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

STATE OF ARIZONA, Appellee,	)	1 CA-CR 10-0735
	)	DEPARTMENT B
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication – Rule
TRAVIS EUGENE ELDER, Appellant.	)	111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-155807-001 DT
The Honorable Paul J. McMurdie, Judge

AFFIRMED AS CORRECTED

Thomas C. Horne, Arizona Attorney General — Phoenix
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Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

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By Thomas K. Baird, Deputy Public Defender
Attorneys for Appellant

N O R R I S, Judge

¶1 Travis Eugene Elder timely appeals from his conviction and sentence for armed robbery, a class two felony. Ariz. Rev. Stat. ("A.R.S.") § 13-1904 (2001). After searching the record on appeal and finding no arguable question of law that was not

frivolous, Elder's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), asking this court to search the record for fundamental error. This court granted counsel's motion to allow Elder to file a supplemental brief *in propria persona*, but Elder did not do so. After reviewing the entire record, we find no fundamental error and, therefore, affirm Elder's conviction and sentence as corrected.

FACTS AND PROCEDURAL BACKGROUND[1]

¶2 On August 23, 2009, T.H.[2] drove a white sedan away from M.V.'s mobile home, which was located in a mobile home park near 41st Avenue and Van Buren Street. According to trial testimony, the passengers in the sedan included a woman in the front passenger seat,[3] Elder in the passenger side backseat, and the

[1]We view the facts in the light most favorable to sustaining the jury's verdict and resolve all reasonable inferences against Elder. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

[2]T.H. pled guilty to armed robbery from this incident and was required to testify truthfully as part of her plea agreement. She testified about this agreement at trial and also testified she had four prior felony convictions.

[3]The victim testified this woman's name was "Tracy." A police officer testified that at the scene the victim indicated the woman's name was "Christina." T.H. testified the woman's name was "Crystal." The woman was not identified at trial and did not testify.

victim in the driver's side backseat.[4] The victim testified that while the car was in motion Elder -- a man the victim did not know -- put a gun to his head and demanded his money. The victim gave Elder his wallet, but then tried to wrest the gun away from him. T.H. testified that after Elder and the victim began struggling, she stopped the car, got out, and pulled the victim out of the vehicle. The victim, now without his wallet, food stamp card, and cell phone, ran to a nearby elementary school where some youths who had been watching the incident called 9-1-1.

¶3 Police responded to the elementary school where they spoke with the victim, who sustained a cut above his eye and cuts on his hands. One officer testified the victim told him that his assailant was a male with a tattoo on his right bicep but made no mention of tattoos on the assailant's face. According to a different officer's testimony, the victim told that officer the assailant had tattoos on his face.[5] At trial,

[4]At trial, the State and defense disputed the circumstances that led the victim to be in the vehicle. The victim testified he was receiving a ride home in return for providing gas money to the unidentified woman. The defense asserted the victim was soliciting prostitution.

[5]No police report mentioned the information about tattoos on the perpetrator's face. The officer who received this information from the victim testified that it was not included in a report due to a "miscommunication" regarding whether it was to be included in the main report or the supplemental report.

the victim testified the assailant had a tattoo on his face and that he had told police this information at the time.[6]

¶4 After the incident, T.H. drove the sedan to another location where the occupants used the money from the victim's wallet to buy drugs. T.H. testified she parked the sedan at an apartment building and the group got into a black truck. Some time later, they went back to get the sedan and returned it to its owner, S.F., at M.V.'s home.

¶5 The following day, the officer, who had been told by the victim the assailant had tattoos on his face, received information a person meeting that description lived in the mobile home park near where the incident occurred. The officer stopped a black truck as it was leaving the park, and the truck's passenger was a man with tattoos on his face, Elder. The officer detained Elder, drove him to the police station, and had him photographed for a photo lineup. The officer later showed the lineup to the victim, and the victim "immediately" identified Elder as his assailant.[7]

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[6]The victim was born in Sudan and speaks with a heavy accent. Although the victim spoke English, at times during the trial a Dinka interpreter translated. The State asserted that some of the "discrepancies" between the victim's trial testimony and what he told police were caused by communication difficulties.

[7]The victim also identified T.H. in a photo lineup. Police showed the victim a third lineup that included S.F., but the victim did not recognize anyone in that lineup.

¶6 Other officers went to M.V.'s home, where the truck had been parked before the traffic stop. These officers spoke with S.F and M.V. S.F. told police she allowed people to borrow her white sedan, and the day before she had allowed T.H. and Elder to do so. Officers returned to M.V.'s home later that day and found a white sedan parked there. During that visit, M.V. showed police a BB handgun[8] that S.F. had found in the sedan upon its return.

¶7 At trial, Elder did not dispute someone had committed an act against the victim that satisfied all of the elements of armed robbery, but he asserted M.V. was the assailant. No witness, however, testified M.V. ever entered the sedan or interacted with the victim. T.H., who knew both Elder and M.V., testified Elder committed the robbery, and the victim identified Elder as the assailant as well.

¶8 A jury found Elder guilty. As discussed in more detail below, Elder admitted he had two prior felony convictions that, as prior historical felony convictions, triggered an enhanced sentencing range. The superior court sentenced Elder

[8]The gun looked like a real handgun but fired BBs instead of bullets. The victim thought the gun was real and even testified at trial the gun was real. Under A.R.S. § 13-1904, use of either a "deadly weapon" or a "simulated deadly weapon" is required for armed robbery; the gun here was, at least, a "simulated deadly weapon."

to a presumptive term of 15.75 years in prison with 305 days of presentence incarceration credit.

DISCUSSION

I. The Superior Court's Failure to Comply with Arizona Rule of Criminal Procedure 17.6 was Non-Prejudicial Error.

¶9 As noted, the court imposed an enhanced sentence based on Elder's admission of two prior historical felony convictions. In accepting the admissions, the court failed to conduct the colloquy required by Arizona Rule of Criminal Procedure ("Rule") 17.6 and therefore committed error. *See generally State v. Morales*, 215 Ariz. 59, 157 P.3d 479 (2007). Because Elder failed to object, our review is for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Although the court's failure to afford a Rule 17.6 colloquy constituted error, the record reflects no prejudice.

¶10 In a separate case, Elder entered a guilty plea to possession or use of dangerous drugs, a class four felony, with two prior felony convictions. *See* Trial Court Minute Entry, *State v. Elder*, Cause No. CR 2009-170873-001 DT (Maricopa County Superior Court filed Aug. 26, 2010). The two prior felony convictions in the other case were the same two prior felony convictions admitted in this case. At the change of plea hearing in the other case, the trial judge -- who also presided over and sentenced Elder in this case -- advised Elder, before

accepting Elder's change of plea, of "all pertinent constitutional rights and rights of review." The same lawyer who represented Elder at trial in this case also represented Elder in the other case. At the sentencing hearing in this case (which occurred nine days after the change of plea hearing in the other case), the trial judge also simultaneously sentenced Elder in the other case. Because we can take judicial notice of the court record in the other case, *see State v. Valenzuela*, 109 Ariz. 109, 110, 506 P.2d 240, 241 (1973), even if we were to assume Elder could establish that he would not have admitted the two prior convictions in this case if he had been given a Rule 17.6 colloquy, there is no need for a further evidentiary hearing because Elder admitted the prior convictions after being advised of "all pertinent constitutional rights and rights of review." Under these circumstances, there would be no point in remanding for rehearing. Accordingly, we see no prejudice, even though the superior court committed error in failing to engage Elder in the colloquy mandated by the rule.

II. The Record

¶11 We have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. Elder rece*ive*d a fair trial. He was represented by counsel at all stages of the proceedings and was present at all critical stages.

¶12 The evidence presented at trial was substantial and supports the verdict. The jury was properly comprised of 12 members, and the court properly instructed the jury on the elements of the charge, Elder's presumption of innocence,[9] the State's burden of proof, and the necessity of a unanimous verdict. The superior court received and considered a presentence report, Elder was given an opportunity to speak at sentencing, and his sentence was within the range of acceptable sentences for his offense.

¶13 Although Elder's sentence was within the acceptable range, the sentencing minute entry does not accurately reflect the oral pronouncement of sentence. When such a discrepancy exists that cannot be resolved by reference to the record, remand for resentencing is necessary. *State v. Bowles*, 173 Ariz. 214, 216, 841 P.2d 209, 211 (App. 1992). No remand is required here, however, because the record clearly reflects the court sentenced Elder as a repetitive offender even though the

[9]The superior court instructed the jury on Elder's presumption of innocence during the preliminary jury instructions, but did not repeat this instruction in final jury instructions. Instead, in the final instructions, the court instructed the jury that the preliminary instructions "still apply unless contradicted" by the final instructions. Although we do not find it caused fundamental error, we caution against this practice of incorporating by reference preliminary instructions into the final instructions. This practice forces a jury to compare two sets of instructions to decide which instructions govern. The better practice is to provide full and specific instructions in the final instructions to the jury after the close of the evidence.

minute entry refers to the crime as "Non Repetitive." At the sentencing hearing, the court explained to Elder that his admission to two historical prior felony convictions would increase his sentencing range, and the court properly referred to the offense as repetitive in the sentencing colloquy. We therefore correct the sentencing minute entry to designate the offense as repetitive.

¶14 Additionally, the superior court granted Elder 305 days of presentence incarceration credit, but the record reveals he was entitled to only 299 days. However, because the error benefited Elder and the State has neither appealed nor cross-appealed, we do not have subject-matter jurisdiction to correct it. *State v. Dawson*, 164 Ariz. 278, 281-82, 792 P.2d 741, 744-45 (1990).

CONCLUSION

¶15 We decline to order briefing and affirm Elder's conviction and sentence as corrected.

¶16 After the filing of this decision, defense counsel's obligations pertaining to Elder's representation in this appeal have ended. Defense counsel need do no more than inform Elder of the outcome of this appeal and his future options, unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984).

¶17 Elder has 30 days from the date of this decision to proceed, if he wishes, with an *in propria persona* petition for review. On the court's own motion, we also grant Elder 30 days from the date of this decision to file an *in propria persona* motion for reconsideration.

_____/s/_____
PATRICIA K. NORRIS, Judge

CONCURRING:

_____/s/_____
PETER B. SWANN, Presiding Judge

_____/s/_____
DANIEL A. BARKER, Judge