attorney and the prosecutor "stipulated" to the fact that he was on probation when he committed the misconduct involving weapons offense. He contends that therefore the jury never determined whether he was on probation and that, consequently, the trial court erred when it accepted the "stipulation" for sentencing purposes without also first conducting a Rule 17.6 colloquy. We find this argument misstates the record.

¶21 Contrary to Defendant's argument, the record shows that Defendant clearly admitted that he was on probation and knew that he could not be in possession of a weapon at the time

he committed the present offenses. Defendant admitted his 2007 felony conviction for possession of marijuana in CR 2007-132666 while on the stand during direct questioning by his attorney.[6] During cross-examination the prosecutor asked Defendant whether he would agree that, at the time of the shooting, he was still on probation for that offense because probation had been ordered to run "for two years beginning in 2007." When Defendant replied that he "thought" that the court had only imposed one year's probation, the following exchange took place:

> [Prosecutor]: So if this document says that back on June 18th of 2007 that you were put on probation for two years, this document is wrong?
>
> [Defendant]: No, if that's what it say, I can't say it's wrong.
>
> [Prosecutor]: So then you would agree with me that on the date of this offense you were in fact in probation?
>
> [Defendant]: Yes, I guess so. Yes.
>
> [Prosecutor]: And you knew that you did not have -- you could not be in the vicinity of any type of weapon, right?
>
> [Defendant]: Yes.

¶22 This testimony by Defendant, given while on the stand under oath, was a sufficient and unambiguous admission that he

[6] In fact, the record shows that Defendant admitted two felony convictions while on the stand, one the possession of marijuana conviction and the other a federal conviction for conspiracy to distribute a controlled substance/cocaine for which he was sentenced on April 11, 2002.

was on probation at the time of the shooting. Under these circumstances, therefore, the trial court did not err in not performing a Rule 17.6 colloquy.

¶23 That his testimony was sufficient is further borne out by the jury's guilty verdict concerning the misconduct involving weapons charge. As part of its final instruction concerning this charge, the trial court instructed the jury that a "prohibited possessor" meant any person who: "A, has been convicted of a felony and whose civil rights to possess or carry a gun or firearm has not been restored; or B, who is at the time of possession serving a term of probation pursuant to a conviction for a felony offense." Again, contrary to Defendant's arguments on appeal, the record shows that, in rendering its guilty verdict, the jury specifically found "beyond a reasonable doubt" that "[Defendant] at the time of possessing the gun or firearm was serving a term of probation pursuant to a conviction for a felony offense."

¶24 The "stipulation" to which Defendant refers in his argument appears to derive from a statement that the trial judge made in a conversation with counsel concerning the aggravation phase of the proceedings as they awaited the jury's verdicts. It was not a trial "stipulation" as that term is normally used.[7]

[7] In a trial stipulation, "[p]arties routinely stipulate to easily proven facts . . . 'to narrow issues and to promote

During his conversation with counsel, the trial judge noted that the "appellate courts" wanted juries to decide the issue of probation, not judges, and that the "exception" to that rule was "if the defendant admits on the stand." The judge then stated that, in his view, Defendant "did admit that" and asked if counsel agreed with him. He stated that if both counsel would "stipulate" to that fact, he would inform the jury that it need not concern itself with the probation part during the aggravation hearing. Both counsel agreed that Defendant had admitted, and the trial judge concluded "[t]hats the stipulation, so we're just going to talk about the three alleged aggravators." Shortly thereafter the jury entered the courtroom to render its verdicts, including the special verdict on the misconduct charge.

¶25 The trial judge's use of the word "stipulate" in this context was intended to signify "agreement" that Defendant had admitted while testifying on the stand that he was on probation

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judicial economy.'" *State v. Allen*, 223 Ariz. 125, 127, ¶ 11, 220 P.3d 245, 247 (2009) (citation omitted). "Although stipulations may bind the parties and relieve them of the burden of establishing the stipulated facts, stipulations do not bind the jury." *Id.* (citing *State v. Virgo*, 190 Ariz. 349, 353, 947 P.2d 923, 927 (App. 1997)).

at the time of the offenses. Since all of the parties,[8] including the trial judge, "agreed" that Defendant had "admitted," and since the record supports this as well, it is clear that the trial court did not rely on any "stipulation" concerning Defendant's probation status. Furthermore, even had the trial court done so, the jury's verdict regarding the misconduct offense would render any error moot. Defendant's argument is, at best, misguided.

¶26 Defendant's reliance on our supreme court's decision in *Morales* is likewise unavailing. In *Morales*, the supreme court held that even a defense counsel's "stipulation" to the fact of a prior conviction for sentence-enhancement purposes requires a Rule 17.6 "plea-type colloquy." 215 Ariz. at 61, ¶¶ 8-9, 157 P.3d at 481. Here, Defense counsel did not stipulate either to Defendant's prior convictions or probation status; instead Defendant admitted them while on the stand. *Morales* acknowledged that when the defendant makes this admission on the stand, a Rule 17.6 colloquy is not required. *Id.* at 61, ¶ 7, 157 P.3d at 481.

¶27 Defendant has failed to show that the trial court committed any error, let alone fundamental error, by failing to

[8] Defense counsel's closing argument regarding the misconduct charge also reflects the fact that he considered that Defendant had admitted being on probation.

conduct the Rule 17.6 colloquy. *Lavers*, 168 Ariz. at 385, 814 P.2d at 342.

II. THE BURDEN ON DEFENDANT'S DUE PROCESS RIGHT TO TESTIFY

¶28 Defendant next argues that, by permitting the state to establish his prior convictions via his admissions while on the stand, the trial court violated his constitutional right to testify on his own behalf. Defendant contends that Ariz. R. Evid. 609, which permits the state to impeach a testifying defendant with his prior felonies, and Ariz. R. Crim. P. 17.6 and 19.1, which provide that a prior conviction may be established if the defendant admits it from the stand, are constitutionally infirm because they alleviate the prosecution's burden of proving prior convictions and, concomitantly, "chill" a defendant's right to testify on his own behalf by forcing him to give up the right to have the state prove his priors if he does so.

¶29 Defendant has waived all but fundamental error on this issue, first, because he failed to raise it before the trial court and, second, because he chose to testify without preserving his objection at trial. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. The trial court in this case did not commit any error, let alone fundamental error, by permitting the state to establish the prior convictions through the applicable rules. *Lavers,* 168 Ariz. at 385, 814 P.2d at 342.

¶30 Furthermore, as the state notes, Defendant was not entitled to have the jury find the existence of his prior convictions beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt."). *See also State v. Fell*, 210 Ariz. 554, 557, ¶ 8, 115 P.3d 594, 597 (2005). Nor is the state's burden of proving a prior conviction "alleviated" when a defendant takes the stand; it is simply the manner of proving it that changes. Thus, the prosecutor must still be prepared to elicit and present the required information, particularly where, as here, the defendant may not recall all of the pertinent information regarding the prior. Moreover, the prosecutor must also have proven the prior to the court and passed the scrutiny of a 609 hearing before he or she will be permitted to elicit any statements regarding the prior from the defendant.

¶31 Defendant's reliance on *Simmons v. United States*, 390 U.S. 377 (1968), to support his argument is flawed. *Simmons* is not analogous. *Simmons* holds that a defendant's testimony at a suppression hearing may not be "admitted against him at trial on the issue of guilt unless he makes no objection" because to do otherwise would oblige the defendant to give up a "valid Fourth

Amendment claim or . . . waive his Fifth Amendment privilege against self-incrimination." 390 U.S. at 394. A defendant's admissions at trial regarding prior felony convictions are not and cannot be admitted as evidence against him on the issue of guilt.

CONCLUSION

¶32 For the foregoing reasons, we affirm Defendant's convictions and sentences.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
LAWRENCE F. WINTHROP, Presiding Judge

/s/
_____
MICHAEL J. BROWN, Judge