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 08-0855
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	
NICHOLAS ISAIAH GARCIA,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2007-007415-001 DT

The Honorable Julie P. Newell, Judge Pro Tempore

AFFIRMED

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

Bruce Peterson, Office of the Legal Advocate — Phoenix
By Frances J. Gray, Deputy Legal Advocate
Attorneys for Appellant

T H O M P S O N, Judge

¶1 Nicholas Isaiah Garcia (defendant) appeals from his convictions and sentences for attempted second degree murder; two counts of aggravated assault; misconduct involving weapons; and disorderly conduct. Defendant argues that the trial court violated his right to a unanimous verdict on one of the counts of aggravated assault and erred in imposing sentence on three of his convictions. For reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 A.B. was standing outside with his three-year-old son when a young woman exited the house across the street followed by defendant. The woman and defendant were arguing. When defendant noticed A.B., he yelled something akin to "What the 'F' are you looking at?" A.B. yelled back, complaining about defendant's use of profanity in front of his son. In response, defendant charged across the street and pointed a pistol at A.B. and his son. A.B. begged defendant not to shoot him in front of his son. Defendant responded, "F that, you should have thought of that before you stepped up" and fired one shot at A.B. A.B. raised his hand to block the shot and the bullet struck him in the arm. Defendant ran away, but was apprehended by police after A.B. identified him from a photograph lineup.

¶3 Defendant was charged by indictment with attempted second degree murder, a class two felony and dangerous offense; aggravated assault on A.B., a class 3 felony and dangerous

offense; aggravated assault on A.B.'s son, a class 2 felony and dangerous crime against children; misconduct involving weapons, a class 4 felony; disorderly conduct, a class 6 felony; and aggravated assault on defendant's girlfriend, a class 3 felony. On motion by the State, the assault charge pertaining to defendant's girlfriend was dismissed prior to trial.

¶4 Upon trial to a jury, defendant was found guilty on the remaining charges. The jury also found three aggravating factors. The trial court sentenced defendant to concurrent and consecutive terms of imprisonment totaling twenty-seven years. Defendant timely appealed.

DISCUSSION

¶5 Arizona Revised Statutes (A.R.S.) section 13-1204(Supp. 2007) provides, in pertinent part:

> A. A person commits aggravated assault if the person commits assault as defined in section 13-1203 under any of the following circumstances:
>
> . . .
>
> 2. If the person uses a deadly weapon or dangerous instrument.
>
> . . .
>
> 6. If the person is eighteen years of age or more and commits the assault upon a child the age of fifteen or under the age of fifteen.

Aggravated assault under circumstances described in paragraph 2 is a class 3 felony, unless the victim is under fifteen years of age in which case the offense is a class 2 felony punishable as

a dangerous crime against children. A.R.S. § 13-1204(B). Aggravated assault under circumstances described in paragraph 4 is a class 6 felony. *Id.*

¶6 In submitting the charge of aggravated assault with respect to A.B.'s son to the jury, the trial court instructed on the two types of aggravated assault applicable to the charged offense: assault with a deadly weapon or dangerous instrument and assault on a child fifteen or under. The verdict form, however, did not distinguish between the two types of aggravated assault. Nor was there an instruction requiring that the jury unanimously agree on the type of aggravated assault committed in order to find defendant guilty. As a result, defendant asserts, it is unclear whether the jury convicted him of the greater or the lesser class felony. In addition, he argues that his right to a unanimous verdict under Article 2, section 23 of the Arizona Constitution was violated because the jury may not have been unanimous in deciding which type of aggravated assault was committed.

¶7 Defendant failed to object to either the instructions or the verdict forms in the trial court. Accordingly, our review of the claim of lack of unanimous verdict is limited to fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To obtain reversal under this standard of review, defendant has the burden of showing "both

that fundamental error exists and that the error in his case caused him prejudice." *Id.* at ¶ 20.

¶8 The record in the instant case clearly establishes that the jury unanimously determined that defendant committed aggravated assault in regards to A.B.'s son under A.R.S. § 13-1204(A)(2) by using a deadly weapon or dangerous instrument. In addition to returning a guilty verdict on the aggravated assault charge, the jury found the offense to be "dangerous." An offense is "dangerous" if it involves "the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the knowing or intentional infliction of serious physical injury upon another." A.R.S. § 13-604(P) (Supp. 2007). The jury instruction defining "dangerous offense" in this case was limited to "the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument." Thus, in unanimously finding the aggravated assault to be a dangerous offense, the jury necessarily found that defendant committed the offense by using a deadly weapon or dangerous instrument. Accordingly, there was no violation of the right to a unanimous verdict with respect to the conviction on this charge.

¶9 Defendant also contends he was improperly sentenced on this count as a dangerous crime against children because of lack of findings on the nature of the assault, the age of the victim, and the age of defendant. As with the previous issue, defendant

failed to object below. Thus, our review is again limited to fundamental error. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607.

¶10 Regarding the absence of a finding as to the nature of the assault, as discussed previously in regards to defendant's challenge to his conviction on this count, the record clearly establishes that the jury found defendant committed aggravated assault in violation of A.R.S. § 13-1204(A)(2) based on use of a deadly weapon or dangerous instrument. We therefore find no merit to defendant's argument on this point.

¶11 A violation of A.R.S. § 13-1204(A)(2) is elevated from a class 3 felony to a class 2 felony and is punishable as a dangerous crime against children when the victim is under the age of fifteen. A.R.S. § 13-1204(B). There was no specific finding by the jury that A.B.'s son was under the age of fifteen. The absence of such a finding, however, is not fatal. The omission of an element from a jury finding is subject to harmless error review. *Neder v. United States*, 527 U.S. 1, 15, (1999). When a trial court erroneously fails to instruct a jury on an element of the offense, a reviewing court considers "whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *Id.* at 19. If there is no evidence in the record supporting a contrary finding, the error is harmless. *Id.*

¶12 In the present case, there was undisputed testimony that A.B.'s son was three years old when the offense occurred. At no time did defendant contest that A.B.'s son was not under the age of fifteen. To the contrary, during closing argument defense counsel expressly referenced his young age in assailing the police investigation. In the absence of any evidence that would permit the jury to find that he was not under the age of fifteen, there was no fundamental error by the trial court in imposing sentence on this aggravated assault count as a class 2 felony and dangerous crime against children. *See State v. Garcia*, 200 Ariz. 471, 475, ¶ 24, 28 P.3d 327, 331 (App. 2001) (holding failure to instruct jury on age of victim constituted harmless error even though classification of indecent exposure charge depended on age of victim).

¶13 We also find no merit to defendant's claim of error based on the absence of a finding that he was at least eighteen years of age. The sentencing provision for aggravated assault as a dangerous crime against children applies to any "person who is at least eighteen years of age *or who has been tried as an adult*." A.R.S. § 13-604.01(D) (Supp. 2007) (emphasis added). Given that he was convicted in a criminal prosecution as opposed to a juvenile proceeding, defendant satisfies the requirement of being tried as an adult irrespective of his age.

¶14 Defendant next challenges the consideration of certain aggravating factors by the trial court in imposing sentence on his convictions for aggravated assault. The jury found that the State had proven three aggravating factors: (1) infliction or threatened infliction of serious physical injury; (2) use, threatened use or possession of a deadly weapon; and (3) physical, emotional or financial harm to the victim. At sentencing, the trial court noted the three aggravating factors found by the jury and appeared to consider all three in imposing sentence on each of defendant's five offenses.

¶15 Pursuant to A.R.S. § 13-702(C) (Supp. 2007), the first two of the three aggravating factors found by the jury cannot be used as aggravators when they are essential elements of the offense. *State v. Pena*, 209 Ariz. 503, 507, ¶ 14, 104 P.3d 873, 877 (App. 2005). The two aggravated assault charges on which defendant was convicted included at least one of these factors as an essential element. Defendant argues that the trial court therefore erred in imposing sentence on these two offenses by considering improper factors as aggravators. Because defendant failed to object at sentencing, our review is again limited to fundamental error. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607.

¶16 Fundamental error occurs only in "rare cases" and "usually, if not always, involves the loss of federal

constitutional rights." *State v. Tucker*, 215 Ariz. 298, 317, ¶ 69, 160 P.3d 177, 196 (2007); *State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991) (citation omitted). An error resulting in the imposition of an illegal sentence is fundamental. *State v. Munninger*, 213 Ariz. 393, 397, ¶¶ 11-12, 142 P.3d 701, 705 (App. 2006). An illegal sentence is "one that is outside the statutory range." *State v. House*, 169 Ariz. 572, 573, 821 P.2d 233, 234 (App. 1991). In *Munninger*, we held that consideration of an improper aggravating factor did not render a sentence illegal when the sentence imposed was "within the aggravated range prescribed for [the defendant's] offense." *Munninger*, 213 Ariz. at 397, ¶¶ 11-13, 142 P.3d at 705 (relying in part on *State v. Glassel*, 211 Ariz. 33, 116 P.3d 1193 (2005), in which "the supreme court plainly recognized the error of using an improper aggravating factor, but did not find it to be fundamental").

¶17 The finding of a single proper aggravating factor suffices to establish an aggravated statutory sentencing range for purposes of determining the legality of the sentence. *See State v. Martinez*, 210 Ariz. 578, 584, ¶ 21, 115 P.3d 618, 624 (2005) ("Under Arizona's sentencing scheme, once a jury implicitly or explicitly finds one aggravating factor, a defendant is exposed to a sentencing range that extends to the maximum punishment available under section 13-702. … Under those

circumstances, a trial judge has discretion to impose any sentence within the statutory sentencing range.") (citation omitted).

¶18 Here, the jury found a third aggravating factor to which defendant does not raise any issue regarding its use at sentencing by the trial court. This third factor was sufficient to expose defendant to aggravated sentences on the two offenses. Because the sentences imposed by the trial court were within the statutorily proscribed ranges for the two offenses, defendant's sentences were not illegal. Thus, the sentencing error was not fundamental. *Munninger*, 213 Ariz. at 397, ¶¶ 12-13, 157 P.3d at 705.

¶19 Moreover, defendant has failed to meet his burden to prove the error caused him prejudice. *Henderson*, 210 Ariz. at 568, ¶ 26, 115 P.3d at 608. Speculation alone is insufficient to prove prejudice; rather, the defendant must demonstrate from the record that the trial court would have otherwise imposed a lesser sentence. *See Munninger*, 213 Ariz. at 397, ¶ 14, 157 P.3d at 705. Nothing in the record indicates the trial court would have imposed lesser sentences on the aggravated assault convictions absent consideration of the challenged factors. Accordingly, we find no fundamental error.

¶20 Finally, defendant contends the trial court erred in sentencing him as a repetitive offender on his conviction for

disorderly conduct. Specifically, defendant argues that the State failed to prove his prior conviction and that he did not stipulate to a prior conviction for sentencing purposes or waive his right to have the State prove his prior conviction. Because defendant failed to object at sentencing, our review is again limited to fundamental error. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607.

¶21 Prior to trial, the State alleged that defendant had three historical felony convictions. At trial, to avoid having the State present evidence of a prior conviction in regards to charge of misconduct involving weapons, defendant stipulated with the State as follows: "The parties stipulate that the defendant was convicted of a felony offense which occurred on August 15, 2004, and was sentenced on September 30, 2005. The defendant's right to possess a firearm was never restored." The stipulation was entered into evidence as an exhibit and the stipulation was read to the jury.

¶22 At sentencing, the trial court stated that defendant's prior felony conviction was applicable to sentencing on the charge of disorderly conduct. Counsel for the State and defendant both agreed, and defendant was sentenced on the charge as a repetitive offender in accordance with A.R.S. § 13-604.

¶23 Before a prior conviction may be used for sentencing purposes, it must be proven by the State or admitted by the

defendant. A.R.S. § 13-604(P). As support for his argument that the trial stipulation could not be relied on for sentence enhancement purposes, defendant cites *State v. Osborn*, 220 Ariz. 174, 204 P.3d 432 (App. 2009). In *Osborn*, we held the trial stipulation to a prior conviction was insufficient to serve as an admission in the absence of full compliance with the requirements of Arizona Rule of Criminal Procedure 17.6 when the jury failed to convict on the charge of misconduct involving weapons. 220 Ariz. at 177, ¶ 7, 204 P.3d at 435. The obvious problem with defendant's reliance on this decision is that, unlike the defendant in *Osborn*, defendant was convicted on the misconduct involving weapons charge. In finding him guilty on the charge, the jury necessarily found beyond a reasonable doubt that he had been previously convicted of the felony referenced in the stipulation. Because the prior felony conviction was proven at trial, compliance with the requirements of Rule 17.6 was unnecessary. *See* comment to Rule 17.6 ("The parties may stipulate under Rule 16 to evidentiary use of any prior conviction without the Rule 17 formalities."). Thus, there was no fundamental error by the trial court using the prior felony conviction for sentence enhancement purposes.

¶24 Defendant's convictions and sentences are affirmed.

/s/
_____
JON W. THOMPSON, Judge

CONCURRING:

/s/
_____
PATRICIA A. OROZCO, Presiding Judge

/s/
_____
DIANE M. JOHNSEN, Judge