

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: 09/15/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

STATE OF ARIZONA,) 1 CA-CR 10-0591
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
)
MARK JOSEPH ZEIGLER,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-144295-001 SE

The Honorable Steven P. Lynch, Commissioner

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Suzanne M. Nicholls, Assistant Attorney General
Attorneys for Appellee

James Haas, Maricopa County Public Defender Phoenix
By Terry Reid, Deputy Public Defender
Attorneys for Appellant

H A L L, Judge

¶1 Mark Joseph Zeigler (defendant) appeals from the trial court's imposition of enhanced sentences following his convictions for one count of burglary in the second degree, one

count of kidnapping, six counts of sexual assault, and one count of aggravated assault. For the reasons that follow, we affirm defendant's sentences.

FACTS AND PROCEDURAL BACKGROUND

¶12 The undisputed facts relevant to the issue on appeal are as follows. On July 15, 2009, defendant was charged by indictment with one count of burglary in the second degree, a class three felony, one count of kidnapping, a class two felony, eight counts of sexual assault, class two felonies, two counts of aggravated assault, class three dangerous felonies, one count of assault, a class one misdemeanor, and one count of assault, a class three misdemeanor. The State also alleged that defendant had nine historical prior felony convictions.

¶13 A nine-day trial began on May 3, 2010. On the seventh day of trial, defendant testified on his own behalf. On direct, defendant admitted that he had previously been convicted of three felonies:

Q: I'm going to ask you some questions, and I want you to tell me if they are true or not about your history. Have you been found guilty before of some felonies?

A: Yes, I have.

Q: Let me read to you some case numbers. In Case Number 2002-019844, were you charged with a crime on November 14, 2002, convicted of that crime on March 3rd of 2003, in Maricopa County, and did you have an attorney assist you?

A: Yes, I did.

Q: And you believe that was for a charge of misconduct involving weapons?

A: Correct.

Q: In case 98-130643, I believe you were arrested on April 23, '97, and convicted on March 16, '99, again, in Maricopa County, again, with the help of an attorney, for the charge of trafficking in stolen property?

A: Yes, I was.

Q: And in Case Number 98-039009, on December 11, '97, you were arrested and convicted April 20th, '98, for a vehicular theft. Did that happen to you in Maricopa County?

A: Yes, it did.

Following the completion of defendant's direct testimony, the trial court recessed for the day. When trial resumed the next day, the State commenced its cross-examination. Defendant responded to the prosecutor's first question by stating that he had "made a couple of lies" during his direct testimony and he wanted to "clarify" his statements before the State proceeded. The trial court informed defendant that he could clarify his statements when his attorney had the opportunity to ask him additional questions following his cross-examination. Defendant responded that he would not proceed until he was permitted to "clear the matter up." The trial court then excused the jury and allowed defense counsel to confer with defendant. Defense counsel then informed the court that defendant would not proceed

with cross-examination unless he was permitted to make a direct statement to the jury. The trial court informed defendant that, if he refused to submit to cross-examination, his testimony would be stricken and his attorney would not be permitted to use it during his closing argument. Following the trial court's admonishment, defendant stated that he understood that his testimony would be stricken and affirmed that he would not submit to cross-examination. The trial court then summoned the jury and informed them that defendant had exercised his right not to testify and the court was therefore striking his testimony in its entirety and they were precluded from considering it when they deliberated. Defense counsel then rested and the matter was submitted to the jury.

¶4 The jury found defendant guilty of one count of burglary in the second degree, one count of kidnapping, six counts of sexual assault, one count of aggravated assault, and one count of assault. After the jury returned its verdicts, defendant asked if he could be sentenced immediately. The trial court informed defendant that the sentencing hearing would not occur until June 21, 2010, which would allow time for the presentence report to be prepared and for defense counsel to "explain your options to you." Defendant inquired whether he could "just waive it and agree to whatever the prosecution wants to give me" and the trial court explained that it was required

to follow certain procedures, including waiting for the presentence report.

¶15 At that point, the prosecutor asked the trial court whether defendant's testimony, which was stricken "for purposes of jury deliberations," could be used to establish defendant's historical prior felony convictions. The trial court responded that it would need to research the issue and defendant interjected that he was willing to stipulate to having two prior felony convictions.

¶16 At the June 21, 2010 sentencing hearing, the trial court sentenced defendant to the presumptive, enhanced sentence for each count based on his "testimony and [] admissions [at] trial . . . with two prior felony convictions." Defendant timely appealed, and we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2003), 13-4031, and -4033(A)(1) (2010).

DISCUSSION

¶17 As his sole issue on appeal, defendant contends that the trial court erred by failing to conduct a colloquy, pursuant to Arizona Rules of Criminal Procedure (Rule) 17.6, to ensure that his stipulation to two prior convictions was knowing, voluntary, and intelligent.

¶8 Before a defendant's sentence may be enhanced by prior conviction, "the existence of the conviction must be found by the court." *State v. Morales*, 215 Ariz. 59, 61, ¶ 6, 157 P.3d 479, 481 (2007). The State may prove the prior conviction by providing a certified copy of the conviction and establishing that the defendant is the person to whom the document refers. *Id.* "The need for a hearing may be obviated, however, if the defendant admits to the prior conviction." *Id.* at 61, ¶ 7, 157 P.3d at 481.

¶9 As set forth in Rule 17.6, "[w]henver a prior conviction is charged, an admission thereto by the defendant shall be accepted only under the procedures of this rule [requiring the judge to engage in a plea-type colloquy with the defendant], unless admitted by the defendant while testifying on the stand." Thus, applying the plain meaning of the Rule, a trial court need not engage a defendant in a plea-type colloquy when the defendant has admitted a prior conviction during his trial testimony. See *State v. Martin*, 225 Ariz. 162, 165, ¶ 11, 235 P.3d 1045, 1048 (App. 2010) (explaining that procedural rules are interpreted according to their plain meaning unless the language is ambiguous or would create an absurd result).

¶10 Here, defendant admitted the date, jurisdiction, and nature of the offense for three historical prior felony convictions during his direct examination. Although the trial

court struck defendant's testimony from the jury's consideration after he refused to submit to cross-examination, defendant's admissions remained valid and could be considered by the court for sentencing purposes. See *Wallace v. State*, 5 Ariz.App. 377, 379, 427 P.2d 358, 360 (1967) (explaining that a defendant's admission to the truth of an allegation of a prior conviction is "conclusive in all subsequent proceedings"); see also *People v. Rush*, 382 N.E.2d 630, 634 (Ill. App. 1978) (holding that testimony stricken as incompetent in one proceeding may nonetheless be used to impeach the witness in a later proceeding). Therefore, the trial court did not err by relying on defendant's trial admissions of historical prior felony convictions to enhance his sentences.

CONCLUSION

¶11 For the foregoing reasons, we affirm defendant's sentences.

/s/

PHILIP HALL, Judge

CONCURRING:

/s/

MICHAEL J. BROWN, Presiding Judge

/s/

PATRICIA K. NORRIS, Judge