DIVISION ONE
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PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 08-0786
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	
GUILLERMO ESQUER BUSTAMANTE,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-009032-001 DT

The Honorable Susan M. Brnovich, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Sarah E. Heckathorne, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Margaret M. Green, Deputy Public Defender
Attorneys for Appellant

K E S S L E R, Judge

¶1 Guillermo Esquer Bustamante ("Bustamante") appeals his conviction and sentence for theft of means of transportation,

resisting arrest, and two counts of aggravated assault, one for use of a dog as a dangerous instrument, on grounds of insufficiency of the evidence and errors in sentencing. For the reasons that follow, we find no error and affirm Bustamante's conviction and sentence.

FACTUAL AND PROCEDURAL HISTORY[1]

¶2 In October 2007, a Phoenix police officer chased Bustamante into a residential backyard near 16th Street and Southern Avenue after discovering that a car the suspect had just left in a nearby supermarket parking lot was reported stolen. The officer tackled Bustamante in the backyard and the suspect punched the officer in the chest as the officer attempted to handcuff him. While the two struggled, the officer heard the suspect call out what sounded like, "Rocky," and then, "Get him. Get him. Get him." The officer saw a large Rottweiler walk to his left and behind him, and then felt the nearly ninety-pound dog on his shoulders and the dog's teeth and wet saliva on the base of his neck. While Bustamante continued to yell, "get him," the officer hunched instinctively and drew his arm back, but the dog bit the officer's arm. The officer stood up immediately and faced the dog, which was growling and charging at him. The officer fired five or six shots at the

[1] We view the evidence in the light most favorable to sustaining the conviction. *State v. Greene*, 192 Ariz. 431, 436-37, ¶ 12, 967 P.2d 106, 111-12 (1998).

dog, killing him. The officer looked over to where he had last seen the suspect, but he had disappeared. Police later found Bustamante hiding on the underside of a vehicle in a nearby residential driveway and took him into custody.

¶3 Another officer testified that Bustamante admitted to him after his arrest that he had called the dog over as he struggled with the officer, and, as he escaped, he realized that the dog was attacking the officer. At trial, however, Bustamante denied having made these admissions and having called the dog over, but admitted that he realized that his mother's dog was first growling, then barking, and finally, possibly bit the officer before Bustamante "just fled the scene." Bustamante also testified that he knew, "if you go in the back yard where there's a dog you don't know, the dog's going to bite you."

¶4 A canine handler testified that a large breed dog such as the one that bit the officer was capable of causing serious injury, and in rare cases, death. He testified that he believed Bustamante initiated the bite by calling the dog "into the fray."

¶5 The jury convicted Bustamante of the charged crimes, and found that the aggravated assault with a dangerous instrument was a dangerous offense. The court sentenced Bustamante to aggravated terms of 13 years on the theft conviction and 20 years on the dangerous aggravated assault

conviction, and presumptive sentences of three and three-quarters years on each of the two remaining counts, all repetitive offenses, and all sentences to be served concurrently. At the same proceeding, the court revoked Bustamante's probation on a conviction for aggravated assault committed on April 15, 2000, and sentenced Bustamante to three and one-half years, to be served consecutively to the sentence in the instant case. Bustamante timely appealed.

DISCUSSION

I. Use of Prior Convictions in Sentencing

¶6 First, Appellant argues the trial court fundamentally erred in sentencing him as a repetitive offender, based solely on his admission at trial from the witness stand that he had three prior felony convictions, and without a formal finding. Second, Bustamante argues that the trial court fundamentally erred in pronouncing one of those prior convictions a dangerous offense, a finding not supported by the record.

¶7 Because Bustamante failed to raise this issue at sentencing, we review for fundamental error only. *See State v. Henderson,* 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Bustamante accordingly bears the burden of establishing that the trial court erred, that the error was fundamental, and that the error caused him prejudice. *Id.* at 568, ¶ 22, 115 P.3d at 608.

¶8 We find no error, much less fundamental error that prejudiced Bustamante, in the trial court's use of the prior felony convictions to enhance his sentence. Prior to trial, the State alleged Bustamante had five historical prior felony convictions: one for discharge of a firearm and another for aggravated assault, both Class 3 felonies committed on April 15, 2000; aggravated assault on a law enforcement officer, a Class 6 felony committed on June 3, 2000; theft, a Class 5 felony committed on October 11, 1995; and theft of a vehicle, a Class 4 felony committed on March 5, 1997. Before trial, the court precluded the State from impeaching Bustamante with his prior convictions from 1995 and 1997, but allowed impeachment with his convictions for the offenses committed in 2000. Bustamante's convictions for the 2000 offenses were included in a sanitized form with the date of the offense, the case number, that it was a felony, and that it was from Maricopa County. At trial, Bustamante admitted on the stand that he had three prior felony convictions: two for crimes that occurred on April 15, 2000, and one for a crime that occurred on June 3, 2000.

¶9 Bustamante argues that his admission to the prior convictions while testifying was insufficient to prove the priors for enhancement purposes because the State failed to establish that he had been represented by counsel, the class of the felony for each conviction, or whether the prior was an in

state or an "out of state prior," and failed to introduce written documentation of the priors. Bustamante's claim has no merit.

¶10 It is well-established that a defendant's admission to prior convictions while testifying is sufficient to establish the existence of the priors for sentencing enhancement. *State v. Carver*, 160 Ariz. 167, 175-76, 771 P.2d 1382, 1390-91 (1989); *see* Arizona Rules of Criminal Procedure ("Ariz. R. Crim. P.") 17.6 ("Whenever a prior conviction is charged, an admission thereto by the defendant shall be accepted only under the procedures of this rule, *unless admitted by the defendant while testifying on the stand*.") (emphasis added). When a defendant admits to prior convictions on the witness stand, we presume the regularity of those convictions. *See Carver*, 160 Ariz. at 175-76, 771 P.2d at 1390-91.

¶11 Although the trial court precluded the prosecutor from eliciting testimony from Bustamante on the class or nature of the prior felony convictions, the convictions to which Bustamante admitted while testifying on the stand all occurred in Maricopa County and represented two Class 3 felonies committed on April 15, 2000 and one Class 6 felony committed on June 3, 2000, as identified in the State's allegation of historical priors. *See State v. Seymour*, 101 Ariz. 498, 501, 421 P.2d 517, 520 (1966) ("An admission on cross-examination is

surely the strongest evidence available to prove a prior conviction for it may be said with certainty that there is no danger that an accused will falsely testify that he had been previously convicted and thus, the truth of the fact is assured."); *State v. Valenzuela*, 109 Ariz. 109, 110, 506 P.2d 240, 241 (1973) (finding when the State was prepared to prove defendant's prior felony conviction until defendant admitted to it himself, such proof by the State was unnecessary and the court could take judicial notice of defendant's prior felony conviction). Just as in *Carver*, Bustamante's admission of the existence of three prior felony convictions during trial permitted the trial court to use them in sentencing enhancement. *See id.* Further, the trial court did not err in failing to formally find the existence of the historical prior felony convictions. Rule 19.1 of the Arizona Rules of Criminal Procedure ("Ariz. R. Crim. P.") neither requires a jury trial nor a formal determination of the prior convictions when, as here, a defendant admits the prior convictions on the witness stand. *See* Ariz. R. Crim. P. 19.1(b)(2). The trial court asked the prosecutor prior to sentencing whether he was relying on Bustamante's admissions of his priors at trial, and the prosecutor said he was. This was all that was necessary for the court to use these priors to enhance Bustamante's sentence. *See id.*

¶12 Bustamante also argues that the trial court erred in sentencing him on Count Two to an aggravated sentence of 20 years, based on a finding that one of the historical priors was a dangerous prior, without any support in the record. Before trial, the State had alleged as one of the prior convictions "Discharge of a Firearm at a Non-Residence, a Class 3 Felony." This offense, committed on April 15, 2000, was one of the prior felony convictions Bustamante admitted to at trial. At sentencing, the prosecutor told the trial court that it could impose up to a 35 year sentence on Count Two, a Class 2 dangerous offense, as a non-dangerous offense using two historical priors for enhancement. The prosecutor asked the trial court, however, to "go under the dangerous sentencing range" if it was not going to impose more than 21 years, the maximum aggravated sentence for a non-repetitive dangerous offense. *See* A.R.S. § 13-604(I) (Supp. 2008). The court sentenced Bustamante to 20 years, and clarified in response to a later question from defense counsel that he was sentencing him "under the dangerous offense with one historical dangerous prior."

¶13 We find on this record that the trial court did not err, much less fundamentally err, in finding that Bustamante had

"one historical dangerous prior."[2] We find that the very nature of Bustamante's prior conviction for "discharge of a firearm at a non-residence" makes it a dangerous historical prior. *See* A.R.S. § 13-1211(B) (2010) ("A person who knowingly discharges a firearm at a nonresidential structure is guilty of a class 3 felony"); A.R.S. § 13-604(P) (Supp. 2008) (The "'dangerous nature of the felony' means a felony involving the discharge . . . of a deadly weapon"); *State v. Smith*, 146 Ariz. 491, 499, 707 P.2d 289, 297 (1985) ("[N]o specific finding of dangerousness is required where an element of the offense charged requires proof of the dangerous nature of the felony"); *Montero v. Foreman*, 204 Ariz. 378, 381-82, ¶ 13, 64 P.3d 206, 209-10 (App. 2003) (finding the State was not required to prove defendant's prior conviction was a violent offense because the crime's definition requires proof that the crime was violent).

¶14 Although the State characterized this felony and the other prior convictions as "non-dangerous" in its pre-trial allegation of historical priors, the key to any claim of inadequate allegations of dangerous offenses is notice. *State v. Cons*, 208 Ariz. 409, 412, ¶¶ 5-6, 94 P.3d 609, 612 (App.

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[2] On appeal, the State concedes that nothing in the record demonstrates that Bustamante has a dangerous historical felony conviction. We are not bound by the State's concession. *See State v. Stewart,* 3 Ariz. App. 178, 180, 412 P.2d 860, 862 (1966). For the reasons stated in *supra* ¶¶ 13-14, the court did not err in finding Bustamante had one historical dangerous prior.

2004); *State v. Francis*, 224 Ariz. 369, 371-72, ¶¶ 11-13, 231 P.3d 373, 375-76 (App. 2010). The very name of the offense in the list of prior convictions provided adequate notice to Bustamante that the State was alleging one dangerous historical felony conviction. *See State v. Bayliss,* 146 Ariz. 218, 219, 704 P.2d 1363, 1364 (App. 1985) ("An accused must receive adequate notice . . . of the charge of an allegation of prior convictions, so as not to be misled, surprised or deceived in any way by the allegations"); *State v. Benak*, 199 Ariz. 333, 337, ¶ 16, 18 P.3d 127, 131 (App. 2001) ("reference in the indictment or information to the statute under which the enhancement is authorized may constitute sufficient notice.") (citation omitted); *Montero*, 204 Ariz. at 382, 64 P.3d at 210.[3] Additionally, at a pre-trial settlement conference, the settlement judge noted that Bustamante had "four prior felony convictions, including a dangerous offense . . . ." The judge also discussed the range of sentence Bustamante would face given he had one dangerous prior felony conviction. Bustamante acknowledged that he felt comfortable with and understood the range of sentence he could face. Consequently, there is no

[3] Moreover, defense counsel's inquiry at sentencing as to whether the trial court was imposing the sentence on Count Two as a "dangerous upon dangerous prior, or . . . non-dangerous with two priors" persuades us that defense counsel had not been misled by the State's summary characterization of the priors as non-dangerous, and knew that this prior was a dangerous offense for sentencing purposes.

confusion that even though the State listed Bustamante's prior felony conviction as non-dangerous, the parties had sufficient notice and knew it was dangerous. Thus, the court did not err when it sentenced Bustamante for a dangerous, repetitive offense, based on the existence of a dangerous historical prior conviction. Therefore, we decline to vacate Bustamante's sentence on this basis. *See* A.R.S. § 13-604(J) (Supp. 2008).

II. Judicial Finding of Aggravators

¶15 Bustamante next argues that the trial court fundamentally erred in sentencing him on Counts One and Two to aggravated sentences based on aggravating factors neither found by the jury nor admitted by him, in violation of *Blakely v. Washington*, 542 U.S. 296, 301 (2004). In addition, he argues the court violated his Fifth Amendment privilege against self-incrimination in relying on his "lack of remorse" as an aggravating factor. Because Bustamante failed to raise these issues at sentencing, we review for fundamental error only. *See Henderson,* 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. An appellant bears the burden of establishing that the trial court erred, that the error was fundamental, and that the error caused him prejudice. *Id.* at 568, ¶ 22, 115 P.3d at 608.

¶16 In sentencing Bustamante on Count One, the trial court found no mitigating factors, and, as aggravating factors, Bustamante's prior convictions, the fact that he committed the

instant offense while he was on probation, and his lack of remorse. In sentencing Bustamante on Count Two, the court again found no mitigating factors and the same aggravating factors, as well as "the fact that you left of [sic] the victim there to deal with your dog who was clearly in the attack mode because you called him over."

¶17 Bustamante's argument that the trial court improperly relied upon aggravating factors neither found by the jury nor admitted by him has no merit. Bustamante's admission at trial that he had three prior felony convictions exposed him to an aggravated sentence without any additional jury findings. *See Blakely,* 542 U.S. at 301. Bustamante concedes, as he must, that under the Arizona sentencing scheme, once one aggravating factor is established, a defendant is exposed to the maximum punishment, and the trial court is free to consider additional aggravating factors in imposing sentence. *See State v. Martinez,* 210 Ariz. 578, 585, ¶ 26, 115 P.3d 618, 625 (2005). The trial court in this case was free to find aggravating factors neither found by the jury nor admitted by Bustamante because he had admitted that he had prior felony convictions, and the court relied upon the prior convictions as aggravating factors. *See id.*

¶18 Bustamante also argues for the first time on appeal that the court improperly considered "lack of remorse" as an

aggravating factor, in violation of his Fifth Amendment privilege against self-incrimination. A trial court may not consider a defendant's lack of remorse as an aggravating factor at sentencing, because to do so violates the defendant's right not to incriminate himself. *See State v. Hardwick*, 183 Ariz. 649, 656, 905 P.2d 1384, 1391 (App. 1995). This Court, however, will not disturb a trial court's decision to impose an aggravated sentence if there were "sufficient and appropriate aggravating factors to justify imposition of maximum sentences." *State v. Gillies*, 142 Ariz. 564, 573, 691 P.2d 655, 664 (1984).

¶19 Our review of the record shows the court considered several aggravating factors, in addition to Bustamante's lack of remorse, before imposing an aggravated sentence. *Supra* ¶ 16. Moreover, Bustamante has failed to show that the court would have imposed a different sentence had it not considered this improper aggravating factor, as necessary for reversal on this basis on fundamental error review. *See State v. Munninger,* 213 Ariz. 393, 397, ¶¶ 12-15, 142 P.3d 701, 705 (App. 2006) (holding that when it is clear that the judge would have imposed an aggravated sentence even if the improper aggravating factor had not been used, the error is neither fundamental nor prejudicial). It is clear in this instance, in which the court found no mitigating and several aggravating factors, that it would have imposed an aggravated sentence even if this improper

factor had not been used. *Munninger,* 213 Ariz. at 397, ¶ 12, 142 P.3d at 705. Thus, we decline to reverse on this basis and do not remand for resentencing. *Gillies*, 142 Ariz. at 573, 691 P.2d at 664; *Munninger*, 213 Ariz. at 396, ¶ 9, 142 P.3d at 704 (remanding for resentencing is proper when a trial court relies on an improper factor and it is uncertain whether it would have imposed the same sentence absent that factor).

III. Evidence of Use of Dog as Dangerous Instrument

¶20 Bustamante also argues that insufficient evidence supported the jury's finding that he used the dog as a "dangerous instrument" for purposes of convicting him of aggravated assault in Count Two. He argues that the evidence showed that the dog acted on instinct, not based on any control he exerted, either through a leash or because it had been trained, and the dog was "just an old back yard dog protecting his territory independent of Bustamante." Bustamante argues that the evidence failed to show that the dog responded to his call to "get'em," by biting the officer, and on this basis, no evidence that he "used" the dog as required by the definition of dangerous instrument.

¶21 A judgment of acquittal is appropriate only "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could

accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Landrigan,* 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993) (quoting *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990) (citation omitted)). In reviewing the sufficiency of evidence, we view the facts in the light most favorable to upholding the jury's verdict, and resolve all conflicts in the evidence against Bustamante. *State v. Girdler,* 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983).

¶22 "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (citation omitted). Credibility determinations are for the fact finder, not this Court, *see State v. Dickens,* 187 Ariz. 1, 21, 926 P.2d 468, 488 (1996), and no distinction exists between circumstantial and direct evidence. *State v. Stuard*, 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever [sic] is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶23 We find that the State introduced more than sufficient evidence to survive Bustamante's motion for judgment of

acquittal and to support the jury's conviction for aggravated assault based on use of the dog as a dangerous instrument. A person commits aggravated assault by "knowingly . . . causing any physical injury to another person" "if the person uses a . . . dangerous instrument." A.R.S. §§ 13-1203(A)(1), 13-1204(A)(2) (2010). Arizona Revised Statutes section 13-105(12) (2010) defines "dangerous instrument" as "anything that under the circumstances in which it is used, attempted to be used or threatened to be used is readily capable of causing death or serious physical injury." This Court recently held that, under this definition, "a person can be responsible in a criminal setting for using a dog or a vicious animal as a dangerous instrumentality without expressly ordering the animal to attack if the party knows the dog had the ability to threaten or cause serious physical injury, knows the dog was presenting itself as such and the party failed to control or stop the dog from presenting such possible harm." *State v. Fish*, 222 Ariz. 109, 131, ¶ 75, 213 P.3d 258, 280 (App. 2009).

¶24 Here, Bustamante ordered his mother's ninety-pound Rottweiler to attack the officer by repeatedly calling the dog's name, and saying, "Get him. Get him. Get him." The dog subsequently jumped on the officer's back and bit the officer's arm. An expert canine handler testified that it was his opinion that Bustamante initiated the bite by calling the dog "into the

fray." Bustamante, by his own admission, made no attempt to control or stop the dog after it jumped on the officer's back and bit the officer, and instead ran away, leaving the officer alone to face the large, growling, and charging Rottweiler. Bustamante admitted after his arrest that he had called the dog over while he struggled with the officer, and he ran away, realizing that the dog was attacking the officer. Bustamante testified at trial that it was his understanding that dogs will bite a stranger who ventures into their back yard. On this record, more than sufficient evidence supported Bustamante's conviction for aggravated assault of the officer, on the basis that he used the dog as a dangerous instrument. *See id.*

CONCLUSION

¶25 For the foregoing reasons, we affirm Bustamante's conviction and sentence.

/S/
DONN KESSLER, Judge

CONCURRING:

/S/
PHILIP HALL, Presiding Judge

/S/
MARGARET H. DOWNIE, Judge