



class 4 felony, and one count of possession of burglary tools, a class 6 felony. Defendant claims the trial court erred by sentencing him without finding that defendant had intelligently, knowingly and voluntarily waived his trial rights regarding a trial on the prior conviction. For the reasons that follow, we affirm.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

¶2 At approximately 7:00 p.m. on May 1, 2010, two police officers conducted a security check of a partially demolished commercial building. A temporary fence surrounded the demolition site. During the security check officers saw defendant on his hands and knees leaning into a seven foot tall electrical box.

¶3 As an officer approached defendant, the officer noticed tools on the ground near defendant, including a saw and metal shears. Defendant told the officers that he planned on getting scrap metal and that he owned some of the nearby tools. The officers arrested defendant.

¶4 The state charged defendant with one count of third degree burglary, a class 4 felony, and one count of possession of burglary tools, a class 6 felony. A jury found defendant guilty of both counts. The trial court sentenced defendant to concurrent mitigated sentences of three years in prison for count one and one year in prison for count two.

¶5 Defendant timely appealed. This court has jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(1), 13-4031 and -4033 (2010).

#### **DISCUSSION**

¶6 Prior to trial, the state alleged defendant had a conviction in 2007 for possession of drug paraphernalia, a class 6 undesignated offense. At sentencing, the trial court asked for information regarding to the prior. Defense counsel stated, "[W]e're stipulating to the fact there's a prior conviction." In addition, the state produced a certified minute entry of the prior conviction including the defendant's thumbprint and a signature from the court, which the trial court admitted into evidence.

¶7 The trial court asked defendant if he understood he had the "right to have a hearing on whether or not [he had] the prior conviction . . . at which the State would have to prove [the prior conviction] beyond a reasonable doubt?" Then, the trial court asked if defendant wanted to "waive, give up that right and just admit the prior that's submitted in this minute entry?" Finally, the trial court asked defendant if he knew "that the prior conviction increases the range of penalty . . . ?" Defendant answered all of the court's questions in the affirmative.

¶8 The trial court applied the prior felony as an enhancement and sentenced defendant to mitigated sentences. The trial court did not go through a formal colloquy consistent with Rule 17.6 of the Arizona Rules of Criminal Procedure. A formal colloquy includes the nature of the charge to which the plea is offered, the range of the possible sentence, the constitutional rights which the defendant foregoes, the right to plead not guilty, the limitations of direct appellate review for noncapital cases, and immigration consequences. Ariz. R. Crim. P. 17.2.

¶9 On appeal, defendant argues that the trial court's failure to properly follow Rule 17 constitutes fundamental error. Defendant specifies that the court's failure to follow Rule 17 permits a hearing on remand to show prejudice requiring re-sentencing. The state, however, contends that a remand is not necessary because defendant knowingly waived his right to a trial on the prior conviction and the record contains the uncontested certified minute entry. We agree.

¶10 In *State v. Morales*, 215 Ariz. 59, 61, ¶ 6, 157 P.3d 479, 481 (2007), our supreme court held that when a defendant's sentence is enhanced by a prior conviction, the conviction must be found by the court. Generally, this is accomplished through a hearing, although the requirement is obviated if the defendant admits to the prior conviction. *Id.* at ¶¶ 6-7. If defense

counsel stipulates to the prior conviction, the trial court must conduct a plea-type colloquy with defendant to determine if the admission is made voluntarily and intelligently. *Id.* at ¶¶ 7–9.

¶11 In *Morales*, our supreme court further held that the absence of an adequate Rule 17.6 colloquy does not automatically entitle a defendant to re-sentencing. *Id.* at 62, ¶ 11, 157 P.3d at 482–83. The defendant must establish prejudice by showing that he would not have admitted to the prior conviction had the trial court conducted the colloquy. *Id.* Even if prejudice is shown, re-sentencing is not required if uncontested evidence conclusively proving the defendant’s prior conviction is in the record. *Id.* at ¶ 13. Sufficient evidence includes a certified copy of the minute entries of the former conviction. *State v. Hauss*, 140 Ariz. 230, 231, 681 P.2d 382, 383 (1984).

¶12 Here, defendant did not contest the prior conviction and the record contains the certified minute entry from the sentencing of the prior conviction including defendant’s thumbprint, the cause number and a signature by a judicial officer of the superior court of Maricopa County. Accordingly, under these circumstances re-sentencing is not required.<sup>1</sup>

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<sup>1</sup> Defendant invites us to grant a limited remand pursuant to *State v. Carter*, 216 Ariz. 286, 165 P.3d 687 (App. 2007). *Carter* is inapposite to the facts of this case in light of our analysis based on *Morales*.

**CONCLUSION**

¶13 For the foregoing reasons, we affirm defendant's convictions and sentences.

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JON W. THOMPSON, Presiding Judge

CONCURRING:

/s/

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MAURICE PORTLEY, Judge

/s/

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JOHN C. GEMMILL, Judge