DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 09-0403
	)	DEPARTMENT D
v.	)	**MEMORANDUM DECISION**
JOSE ANGEL HERNANDEZ-HERNANDEZ, Appellant.	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-176152-001 SE

The Honorable Helene Abrams, Judge

AFFIRMED

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

Maricopa County Public Defender — Phoenix
By Kathryn Petroff, Deputy Public Defender
Attorneys for Appellant

I R V I N E, Judge

¶1 Jose Angel Hernandez-Hernandez ("Appellant") appeals from his conviction and sentence for sexual conduct with a nine-

year-old minor, a dangerous crime against children in the first degree and class 2 felony. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Appellant. *State v. Guerra,* 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). Appellant is the victim's uncle. He had a close relationship with the victim's family and lived in the same apartment complex.

¶3 In June 2002, the mother sent the victim and her sister to Appellant's home to retrieve a set of speakers he sold her earlier that day. When the girls arrived, Appellant was standing by the bathroom wearing only his underwear. He led them into the bedroom, where he pushed them down. He smothered the sister's face with a pillow as he pulled off the victim's pants and underwear. They both screamed for him to stop. Appellant then put his penis in the victim's vagina.

¶4 When he finished, he told the sister she was next. The sister broke free, and they fled to a nearby laundry room. Appellant came in and said, "[D]id you say something? Nobody is going to believe you, because I'm older and I'm your mom's brother. You guys are little kids." Then, he left and the girls went home.

¶5 At home, the victim noticed bleeding and called her mother into the bathroom. Mistaking it for a period, the mother gave the victim a feminine napkin. After that incident, Appellant repeatedly threatened the victim that he would harm her parents if she told anyone. The victim was scared of Appellant and hid in her room whenever he came over to visit. Once, when the victim was ten or eleven years old, Appellant offered the victim twenty dollars to "let [him] do the same thing" to her again.

¶6 Several years later, the victim confided in her mother that Appellant had "[done] something really bad to her" and took advantage of her that day they went to get the speakers. The sister confirmed her story, and the mother eventually notified police. Appellant denied the allegations, but told police "he made a mistake by being alone with the young ladies in his apartment" that day.

¶7 A jury found Appellant intentionally or knowingly engaged in "sexual intercourse" with the victim and convicted him of sexual conduct with a minor under the age of fifteen, in violation of Arizona Revised Statutes ("A.R.S.") section 13-1405 (2010).[1] Because the jury also found the victim was under the age of twelve, Appellant was exposed to a life sentence under A.R.S.

[1] We cite to the current version of statutes where no revisions material to this case have occurred.

§ 13-604.01(A) and (B) (2003).[2] Citing A.R.S. § 13-604.01(A), the trial imposed a mandatory life term without the possibility of parole for thirty-five years.

DISCUSSION

¶8 Appellant contends the trial court erroneously sentenced him to a mandatory life term under § 13-604.01(A) for his sexual conduct. He argues he should have been sentenced under § 13-604.01(B) instead, because the verdict did not reflect whether the jury convicted him for penetration or masturbatory contact, and § 13-604.01(A) does not apply to the latter. Because Appellant failed to object at sentencing, we review only for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).

¶9 Fundamental error is "rare" and limited to cases involving "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Id*. (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)). A defendant has the burden of proving that fundamental error exists and that it caused him prejudice. *Id.* at ¶ 20.

[2] This statute has been renumbered to A.R.S. § 13-705 by the amendment in Arizona Session Laws 2008, Ch. 301.

¶10 Appellant was found guilty of "sexual intercourse," which is defined as either penetration or masturbatory contact. A.R.S. § 13-1401(3). Because the jury was not asked to distinguish between the two, the trial court assumed Appellant was convicted for penetration. This prevented the trial court from exercising its discretion to impose a lesser term under § 13-604.01(B). *State v. Garza*, 192 Ariz. 171, 175, ¶¶ 16-17, 962 P.2d 898, 902 (1998) (a court's refusal or failure to exercise its discretion is an abuse of discretion).

¶11 Nevertheless, the error was not fundamental because the sentence was legal. *Cf. State v. Cox*, 201 Ariz. 464, 468, ¶ 13, 37 P.3d 437, 441 (App. 2002) (holding an illegal sentence constitutes fundamental error). A sentence is legal if it is authorized by facts reflected in the jury verdict alone. *State v. Martinez*, 209 Ariz. 280, 284, ¶ 15, 100 P.3d 30, 34 (App. 2004). Here, a life sentence was authorized by the express finding that the victim was age twelve or under. A.R.S. § 13-604.01(B).

¶12 We recognize that the jury verdict did not reflect whether there was penetration or masturbatory contact--an essential fact that exposed him to the mandatory life term. In order to prevail, however, Appellant must also establish prejudice. *See Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607. Prejudice is a fact-intensive inquiry that varies from case

to case depending on the type of error that occurred. *Id*. at 568, ¶ 26, 115 P.3d at 608. Prejudice must be shown in the record and may not be based solely on speculation. *State v. Munninger*, 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006). Appellant bears the burden of proving prejudice. *Henderson*, 210 Ariz. at 571, ¶ 39, 115 P.3d at 611.

¶13 The nature of the error here required Appellant to "show that a reasonable jury, applying the appropriate standard of proof, could have reached a different result than did the trial judge." *Id*. at 569, ¶ 27, 115 P.3d at 609. On this record, we cannot say a reasonable jury could have found that Appellant was guilty of only masturbatory contact. The State's theory at trial was based solely on penetration. In opening remarks, the prosecutor argued defendant was charged "for forcefully *penetrating* his young niece." (Emphasis added.) The victim then testified that Appellant penetrated her, that she felt pain, and that she was given a sanitary napkin for the bleeding.

¶14 In closing, the prosecutor further argued only the penetration theory, stating in pertinent part:

> [T]he crime of sexual conduct requires proof of the following: One, *that the defendant intentionally or knowingly penetrated the vulva or anus of another person with a part of his body* and that that person was under the age of 15 at the time of the conduct*. . . .*
>
> . . . .

> *Penetration* . . . to slightest degree *is sufficient* enough [sic] *to complete the offense.*

(Emphasis added).

¶15 Appellant presented no argument to rebut the State's theory of penetration. Nor is there any evidence in the record to support a theory of masturbatory contact. On appeal, Appellant argues that the jury *might have believed* the victim was too young to understand she was penetrated, or it *might have believed* the bleeding was caused by "some other sexual act." These assertions, however, are merely based on "room for speculation by jury members" and are insufficient to show prejudice. *See Munninger*, 213 Ariz. at 397, ¶ 14, 142 P.3d at 705.

¶16 Moreover, Appellant's contention that "it is not inconceivable" that the judge would have sentenced him to a twenty-year presumptive term under A.R.S. § 13-604.01(B) is nothing more than speculation. *Id*. First, the presentence report recommended "*at least* the presumptive" term because "the harm he caused to the very young victim" outweighed Appellant's lack of a prior felony record. (Emphasis added.) In addition, the court merely stated, "[A life term] is mandated by statute and that is the sentence that I must impose." It never, however, indicated a desire or inclination to impose less than a life term. *Cf., State v. Price*, 217 Ariz. 182, 187, ¶ 22, 171 P.3d 1223, 1228

(2007) (discerning prejudice because the trial court indicated it would have sentenced defendant differently). Nor did it appear the court believed a life term was inappropriately harsh. *Cf., Cox,* 201 Ariz. at 468, ¶ 14, 37 P.3d at 441 (concluding prejudice where court imposed a harsher sentence based on mistaken belief it had no discretion, though both it and the prosecutor agreed that "a lesser sentence was appropriate."). Short of conjecture, Appellant has not shown the court would have imposed a lesser sentence under A.R.S. § 13-604.01(B).

CONCLUSION

¶17 Because Appellant has not met his burden of showing prejudice, we affirm.

/s/
PATRICK IRVINE, Judge

CONCURRING:

/s/
LAWRENCE F. WINTHROP, Presiding Judge

/s/
RANDALL H. WARNER, Judge[3]

[3] Pursuant to Article 6, Section 3 of the Arizona Constitution, the Arizona Supreme Court has designated the Honorable Randall H. Warner, of the Maricopa County Superior Court, to sit in this matter.