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: 07/28/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	No. 1 CA-CR 10-0722
v.	DEPARTMENT B
RAFAEL ANGEL JARAMILLO, Appellant.	**MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-031235-001 SE

The Honorable Connie Contes, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
And Liza-Jane Capatos, Assistant Attorney General
Attorneys for Appellee

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

S W A N N, Judge

¶1 Rafael Angel Jaramillo ("Defendant") appeals the trial court's use of two historical prior felony convictions to

enhance his sentence after a jury found him guilty of 13 felony counts. Because we find no error in the sentence, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Defendant was indicted on six counts of armed robbery, class 2 dangerous felonies ("Counts 1 through 6"); six counts of kidnapping, class 2 dangerous felonies ("Counts 7 through 12"); and one count of misconduct involving weapons, a class 4 felony ("Count 13") for events that occurred February 6, 2008.[1] The state amended the indictment to allege Defendant had two "historical non-dangerous felony convictions" that it would use to enhance sentencing.

¶3 After trial, a jury found Defendant guilty on all counts. The jury also found two aggravating factors for each of Counts 1 through 12. The trial court found that Defendant had two historical prior felony convictions: armed robbery, a class 2 felony committed July 14, 2001; and misconduct involving weapons, a class 4 felony committed May 27, 2007.

¶4 The court sentenced Defendant to 15.75 years for each of Counts 1 through 12, which was the presumptive term for class 2 felonies committed by a defendant with two historical prior

[1] The facts of the underlying convictions are not at issue on appeal.

felony convictions. *See* A.R.S. § 13-604(D).[2] The court also imposed a presumptive 10-year sentence for Count 13. Defendant raised no objection to this sentence.

¶5 Defendant timely appeals. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A).

DISCUSSION

¶6 Defendant contends the trial court committed fundamental error when it used his two historical prior felony convictions to enhance his sentence on Counts 1 through 12, pursuant to A.R.S. § 13-604. We disagree.

¶7 We review for fundamental error because Defendant did not object to his sentence at the trial court. *See State v. Henderson,* 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Defendant bears the burden to demonstrate that fundamental error occurred and that he was prejudiced by it. *Id.* at ¶ 20. "Imposition of an illegal sentence constitutes fundamental error." *State v. Thues,* 203 Ariz. 339, 340, ¶ 4, 54 P.3d 368, 369 (App. 2002). "An unlawful sentence is one that is outside

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[2] We reference the version of A.R.S. § 13-604 in effect at the time the offense occurred (February 6, 2008). That statute defined "historical prior felony conviction" to include any prior felony that involved the use or exhibition of a deadly weapon or dangerous instrument; any class 2 or 3 felony that was committed within the ten years immediately preceding the date of the present offense; or any class 4, 5 or 6 felony that was committed within the five years immediately preceding the date of the present offense. *See* A.R.S. § 13-604(W)(3) (2008).

the statutory range." *State v. House*, 169 Ariz. 572, 573, 821 P.2d 233, 234 (App. 1991).

¶8 At issue here are various subsections of A.R.S. § 13-604. The sentencing order does not specify the subsection under which Defendant was sentenced, but it does designate Counts 1 through 12 as "[d]angerous" and "[r]epetitive" offenses.[3] The state's amended indictment alleged historical prior felony convictions "pursuant to A.R.S. § 13-604(A), (B), (C), (D), (G), (H), (U)."

¶9 In his opening brief, Defendant variously discusses A.R.S. § 13-604 (D), (G), (I), (J) and (K). Of those subsections, only (D) was noticed in the state's amended indictment.[4] Subsection (D) required a 14-year minimum, 15.75-year presumptive, and 28-year maximum sentence for a defendant convicted of a class 2 felony with two or more historical prior felony convictions. This is the exact sentencing range that was suggested by the presentence investigation and accepted by the court. We find no error.

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[3] "In order to facilitate appellate review, trial judges should indicate on the record the specific statutory subsection under which a criminal sentence is imposed." *State v. Anderson*, 211 Ariz. 59, 61 n.1, ¶ 4, 116 P.3d 1219, 1221 n.1 (2005).

[4] Although subsection (G) was noticed, it is not relevant because it discussed conviction of a class 4, 5 or 6 felony, and Counts 1 through 12 here were class 2 felonies.

¶10 We also find no error flowing from the fact that the court *could* have sentenced Defendant pursuant to subsection (I) because his historical prior convictions were designated "non-dangerous." *See* A.R.S. § 13-604(I) (providing a 7-year minimum, 10.5-year presumptive, and 21-year maximum sentence for "a first" conviction of a class 2 dangerous felony). *See also State v. Smith*, 171 Ariz. 54, 56, 828 P.2d 778, 780 (App. 1992) (finding "no merit" to defendant's assertion that the trial court should have sentenced him as a first-time offender and "ignore[d] his two prior felony convictions" simply because the current conviction was his "first dangerous nature conviction"); *State v. Laughter*, 128 Ariz. 264, 269, 625 P.2d 327, 332 (App. 1980) (finding "nothing" in A.R.S. § 13-604 that would prevent defendant convicted of armed robbery with two prior non-dangerous historical felony convictions from receiving the harsher sentence of a repeat offender rather than that imposed for a "first" dangerous offense).

¶11 Here, it is clear that the state never intended to use subsection (I) for sentence enhancement because the state did not include that subsection in its amended indictment. Instead the state gave Defendant notice of its intent to use subsection (D) and provided the court with a sentencing recommendation in accordance with that section. As such, Defendant was appropriately on notice of the full extent of the potential

lawful punishment he faced. *See State v. Benak,* 199 Ariz. 333, 337, ¶ 14, 18 P.3d 127, 131 (App. 2001) ("[F]undamental fairness and due process require that allegations that would enhance a sentence be made before trial so that the defendant can evaluate his options.").

¶12 Additionally, Defendant provides no authority to support his conclusion that merely because the court *could* have sentenced him pursuant to subsection (I), it committed fundamental error when it accepted the state's sentencing recommendation. *See State v. Moody,* 208 Ariz. 424, 443, ¶ 49, 94 P.3d 1119, 1138 (2004) ("We presume that a court is aware of the relevant law and applies it correctly in arriving at its ruling."). *See also State v. Munniger,* 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006) (finding defendant failed to meet burden to demonstrate prejudice when he asked appeals court to "speculate" that sentence imposed might have been different).

¶13 We also disagree with Defendant's assertion that the court's questions and exchanges with the prosecutor suggest that the court "was unfamiliar with the record, the significance of prior convictions, and the pertinent sentencing range." "We will not disturb a sentence that is within the applicable statutory range absent an abuse of the trial court's discretion." *State v. Joyner*, 215 Ariz. 134, 137, ¶ 5, 158 P.3d 263, 266 (App. 2007). However, "[e]ven when the sentence

imposed is within the trial judge's authority, if the record is unclear whether the judge knew he had discretion to act otherwise, the case should be remanded for resentencing." *State v. Garza*, 192 Ariz. 171, 176, ¶ 17, 962 P.2d 898, 903 (1998).

¶14 Here, the sentencing minute entry demonstrates that the court was aware the prior convictions were "non-dangerous." Contrary to Defendant's assertion, the transcript demonstrates the court questioned the prosecutor because it wanted to ensure a clear record of Defendant's prior convictions and their effect on sentencing. The transcript also clearly demonstrates that the court found "all 13 of these crimes are with two prior felony convictions." Defendant did not object to this discussion below and does not now claim that the court's findings were erroneous. Nor did Defendant offer a different sentencing recommendation; instead, he agreed that the presentence investigation report's recommended presumptive term was "probably appropriate under the circumstances and the reasons therein" and requested only that the court run the sentences concurrently. These facts distinguish the situation at bar from the cases cited by Defendant that required remand because the record revealed a misunderstanding of the law. *See State v. Stroud,* 209 Ariz. 410, 414, ¶¶ 20-21, 103 P.3d 912, 916 (2005) (finding error where sentencing court erroneously relied on defendant's statement that consecutive sentences were

required); *Garza,* 192 Ariz. at 175, ¶¶ 14, 16, 962 P.2d at 902 (finding error where trial court "wrongly felt . . . confined by a non-existent presumption"); *State v. LaBar,* 148 Ariz. 522, 524, 715 P.2d 775, 777 (App. 1985) ("Had the trial judge in this case decided that a consecutive sentence was discretionary rather than mandatory, it is possible that he would not have imposed it."); *State v. Pena,* 140 Ariz. 545, 551, 683 P.2d 744, 750 (App. 1983) ("Obviously the trial judge felt constrained to follow the law in effect at the time . . . . Had he realized a consecutive sentence was discretionary rather than mandatory, it is possible he would not have imposed it.").

CONCLUSION

¶15 For the foregoing reasons, we affirm.

/s/

PETER B. SWANN, Presiding Judge

CONCURRING:

/s/

DANIEL A. BARKER, Judge

/s/

PATRICIA K. NORRIS, Judge