

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DANIEL JOE KABINTO,
Appellant.

No. 2 CA-CR 2016-0256
Filed May 16, 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NOT FOR PUBLICATION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 Gila County
No. S0400CR201500560
The Honorable Timothy M. Wright, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By Mariette S. Ambri, Assistant Attorney General, Tucson
Counsel for Appellee

Emily Danies, Tucson
Counsel for Appellant

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MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Howard¹ concurred.

ECKERSTROM, Chief Judge:

¶1 Daniel Kabinto appeals from his conviction and sentence for shoplifting with two or more prior convictions. For the following reasons, we affirm his conviction and sentence.

Factual and Procedural Background

¶2 In October 2014, Kabinto walked into a gas station, told the employees he was going to steal beer, then took beer out of the cooler and walked out without paying. He was charged with shoplifting with two or more prior convictions, a class four felony.² The trial court bifurcated his trial, treating the determination of prior convictions as a factor to be determined in the aggravation section. A jury determined that Kabinto was guilty of shoplifting. While the jury deliberated and after a colloquy, Kabinto made a knowing, voluntary, and intelligent waiver of his right to a jury trial as to the prior convictions. The court found that Kabinto had three prior shoplifting convictions and that Kabinto's offense was therefore a class four felony. The court sentenced him to an enhanced, mitigated prison term of six years. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 13-4031 and 13-4033.

¹The Hon. Joseph W. Howard, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

²Kabinto was also charged with resisting arrest, but that count was dismissed for insufficient evidence pursuant to Rule 20, Ariz. R. Crim. P.

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Bifurcated Trial

¶3 The trial court bifurcated Kabinto’s trial, submitting the shoplifting charge to the jury and treating the two prior convictions for shoplifting as aggravating factors to be proved separately. Section 13-1805(I), A.R.S., provides that “[a] person . . . who commits shoplifting and who has . . . been convicted within the past five years of two or more offenses involving burglary, shoplifting, robbery, organized retail theft or theft is guilty of a class 4 felony.” In *State v. Lara*, this court determined that the two prior convictions that raise the offense to a class four felony are elements of the offense, rather than aggravating factors, and thus defendants are not entitled to a bifurcated trial on the issue of prior convictions. 240 Ariz. 327, ¶ 9, 379 P.3d 224, 225 (App. 2016). Kabinto now claims the court fundamentally erred in bifurcating the trial because his prior shoplifting convictions were elements of the crime and therefore needed to be submitted to a jury pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

¶4 Bifurcating the trial was not proper under our supreme court’s holding in *State ex rel. Romley v. Galati ex rel. County of Maricopa*, 195 Ariz. 9, 10, 985 P.2d 494, 495 (1999) (“[A] trial judge cannot bifurcate a trial when doing so precludes a jury from considering prior convictions that are elements of a charged offense.”).³ But Kabinto has not met his burden of demonstrating

³The state contends any error was invited, noting that the error was actually favorable to the defense. Our supreme court has stated that, in determining whether error is invited, we “look[] to the source of the error.” *State v. Logan*, 200 Ariz. 564, ¶ 11, 30 P.3d 631, 633 (2001). “Mere acquiescence is insufficient to find invited error, the party must have ‘affirmatively and independently initiated the error.’” *State v. Torres*, 233 Ariz. 479, ¶ 7, 314 P.3d 825, 827 (App. 2013), quoting *State v. Lucero*, 223 Ariz. 129, ¶ 31, 220 P.3d 249, 258 (2009). Here, the trial court suggested the bifurcation of the trial, not Kabinto. Kabinto stated “I agree” after the trial court suggested the trial be bifurcated. He never affirmatively urged the court to do so. This constitutes acquiescence, not invitation. *See id.* ¶ 8 (defendant who agreed to use of verdict form did not invite error). We are

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that any error in submitting the issue of prior shoplifting convictions to the court, rather than the jury, resulted in prejudice. *See State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005); *cf. State v. Ring*, 204 Ariz. 534, ¶¶ 51-52, 65 P.3d 915, 935-36 (2003) (*Apprendi* error not structural, reviewable for fundamental or harmless error). We conclude that any error did not result in prejudice to Kabinto because the finding of prior shoplifting convictions was supported by overwhelming evidence. *See State v. Morris*, 215 Ariz. 324, ¶ 61, 160 P.3d 203, 217 (2007).

¶5 The state introduced certified documents establishing that Kabinto had three prior convictions for shoplifting, occurring in July 2014, September 2014, and November 2014. Although the documents did not include a photograph of Kabinto, and only one record included a fingerprint, the documents all showed the defendant's name as "Daniel Joe Kabinto." All three documents showed the same date of birth and the same basic physical description. Two of the documents list the same address that an officer saw listed on Kabinto's identification card. Given all of these consistencies, we conclude overwhelming evidence established that Kabinto had at least two prior convictions for shoplifting within five years of the date of this offense. Kabinto has not shown that any error in the convictions being found by the trial court, rather than the jury, resulted in prejudice to him.

Disposition

¶6 For the foregoing reasons, we affirm Kabinto's conviction and sentence.

nonetheless skeptical that a defendant who agrees to waive his right to a jury trial as to whether prior convictions exist may then complain on appeal that a jury did not make that determination. But we need not address that issue because, as explained below, even if error occurred, that error was not prejudicial.