IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JOSE LAURO VALENZUELA-BARRAGAN,
Appellant.

No. 2 CA-CR 2016-0250
Filed May 11, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20130437001
The Honorable Jane L. Eikleberry, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By Amy Pignatella Cain, Assistant Attorney General, Tucson
Counsel for Appellee

Roach Law Firm, L.L.C., Tucson
By Brad Roach
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Judge Espinosa and Judge Miller concurred.

S T A R I N G, Presiding Judge:

¶1 After a jury trial, Jose Valenzuela-Barragan was convicted of fleeing from a law enforcement vehicle as well as aggravated driving under the influence and aggravated driving with an alcohol concentration (BAC) of .08 or greater, both while his driver's license was suspended or revoked. The trial court sentenced him to concurrent prison terms, the longest of which are 4.5 years.

¶2 Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), asserting he reviewed the record but found no arguably meritorious issue to raise on appeal. Consistent with *Clark*, 196 Ariz. 530, ¶ 32, 2 P.3d at 97, he provided "a detailed factual and procedural history of the case with citations to the record" and asked this court to search the record for error. In our review, we identified as an arguable issue

> whether the trial court's acceptance of Valenzuela-Barragan's admission to having been "on parole or community supervision in Pima County Superior Court cause number CR-20102282" at the time of his offenses was proper in light of *State v. Morales*, 215 Ariz. 59, 157 P.3d 479 (2007), and Rule 17.2 and 17.6, Ariz. R. Crim. P., and

> whether imposition of enhanced sentences pursuant to A.R.S. §§ 13-703 and 13-708 constituted fundamental, prejudicial error.

We ordered the parties to file supplemental briefs addressing this question.

¶3 Viewing the evidence in the light most favorable to sustaining the jury's verdicts, *see State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999), sufficient evidence supports them here. In May 2012, a law enforcement officer attempted to initiate a traffic stop after seeing Valenzuela-Barragan drive the wrong direction on a freeway on-ramp. Valenzuela-Barragan fled at high speeds for several miles before losing control of his vehicle and crashing into a mailbox; analysis of a sample of his blood showed his BAC to be .224, and a deputy custodian of records testified Valenzuela-Barragan's driver's license was suspended at the time of the incident and he had been notified of that suspension. *See* A.R.S. §§ 28-622.01, 28-1383(A)(1).

¶4 The state alleged before trial that Valenzuela-Barragan had committed the charged offenses "while he was on probation, parole, work furlough, community supervision or any other release or escape in Pima County Superior Court, Tucson, Arizona, cause number CR-20102282." While the jury was deliberating, the trial court inquired whether Valenzuela-Barragan "want[ed] to go ahead and try the on-release issue" in the event of a guilty verdict. Defense counsel responded they were "not going to contest it," and Valenzuela-Barragan then admitted "that on May 23, 2012, [he was] on parole or community supervision in CR-20102282."

¶5 Later that day, Valenzuela-Barragan failed to return after a recess, and the trial court determined it would "just call the jury in and take the verdict." Before the court did so, Valenzuela-Barragan's counsel volunteered that she wanted to "clarify that it was discussed by defense counsel th[e] consequences of his admission to [the] on-parole allegation, because there wasn't much colloquy between the Court and the defendant about the consequences." Counsel further

explained she had "the conversation with him of the effects of not admitting he was on parole."

¶6 After the jury returned its verdicts, the trial court found at the state's request that Valenzuela-Barragan had "knowingly, intelligently and voluntary waived his right to submit the issue to the jury of whether he was on parole or community supervision at the time of these offenses." At sentencing, the court noted Valenzuela-Barragan had one historical prior felony conviction and had committed the offenses while on release, and cited A.R.S. §§ 13-703 and 13-708 in imposing enhanced, presumptive sentences.

¶7 Because Valenzuela-Barragan did not raise any purported deficiency in his admission in the trial court, he has forfeited the right to seek relief for all but fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Pursuant to § 13-703(B) and (I), an individual with one historical prior felony conviction is a category two repetitive offender and is subject to an increased sentencing range. Pursuant to § 13-708(C), a person convicted of certain offenses, including those at issue here, while "on probation for a conviction of a felony offense or parole, work furlough, community supervision or any other release or escape from confinement for conviction of a felony offense" must be sentenced to at least the presumptive term of imprisonment.

¶8 In *Morales*, our Supreme Court explained that, when a defendant admits a prior conviction, a "plea-type colloquy" is required unless the defendant "makes this admission while testifying" because, "when a defendant admits to a prior conviction for purposes of sentence enhancement, he waives certain constitutional rights, including the right to a trial." 215 Ariz. 59, ¶¶ 7-8, 157 P.3d at 481. Thus, before accepting such an admission, the trial court must conduct the colloquy required by Rule 17.6, Ariz. R. Crim. P.,[1] and the failure to do so constitutes fundamental error. *Id.* ¶¶ 8-10.

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[1]Rule 17.6 states that "Whenever a prior conviction is charged, an admission thereto by the defendant shall be accepted only under the procedures of this rule, unless admitted by the defendant while

We see no reason to apply a different requirement when a defendant has made admissions subjecting him to sentence enhancement under § 13-708. *See State v. Lizardi*, 234 Ariz. 501, ¶ 13, 323 P.3d 1152, 1156 (App. 2014) (defendant entitled to jury finding of release status for § 13-708 to apply to sentence).

¶9 Valenzuela-Barragan asserts the limited colloquy in this case did not comply with Rule 17.6 and, thus, the application of §§ 13-703 and 13-708 constitutes fundamental error. The state argues, however, that only the "'complete failure' to engage in a colloquy is fundamental error" and that the abbreviated discussion here was sufficient. We need not resolve this question because "[t]he absence of a Rule 17.6 colloquy . . . does not automatically entitle a defendant to a resentencing." *Morales*, 215 Ariz. 59, ¶ 11, 157 P.3d at 482. A defendant must establish resulting prejudice by, for example, "showing that the defendant would not have admitted the fact of the prior conviction had the colloquy been given." *Id.*

¶10 Although Valenzuela-Barragan claims in his supplemental brief that he "would not have admitted his [release] status if he had been fully advised of his right to put the State to its proof on that issue," we conclude he has not demonstrated prejudice warranting either remand for resentencing or for the trial court to determine whether his assertion is true. *See id.* ¶ 13; *State v. Carter*, 216 Ariz. 286, ¶ 21, 165 P.3d 687, 691 (App. 2007). Remand is not required when "evidence conclusively proving his prior convictions is already in the record," *Morales*, 215 Ariz. 59, ¶ 13, 157 P.3d at 482, such as when they are listed in the presentence report, and the defendant has not objected to that report, *see State v. Gonzales*, 233 Ariz. 455, ¶ 12, 314 P.3d 582, 585-86 (App. 2013). Indeed, the court in *Gonzales* concluded "an unobjected-to presentence report showing a prior conviction to which the defendant stipulated without the benefit of a Rule 17.6 colloquy conclusively precludes prejudice and a remand under *Morales*." *Id.* ¶ 11.

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testifying on the stand." Rule 17.2 describes the required colloquy in detail.

¶11 Valenzuela-Barragan did not object to the presentence report in this case, and it shows he was convicted in CR-20102282 of "Possession of a Deadly Weapon by Prohibited Possessor, Amended to Solicitation," a felony offense. *See* A.R.S. §§ 13-1002(B)(4), 13-3102(A)(4), (M). That report further shows he absconded from supervised release in April 2012 and was not returned to custody until September 2012. Thus, the presentence report establishes that Valenzuela-Barragan's sentences were subject to §§ 13-703 and 13-708.[2] And the sentences imposed were within the statutory range. §§ 13-703(B), (I), 28-622.01, 28-1383(M)(1).

¶12 Pursuant to our obligation under *Anders*, we have searched the record for fundamental error and found none warranting relief. *See State v. Fuller*, 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985). We therefore affirm Valenzuela-Barragan's convictions and sentences.

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[2]We acknowledge the "caution" in *Gonzales* "against affording such unobjected-to presentence reports dispositive effect as to prior convictions during sentencing, thereby obviating the need to conduct the required colloquy or put the state to its proof." 233 Ariz. 455, ¶ 13, 314 P.3d at 586. "[C]onducting the colloquy will avoid any unnecessary post-trial proceedings, including an aggrieved defendant's later assertion of ineffective assistance of counsel under Rule 32 for not challenging an erroneous presentence report." *Id.*