

DEC 21 2011

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

PEDRO ROSALES-MARTINEZ, a.k.a.
Pete M. Rosales,

Defendant - Appellant.

No. 07-10524

D.C. No. CR-06-01449-CKJ

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Cindy K. Jorgenson, District Judge, Presiding

Submitted December 19, 2011**

Before: GOODWIN, WALLACE, and McKEOWN, Circuit Judges.

Pedro Rosales-Martinez appeals from the 65-month sentence imposed following his bench-trial conviction for attempted illegal reentry after deportation, in violation of 8 U.S.C. § 1326. We have jurisdiction under 28 U.S.C. § 1291, and

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

we vacate and remand for resentencing.

Rosales-Martinez contends that the district court committed plain error when it imposed a 16-level enhancement pursuant to U.S.S.G. § 2L1.2(b)(1)(A)(ii) based on his conviction for attempted second-degree burglary in violation of Arizona Revised Statutes § 13-1507.

Rosales-Martinez's conviction is not categorically a crime of violence under U.S.S.G. § 2L1.2(b)(1)(A)(ii). *See United States v. Bonat*, 106 F.3d 1472, 1475 (9th Cir. 1997) (“Arizona courts have expanded the [burglary] statute beyond generic burglary because they have interpreted the statute to allow a conviction even if the intent to commit the crime was formed after entering the structure and/or the entry was privileged.”).

The district court plainly erred in applying the 16-level enhancement, because the conviction records relating to Rosales-Martinez's burglary conviction are insufficient under the modified categorical approach to demonstrate that his conviction necessarily rested on facts satisfying the elements of generic burglary. *See United States v. Aguila-Montes de Oca*, 655 F.3d 915, 945-46 (9th Cir. 2011) (en banc). At sentencing, the government introduced the complaint, the information, verdict forms and sentencing papers. These documents, as well as the jury instructions, simply repeat the elements of Arizona burglary and do not establish that Rosales-Martinez formed the intent to commit the burglary before

entering the structure, or that his entry was unlawful or unprivileged, or that he burgled an immovable structure. *See United States v. Terrell*, 593 F.3d 1084, 1092 (9th Cir. 2010); *see also Aguila-Montes de Oca*, 655 F.3d at 946 (“[C]onviction records for [Arizona] burglary cannot demonstrate that a defendant was convicted of generic burglary unless they do something more than simply repeat the elements of [Arizona] burglary.”).

Erroneous application of a sentencing enhancement affects the defendant’s substantial rights and “affect[s] both the fairness and integrity of our judicial system.” *United States v. Portillo-Mendoza*, 273 F.3d 1224, 1228 (9th Cir. 2001). Accordingly, we vacate the sentence and remand for resentencing consistent with this disposition. *See Aguila-Montes de Oca*, 655 F.3d at 946-47.

We grant Rosales-Martinez’s requests for judicial notice, and deny as moot his motion to lift the stay.

VACATED and REMANDED.