

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 01/6/11
RUTH WILLINGHAM,
ACTING CLERK
BY: DN

STATE OF ARIZONA,) 1 CA-CR 10-0321
)
 Appellee,) DEPARTMENT C
)
 v.) MEMORANDUM DECISION
)
 ANTHONY ANTENCIO-GUTIERREZ,)
) (Not for Publication -
 Appellant.) Rule 111, Rules of the
) Arizona Supreme Court)
)
)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-160939-001DT

The Honorable Edward O. Burke, Judge

AFFIRMED

Thomas Horne, Arizona Attorney General Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Jeffrey L. Sparks, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Terry J. Adams
Attorneys for Appellant

B A R K E R, Judge

¶1 Anthony Antencio-Gutierrez appeals his conviction and sentence for one count of forgery, a class 4 felony. Defendant argues that evidence of his prior felony conviction was admitted in violation of Rule 404(b) of the Arizona Rules of Evidence. For the reasons set forth below, we affirm.

Facts and Procedural Background¹

¶2 In June of 2009, two Phoenix police officers were patrolling the area of 12th Street and Devonshire when they observed Defendant riding a bicycle on the wrong side of the street. The officers stopped Defendant and asked him for identification. Defendant did not provide any. He instead told the officers that his name was "Anthony Garcia" and that his date of birth was August 10, 1969.

¶3 One of the officers searched the name and birth date combination through Motor Vehicle Division records, the Arizona Crime Information Center, the National Criminal Information Center, and the Phoenix Police Department's database. When the search did not yield results, the other officer called the Phoenix Police Department's records and identification bureau. That search also found no results for the identification information given by Defendant.

¹ We review the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Defendant. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

¶4 Because the officers were unable to issue Defendant a traffic citation without verifying his identity, they took him to police department headquarters for fingerprinting. After reading a document given to him by the officers stating that it was illegal to provide a false name, Defendant signed a fingerprint card with the name "Anthony Garcia." A digital scan of Defendant's fingerprints revealed that he had an outstanding parole violation and an arrest warrant issued under the name "Anthony Antencio-Gutierrez."

¶5 At trial, a Motor Vehicle Department employee testified that the Department's records showed a driver's license and identification card issued for "Anthony Antencio" with a birth date of August 10, 1970. The Department database had no records for an "Anthony Garcia" born on August 10, 1969.

¶6 Defendant's parole officer testified that he supervised felons on release from prison, he supervised Defendant, Defendant had failed to report as required, and a warrant had been issued for Defendant's arrest. The officer also testified that he knew Defendant as "Anthony Antencio-Gutierrez" with a birth date of August 10, 1970. Defendant did not object to this testimony at trial. Although Defendant filed a motion in limine to preclude reference to his Department of Corrections records, the sole basis for the motion was lack of foundation. The motion did not assert that the testimony of the

parole officer was inadmissible as evidence of prior bad acts. Neither did Defendant object on prior bad acts grounds at oral argument on the motion in limine.

¶7 The jury convicted Defendant of one count of forgery. The trial court sentenced Defendant to 4.5 years' incarceration on March 31, 2010; Defendant timely appealed. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003) and 13-4033(A) (2010).

Discussion

¶8 On appeal, Defendant argues that his parole officer's testimony referencing his prior felony conviction was impermissible evidence of prior bad acts under Arizona Rule of Evidence 404(b).² Defendant, however, did not raise this argument in the trial court. We therefore review Defendant's

² Defendant also argues, briefly, that the "evidence should have been precluded as being too prejudicial and outweighing any evidentiary value." The parole officer's testimony that Appellant missed a meeting and violated parole, which resulted in a warrant, is clearly probative as to motive to use a false name. Whether the probative value is substantially outweighed by unfair prejudice is addressed to the trial court's discretion, and we have affirmed in similar circumstances in the past. See *State v. Martinez*, 196 Ariz. 451, 459, ¶¶ 29-31, 999 P.2d 795, 803 (2000) (holding no abuse of discretion for the trial court to consider an arrest warrant demonstrated motive for murder as defendant did not want to return to prison).

argument for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).

¶9 Fundamental error is rare and is defined as "error going to 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." *Id.* (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)). To be reversible error under this standard, the error must be both fundamental and prejudicial. *Id.* at ¶ 20. The burden of showing both fundamental error and prejudice is on the defendant. *Id.* at ¶ 19.

¶10 Defendant has not met his burden of showing that the evidence was improperly admitted. Evidence of prior bad acts may not be admitted to show that the defendant has a propensity to commit a crime, but it may be admitted to show motive or identity. Ariz. R. Evid. 404(b).

¶11 Here, Defendant's parole violation and subsequent arrest warrant tended to show a motive for Defendant to give a false name on his fingerprint card. *Martinez*, 196 Ariz. at 459, ¶¶ 29-31, 999 P.2d at 803 (arrest warrant and the desire not to return to prison found as providing a motive for murder). Had Defendant given his proper name, he would likely have been arrested pursuant to the outstanding warrant. Thus, this evidence shows that Defendant had a motive to give false

identification information and to subsequently deliberately forge his fingerprint card.

¶12 Additionally, the testimony also established that Defendant was known and identified by the name "Anthony Antencio-Gutierrez," and that writing the name "Anthony Garcia" on a fingerprint card would have been intentionally fraudulent. Defendant argues that his identity may have been proven by the fingerprint technician and that this method would have been less prejudicial. But testimony from Defendant's parole officer, someone who knew Defendant personally, was much more probative as to Defendant's identity. Further, Defendant had objected to the fingerprint evidence on a foundation basis in his motion in limine to preclude the evidence. At trial, Defendant attacked the reliability of the electronic fingerprint identification method. This made additional evidence as to Defendant's identity probative, relevant, and necessary to conclusively establish Defendant's identity to the jury. Thus, there was no error in admitting this testimony, let alone fundamental error.

¶13 Defendant cites to *State v. Holsinger*, 124 Ariz. 18, 601 P.2d 1054 (1979), in support of his contention that we are required to reverse when evidence of prior bad acts is improperly admitted. In *Holsinger*, the prosecutor asked a witness in front of the jury, "Did I tell you that Jeannie Holsinger had a long criminal record and that's why I wanted to

get her?" *Id.* at 20, 601 P.2d at 1056. Here, no party referenced a "long criminal record." As discussed above, the testimony admitted was not improper. Therefore, *Holsinger* does not require us to reverse.

Conclusion

¶14 For the forgoing reasons, the decision of the trial court is affirmed.

/S/

DANIEL A. BARKER, Presiding Judge

CONCURRING:

/S/

MARGARET H. DOWNIE, Judge

/S/

MICHAEL J. BROWN, Judge