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MAY 22 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2008-0052
Appellee,	)	2 CA-CR 2008-0053
	)	(Consolidated)
v.	)	DEPARTMENT A
	)	
THOMAS GEORGE CORTESE,	)	MEMORANDUM DECISION
	)	Not for Publication
Appellant.	)	Rule 111, Rules of
	)	the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR-20061698 and CR-20062906

Honorable Hector E. Campoy, Judge

AFFIRMED IN PART; VACATED IN PART AND REMANDED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and David A. Sullivan — Tucson
Attorneys for Appellee

John William Lovell — Tucson
Attorney for Appellant

E S P I N O S A, Judge.

¶1 Appellant Thomas Cortese was charged in CR-20062906 with aggravated assault with a deadly weapon and fleeing from a law enforcement vehicle. The state alleged

various sentence-enhancing factors, including that he had two historical prior felony convictions and would have a third by the time of his conviction in this cause; he previously had been convicted of felonies that were of a dangerous nature; he previously had been convicted of felonies that were serious offenses; and the offense of aggravated assault in this cause was of a dangerous nature. A jury found Cortese guilty of both charges. In CR-20061698, a jury found Cortese guilty of possession of a narcotic drug and possession of drug paraphernalia. The state alleged various sentence-enhancing factors as to these offenses as well.

¶2 After a bench trial on the sentence-enhancing allegations in both causes, the court found the state had proved Cortese had two or more, dangerous historical prior felony convictions. In CR-20061698, the court sentenced Cortese to concurrent, mitigated but enhanced prison terms of eight and three years. In CR-20062906, the court sentenced him to concurrent, presumptive, enhanced prison terms of twenty years and five years, to be served consecutively to the terms in CR-20061698. On appeal, Cortese asserts the trial court committed reversible error in admitting a certain exhibit at the bench trial on the allegation of historical prior felony convictions and in finding he had two dangerous-nature prior felony convictions.

¶3 Absent a clear abuse of discretion, we will not disturb a trial court's ruling on the admissibility of evidence. *See State v. Tankersley*, 191 Ariz. 359, ¶ 37, 956 P.2d 486, 496 (1998). The state alleged in both causes that Cortese had prior felony convictions in two causes, CR-13574 and CR-14061. After the bench trial on the prior convictions and the other

sentence-enhancing allegations, the court found the state had proved only the convictions in CR-13574, attempted sexual assault and four counts of aggravated assault. The evidence the state had submitted to establish the prior convictions consisted of the testimony of the prosecuting attorney and the fingerprint examiner and various exhibits, including the fingerprint examiner's report, the indictments, the sentencing minute entries, and Exhibit 4, which was the "pen pack" from the Arizona Department of Corrections (ADOC).

¶4 The court admitted the "pen pack" without comment over Cortese's objections that it was not a certified, self-authenticating copy of public records and that the statement by ADOC records supervisor Christina Cadriel, attached to the "pen pack" documents, was hearsay "saying there is a certified record and the person who is making the affidavit is saying . . . I saw one." Cortese argues on appeal, as he did below, that the documents were not self-authenticating, that Cadriel was not a custodian of records and neither did nor could adequately certify the records, that Cadriel's statement was hearsay, and that Cortese was denied the opportunity to cross-examine her. He also contends admission of the hearsay violated his right to due process and his confrontation rights under the Sixth Amendment to the United States Constitution.[1]

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[1]Cortese articulates a due process claim for the first time on appeal and does so only summarily without citation to supporting authority. Therefore, we do not address that argument. *See State v. Lefevre*, 193 Ariz. 385, ¶ 15, 972 P.2d 1021, 1025 (App. 1998) (explaining "failure to raise a claim at trial waives appellate review of that claim, even if the alleged error is of constitutional dimension"). However, we do believe he preserved the argument based on the Confrontation Clause and address it below. *See State v. King*, 212 Ariz. 372, ¶ 14, 132 P.3d 311, 314 (App. 2006) (objection in trial court that defendant would "not be able to cross-examine" unavailable witness whose hearsay statements to emergency

¶5 The preferred method of proving a defendant has prior felony convictions is through documentary evidence, such as a certified copy of the convictions, and additional evidence identifying the defendant as the person previously convicted. *State v. Hauss*, 140 Ariz. 230, 231-32, 681 P.2d 382, 383-84 (1984); *see also State v. Robles*, 213 Ariz. 268, ¶ 16, 141 P.3d 748, 753 (App. 2006) (prior convictions should be proved with "certified conviction documents bearing the defendant's fingerprints"). Cortese does not dispute that courts have found prison "pen packs" sufficient documentary evidence of an inmate's conviction record. *See Robles*, 213 Ariz. 268, ¶¶ 3, 15-17, 141 P.3d at 750, 753; *see also State v. Thompson*, 166 Ariz. 526, 527, 803 P.2d 937, 938 (App. 1990). Nor does he dispute that such records are public records and not, therefore, hearsay. *See* Ariz. R. Evid. 803(8) (public records are exceptions to hearsay rule and are admissible); *State v. Gillies*, 142 Ariz. 564, 572, 691 P.2d 655, 663 (1984) (prison documents public records for admissibility purposes). He argues that the "pen-pack" admitted in this case was not a self-authenticating public record, *see* Ariz. R. Evid. 902(4), and that the state attempted to authenticate it through a document that was itself hearsay and by a person not authorized to certify the authenticity of the documents.

¶6 Rule 902 provides that "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to" certain documents. Rule 902(4)

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operator were admitted was "sufficient to avoid waiver of . . . Confrontation Clause argument").

provides that public records are self-authenticating when certified in accordance with subsection (1), (2), or (3) of the rule. Rule 902(2) applies here and provides:

> A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

¶7 ADOC is required by A.R.S. § 31-221 to maintain records on inmates, including identification and commitment information and conviction history. § 31-221(A). In this case, the "automated summary record" portion of the "pen pack," defined in § 31-221(G), was integrated into a cover letter by Emily Caldwell, "Correctional Records Clerk II." Caldwell "certif[ied] . . . the Master Record File pertaining to [Cortese] has been researched and is found to be in compliance with Arizona Revised Statute 31-221." She added, the "certified Automated Summary Record reflects the true conviction and history of the inmate's term of incarceration with" ADOC. Following the list of Cortese's offenses and other information, and just above her notarized signature, Caldwell again certified that the document was "a true and correct copy taken from the official records of [ADOC], issued in accordance with the provisions of ARS 31-221." Cortese has never contended Caldwell was not authorized to authenticate this portion of the "pen pack" or that her authentication statement was hearsay. Therefore, he has waived any objection to the "automated summary record," which identified Cortese's convictions in CR-13574. *See State v. Murray*, 184 Ariz. 9, 28, 906 P.2d 542, 561 (1995).

¶8 We agree with the state that the entire "pen pack," which included copies of the "automated summary record," photographs of Cortese, and his fingerprints, was self-authenticating based on Cadriel's certification in the in-state exemplification.[2] Noting, as Caldwell had, that the records were kept in compliance with § 31-221, Cadriel attested to the authenticity of the documents that were attached and specifically identified. Cadriel's identity as a records supervisor for ADOC and the genuineness of her signature were verified under seal by a notary public, satisfying Rule 902(2) and (4). The in-state exemplification was tantamount to an individual seal on the document and served the same purpose. It was not hearsay but part of the public records themselves. *See State v. Bennett*, 216 Ariz. 15, ¶ 7, 162 P.3d 654, 656-57 (App. 2007) (finding similar affidavit, certifying ADOC documents, not testimonial for purposes of Confrontation Clause analysis, noting affidavit was "'signed and completed in the ordinary course of business, solely in connection with the [underlying documents] themselves'"), *quoting Bohsancurt v. Eisenberg*, 212 Ariz. 182, ¶ 34, 129 P.3d 471, 480 (App. 2006) (alteration in *Bennett*).

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[2]In *Thompson*, 166 Ariz. at 527, 803 P.2d at 938, the defendant argued the trial court had improperly admitted as proof of his prior felony conviction a certified copy of his ADOC "pen pack" as a self-authenticating document pursuant to Rule 902. This court noted the state had admitted that the "pen pack" "may not have been properly admitted under Rule 902," but we agreed with the state that, because it was clear the documents were what they purported to be—a record of the defendant's prior conviction—the "pen pack" was admissible under Rule 901(a). However, there was no explanation in *Thompson* as to why the documents were not sufficiently certified for purposes of Rule 902. Therefore, we find *Thompson* of limited applicability in determining whether the "pen pack" here was self-authenticating.

¶9 Even assuming arguendo the documents were not self-authenticating, that they were instead authenticated under Rule 901(7) through the in-state exemplification and that the in-state exemplification itself was hearsay, admitting that hearsay was harmless. As in *Thompson*, there was sufficient other evidence establishing that the documents were precisely what they purported to be—namely, Cortese's criminal record, compiled and maintained by ADOC pursuant to § 31-221. At the bench trial, the prosecutor identified Cortese in person and from the photograph in the "pen pack" as the person he had prosecuted in CR-13574, and the latent fingerprint examiner for the Tucson Police Department matched the fingerprints in the "pen pack" with Cortese's known prints. Additionally, as we previously stated, the ADOC "automated summary record" was separately certified, and Caldwell did not object to that certification. The trial court did not, therefore, abuse its discretion in admitting the "pen pack."

¶10 We summarily reject Cortese's Confrontation Clause arguments and his misplaced reliance on *Crawford v. Washington*, 541 U.S. 36 (2004). This court rejected the same argument in *Bennett* and a similar argument in *State v. King*, 213 Ariz. 632, ¶ 24, 146 P.3d 1274, 1280 (App. 2006). In *Bennett*, relying in part on *King* and *Bohsancurt*, we found the affidavit attached to the ADOC records was not testimonial for purposes of *Crawford* and the Sixth Amendment. 216 Ariz. 15, ¶¶ 5-7, 162 P.3d at 656-57. Cortese has not persuaded us either that his case is distinguishable or that we should reconsider the propriety of our previous decisions.

¶11 Finally, Cortese also argues, as he did below, that the trial court erred by finding for sentence-enhancement purposes that he had two or more historical prior convictions for dangerous-nature felonies. Because the offenses in CR-13574 were committed on the same occasion as contemplated by former A.R.S. § 13-604(M),[3] Cortese contends they could only be regarded as one conviction for purposes of sentence enhancement. He argues that, in sentencing him as a repetitive offender with two or more dangerous prior convictions, the court ruled inconsistently with its correct finding that former § 13-604(S) did not apply because his prior serious offenses had been committed on the same occasion. Former § 13-604(S) provided that a person who has been convicted of a nonexempt, serious offense and previously was convicted of two serious offenses "not committed on the same occasion," must be sentenced to a term of life imprisonment.

¶12 At a status conference on March 3, 2008, the trial court pointed out its "potential error in sentencing the defendant with multiple prior convictions on the dangerous nature prior convictions." The court acknowledged it had applied different standards in evaluating former § 13-604(M) and (S). The state concedes that the court erred and that Cortese is entitled to be resentenced in both causes for that reason. We agree. The only

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[3]Significant portions of Arizona's criminal sentencing code have recently been renumbered, *see* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-119, effective December 31, 2008, *id.* § 120. "[E]xcept for very limited adjustments to the sentence length for repetitive offenders" in certain circumstances, the amendments were "not intended to make any substantive changes to the criminal sentencing laws." *Id.* § 119. Section 13-604(M), for example, was renumbered as § 13-703(L) and § 13-704(J), *id.* §§ 15, 28, and § 13-604(S) was renumbered as § 13-706(A), *id.* §§ 15, 27, 30. We refer to the statutes as they were numbered at the time the offenses were committed, in April and July 2006.

historical prior felony convictions the trial court found the state had proved were those obtained in CR-13574. And the record establishes those offenses were committed on the same occasion. *See generally State v. Rasul*, 216 Ariz. 491, ¶¶ 20-27, 167 P.3d 1286, 1291-92 (App. 2007) (evaluating whether offenses were committed on same occasion for purposes of § 13-604(M)); *see also State v. Derello*, 199 Ariz. 435, 18 P.3d 1234 (App. 2001). Therefore, although we affirm the convictions in both causes, we vacate the sentences imposed and remand this matter for resentencing consistent with this decision.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge