NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
***See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24**

DIVISION ONE
FILED: 06/19/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	No. 1 CA-CR 10-0020
Appellee,	DEPARTMENT C
v.	**MEMORANDUM DECISION**
JOSEPH ANGEL LIRA,	(Not for Publication - Rule 111, Rules of the Arizona Supreme Court)
Appellant.	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-009177-001 DT

The Honorable Michael D. Jones, Judge

AFFIRMED AS CORRECTED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Division
and Linley Wilson, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Eleanor S. Terpstra, Deputy Public Defender
Attorneys for Appellant

N O R R I S, Judge

¶1 Joseph Lira appeals his convictions and sentences for discharge of a firearm at a structure and drive by shooting, class 2 dangerous felonies; two counts of aggravated assault,

class 3 dangerous felonies; attempted burglary, denominated in the sentencing minute entry as a class 4 felony; and assisting a criminal street gang, a class 3 dangerous felony. On appeal, Lira argues we should vacate his convictions and grant a new trial because the superior court improperly dismissed a "holdout" juror. Alternatively, Lira argues we should remand for resentencing on one of the aggravated assault convictions and the assisting a criminal street gang conviction because the State failed to notify him it was going to seek a dangerousness enhancement on these charges and, further, we should recalculate his presentence incarceration credit.

¶2 For the reasons that follow, we find no reversible error and affirm his convictions, but correct the presentence incarceration credit calculated by the superior court. Further, in our review, we uncovered a sentencing error concerning the attempted burglary conviction neither party initially raised on appeal, but which, as explained below, we now correct.

I. Lira's Appeal

¶3 Lira first argues the superior court abused its discretion in dismissing juror 11 during deliberations because, at least in part, he disagreed with the other jurors regarding the merits of the State's case, specifically, its accomplice liability theory. Because the record, however, reflects the court dismissed juror 11 for misconduct -- refusing to follow

the court’s instructions not to consider possible punishment -- we disagree. *See State v. Hoskins*, 199 Ariz. 127, 139, ¶ 37, 14 P.3d 997, 1009 (2000) (appellate court reviews dismissal of juror for cause for abuse of discretion); *see also* Ariz. R. Crim. P. 18.4(b) (court must excuse juror “when there is reasonable ground to believe that a juror cannot render a fair and impartial verdict”).

¶4 Before it retired to deliberate, the court instructed the jury, “[y]ou must decide whether the defendant is guilty or not guilty by determining what the facts in the case are and applying [the] jury instructions. You must not consider the possible punishment when deciding on guilt; punishment is left to the judge.” On the first day of deliberations, the jury foreman sent a note to the court asking what it should do because one juror -- who the foreman later identified as juror 11 -- was, nevertheless, considering punishment. In his note, the foreman explained, “a juror . . . cannot make a determination in the case on guilt or innocence because he is thinking of the penalty that may be imposed.” After obtaining clarification from the jury it had reached an impasse, the court gave the jury an impasse instruction. Then, on the third day of deliberations, the foreman sent the court another note that reflected at least some members of the jury were again considering punishment. In this note, the foreman asked if the

dangerousness allegations "mean that the statu[t]e and not the judge determines the amount of prison time." The court responded by reiterating its original instruction not to consider punishment: "You may <u>not</u> consider punishment in deciding issues of guilt or innocence. Punishment is decided by the judge."

¶5 Approximately 90 minutes later, the foreman sent a third note to the court stating that, although the jury had reached a verdict on the underlying charges, it had not agreed on the dangerousness allegations "due to one juror disregarding the judge's instructions to not speculate on the penalty given to the defendant." The note further stated the juror would "not agree to any more conversation on this matter and refuse[d] to be dissuaded." In response and over Lira's objection, the court questioned, first, the foreman, and then separately, juror 11. The foreman explained juror 11 had refused to "make a decision based on the evidence" because he was concerned about potential punishment and that the issue of punishment was "paramount" to him. Consistent with what the foreman explained, juror 11 acknowledged he was concerned . . . about punishment, explaining, "[w]hat I was afraid of was that keyword dangerous would trigger some mandated sentencing out of [the court's] control. . . . That's why I have taken this position." In response to questioning by Lira's counsel, juror 11 also noted

he "never really bought into this accomplice liability thing," viewing it as "unlimited."

¶6 Relying on juror 11's response regarding accomplice liability, Lira argues the court should not have dismissed juror 11 because, at least in part, his disagreement with the other jurors rested on his view of the merits of the State's case. But, Lira's argument takes juror 11's response out of context. Viewed in context, juror 11's concerns about punishment caused him to refuse to consider whether certain aspects of the offenses were dangerous. Quoting him in full, juror 11 explained:

> I never really bought into this accomplice liability thing. I could not see a limit to the accomplice liability. It seemed like it was unlimited. And I thought that the first six charges covered it substantially to where a reasonable person could come up with a reasonable penalty. And I hate to use those words, but that is exactly what was going through my mind. And at some point in time, I was afraid the penalty was going to become excessive.

On this record, therefore, the superior court did not abuse its discretion in dismissing juror 11 because he was unable to follow the court's instructions to disregard potential punishment in considering the merits of the State's case.[1]

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[1]In making this argument, Lira relies on *United States v. Symington*, 195 F.3d 1080 (9th Cir. 1999). There, the Ninth Circuit held the district court should not have dismissed a juror because the evidence disclosed a reasonable possibility

¶7 Lira also argues the court's explanation to the jury as to why it had dismissed juror 11 -- "for misconduct. That is, for expressly failing and refusing to follow an instruction of the Court in this case" -- was coercive and improperly influenced the jury to return a guilty verdict. We disagree; the record fails to show the court's "remarks, viewed in the totality of the circumstances, displaced the independent judgment of the jurors." *State v. Davolt*, 207 Ariz. 191, 213, ¶ 94, 84 P.3d 456, 478 (2004) (internal punctuation and citations omitted); *State v. Lautzenheiser*, 180 Ariz. 7, 9-10, 881 P.2d 339, 341-42 (1994) (appellate court evaluating claim of improper jury coercion "must determine, if possible, whether the defendant received a fair trial at the hands of an independent jury, the members of which were free from intimidation or undue pressure").

¶8 First, the court appropriately informed the jury it had dismissed juror 11 because he had been unable to follow its instructions. Second, the three notes the foreman sent to the court demonstrated the other jurors already knew juror 11 was

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the impetus for the juror's dismissal stemmed from her views on the merits of the case. *Id.* at 1088 ("[T]here was also considerable evidence to suggest that the other jurors' frustrations with her derived primarily from the fact that she held a position opposite to theirs on the merits of the case."). Here, in contrast, the record discloses the impetus for juror 11's removal stemmed from his refusal to follow the court's instruction not to consider punishment, and not from his views on the merits of the case.

refusing to follow the court's instructions not to consider punishment. Third, after it informed the jury it had dismissed juror 11 and before it excused the jury for the evening, the court told the remaining jurors they would begin deliberations "anew" with an alternate juror. And fourth, the next day, the court reinstructed the jury joined by the alternate, and again emphasized to the jury it was "required to begin deliberations complete[ly] anew," which the jury did for approximately eight more hours. Under these circumstances, the court responded appropriately to juror 11's misconduct and did not improperly influence the remaining jurors when it explained why it had dismissed juror 11.

¶9 Lira next argues the superior court should not have enhanced his sentences based on the jury's dangerousness findings on one of the aggravated assault convictions and the assisting a criminal street gang conviction (Counts 3 and 6, respectively), because the grand jury's indictment failed to allege these offenses were dangerous. More specifically, Lira argues that because the indictment alleged Counts 1, 2, and 5 were dangerous, but did not allege Counts 3 and 6 were dangerous, "the only conclusion for the difference was that the [State] was choosing to not pursue a dangerous enhancement" and, thus, the indictment "failed to put Joseph Lira on sufficient notice of a dangerous enhancement" on those counts. *See State*

v. Guytan, 192 Ariz. 514, 522, ¶ 32, 968 P.2d 587, 595 (App. 1998) (citation omitted) (requirement to file sentence-enhancement allegations before trial "intended to ensure that a defendant has sufficient notice of the full extent of potential punishment before his trial begins"). Applying fundamental error review because Lira failed to object in the superior court, we disagree. *State v. Henderson*, 210 Ariz. 561, 564-65, ¶ 8, 115 P.3d 601, 604-05 (2005) (citation omitted).

¶10 Before the court may impose an enhanced sentence, the information or indictment must allege the dangerous nature of an offense. Ariz. Rev. Stat. ("A.R.S.") § 13-604(P) (Supp. 2008) (penalties for dangerous offenses "substituted for the penalties otherwise authorized by law if . . . the dangerous nature of the felony is charged in the indictment or information and admitted or found by the trier of fact") (current version at A.R.S. § 13-704(L) (2010)). The information or indictment can meet this requirement by citing the enhancement statute or describing sufficient facts to support the enhancement. *See State v. Burge*, 167 Ariz. 25, 28, 804 P.2d 754, 757 (1990); *State v. Tresize*, 127 Ariz. 571, 574, 623 P.2d 1, 4 (1980). The superior court may also allow an allegation of dangerousness any time before trial as long as the defendant is not prejudiced by the untimely filing. A.R.S. § 13-604(P) (current version at A.R.S. § 13-704(L)). To establish prejudice, "the burden is on the

defendant to make some showing that the failure of the state to make the allegation at an earlier time somehow 'misled, surprised, or deceived' [the] defendant." *State v. Whitney*, 159 Ariz. 476, 481, 768 P.2d 638, 643 (1989) (citation omitted); *see also Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607 (to prevail under fundamental error standard of review on appeal, "defendant must establish both that fundamental error exists and that the error in his case caused him prejudice").

¶11 Here, the grand jury's indictment did not allege Counts 3 and 6 were dangerous or cite the enhancement statute, and the State did not seek to amend the indictment before trial to allege these counts were dangerous. The joint pretrial statement signed by the prosecutor and Lira's counsel, however, described Counts 3 and 6 as dangerous and outlined the applicable sentencing ranges for dangerous offenses. Without objection, the court instructed the jury on dangerousness with respect to Counts 3 and 6, provided the jury with verdict forms that required it to decide whether these counts were dangerous, and imposed sentences based on the jury's dangerousness findings.

¶12 On this record, Lira had sufficient pretrial notice of the dangerousness allegations on both Counts 3 and 6, and has failed to prove he was prejudiced by the State's failure to formally allege before trial that these counts were dangerous

offenses. First, the indictment specifically alleged he committed Count 3 using a deadly weapon. That description was sufficient to serve as an allegation the offense was dangerous. *See Tresize*, 127 Ariz. at 574, 623 P.2d at 4. Second, the joint pretrial statement his counsel signed alleged both Counts 3 and 6 were dangerous and outlined the punishment he faced if the jury found the offenses proven and dangerous. Further, Lira has not argued he would have defended any differently had the State given him more formal notice it was alleging Counts 3 and 6 were dangerous. Thus, the superior court did not commit fundamental, prejudicial error in sentencing Lira on Counts 3 and 6 based on the jury's findings the offenses were dangerous.

II. Other Sentencing Issues

¶13 Lira argues the superior court miscalculated his presentence incarceration credit by awarding him one less day than he was entitled to, and awarding it only for his sentence on Count 1 (discharge of a firearm at a structure), which the court ordered him to serve concurrently with his sentence on Count 2 (drive by shooting). The State concedes error, and after reviewing the record, we agree. *See State v. Caldera*, 141 Ariz. 634, 638, 688 P.2d 642, 644 (1984) (defendant must be given full credit for presentence incarceration on concurrent sentences); *State v. Carnegie*, 174 Ariz. 452, 453-54, 850 P.2d 690, 691-92 (App. 1993) (defendant entitled to full day of

credit for day he is booked into detention facility); *State v. Ritch*, 160 Ariz. 495, 498, 774 P.2d 234, 237 (App. 1989) (failure to award correct presentence incarceration credit constitutes fundamental error). Accordingly, we correct Lira's sentences on Counts 1 and 2 to reflect 394 days of presentence incarceration credit on those counts. *See* A.R.S. § 13-4037(A) (2010) (requiring appellate court to correct illegal sentences).

¶14 As discussed, the court's sentencing minute entry designated Lira's attempted burglary in the third degree conviction (Count 4) a class 4 felony. As both parties acknowledged in their supplemental briefing filed after this appeal was at issue, under A.R.S. §§ 13-1001 (2003) and -1506 (Supp. 2008), however, attempted burglary in the third degree is a class 5 felony.

¶15 Further, the superior court imposed a two-year sentence on this count, intending it to be "[s]lightly [m]itigated." The presumptive term for a class 5 felony, however, was 1.5 years, and two years would have been a "maximum" sentence if the court had used the correct class of felony. A.R.S. §§ 13-701(C) (1993), -702(A) (Supp. 2008) (current version at A.R.S. § 13-702(D) (2010)). The court did not rely on any aggravators that would have entitled it to impose the maximum sentence of two years and, thus, Lira's

sentence was outside the applicable sentencing range for a class 5 felony.

¶16 This court, on its own motion, ordered the parties to brief whether the resulting sentence was illegal, and what remedy, if any, would be appropriate. *See State v. House*, 169 Ariz. 572, 573, 821 P.2d 233, 234 (App. 1991) (sentence outside applicable range illegal); *see also State v. Fernandez*, 216 Ariz. 545, 554, 169 P.3d 641, 650 (App. 2007) ("Although we do not search the record for fundamental error, we will not ignore it when we find it."). Because the court ordered Lira's sentence on this count to run concurrently to his seven-year sentence on Count 6, Lira's counsel acknowledged the issue was non-prejudicial and essentially moot, and requested this court "correct count 4 to reflect that Joseph Lira was convicted of a class 5 felony . . . but leave the sentence of two years undisturbed." We thus correct the sentencing minute entry to reflect Count 4 is a class 5 felony. But, because the superior court did not rely on any aggravators that would have entitled it to impose a two-year sentence, we reduce Lira's sentence on Count 4 to the presumptive term of 1.5 years. A.R.S. § 13-701(C) (current version at A.R.S. § 13-702(D)).[2]

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[2]We note the State, in its supplemental brief, requested this court remand Lira's sentence on Count 4 to the superior court because it is "illegally lenient." We do not have jurisdiction to consider this claim because the State

CONCLUSION

¶17 For the foregoing reasons, we affirm Lira's convictions and sentences on Counts 3, 4, 5, and 6, but correct his sentences on Counts 1 and 2 to reflect 394 days of presentence incarceration credit on those counts. We also correct his conviction and sentence on Count 4 to reflect it is a class 5 felony and impose the presumptive sentence of 1.5 years.

/s/
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/
MARGARET H. DOWNIE, Judge

/s/
MICHAEL J. BROWN, Judge

failed to raise it in a proper appeal or cross-appeal. *State v. Dawson*, 164 Ariz. 278, 286, 792 P.2d 741, 749 (1990).