

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

RENATO PANTOJA BOJORQUEZ,
Appellant.

No. 2 CA-CR 2017-0252
Filed July 13, 2018

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NOT FOR PUBLICATION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. 31.19(e).

Appeal from the Superior Court in Pinal County
No. S1100CR201601209
The Honorable Richard T. Platt, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Alice Jones, Assistant Attorney General, Phoenix
Counsel for Appellee

Rosemary Gordon Pánuco, Tucson
Counsel for Appellant

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MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Brearcliffe concurred.

S T A R I N G, Presiding Judge:

¶1 Following a jury trial, appellant Renato Bojorquez was convicted of two counts of burglary and one count of possession of drug paraphernalia. The trial court found Bojorquez had two or more historical prior felony convictions and sentenced him to enhanced, concurrent, maximum, twelve-year prison terms for the burglaries, to be served concurrently with sentences already imposed for other offenses. The court suspended the imposition of sentence on the drug paraphernalia charge and placed Bojorquez on a three-year term of probation, to begin after his release from prison.

¶2 Counsel filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), stating she had reviewed the record and found no non-frivolous issue to raise on appeal. Consistent with *State v. Clark*, 196 Ariz. 530, ¶ 32 (App. 1999), she provided “a detailed factual and procedural history of the case with citations to the record” and submitted the record for our independent review in accordance with *Penson v. Ohio*, 488 U.S. 75, 80 (1988). In reviewing the record, we identified a possible sentencing issue related to the trial court’s finding of prior felony convictions as an aggravating circumstance.

¶3 We view the evidence in the light most favorable to sustaining Bojorquez’s convictions. See *State v. Tamplin*, 195 Ariz. 246, ¶ 2 (App. 1999). So viewed, the evidence established that on May 2, 2016, Bojorquez entered two vehicles parked at a convenience store, taking a pair of pliers that had been in the bed of a truck that belonged to D.C., and a cigarette lighter from the passenger compartment of a vehicle belonging to J.S. A responding police officer found Bojorquez sitting in J.S.’s vehicle, arrested him, and, in a subsequent search of his pockets, found D.C.’s pliers, J.S.’s lighter, and a marijuana pipe. This evidence was sufficient to support the jury’s verdicts. See A.R.S. §§ 13-1501(3), (12), 13-1506(A)(1), 13-3415(A).

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¶4 We also conclude the sentences and probationary term imposed are within ranges authorized by statute. *See* A.R.S. §§ 13-105(22)(d), 13-701(D)(11), 13-703(C), (J), 13-901.01, 13-902(A)(4), 13-1506(B), 13-3415(A). However, because it appeared the trial court had mistakenly found that Bojorquez was “previously convicted” of “all four felonies” identified at sentencing “within the last ten years immediately preceding the date of the offense,” *see* § 13-701(D)(11), we ordered the parties to file briefs on that issue.

¶5 Although Bojorquez had committed the four felonies before committing those at issue here, he had been “convicted” for only two of those offenses before May 2, 2016, the date of the instant offenses.¹ Thus, only two of those prior felony convictions would constitute an aggravating factor under § 13-701(D)(11). *See State v. Provenzano*, 221 Ariz. 364, ¶ 15 (App. 2009) (finding under § 13-701(D)(11) constitutes a single aggravating circumstance, regardless of whether it is supported by one conviction or “a criminal history of multiple qualifying felony convictions”; “courts [may] weigh [a § 13-701(D)(11)] factor more heavily when there are multiple convictions”). We asked the parties to address whether, under these circumstances, the case should be remanded for resentencing. *See State v. Ojeda*, 159 Ariz. 560, 561 (1989) (if “it is unclear whether the judge would have imposed the same sentence absent the inappropriate factors” considered at sentencing, “the case must be remanded”). After reviewing the supplemental briefs, we agree with the state that, although error occurred, Bojorquez was not prejudiced, and remand is unnecessary.

¶6 In weighing mitigating and aggravating circumstances, as required by § 13-701(F), the trial court considered several factors in aggravation. Notably, in addition to finding prior felony convictions under § 13-701(D)(11), the court identified, as an aggravating factor, Bojorquez’s “other criminal history,” which it said was “lengthy.” Thus, Bojorquez’s

¹In contrast, the trial court correctly found Bojorquez was a repetitive offender, *see* § 13-703(C), based on his four “historical prior felony convictions,” defined in part as “[a]ny class 4, 5 or 6 felony . . . that was committed within the five years immediately preceding the date of the present offense,” § 13-105(22)(c). As our supreme court has explained, that definition is limited to the date the prior offense was committed, rather than the date of conviction. *See State v. Thompson*, 200 Ariz. 439, ¶ 6 (2001) (definition now found at § 13-105(22)(c) “does not refer to the timing of the conviction for the prior offense” and thus does not require that a conviction for the prior offense precede the instant offense date).

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four prior felony convictions were always before the court. Two of those convictions constituted an aggravating circumstance under § 13-701(D)(11) that authorized the court to impose a maximum sentence. *See State v. Martinez*, 210 Ariz. 578, ¶¶ 26-27 (2005). Although the other two convictions did not meet the definition in § 13-701(D)(11), they were still subject to the court's consideration as part of Bojorquez's "other criminal history." *See id.* We see no reasoned basis to conclude Bojorquez would have received a different sentence had the trial court considered the same prior convictions but simply characterized them differently. *Cf. State v. Bonfiglio*, 231 Ariz. 371, ¶¶ 8-10 (2013) (court authorized to impose maximum sentence without express finding of aggravator enumerated in § 13-701(D) "as long as a properly found specifically enumerated aggravating factor made the defendant eligible for a sentence greater than the presumptive"). The same underlying circumstances would have led to the same conclusion—"that the aggravating factors substantially outweigh the mitigating factors." *See* § 13-701(F) (describing weighing process).

¶7 In our examination of the record, we have found no other error or arguable issue warranting further appellate review. *See Anders*, 386 U.S. at 744. Accordingly, we affirm Bojorquez's convictions, sentences, and probation order.