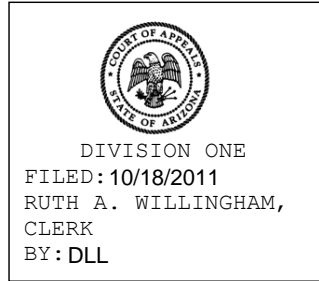


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



STATE OF ARIZONA, ) 1 CA-CR 11-0034  
)  
Appellee, ) DEPARTMENT B  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication - Rule  
ANNETTE RAE BROWN, ) 111, Rules of the Arizona  
) Supreme Court)  
Appellant. )  
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-178890-001 DT

The Honorable Roger E. Brodman, Judge

**AFFIRMED IN PART, REMANDED IN PART**

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

Bruce F. Peterson, Legal Advocate Phoenix  
By Consuelo M. Ohanesian, Deputy Legal Advocate  
Attorneys for Appellant

**N O R R I S**, Judge

¶1 Brown timely appeals from her conviction and sentence for burglary in the third degree, a class four felony. Ariz. Rev. Stat. ("A.R.S.") § 13-1506 (2009). After searching the

record on appeal and finding no arguable question of law that was not frivolous, Brown'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 Brown to file a supplemental brief *in propria persona*, but Brown did not do so.

¶12 Our review revealed the superior court's failure to advise Brown of her constitutional rights, under Arizona Rule of Criminal Procedure ("Rule") 17.6, before she stipulated to the existence of two prior felony convictions, may have constituted fundamental error. Pursuant to *Penson v. Ohio*, 488 U.S. 75, 83, 109 S. Ct. 346, 351, 102 L.Ed. 300 (1988), we ordered the parties to file supplemental briefs on whether the deficient Rule 17.6 colloquy constituted fundamental error requiring remand. For the reasons discussed below, we affirm the jury's guilty verdict, but remand for a determination of prejudice at sentencing.

## FACTS AND PROCEDURAL BACKGROUND<sup>1</sup>

¶3 In 2009, Brown worked as a property inspector for M.G., a subcontractor whose business included inspecting vacant properties for banks when borrowers vacated homes or failed to make payments. On December 22, 2009, watched by undercover surveillance officers, Brown and her co-defendant, Whigham, pulled a truck up to T.M.'s vacant home and walked around the outside with a clipboard. When the couple moved the truck to a lot behind the house, the detective watched them leave T.M.'s fenced backyard with a wheelbarrow and patio table. The detective alerted another officer in a marked vehicle, who stopped the truck with Brown and Whigham inside. The officers found the wheelbarrow and table inside the truck.

¶4 At trial, Brown admitted she entered the yard and took the wheelbarrow and table. Although her job description did not include cleaning debris,<sup>2</sup> she testified M.G. had given her permission to take debris, because cleaning crews would later remove the property anyway.

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

<sup>2</sup>Throughout the trial, witnesses distinguished "debris" from an owner's personal property. They defined debris as property left behind outside of houses, which would later be taken to the dump by clean-up crews. In the case of personal property of greater value, a clean-up crew would take it to storage for the owner to retrieve.

¶15 As noted, the jury found Brown guilty of burglary in the third degree. At sentencing, Brown admitted to two prior felony convictions which were not prior historical felony convictions, but triggered an enhanced sentencing range. A.R.S. § 13-703(B)(1) (2009). The superior court sentenced Brown to the mitigated term for non-dangerous, category-two repetitive offenses, 2.25 years in prison, with 111 days pre-sentence incarceration credit and eligibility for community supervision.

## DISCUSSION

### *I. Sentencing*

¶16 Consistent with *State v. Carter*, the State concedes the superior court's failure to advise Brown of her constitutional rights as part of the Rule 17.6 colloquy<sup>3</sup> was fundamental error, and we agree. See 216 Ariz. 286, 292, ¶ 27, 165 P.3d 687, 693 (App. 2007).

¶17 The State also concedes, and we agree, this error is one for which remand on the issue of prejudice is appropriate. At trial, Brown did not testify regarding any prior convictions, nor does the record show she was aware of her constitutional rights in this context. Further, the State never entered certified copies of prior convictions on the record at trial or

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<sup>3</sup>Rule 17.6, applying Rule 17.2 requirements to stipulations regarding priors, requires the superior court to conduct a colloquy to ensure a defendant understands, among other things, the constitutional rights foregone by stipulating to priors. See Ariz. R. Crim. P. 17.2.

sentencing. Based on the state of the record, we cannot conclusively say the error was non-prejudicial. See *State v. Morales*, 215 Ariz. 59, 62, ¶ 10, 157 P.3d 479, 482 (2007); *Carter*, 216 Ariz. at 290, ¶ 18, 165 P.3d at 691. Thus, the proper remedy is remand for a hearing in which Brown may demonstrate she was prejudiced by the improper colloquy. If she demonstrates the error was prejudicial, the court must vacate her sentence and resentence her. *Carter*, 216 Ariz. at 292, ¶ 27, 165 P.3d at 693.

¶8 Although the applicable sentencing statute and range will depend on the resolution of the Rule 17.6 issue on remand, we note the sentencing minute entry contains an error. The sentencing transcript reflects the superior court relied on A.R.S. § 13-703(B)(1), (I), to sentence Brown as a non-dangerous, category-two repetitive offender. The sentencing minute entry, however, refers to A.R.S. § 13-702, the sentencing statute for first-time offenses. Because we remand the sentencing issue, the superior court may correct this discrepancy in the event it does not vacate her sentence.

## *II. The Jury's Verdict*

¶9 We find no reversible error in the jury's verdict. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881.

¶10 Brown received a fair trial. She was represented by counsel at all stages of the proceedings and was present at all

