

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

BUCK NELSON RICH, *Appellant*.

No. 1 CA-CR 13-0891
FILED 2-26-2015

Appeal from the Superior Court in Yavapai County
V1300CR2013-80120
The Honorable Michael R. Bluff, Judge

REVERSED AND REMANDED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz
Co-Counsel for Appellee

Yavapai County Attorney's Office, Prescott
By Sheila Sullivan Polk
Co-Counsel for Appellee

David Goldberg, Esq., Fort Collins, CO
Counsel for Appellant

STATE v. RICH
Decision of the Court

MEMORANDUM DECISION

Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Patricia K. Norris and Judge Kent E. Cattani joined.

T H U M M A, Judge:

¶1 This is an appeal under *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Counsel for defendant Buck Nelson Rich has advised the court that, after searching the entire record, he has found no arguable question of law and asks this court to conduct an *Anders* review of the record. Rich was given the opportunity to file a supplemental brief pro se, but has not done so. After an initial review of the record, this court ordered additional briefing, pursuant to *Penson v. Ohio*, 488 U.S. 75 (1988), on the issue of whether Rich properly preserved any objection to the admissibility of an unredacted (sometimes called sanitized) penitentiary package (pen pack) at trial, whether admitting the unredacted pen pack in evidence at trial was error and, if so, whether that was reversible error.¹ Having reviewed the record and the *Penson* briefs, the admission of the unredacted pen pack over Rich's objection was error and the State has not shown the error was harmless. Accordingly, Rich's convictions and resulting sentences are reversed and this matter is remanded to the superior court for a new trial.

FACTS² AND PROCEDURAL HISTORY

¶2 Rich is a 78 year old retired civil engineer who was living in a trailer on a pecan farm owned by D.W., a longtime friend, near Camp

¹ The pen pack is a certified copy of a record abstract from the California Department of Corrections and Rehabilitation that includes, among other things, the abstract of judgments, fingerprint cards, chronological movement history and a photograph of the defendant.

² This court views the facts "in the light most favorable to sustaining the verdict, and resolve[s] all reasonable inferences against the defendant." *State v. Rienhardt*, 190 Ariz. 579, 588-89, 951 P.2d 454, 463-64 (1997) (citation omitted).

STATE v. RICH
Decision of the Court

Verde.³ Rich is alleged to have gotten into an argument with an employee of an irrigation company after expressing concern that the employee was taking action that would flood the land around his trailer, and then pepper-sprayed the individual and shot at him with a .22-caliber pistol. The State charged Rich with aggravated assault (a Class 3 felony), misconduct involving weapons-prohibited possessor (a Class 4 felony), disorderly conduct (a Class 6 felony) and assault (a Class 1 misdemeanor). Rich asserted self-defense, defense of property, lack of specific intent and insufficiency of the evidence. Defense counsel later withdrew the claim of self-defense because “in speaking to my client it’s his position that he used neither a weapon or -- nor pepper spray.”

I. The Ariz. R. Evid. 609 Hearing.

¶3 Before trial, the State filed a timely request for a hearing pursuant to Arizona Rule of Evidence (Rule) 609 (2015),⁴ alleging Rich had October 2008 felony convictions in California “for Assault with a Deadly Weapon and Inflict[ing] Corporal Injury on a Spouse” and a January 2012 felony conviction in California “for False Imprisonment.” The State sought to use evidence of these convictions for impeachment on cross-examination if Rich testified at trial. Noting authority that such prior convictions are probative of witness credibility, the State alleged Rich’s credibility, “if he chooses to testify, is of paramount importance.”

¶4 The 609 hearing began with the superior court stating its “understanding that [Rich] is going to stipulate that he has [prior] convictions, but that for purposes of the trial that those convictions will be sanitized.” When the court sought to confirm that understanding with Rich directly, Rich stated “[w]ell, I want them [the jury] to know what they’re for if they’re going to be presented to them as me being a felon” In response to the court’s question, Rich appeared to indicate he did not dispute the three felony convictions alleged by the State but did “dispute the use of them by the State.” The court then took a break to allow Rich to confer with his attorney privately. After resuming, Rich’s attorney stated “it’s [Rich’s] desire that the records of his conviction be introduced rather than stipulating to the fact that he has prior convictions and perhaps the

³ Initials are used to protect the identity of the victim and witnesses. See *State v. Malonado*, 206 Ariz. 339, 341 n.1 ¶ 2, 78 P.3d 1060, 1062 n.1 (App. 2003).

⁴ Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

STATE v. RICH
Decision of the Court

Court needs to clarify that with Mr. Rich.” The superior court then explained to Rich the purpose of a 609 hearing, noting it would “decide whether or not they [the convictions] should be sanitized” and that it “would be inclined not to tell the jury that [Rich’s] prior felony convictions are for aggravated assault because I don’t want them to think just because you committed an aggravated assault in the past means that you may have committed an aggravated assault in this case.”

¶5 The superior court then asked Rich whether he disputed that he had three prior felony convictions, to which Rich replied “I didn’t know I had three felony convictions like you stated and/or – or a deadly weapon or something you stated there at the first one and where I – well, I’m getting old and don’t have a good memory or what, I don’t know, but I don’t have that many felony convictions. I was found innocent by a jury of one charge at one time about my family saying I was going to kill them. . . . I’m innocent of one of those, one charge I know.”⁵ In response, the court concluded that Rich appeared to dispute that he had three felony convictions and the 609 hearing went forward.

¶6 The State then offered certified copies of Rich’s California convictions and a California Department of Corrections pen pack. Ultimately, the State withdrew the allegation that Rich had been convicted of inflicting corporal injury on a spouse, conceding that the documentation provided “insufficient evidence” to show such a conviction. The State, however, argued Rich had two September 2008 convictions (assault with a deadly weapon and attempted terror⁶) and the January 2012 false imprisonment conviction. Rich, through his attorney, argued that “clearly given the facts of this case, the nature of the allegations which are essentially a variation of assault, would be extremely prejudicial to my client. The State has not alleged that they are using the prior convictions or prior offenses to show propensity, therefore it would be our argument that the convictions should be sanitized.” The superior court found the evidence showed Rich was convicted of two felonies in September 2008 (assault with a deadly weapon and attempted terror) and a third in January 2012 (false

⁵ The sentencing order relating to Rich’s California convictions suggests that there may have been an additional charge in the case resulting in his 2008 conviction where the jury found him not guilty.

⁶ The attempted terror conviction was not expressly mentioned in the State’s 609 motion. As discussed in more detail below, although the record supports a finding that Rich had such a conviction, the record does not show that such a conviction was admissible under Rule 609.

STATE v. RICH
Decision of the Court

imprisonment) and that “the probative value of any of the evidence of prior convictions outweighs any prejudicial effect and the State can use those convictions.” The court added, however, that “[t]hey will be sanitized versions of the convictions based on the fact that one of the convictions is for an assault with a deadly weapon and we have similar offenses in this case, so the convictions will be sanitized.”

II. Evidence At Trial.

A. The State’s Case In Chief.

¶7 Trial testimony showed that in March 2013, the victim, R.P., was working for a local irrigation company and was closing an irrigation valve in a ditch when Rich rode up to R.P. on a bicycle. The other victim, C.B., was sitting in the front seat of R.P.’s truck, which was parked on the road by the ditch. Both C.B. and R.P. identified Rich at trial.

¶8 R.P. testified that Rich confronted him and claimed that R.P.’s actions would flood the property where Rich was living in a trailer. After a verbal altercation, R.P. stated he walked from the ditch towards his vehicle and Rich followed. R.P. testified that Rich then sprayed him on the left side of his face with pepper spray from “[p]robably five, six feet away.” R.P. further testified that Rich said “[w]ell if you didn’t like this, how do you like this?” R.P. then testified that all he had “seen was the barrel of the gun pointed at me. I couldn’t see the gun, I couldn’t see the caliber, nothing, and then I heard the shot.” R.P. stated that Rich was “[m]aybe 10, 15 feet” away from him at the time. R.P. testified that, after hearing the shot, he turned and ran to the front of the truck. The other victim, C.B., testified that she never saw a gun but she saw R.P. run to the front of the truck and then heard a gunshot.

¶9 During direct examination, R.P. testified to the following:

Q. And did you ever see more than just the barrel of the gun?

A. No.

Q. Do you think you could identify the gun if you saw it?

A. Like I said, I only saw the barrel.

Q. Okay. So does that mean that you can’t?

STATE v. RICH
Decision of the Court

A. I -- I can't. I don't know what the rest of the gun looked like at the time.

After further questioning, R.P. stated "[i]t was a small caliber gun. I could tell you that, yes." On cross-examination, the following exchange took place between R.P. and Rich's counsel:

Q. If one of the officers had reported that you had described the gun, do you know how the officer would have gotten that description?

A. I don't know. I told all the officers all I seen was the barrel.

Q. Okay. You were very clear about that?

A. Yes.

Q. And you are positive about that?

A. I'm positive.

On redirect, R.P. testified "I said it looked -- it looked kind of like a derringer" but added "[b]ut I couldn't say it was. I couldn't describe the gun."

¶10 According to R.P., after firing the shot, Rich rode away on his bicycle and R.P. contacted the police. After R.P. identified Rich, police officers arrested Rich and advised him of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). In executing a search warrant for Rich's trailer and a nearby metal storage unit, the police located a loaded .22-caliber pistol with a single expended round under an oil pan in a chicken coop. Inside Rich's trailer, the police also found a plastic yellow medication-type bottle with some rounds of the same type of ammunition used in the pistol. There was no forensic evidence received at trial, such as whether Rich's fingerprints were on the gun or bullets, whether any gunshot residue or pepper spray was found on Rich's hands or whether the gun had been fired recently. There is no indication that any pepper spray was located.

¶11 Just before the close of the State's case in chief, the court informed the jury that the parties stipulated that, at the time of the alleged offenses, Rich "was a prohibited possessor" and "had been convicted of a felony and his civil right to possess or carry a gun or a firearm had not been

STATE v. RICH
Decision of the Court

restored” and provided an instruction describing how the jury could consider that stipulation.

B. Rich’s Case In Chief.

¶12 After the State rested, Rich’s counsel made his opening statement as permitted by Arizona Rule of Criminal Procedure 19.1(a)(3). During his opening statement, Rich’s counsel conceded that Rich “does have prior felony convictions. We acknowledge that. It’s an unfortunate thing and he bears the stigma of that. Having said that, you are not to consider that in determining whether or not he’s guilty or innocent. That’s not a relevant factor.”

¶13 Rich called D.W. as a witness. D.W. contradicted testimony by the State’s witnesses and testified that the gun was his, he stored it under the pan in the chicken coop, he always kept an empty round in it and that Rich did not know the gun was there.

¶14 Rich elected to testify on his own behalf, stating that he and R.P. got into a verbal altercation but denying possession or use of any pepper spray and gun. Rich also testified that he did not know that there was a gun stored on the property.

¶15 During cross-examination, the State asked Rich about his prior felony convictions. Rich admitted he had been convicted of a felony in California in 2008 but, when asked if he had been convicted of another felony in California in 2012, he responded “In 2012? I don’t think so.” The State requested a bench conference, where Rich’s counsel objected to the line of questioning, stating Rich had “already conceded there’s felony convictions. The State agreed and I believe the Court ordered those sanitized,” with the court responding “Um-hum.” When asked by the court whether the State was “going to get into the specifics of the charges,” the prosecutor responded that she “didn’t intend to.” The bench conference concluded with the court stating that “the State can establish that there [is] more than one conviction and how [the prosecutor] does that is her business,” adding, however, that “we’re not going to get into the nature of the offenses,” with the prosecutor again stating “I don’t intend to.”

¶16 In open court, the State then handed Rich Exhibit 26 (an unredacted, certified copy of a pen pack from the California Department of Corrections and Rehabilitation) and asked if it appeared “to be a document that applies” to Rich. In response, Rich said “[w]ell, I don’t understand it, if that’s what you mean. It says false imprisonment or something.” Although Rich admitted that Exhibit 26 had his name on it, when asked whether it

STATE v. RICH
Decision of the Court

showed a January 9, 2012 conviction, Rich testified that he did not “remember anything going on at that time” other than making “a phone call to an answering machine.” Stating that Rich was not answering the questions, the prosecutor moved for the admission of Exhibit 26 into evidence, Rich’s counsel reiterated his objection and the court held another bench conference.

¶17 During this second bench conference, the court asked whether the parties would stipulate that Rich had two convictions on the two dates and Rich’s counsel agreed, adding that he “told the jury that already” during his opening statements. The court stated “I just don’t want the jury, you know, seeing” the pen pack. The State, however, took the position that it “can’t stipulate if [Rich] doesn’t agree he has it. And having shown him the document, he won’t agree that he has it.” Noting the State’s prior willingness to stipulate and “to allow them to be sanitized,” the prosecutor added that, given Rich was not going to admit the felonies, “then I think I can prove it up.” The court then asked the State to “ask him some more questions” to “[s]ee if you can get him to admit to the two” convictions. Ultimately, the State agreed to do so, noting that “[t]he only other way I know to do it is to ask him if [he] went to prison a second time and I don’t think we want to go there,” with the court answering “No.” As the bench conference ended, the State asked what would happen if he doesn’t admit to two felony convictions, with the court stating “[t]hen we’ll talk about” Exhibit 26.

¶18 In open court, the State then asked Rich how many times he had been convicted of a felony and Rich responded “[o]nly once that I know of other than --.” With that, the State said “Okay. That’s – that’s sufficient” and moved for the admission of the unredacted pen pack (Exhibit 26). In response, the superior court asked Rich’s counsel if he had “any other objections?” and Rich’s counsel “reiterate[d his] previous objections.” The court then admitted the unredacted pen pack in evidence “[o]ver the defense objection.”

C. The Unredacted Pen Pack.

¶19 The unredacted pen pack states Rich was convicted of a criminal offense punishable for more than a year in (1) September 2008 (abbreviated as “ASSAULT WITH DEA”) and (2) January 2012 (abbreviated as “FALSE IMPRISONME”) and that he was represented by counsel in those cases. The pen pack, however, also contains a great deal of additional information not contemplated by Rule 609.

STATE v. RICH
Decision of the Court

¶20 For example, for the 2008 matter, the pen pack states Rich (1) was sentenced to three years in prison on the assault conviction; (2) had been convicted of inflicting corporal injury (“INFLICT CORPORAL”), which the State had withdrawn for lack of supporting evidence at the 609 hearing and (3) had been convicted of an offense described as “ATTEMPTED TERROR,” with a consequence of four months’ incarceration. For the 2012 matter, the pen pack states Rich was incarcerated for one year and four months. The pen pack also included a chronological history that appears to describe Rich’s time in prison in California, including (1) a crossed out notation “Wanted by San Bernardino Co. s/o [Sherriff’s Office] per warrant,” and a subsequent note that he was no longer wanted on the warrant; (2) a reference to a probable cause hearing stating “RTC [apparently Return To Custody] due to seriousness of Parole Violation – victim of P.V. [apparently Parole Violation] – victim of I/O [apparently Initial Offense];” (3) another note “Special Cond. Of parole amended – no contact with victim, ect. [sic]” and (4) a note stating “suspend parole effective 1-10-12 . . . Return to prison for further proceedings,” elsewhere referred to as “emergency action of 1-10-12.” The pen pack also includes other references including “FBI,” “Hold placed” and notes the amounts of restitution Rich was required to pay.

D. Arguments And The Final Jury Instructions.

¶21 The superior court’s final jury instructions included the following: “You have heard evidence that [Rich] has previously been convicted of a criminal offense. You may consider that evidence only as it may affect [Rich’s] believability as a witness. You must not consider a prior conviction as evidence of guilt of the crime for which [Rich] is now on trial.” During initial closing argument, the State noted Rich’s testimony that he had only one prior conviction, adding that “the paperwork that’s submitted as evidence [Exhibit 26] shows that he has a felony conviction from 2008 and a felony conviction from 2012.” Rich’s counsel did not further address his felony convictions, but did argue that it was “a unique case because there are essentially two witnesses [Rich and R.P.] to what happened,” thus highlighting the importance of assessing the credibility and ability of the witnesses to accurately portray what happened.

E. The Verdict And Sentencing.

¶22 After deliberation, the jury found Rich guilty of felony aggravated assault, misconduct involving weapons and misdemeanor assault, but not guilty of disorderly conduct.

STATE v. RICH
Decision of the Court

¶23 After the verdict, defense counsel requested a mental health evaluation of Rich pursuant to Arizona Rule of Criminal Procedure 26.5 and the court ordered such an evaluation, adding that it “would be of assistance to the Court in determining sentence.” During the examination, Rich admitted that after his stroke, suffered nine years earlier, “he was having problems with thinking clearly and with his memory.” Rich also admitted that “he continues to have problems at times concentrating and finding the right word to express himself.” The evaluator concurred with this assessment and noted that “[Rich] did not always appear organized in his responses.” The evaluator further stated that “[Rich] never had legal problems in life until after he experienced a stroke” and “[t]he effects of his stroke 9 years ago may be related to his alleged criminal behavior in recent years.” The report concluded Rich was capable of understanding the proceedings, charges, defenses available and relevant rights.

¶24 At sentencing, the superior court found two mitigating factors and sentenced Rich to concurrent terms, the longest of which was a mitigated term of ten years in prison, and gave him 74 days of presentence incarceration credit.⁷ This court has jurisdiction over Rich’s timely appeal from his convictions and sentences pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1), 13-4031 and -4033(A)(1).

DISCUSSION

¶25 The court has reviewed and considered counsel’s brief and the supplemental *Penson* briefs, and has searched the entire record for reversible error. *See State v. Clark*, 196 Ariz. 530, 537 ¶ 30, 2 P.3d 89, 96 (App. 1999). That review and consideration reveals that Rich’s challenge to the admission of the unredacted pen pack preserved the issue for appellate review, the admission of the unredacted pen pack was error and that error warrants reversal and remand for further proceedings.⁸

⁷ It appears Rich should have been given 76 days of credit, an issue this court need not resolve given the reversal of his convictions and remand for further proceedings.

⁸ The briefs do not argue that the analysis should differ depending upon the nature of the conviction.

STATE v. RICH
Decision of the Court

I. Rich Timely Objected To The Admissibility Of The Unredacted Pen Pack.

¶26 The State argues that “[a]lthough [Rich] objected to the outright admission of the pen pack into evidence, he did not object based upon the *form of the evidence*, a separate objection. In other words, [Rich] never objected to the *unredacted nature* of the pen pack, nor did he *request* that the pen pack *be redacted*.” Accordingly, the State argues Rich did not timely preserve his objection, meaning “his claim must be reviewed only for fundamental error and prejudice.”

¶27 To preserve a challenge to the admission of evidence, a party must make a timely objection that “states the specific ground, unless it was apparent from the context.” Ariz. R. Evid. 103(a)(1). Here, Rich timely objected and the specific ground of objection is apparent from the context. Rich specifically argued at sidebar when addressing his prior convictions that the pen pack should not be admitted “to show what the crimes were,” adding that the parties had agreed that the prior convictions would be sanitized. In addressing the admissibility of the unredacted pen pack, the superior court asked Rich’s counsel if he had “any other objections,” thereby acknowledging that Rich was objecting to the admissibility of the exhibit on the grounds apparent from the record and summarized above. In response, Rich’s counsel reiterated “my previous objections,” and the court noted “[o]ver the defense objection, Exhibit 26 is admitted.” Accordingly, Rich timely objected to the unredacted pen pack on the ground that it was not redacted and the specific ground for objection is apparent from the context. Therefore, the issue properly is preserved for review.

II. Admission Of The Unredacted Pen Pack Was Error.

¶28 This court “review[s] the admission of prior convictions under Rule 609 for abuse of discretion.” *State v. Beasley*, 205 Ariz. 334, 338 ¶ 19, 70 P.3d 463, 467 (App. 2003) (citation omitted). When he elected to testify, evidence of Rich’s prior felony convictions was properly admitted for impeachment. *See* Ariz. R. Evid. 609, 401.⁹ The State, however, could not

⁹ Although evidence of Rich’s prior felony convictions was relevant to show he was a prohibited possessor as applicable to the misconduct involving weapons-prohibited possessor charge, *see* A.R.S. §§ 13-3102(A)(4), - 3101(A)(7)(b), the parties stipulated that Rich was a prohibited possessor and the superior court read that stipulation to the jury in the State’s case in chief and instructed the jury on considering the stipulation.

STATE v. RICH
Decision of the Court

offer evidence of Rich's prior felony convictions to show a propensity to commit the charged offenses and the State did not offer the evidence under any potentially applicable exceptions to this prohibition under Arizona Rule of Evidence 404(b).

¶29 Rule 609(a) does not require a prior conviction be "sanitized" when admitted to impeach a witness's credibility. *See State v. Harrison*, 195 Ariz. 28, 33 ¶ 23, 985 P.2d 513, 518 (App. 1998) ("The trial court's ruling did not 'sanitize' the prior conviction; it permitted the prosecutor to refer to the nature of the crime. That aspect of the ruling is within Rule 609 and is not in dispute."), *aff'd on other grounds*, 195 Ariz. 1, 985 P.2d 486 (1999). *But cf. Beasley*, 205 Ariz. at 340 ¶ 25, 70 P.3d at 469 (noting, on specific facts, "[w]e must therefore reluctantly conclude the trial court did abuse its discretion in failing to preclude impeachment of the defendant with the nature of his prior convictions.") (2-1 decision); *Beasley*, 205 Ariz. at 343 ¶ 42, 70 P.3d at 372 (Hall, J., dissenting) (noting offenses alleged use of guns and "[t]he trial court disallowed [evidence of] the two convictions that specifically referenced the use of weapons"). However, "in deciding whether to reveal the nature of the defendant's offenses to the jury, the court must balance the probative value of the conviction as to the defendant's credibility against the very real possibility that the jury may misuse this information to the defendant's prejudice." *Beasley*, 205 Ariz. at 338 ¶ 19, 70 P.3d at 467; *see also* Ariz. R. Evid. 403.

¶30 "'The danger of unfair prejudice under Rule 609(a) is at its highest when the witness being impeached is the defendant in a criminal case and the prior conviction is the same as, or similar to, the crime for which the defendant [is] on trial.'" *Beasley*, 205 Ariz. at 338 ¶ 19, 70 P.3d at 467 (citing authority). As stated by the Arizona Supreme Court,

When prior convictions are similar to the charged offense, the potential for prejudice is particularly strong. The reason is clear—similarity to the charged offense may lead to the unfair inference that if defendant "did it before he probably did so this time."

STATE v. RICH
Decision of the Court

As such, a trial court should sparingly admit evidence of prior convictions when the prior convictions are similar to the charged offense; or in appropriate cases, the trial court may reduce the risk of prejudice by admitting the fact of a prior conviction without disclosing the nature of the crime.

State v. Bolton, 182 Ariz. 290, 303, 896 P.2d 830, 843 (1995) (citing cases). Arizona “case law has consistently approved of sanitization as a means of limiting prejudicial effect.” *State v. Montano*, 204 Ariz. 413, 426 ¶ 66, 65 P.3d 61, 74 (2003) (citation omitted).

¶31 Here, before the unredacted pen pack was admitted at trial, the jury had been told the parties stipulated that Rich “had been convicted of a felony;” Rich’s counsel had acknowledged in his opening statement that Rich “does have prior felony convictions” and Rich had testified that he had been convicted of a felony in 2008. Accordingly, the need for additional evidence of Rich’s prior felony convictions in the form of a pen pack was minimal.

¶32 The State argues that the admission of the pen pack was not unfairly prejudicial under Rule 403 because Rich had previously identified the nature of the 2012 conviction by asking, in response to one of the prosecutor’s questions, “[W]hat does that false imprisonment mean?” However, as noted above, the pen pack included information far beyond noting the nature of those two prior convictions. It included the nature of Rich’s *four* criminal convictions, including “false imprisonme[nt], attempted terror, inflict corporal [punishment], [and] assault with a dea[dly weapon].” Notably, the pen pack included information on the conviction of infliction of corporal injury on a spouse or co-habitant, which the State had withdrawn during the 609 hearing because there was “insufficient evidence” to show such a conviction. The pen pack also included Rich’s “chronological history” indicating his parole was revoked in February 2010, he was denied parole in March 2010 and he was returned to prison for a further parole violation in January 2012. Finally, the pen pack included the restitution amount and length of Rich’s previous prison terms.

¶33 In addition, the “attempted terror” conviction noted in the pen pack was not expressly mentioned in the State’s 609 motion and the record does not show that such a conviction would be admissible under Rule 609. Under Rule 609, a witness’s character for truthfulness may be attacked by evidence of a criminal conviction (1) for a crime that was

STATE v. RICH
Decision of the Court

“punishable by death or by imprisonment *for more than one year* . . . if the probative value of the evidence outweighs its prejudicial effect” or (2) for any crime “if the court can readily determine that establishing the elements of the crime required proving--or the witness’s admitting--a dishonest act or false statement.” Ariz. R. Evid. 609(a) (emphasis added). There is no suggestion that the “attempted terror” conviction under California law required proving a dishonest or false statement, meaning the second alternative of Rule 609 does not apply. For the first alternative of Rule 609, the sentence imposed for the “attempted terror” conviction was four months, far less than the “more than one year” requirement. *See* Ariz. R. Evid. 609(a)(1). This offense, which is technically called “criminal threat” under California law, can be a felony or a misdemeanor and punishable “by imprisonment in the county jail *not to exceed one year*, or by imprisonment in the state prison.” *See* Cal. Penal Code § 422 (emphasis added); *see also Beckway v. DeShong*, 717 F. Supp. 2d 908, 920 (N.D. Cal. 2010). Rich’s conviction was charged as an attempt, which suggests it was punishable by “one-half the term of imprisonment prescribed upon a conviction of the offense attempted.” *See* Cal. Penal Code § 664. Although recognizing defense counsel did not object at the 609 hearing, particularly given the four-month incarceration, nothing in the record indicates that Rich’s “attempted terror” conviction under California law was subject to “imprisonment for more than one year,” which was a necessary prerequisite for its admission in evidence under Rule 609. *See* Ariz. R. Evid. 609(a)(1).

¶34 The unredacted pen pack also contained information about Rich’s prior “assault with a dea[dly weapon]” conviction. “When prior convictions are similar to the charged offense, the potential for prejudice is particularly strong.” *Bolton*, 182 Ariz. at 303, 896 P.2d at 843 (citation omitted). Here, Rich was on trial for a nearly identical charge and the record does not reflect a balancing of “the probative value of the conviction as to the defendant’s credibility against the very real possibility that the jury may misuse this information to the defendant’s prejudice.” *See Beasley*, 205 Ariz. at 338 ¶ 19, 70 P.3d at 467. Indeed, the record contains no statement or finding that the nature of the prior convictions should *not* be sanitized. Rather, the superior court expressly, consistently and properly noted that the nature of Rich’s prior convictions would be prejudicial if disclosed to the jury and ordered that the convictions be sanitized to avoid unfair prejudice. Yet the unredacted pen pack was admitted into evidence over Rich’s objection.

¶35 The State argues Rich (1) invited any error when he asked the superior court to admit the nature of the offenses to the jury at the 609

STATE v. RICH
Decision of the Court

hearing, (2) only admitted to one felony when testifying and (3) volunteered the nature of a felony when he testified. The superior court, however, ordered evidence of the prior convictions sanitized *after* Rich asked that the nature of the offenses be admitted. Moreover, at the point in time that the unredacted pen pack was admitted, the jury did not know the nature of Rich's 2008 assault with a deadly weapon conviction. Accordingly, it cannot be said that Rich invited any error when the unredacted pen pack was admitted. It was therefore error to admit the unredacted pen pack in evidence over Rich's timely objection.

III. Admitting The Unredacted Pen Pack Was Not Harmless Error.

¶36 Notwithstanding error in receiving evidence over an objection, a conviction may still be confirmed if the State shows the error was harmless beyond a reasonable doubt. *See State v. Henderson*, 210 Ariz. 561, 567 ¶ 18, 115 P.3d 601, 607 (2005); *State v. Dunlap*, 187 Ariz. 441, 456, 930 P.2d 518, 533 (App. 1996). "Harmless error review places the burden on the [S]tate to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence." *Henderson*, 210 Ariz. at 567 ¶ 18, 115 P.3d at 607 (citation omitted). As applied, the State has not made this showing.

¶37 The parties have cited no Arizona case and this court has found none affirming the admission of an unredacted pen pack into evidence in a jury trial determining guilt over a defendant's timely objection. The *Person* order asked the parties to address whether admitting the unredacted pen pack into evidence at trial was error and, if so, whether that error justified reversal. The State's brief in response argued invited and fundamental error, but did not argue harmless error. Accordingly, on the briefs, the State has not shown that the error did not contribute to or affect the verdict or sentence. *See id.*

¶38 The State argues that the convictions and sentences cannot be reversed unless there exists "a reasonable probability that the verdict would have been different had the evidence not been admitted." *See State v. Lacy*, 187 Ariz. 340, 349, 929 P.2d 1288, 1297 (1996). But *Lacy* applied the harmless error analysis applicable here and "conclude[d] beyond a reasonable doubt that the jury would have reached the same verdict even without mention of the later burglary." *Id.* Moreover, in *Lacy*, the jury was already aware that the defendant had committed other burglaries when the court admitted evidence of an unrelated burglary committed seven months after the murder at issue. *See id.* Here, however, prior to the admission of the unredacted pen pack, the jury had no indication that Rich had a prior

STATE v. RICH
Decision of the Court

conviction for assault with a deadly weapon, and the jury was not aware of the other information contained in the unredacted pen pack. Thus, *Lacy* does not compel a finding that the erroneous admission was harmless in this case.¹⁰

¶39 Contrary to the State's assertion, the evidence against Rich was not overwhelming and the fact that the prosecutor did not spend much time in closing argument focusing on the pen pack is not dispositive. The State asserted in pretrial briefing that Rich's credibility was "of paramount importance." In closing, Rich's counsel similarly argued the case turned on an assessment of witness credibility. Conflicting evidence was presented at the trial, with both D.W. and Rich testifying that Rich did not own the gun or know where the gun was located. D.W. further testified that he owned the gun and that he stored it in the location and condition the police found it. Moreover, apart from the different versions of the evidence by the witnesses, there was no forensic evidence received that might have corroborated or confirmed the testimony presented.

¹⁰ Although the State cites *State v. Mills*, 196 Ariz. 269, 275-76 ¶ 28, 995 P.2d 705, 711-12 (App. 1999) as the applicable standard of review, the Arizona Supreme Court further delineated the standard in *Henderson*, 210 Ariz. at 567 ¶ 18, 115 P.3d at 607, which is binding on this court and therefore the standard this court applies.

STATE v. RICH
Decision of the Court

¶40 Given the evidence presented on Rich’s behalf and the prejudicial effect of the “assault with a dea[dly weapon]” statement and other information in the pen pack, the State has not shown that the unredacted pen pack “did not contribute to or affect the verdict.” *Henderson*, 210 Ariz. at 567 ¶ 18, 115 P.3d at 607 (citation omitted). Accordingly, the State has not shown that the error in admitting the unredacted pen pack into evidence over Rich’s timely objection was harmless.

CONCLUSION

¶41 The admission of the unredacted pen pack was error and, because the State has not shown that error was harmless, the error warrants reversal. Accordingly, Rich’s convictions and resulting sentences are reversed and this matter is remanded to the superior court for a new trial.



Ruth A. Willingham · Clerk of the Court
FILED : ama