DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. TRINIDAD CHAVEZ, JR., Appellant.	)	1 CA-CR 10-0348 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-006832-001DT

The Honorable James T. Blomo, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Eleanor S. Terpstra, Deputy Public Defender
Attorneys for Appellant

K E S S L E R, Judge

¶1 Appellant Trinidad Chavez, Jr. ("Appellant") was tried and convicted of one count of aggravated assault on a police officer, a class 5 felony, under Arizona Revised Statutes ("A.R.S.") sections 13-1203, -1204 (2008).[1] Counsel for Appellant filed this appeal in accordance with *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969) from his conviction and sentence. Finding no arguable issues to raise, counsel requests that this Court search the record for fundamental error.

¶2 Appellant did not submit a supplemental brief, however, his counsel identified four issues that Appellant would like us to review: (1) The trial court's denial of a mistrial when the State asked about Appellant's prior "felony" conviction after it had been sanitized; (2) Appellant was prejudiced because the case was previously dismissed twice due to a police officer's failure to respond to court ordered subpoenas; (3) Insufficient information to prove the existence of his prior felony convictions because the fingerprint cards did not contain a name, date or signature; and (4) His sentence should not have been enhanced due to his prior felony convictions because of their age and irrelevance to this case.

[1] We cite to the most current version of statutes when they have not been substantively revised since the date of the underlying conduct.

¶3 After reviewing the entire record, we conclude that the evidence is sufficient to support the verdict and there is no fundamental error. Therefore, we affirm Appellant's conviction and sentence.

FACTUAL AND PROCEDURAL HISTORY

¶4 Officer P. ("P.") and Officer L. ("L.") of the Phoenix Police Department responded to an emergency domestic violence call, not involving Appellant, at Appellant's home. P. and L. arrived at Appellant's home just as Appellant and his girlfriend at the time, Sonya S. ("Girlfriend"), pulled into the driveway. Appellant and Girlfriend were not aware of the domestic violence incident or of the fact that police had been called to the home.

¶5 Although there were people outside the residence, L. admitted that everyone and everything was calm when they arrived. There was no screaming, arguing, or signs of distress coming from the house. L. instructed everyone, and Appellant specifically, to stay outside. L. asked Appellant what was going on and Appellant responded that he did not know because he had just got there. Appellant started to enter the house and L. told him to "get his asa [sic] out here." Appellant disregarded L.'s instruction, said "fuck you," and walked into the house. L. followed Appellant into the house to pull him out. When L. grabbed onto Appellant's wrist, Appellant jerked away and continued through the house.

¶6 P. followed L. into the house, where he saw Appellant and L. physically grabbing and wrestling each other. Appellant testified that throughout the struggle, he was just trying to escape from L. L. testified that Appellant punched him in the chest, but Appellant testified that he never punched, slapped, or scratched L. and that he was only trying to free himself from L.'s hold of him.

¶7 Appellant and L. ended up wrestling on the kitchen floor. L. testified that Appellant lifted him by his thighs and plowed him to the ground, whereas Appellant testified they tripped over a mop bucket filled with water and slipped.[2] Appellant's family was upset by the situation and yelled at L. to leave Appellant alone because he did not do anything and was not involved in the domestic violence. During the struggle, P. discharged his taser twice into Appellant's back. The second discharge caused Appellant to submit and ended the struggle. Appellant was then placed under arrest. L. sustained an injury to his right ankle and scratches under his eye.

¶8 Appellant was indicted of aggravated assault on a police officer, a class 5 felony. Before trial, the State requested a Rule 609 hearing. The court found two of Appellant's prior felony convictions could be used to impeach

[2] This is supported by P.'s testimony that the floor was wet and by crime scene photos showing the mop bucket knocked over and Appellant's pants being wet.

Appellant. However, the court sanitized the convictions and the parties were not allowed to inquire into the nature of the crimes or the fact that they were felony convictions.

¶9 During trial, the State asked Appellant about his prior "felony" conviction in violation of the court's order. Appellant's counsel requested the statement be stricken from the record and moved for an immediate mistrial. The court denied Appellant's motion for mistrial, but at his request, polled the jurors as to whether they heard the term "felony" used and if they had, to see if they could remain fair and impartial. Four jurors admitted hearing the word felony, but all responded that they could be impartial with the knowledge that Appellant's prior convictions were felonies. Before final jury instructions, Appellant unsuccessfully re-urged his motion for mistrial.

¶10 The jury found Appellant guilty of aggravated assault on a police officer. Prior to sentencing, the court held a hearing on Appellant's prior felony convictions, specifically two aggravated DUIs, both class 4 felonies that occurred on June 18, 1998 and May 22, 1999. L. did not take Appellant's fingerprints until approximately October 22, 2009, when trial proceedings had already begun. L. did not date, sign, or put any identifying marks on the fingerprint cards other than "right hand" and "left hand." Over Appellant's objection for lack of

identifying information, the court admitted the fingerprint cards. A forensic scientist with the Phoenix Police Department compared and matched Appellant's fingerprints to the thumbprints on two certified minute entries from Appellant's prior aggravated DUI convictions. The court found that the State proved the two prior felony convictions for sentencing consideration. After hearing from Appellant's family and a mitigation specialist, the court sentenced Appellant to a mitigated term of four years for aggravated assault on a police officer with two prior historical felony convictions.

¶11 Appellant timely appealed. *See* Ariz. R. Crim. P. 31.3. We have jurisdiction under Article 6, Section 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2003) and 13-4033 (A)(1), (4) (2010).

STANDARD OF REVIEW

¶12 On review, we examine the evidence in the light most favorable to sustaining the jury's verdict and resolve all inferences against the defendant. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998). This Court must review 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 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." *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)). To prevail under this standard, Appellant must also demonstrate that the error caused him prejudice. *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607.

DISCUSSION

¶13 This Court has reviewed the entire record for fundamental error. After careful review, we find no meritorious grounds for reversal of Appellant's conviction or modification of the sentence imposed. The record reflects that Appellant had a fair trial and was present and represented by counsel at all critical stages of trial. Appellant was given the opportunity to speak at sentencing, and the trial was conducted in accordance with the Arizona Rules of Criminal Procedure. The evidence is sufficient to sustain the verdict and the trial court imposed a proper sentence for Appellant's offense.

I. There is substantial evidence in the record that supports the jury's verdict.

¶14 In reviewing a claim for the sufficiency of the evidence, we construe the evidence in the light most favorable to sustaining the verdict. *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998). "Reversible error based on insufficiency of the evidence occurs only where there is a

complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (quoting *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976)).

¶15 For the jury to find Appellant guilty of aggravated assault on a police officer, it had to find Appellant: (1) Actually caused some kind of physical injury to another person; (2) Intentionally, knowingly or recklessly caused that harm; and (3) Knew or had reason to know that the other person was a peace officer performing his duties. A.R.S. §§ 13-1203(A)(1), -1204(A)(1), (A)(8)(a).

¶16 The State presented sufficient evidence to support the jury's verdict. P. testified that Appellant was on top of L. while they were wrestling on the floor. L. testified that Appellant punched him once in the chest, plowed him into the ground and continued to try to strike him in the face. L. also testified that he incurred an injury to his right ankle and underneath his eye. This is supported by photographs taken of L. after the struggle. The photos of L.'s injuries along with P.'s and L.'s testimony all support the conclusion that Appellant assaulted L.

¶17 It was reasonable for the jury to conclude that Appellant acted intentionally or recklessly in injuring L. when he disregarded L.'s commands to stop and intentionally struggled

and fought back. There was also sufficient evidence for the jury to find that Appellant inflicted those injuries on L. given L.'s testimony and the pictures of his injuries. The jury was also within reason in finding Appellant knew or should have known that L. was a peace officer given his attire (his black uniform), the fact that he arrived in a police car and his conduct throughout the incident. Therefore, we find that the evidence is sufficient to support the jury's guilty verdict for aggravated assault on a police officer.

II. No fundamental error occurred from the trial court's denial of Appellant's motion for a mistrial.

¶18 The trial court's denial of Appellant's motion for a mistrial after the State used the word "felony" did not result in fundamental error. "The decision to grant or deny a motion for mistrial rests with the discretion of the court." *State v. Hoskins*, 199 Ariz. 127, 142, ¶ 57, 14 P.3d 997, 1012 (2000). "In deciding whether to grant a mistrial, the trial court must determine if a statement, the substance of which was not admissible, alerted the jury to a matter it should not consider and the probability that the jury indeed was influenced by it." *State v. Gilfillan*, 196 Ariz. 396, 405, ¶ 35, 998 P.2d 1069, 1078 (App. 2000) (citing *State v. Hansen*, 156 Ariz. 291, 297, 751 P.2d 951, 957 (1988)). The influence on the jury must be great; the defendant must show that use of the word "felony" in

the context of the entire proceeding infected the trial with unfairness. *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998). Here, all the jurors stated that they could remain fair and impartial with the knowledge that Appellant had been convicted of previous felonies. Appellant was not able to prove that the statement influenced the jury or prejudiced him in any way. Therefore, we support the trial court's denial of Appellant's motion for a mistrial.

III. Appellant was not prejudiced by the previous dismissals of this case.

¶19 We think Appellant is arguing that the State's previous dismissals of this case violated his rights to a speedy trial protected by Rule 8 of the Arizona Rules of Criminal Procedure, Article 2 of the Arizona Constitution, and the Sixth Amendment to the United States Constitution.

¶20 Under Rule 8.2(a) of the Arizona Rules of Criminal Procedure, a defendant released from custody must be tried within 180 days of arraignment, except if it is considered a complex case under Rule 8.2(a)(3) or subject to the time exclusions enumerated in Rule 8.4. However, "a defendant may waive speedy trial rights by not objecting to the denial of speedy trial in a timely manner." *State v. Spreitz*, 190 Ariz. 129, 138, 945 P.2d 1260, 1269 (1997). Appellant was out of custody, and arraigned on June 3, 2009. Trial started on

November 2, 2009, 152 days later. Therefore, Appellant was tried within 180 days of arraignment and was not denied his rights to a speedy trial under Rule 8. The relevant date is the arraignment date in this particular trial and not the two previous dismissals because "[a] dismissal without prejudice to the [State] to refile the charges would have little meaning if it were not implied that the time limits of Rule 8 would begin anew upon refiling the charges." *State v. Avriett*, 25 Ariz. App. 63, 64, 540 P.2d 1282, 1283 (1975). It is irrelevant that the State had previously dismissed the case two times so long as Appellant was tried within 180 days of arraignment in this particular trial.

¶21 Nor do we find any violation of a constitutional right to a speedy trial. The United States Constitution and the Arizona Constitution also guarantee the right to a speedy trial. U.S. Const. amend. VI; Ariz. Const. art. 2, § 24. However, neither provision requires that the trial take place within a specific time period. *Spreitz*, 190 Ariz. at 139, 945 P.2d at 1270. In determining whether the delay is sufficient to constitute a violation of one's right to a speedy trial, we must look at four factors: (1) The length of delay; (2) The reason for the delay; (3) Whether the defendant demanded a speedy trial; and (4) Whether the defendant suffered any prejudice from the delay. *Barker v. Wingo*, 407 U.S. 514, 530-32 (1972). In

weighing the factors, the most important is prejudice to the defendant, while the least important is the length of delay. *Spreitz*, 190 Ariz. at 139-40, 945 P.2d at 1270-71. Here, the record does not reflect any prejudice to Appellant. Appellant was not in custody, so he was not exposed to additional jail time and there is no evidence he lost any witnesses or time-sensitive evidence due to the delay. The prejudice to Appellant caused by the delay was non-existent and the lack of prejudice greatly outweighs the delay caused by the second dismissal.[3] Therefore, the State's prior dismissals did not violate Appellant's rights to a speedy trial under either the United States or Arizona Constitutions.

IV. There was sufficient evidence to prove Appellant's prior felony convictions.

¶22 Appellant argues that the trial court erred in finding the evidence was sufficient to prove the existence of his prior felony convictions because of the lack of identifying information on the fingerprint cards taken during this trial. We disagree.

¶23 Rule 104 of the Arizona Rules of Evidence confers discretion on the court to determine the admissibility of evidence. "[D]iscrepancies in the evidence affect the weight of

[3] We calculate the delay from the second dismissal due to Appellant's failure to object and demand a speedy trial after the State's first dismissal of the case.

evidence [and] not its admissibility." *State v. King*, 213 Ariz. 632, 640, ¶ 34, 146 P.3d 1274, 1282 (App. 2006). Appellant's argument is an attack on L.'s credibility and the authenticity of the fingerprint cards rather than on the actual admissibility of them. The court "does not determine whether the document is authentic, only whether there is some evidence from which the trier of fact could reasonably conclude that it is authentic. Once admitted, [Appellant was] free to contest the genuineness or authenticity of the document, and the weight to be given [to it]. . . ." *State v. Irving*, 165 Ariz. 219, 223, 797 P.2d 1237, 1241 (App. 1990).

¶24 Here, a reasonable trier of fact would be able to conclude that the fingerprint cards were authentic from L.'s testimony that it was his handwriting on the cards and that he immediately transported them to the lab. Therefore, the court did not err in admitting the fingerprint cards to prove Appellant's prior convictions.

V. Appellant's sentence was properly enhanced due to his prior felony convictions.

¶25 Generally, "[t]he trial court is in the best position to evaluate the defendant's crime in light of the facts . . . of the case and the defendant's background and character." *State v. Anzivino*, 148 Ariz. 593, 597, 716 P.2d 50, 54 (App. 1985). Here, the court did not erroneously consider Appellant's prior

felony convictions in sentencing him. The age and relevance of Appellant's prior convictions are irrelevant. Under A.R.S. § 13-703(C) (2010), "a person shall be sentenced as a category three repetitive offender if the person is at least eighteen years of age . . . and stands convicted of a felony and has two or more historical prior felony convictions." Historical priors include: "aggravated driving under the influence of intoxicating liquor or drugs." A.R.S. § 13-105(22)(a) (2010). Since both of Appellant's prior convictions were aggravated DUIs, they are classified as historical prior felony convictions and thus, are considered for enhancement purposes.

¶26 The presumptive sentence for a category three repetitive offender of a class 5 felony is five years. A.R.S. § 13-703(J). The trial court sentenced Appellant to a mitigated term of four years. Therefore, the trial court properly considered Appellant's prior convictions and lawfully sentenced Appellant.

CONCLUSION

¶27 For the foregoing reasons, we affirm Appellant's conviction and sentence. Upon the filing of this decision, counsel shall inform Appellant of the status of his appeal and his future appellate options. Defense counsel has no further obligations, unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by

petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Upon the Court's own motion, Appellant shall have thirty days from the date of this decision to proceed, if he so desires, with a pro per motion for reconsideration or petition for review.

DONN KESSLER, Presiding Judge

CONCURRING:

DIANE M. JOHNSEN, Judge

SHELDON H. WEISBERG, Judge*

* Pursuant to Article VI, Section 3 of the Arizona Constitution, the Arizona Supreme Court designated the Honorable Sheldon H. Weisberg, as appointed to serve as a judge pro tempore in the Arizona Court of Appeals, Division One, to sit in this matter.