DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 08-0036
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	
FELIX UFRANO RAMIREZ-RAMOS	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Yavapai County

Cause No. CR-820070436

The Honorable Warren R. Darrow, Judge Pro Tempore

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Julie A. Done, Assistant Attorney General
Attorneys for Appellee

Law Office of Cynthia A. Leyh — Tolleson
By Cynthia A. Leyh
Attorney for Appellant

G E M M I L L, Judge

¶1 Felix Ufrano Ramirez-Ramos ("Defendant") appeals his conviction and sentence for sexual misconduct with a minor, a

class two felony and dangerous crime against children. He raises two issues regarding the trial court's consideration of aggravating factors during sentencing. Defendant also raises two issues regarding the final jury instructions. After consideration of these arguments, we affirm.

BACKGROUND

¶2 The facts, viewed in the light most favorable to sustaining the conviction, *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989), and drawing all reasonable inferences in support thereof, *State v. Fulminante*, 193 Ariz. 485, 494, ¶ 27, 975 P.2d 75, 84 (1999), are as follows. On November 7, 2000, Defendant, an adult aide on eleven-year-old M.D.'s school bus, put his hand under M.D.'s underwear while they were seated together on the bus and rubbed her clitoris for a couple minutes just before M.D. was dropped off after school. Based on this incident, Defendant was indicted, tried, and convicted for molestation of a child and sexual conduct with a minor under twelve years of age.[1]

¶3 The parties stipulated that the offenses arose out of the same act; thus, the trial court sentenced defendant to concurrent terms of seventeen years' imprisonment based on its

[1] The indictment referred to M.D. as being under the age of fifteen. The State, however, amended the indictment before trial to allege M.D.'s age as under twelve.

evaluation of mitigating and aggravating factors.[2] On January 9, 2008, Defendant timely appealed. The trial court subsequently vacated the child molestation conviction because, under the facts of this case, it is a lesser-included offense of sexual conduct with a minor. We have jurisdiction over this appeal pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001), and 13-4033(A)(1) (2001).

DISCUSSION

¶4 Defendant first contends the trial court abused its discretion in considering as an aggravating factor M.D.'s young age at the time of the offense. Specifically, he claims the victim's age is an element of sexual conduct with a minor under the age of fifteen.[3]

¶5 Because Defendant did not raise this issue with the trial court, we review for fundamental error.[4] *See State v.*

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[2] As noted by the trial court, this is the presumptive sentence for molestation of a child and a slightly mitigated sentence for sexual conduct with a minor under twelve years of age. A.R.S. § 13-604.01(B), (D), (F) (2000).

[3] Defendant also raises this argument with respect to his conviction for molestation of a child. However, because Defendant's conviction and resulting sentence for the molestation offense was vacated, we need not address this argument regarding that conviction.

[4] In his reply brief, Defendant maintains the proper standard of review is abuse of discretion because there are no Arizona cases that review sentencing error for fundamental error when no

Velazquez, 216 Ariz. 300, 309, ¶ 37, 166 P.3d 91, 100 (2007); *see also State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To obtain relief under fundamental error review, Defendant has the burden to show that error occurred, the error was fundamental and that he was prejudiced thereby. *See Henderson*, 210 Ariz. at 567-68, ¶¶ 20-22, 115 P.3d at 607-08.

¶6 Without deciding whether error occurred on this basis, we conclude Defendant has failed to establish the requisite prejudice. First, Defendant received a mitigated seventeen-year sentence although he faced a possible life sentence or, alternatively, a presumptive sentence of twenty years. *See* A.R.S. § 13-604.01(B) (2000).[5] Further, Defendant requests we remand for resentencing although he is not "sure and it is unclear that the Court would have imposed the same sentence minus the aggravating factor of [M.D.'s] young age." Such speculation is insufficient to prove prejudice. *See State v. Trostle*, 191 Ariz. 4, 13-14, 951 P.2d 869, 878-79 (1997) (noting

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objection was raised below. Defendant is incorrect. *See State v. Provenzino*, 221 Ariz. 364, __, ¶ 18, 212 P.3d 56, 61 (App. 2009); *see also State v. Osborn*, 220 Ariz. 174, 176, ¶ 4, 204 P.3d 432, 434 (App. 2009).

[5] Effective January 1, 2009, the sentencing provisions for Dangerous Crimes Against Children can be found at A.R.S. § 13-705. *See* 2008 Ariz. Sess. Laws, ch. 301, § 17 (2nd Reg. Sess.). We thus cite to the version of the statute in effect at the time of the offense.

we will not presume prejudice where none appears affirmatively in the record); *see also State v. Munninger,* 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006) (holding appellant's speculation that trial court would impose specific sentence when improper aggravating factor not considered does not show prejudice). Absent prejudice, we find no reversible fundamental error in the trial court's purported consideration of M.D.'s age in determining Defendant's sentence. Accordingly, we will not remand on this basis.

¶7 Similarly unavailing is Defendant's next argument that the court abused it discretion in determining M.D.'s "pain" that resulted from the offense was an aggravating factor. We again review for fundamental error because Defendant did not object to the court's consideration of this aggravating factor. *Supra* ¶ 5.

¶8 At sentencing, M.D. addressed the court describing how the incident on the bus had negatively affected her. Based on M.D.'s statements, the court found harm to M.D. was shown by a preponderance of evidence and determined this impact on M.D. was an aggravating factor. Defendant argues he is entitled to resentencing absent consideration of this aggravating factor because M.D.'s statements at sentencing were not supported by trial evidence and were, in fact, contrary to her trial testimony. Defendant offers no authority to support this

argument, thus we need not address it. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (failure to sufficiently argue a claim on appeal constitutes abandonment of that claim); *State v. Carver,* 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) (noting opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised; failure to cite to legal authority usually constitutes abandonment and waiver of that claim); Ariz. R. Crim. P. 31.13(c)(1)(vi). Moreover, Defendant's speculative claim that he was prejudiced because "it is uncertain and unclear whether the [c]ourt would have imposed the same sentence absent this aggravating factor . . ." does not satisfy his burden under fundamental error review.

¶9 Finally, Defendant argues that, because the charged offenses were based on one act, the trial court committed fundamental error when it gave a separate counts instruction and when it failed to give a lesser-included instruction regarding the molestation charge. Based on these purported errors, he requests we vacate his conviction for sexual conduct with a minor. We do not address these arguments for two reasons.

¶10 First, when the parties and the trial court discussed the final instructions, defense counsel stated she wanted the separate counts instruction to be presented to the jury. Further, when addressing whether a lesser-included instruction

should be given, defense counsel stated:

> [A]lthough we are in agreement that the child molestation is a lesser included under these facts of the sexual conduct with a minor under 15, we also agree that the child molestation –- there could be a conviction on that that wouldn't inherently be a lesser included offense of the sexual conduct with a minor.
>
> So I think the way we've discussed resolving that problem is to say [sic] to have separate verdict forms. Let the jury determine which they want to convict on with the agreement that if my client was convicted on both counts it would be prohibited for The Court to impose consecutive sentencing.

We conclude Defendant invited any possible error regarding the separate counts instruction and the failure to include a lesser-included instruction. *State v. Logan*, 200 Ariz. 564, 565-66, ¶ 9, 30 P.3d 631, 632-33 (2001) ("If an error is invited, we do not consider whether the alleged error is fundamental, for doing so would run counter to the purposes of the invited error doctrine. Instead, as we repeatedly have held, we will not find reversible error when the party complaining of it invited the error."); *State v. Islas*, 132 Ariz. 590, 592, 647 P.2d 1188, 1190 (App. 1982) ("Generally, a party who participates in or contributes to an error cannot complain of it."); *State v. Mead*, 120 Ariz. 108, 111, 584 P.2d 572, 575 (App. 1978) ("A party may not invite error at the trial and then assign it as error on appeal. *United States v. White*, 377 F.2d 908 (4th Cir. 1967);

State v. Vidalez, 89 Ariz. 215, 360 P.2d 224 (1961) nor will he be permitted to take advantage of an error which was a natural consequence of his own actions. *State v. Crocker*, 275 S.W.2d 293 (Mo. 1955).").

¶11 Second, even if we were to agree that the court committed reversible fundamental error on either of these bases, the remedy would be to vacate Defendant's conviction for molestation of a child, something the trial court has already done. *See State v. Jones*, 185 Ariz. 403, 407, 916 P.2d 1119, 1123 (App. 1995) (noting that where a defendant has been convicted and sentenced based on a single act, the remedy is "to remove the lesser sentence") (quoting *State v. Ballez,* 102 Ariz. 174, 175, 427 P.2d 125, 126 (1967)); *see also State v. Ortega*, 220 Ariz. 320, 328, ¶¶ 24-25, 206 P.3d 769, 777 (App. 2008) (holding molestation of a child under fifteen years of age is a lesser included offense of sexual conduct with a minor); *In re Jerry C.*, 214 Ariz. 270, 274, ¶ 13, 151 P.3d 553, 557 (App. 2007) (same). These arguments are therefore moot. *Henderson*, 210 Ariz. at 565, ¶ 10, n.2, 115 P.3d at 605 (noting appellate courts generally do not examine moot issues).

CONCLUSION

¶12 For these reasons, Defendant's conviction and sentence are affirmed.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

___/s/_____
PETER B. SWANN, Presiding Judge

___/s/_____
MARGARET H. DOWNIE, Judge