IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JEREMY GEORGE THOMAS FLETCHER,
Appellant.

No. 2 CA-CR 2020-0107
Filed June 8, 2022

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20190657001
The Honorable Kimberly H. Ortiz, Judge

AFFIRMED IN PART; VACATED IN PART AND REMANDED

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Eppich authored the decision of the Court, in which Vice Chief Judge Staring concurred and Judge Brearcliffe concurred in part and dissented in part.

E P P I C H, Presiding Judge:

¶1 Jeremy Fletcher appeals from his convictions and sentences for three counts of armed robbery, three counts of aggravated robbery, one count of aggravated assault, two counts of burglary, and one count of fleeing from law enforcement. He contends the trial court erred in denying his motion for a mistrial following the state's reference to his in-custody status and that his conviction for aggravated assault resulted from a duplicitous charge. He further argues the court abused its discretion in sentencing. For the following reasons, we affirm Fletcher's convictions but vacate his sentences and remand for resentencing.[1]

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against Fletcher. *See State v. Gill*, 248 Ariz. 274, ¶ 2 (App. 2020). In early 2019, Fletcher and an accomplice, both masked, entered a Lucky Wishbone restaurant in Tucson, Arizona. Fletcher, wearing a gray and black jacket, flashed a gun, and the manager handed over the contents of a register. Four days later, Fletcher and an accomplice, both masked, robbed another Lucky Wishbone. Fletcher was again armed and wearing a gray and black jacket. Both robberies were recorded on surveillance video, and an image of a maroon sedan was captured during the second robbery. Early the next morning, an officer saw the maroon sedan and followed it. Fletcher was driving and led officers on a high-speed pursuit before crashing and fleeing on foot. He was quickly located and taken into custody.

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[1]Following Fletcher's trial on these counts, and prior to sentencing, he resolved other severed counts by plea agreement. The trial court sentenced him on the trial and plea counts at one hearing. The remand does not affect sentencing on the pled counts as they are not before this court.

¶3 Following a jury trial, Fletcher was convicted as described above. The trial court sentenced him to concurrent, enhanced terms of imprisonment for the counts associated with the first robbery, the longest of which was 17.75 years.[2] It also sentenced him to concurrent terms for those counts associated with the second robbery and fleeing from law enforcement, the longest being 15.75 years, to be served consecutively to the terms imposed for the counts associated with the first robbery. This appeal followed. We have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Motion for Mistrial

¶4 Fletcher contends the trial court abused its discretion by denying his motion for a mistrial after the state referred to his in-custody status. We review the court's ruling for an abuse of discretion, because "the trial judge is in the best position to assess the impact" of improper comments on the jury. *State v. Dann*, 205 Ariz. 557, ¶ 43 (2003). Mistrial is "the most dramatic remedy for trial error" and should only be granted if "justice will be thwarted unless the jury is discharged and a new trial granted." *Id.* (quoting *State v. Adamson*, 136 Ariz. 250, 262 (1983)).

¶5 Before trial, Fletcher filed a motion to preclude any mention of his in-custody status. The state did not object, but sought to introduce into evidence audio clips from phone calls Fletcher made from jail. In order to avoid references to his in-custody status, Fletcher stipulated to their admission. Nonetheless, at least one juror apparently realized that the recorded calls had been made from jail, asking if Fletcher was aware that "recorded conversations in custody are admissible in court."

¶6 Later in the trial, the state cross-examined one of Fletcher's witnesses, asking: "[Y]our role was to go down to the jail and do some measurements of his feet; correct?" Fletcher did not object. After the close of evidence, Fletcher moved the court for a mistrial based on the state's

[2]Fletcher committed the offenses while on release, subjecting him to a sentence two years longer than would otherwise be imposed. *See* A.R.S. § 13-708(D). The state ultimately requested to withdraw its allegation of release pursuant to § 13-708(D) as to the counts associated with the second robbery and fleeing from law enforcement, and the court granted the request.

reference to the jail, explaining that any limiting instruction would only call more attention to his in-custody status and that the comment had prejudiced the jury. The court denied his request, noting that the comment was minor and did not meet the standard for a mistrial, which it explained, in part, was "the probability that what [the jury] heard influenced [it] to the point where it can't make a decision."

¶7 In deciding a motion for mistrial due to an improper comment, the trial court must consider "whether the comments caused jurors to consider improper matters and the probability that the jurors were influenced by such comments." *State v. Murray*, 184 Ariz. 9, 35 (1995). The court's ruling will only be reversed if "palpably improper and clearly injurious." *Id.* (quoting *State v. Walton*, 159 Ariz. 571, 581 (1989)). Fletcher contends that the jury's knowledge that he was in custody while awaiting trial was "highly prejudicial" and "negate[d] the presumption of innocence." The state acknowledges that its "inadvertent" reference to the jail was "something the jury should not have heard," but counters that the remark did not prejudice Fletcher.

¶8 A defendant's presumption of innocence, which stems from the foundational principle that an accused has the right to a fair trial, requires courts to scrutinize procedures that might impair that presumption. *Estelle v. Williams*, 425 U.S. 501, 503-04 (1976). The state cannot compel a defendant to appear at trial in jail clothing because a "constant reminder of the accused's condition . . . may affect a juror's judgment." *Id.* at 504-05. Similarly, courts cannot "routinely place defendants in shackles," but must make case-specific determinations based on essential state policies. *Deck v. Missouri*, 544 U.S. 622, 630-33 (2005); *cf. Estelle*, 425 U.S. at 505. However, a defendant is not necessarily denied the presumption of innocence by a jury's knowledge of his in-custody status. *See Murray*, 184 Ariz. at 35 ("Certainly the jurors were aware that defendants were arrested and had spent some time in custody prior to trial. Such knowledge is not prejudicial and does not deny defendants the presumption of innocence."); *see also State v. Hardy*, 230 Ariz. 281, ¶¶ 53-55 (2012) (juror exposure to defendant in jail garb did not prejudice defendant).

¶9 Here, although the trial court incorrectly stated the standard for denying a mistrial, it reached the correct result because the state's reference to the jail was not clearly injurious. *See Murray*, 184 Ariz. at 35 (motion for mistrial based on evidence exposing defendant's in-custody status properly denied when information "not prejudicial"). Unlike forcing

a defendant to wear jail garb, the state's brief mention that Fletcher was in jail was not a "constant reminder of the accused's condition." *Estelle*, 425 U.S. at 504. Moreover, jurors were already aware Fletcher had been arrested and taken into custody, given officers' testimony describing Fletcher's flight from law enforcement, both in car and on foot, and his subsequent arrest and booking, to which Fletcher did not object. And, as reflected in a juror question, at least one juror had adduced that the audio recordings of Fletcher's phone calls were made from jail. Even Fletcher's opening statement indicated that the jury would hear a recorded phone call revealing "he's been booked, he's been arrested." The jury was aware Fletcher had been booked into jail, and consequently he has not shown that the state's brief reference to the jail warrants reversal.

Duplicitous Charge

¶10 Fletcher next argues that his conviction for aggravated assault should be reversed because of a risk that the jury did not reach a unanimous verdict given that it was instructed on three types of underlying assault and its verdict form did not specify which type supported his conviction. He therefore suggests that his aggravated assault charge was duplicitous. Duplicity is a question of law which we review de novo. *See State v. Ramsey*, 211 Ariz. 529, ¶ 5 (App. 2005).

¶11 Fletcher notes he "did not object to the instruction nor did he request specificity in the charges." Because he had the right to a unanimous jury verdict, *see* Ariz. Const. art. II, § 23, such a violation would constitute fundamental error but would only be reversible if a defendant suffered prejudice from the duplicitous charge, *State v. Waller*, 235 Ariz. 479, ¶ 34 (App. 2014).

¶12 Fletcher was charged with aggravated assault with a deadly weapon or dangerous instrument under A.R.S. § 13-1204(A)(2), an offense requiring the accused to have committed an underlying assault proscribed by A.R.S. § 13-1203. Fletcher's indictment did not specify which subsection of § 13-1203 he had violated in committing the underlying assault. The jury received the following instruction as to assault:

> The crime of assault requires the proof that the defendant:
>
> 1. Intentionally, knowingly, or recklessly caused a physical injury to another person; ***or***

> 2. Intentionally put another person in reasonable apprehension of imminent physical injury; ***or***
>
> 3. Knowingly touched another person with the intent to injure, insult, or provoke that person.

It subsequently found Fletcher guilty of aggravated assault, and the verdict form did not require the jury to indicate which of the three types of assault constituted the underlying assault. Fletcher reasons that because there was "no instruction that the jury had to be unanimous as to which method of assault [he] committed" and because it was instructed on all three types, the jury instructions resulted in a duplicitous charge.

¶13 A duplicitous charge arises when "the text of an indictment refers only to one criminal act, but multiple alleged criminal acts are introduced to prove the charge." *State v. Klokic*, 219 Ariz. 241, ¶ 12 (App. 2008). A duplicitous charge differs from a duplicitous indictment, which charges two or more distinct crimes in a single count and is facially defective, because whether a charge is duplicitous "depends on the evidence and theories presented at trial" rather than solely the text of the indictment. *Waller*, 235 Ariz. 479, ¶¶ 31-32. Although Fletcher's indictment was for one distinct crime, aggravated assault under § 13-1204(A)(2), he correctly notes that the three types of underlying assaults proscribed by § 13-1203 are separate and distinct crimes.[3] *See State v. Freeney*, 223 Ariz. 110, ¶¶ 16-17 (2009); *In re Jeremiah T.*, 212 Ariz. 30, ¶ 12 (App. 2006).

¶14 Here, the state's evidence went to only one type of underlying simple assault, "intentionally placing another person in reasonable apprehension of imminent physical injury," § 13-1203(A)(2), and therefore the basis for the jury's verdict was clear. The state presented evidence that Fletcher had "flashed" or "waved" a weapon, and then returned it to his

[3]Although Fletcher's indictment might have been insufficient for its failure to specify the type of assault supporting the aggravated assault charge, he waived any claim for relief based on a defective indictment. *See* Ariz. R. Crim. P. 13.5(d) (defendant must object to defective indictment by filing a motion under Rule 16); Ariz. R. Crim. P. 16.1(b) (pretrial motions must be made twenty days prior to trial); *see also Waller*, 235 Ariz. 479, n.9 (aggravated assault indictment could have been challenged as vague or indefinite for failing to specify nature of underlying assault, but defendant had waived any claim for relief).

jacket pocket. There was no evidence of any physical injury or touching that might constitute the other two types of assault. *See* § 13-1203(A)(1), (3). In the state's closing argument, it explained that the victim "was scared he might get hurt by [the gun]," and that Fletcher would be guilty of assault if he "intentionally put another person in reasonable apprehension of imminent physical injury." Fletcher evidently shared this understanding because, in arguing his Rule 20, Ariz. R. Crim. P., motion, he stated, "we have no testimony about injury or touching. So we are working under this theory of intentional or intent to put someone in reasonable apprehension of their safety." Accordingly, Fletcher has not shown prejudice by demonstrating that a reasonable jury could have reached a non-unanimous verdict on the record before us. *See State v. Delgado*, 232 Ariz. 182, ¶ 19 (App. 2013).

Imposition of Consecutive Sentences

¶15 Fletcher also argues the trial court abused its discretion by sentencing him to consecutive sentences based on "a presumption in favor of consecutive sentences for separate offenses and separate victims." We will not disturb the court's broad discretion in sentencing absent an abuse of discretion. *State v. Ward*, 200 Ariz. 387, ¶ 5 (App. 2001). However, committing an error of law in reaching a discretionary conclusion can be an abuse of discretion. *State v. Wall*, 212 Ariz. 1, ¶ 12 (2006). If a court relies on "inappropriate factors and it is unclear whether the judge would have imposed the same sentence absent the inappropriate factors, the case must be remanded for resentencing." *State v. Garza*, 192 Ariz. 171, ¶ 17 (1998) (quoting *State v. Ojeda*, 159 Ariz. 560, 561 (1989)); *see State v. Johnson*, 229 Ariz. 475, ¶ 20 (App. 2012) (remand for resentencing where record did not indicate whether court would impose the same sentence after reconsideration). Because Fletcher did not object on this basis, we review for fundamental, prejudicial error. *See State v. Escalante*, 245 Ariz. 135, ¶¶ 12, 21 (2018).

¶16 Prior to sentencing, Fletcher requested the trial court sentence him to concurrent terms for all counts because they were committed "within just a few days as part of a series of related actions" with a singular state of mind. In his sentencing memorandum, he cited *State v. Perkins*, 144 Ariz. 591 (1985), *overruled on other grounds by State v. Noble*, 152 Ariz. 284, 288 (1987), which he asserted considered factors for determining whether multiple offenses were committed on the same occasion. Fletcher argued that although his offenses did not "meet the standards outlined in *Perkins*," the "crimes within each incident [did]."

¶17 At sentencing, the trial court explained to Fletcher that "there were two distinct armed robberies that you were convicted of with two different sets of victims," and "our case law and our statutes don't favor providing concurrent sentences when we have separate harm to separate people on separate occasions." It later repeated,

> Our statutes and our case law do not favor giving concurrent sentences on that. Separate people were injured. Separate people have emotional harm. And when I say injury, things that they will relive in their heads for the rest of their lives, not actual physical harm. That sentence will run consecutively to the other counts.

The court did not indicate which statute or cases it was referring to when making these comments.

¶18 On appeal, Fletcher asserts the trial court held a mistaken belief that there was a presumption in favor of consecutive sentences. He assumes the court's remarks referred to A.R.S. § 13-711, which governs concurrent and consecutive determinations for multiple sentences of imprisonment. We agree with Fletcher that, to the extent the court believed such a presumption existed, it was mistaken.[4] *See Garza*, 192 Ariz. 171, ¶ 12. Fletcher argues that a remand for resentencing is appropriate because the record is unclear as to whether the court misunderstood the sentencing law.

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[4]The version of § 13-711(A) in effect at the time of Fletcher's offenses stated, in relevant part, that "if multiple sentences of imprisonment are imposed on a person at the same time, the sentence or sentences imposed by the court shall run consecutively unless the court expressly directs otherwise . . . ." 2007 Ariz. Sess. Laws, ch. 20, § 1; 2008 Ariz. Sess. Laws, ch. 301, § 27 (renumbered as § 13-711). This language was amended before Fletcher's sentencing, and now states, "if multiple sentences of imprisonment are imposed on a person at the same time, the sentences imposed by the court may run consecutively or concurrently, as determined by the court." *See* § 13-711(A) (effective Aug. 27, 2019). Although the change was procedural and thus applicable to Fletcher, *see State ex rel. Montgomery v. Harris*, 232 Ariz. 34, ¶ 5 (App. 2013) ("statute may be applied retroactively if it is procedural in nature"), it does not alter our analysis but instead clarifies that the legislature intended no presumption in favor of consecutive sentences.

See State v. Stroud, 209 Ariz. 410, ¶ 21 (2005) (remand for resentencing where trial court mistakenly thought consecutive sentence was mandatory rather than discretionary).

¶19 The state counters that taken in context, the trial court's comments more likely referred to Fletcher's argument that the court should grant concurrent sentences because the crimes were like a "spree" under *Perkins*. It points out that the court knew it had the discretion to impose concurrent sentences because it sentenced him to concurrent terms for all the counts associated with the first robbery, despite multiple victims. The state also notes that the court used the term "favor," rather than "presumption," and that even if the court believed consecutive terms were favored, it does not follow that it also believed it lacked the discretion to impose concurrent sentences.

¶20 Although the sentences imposed were within the trial court's authority, its explanation that "statutes and our case law do not favor giving concurrent sentences," indicates the court believed concurrent sentences were *disfavored* for crimes with "separate harm to separate people on separate occasions." Because the applicable sentencing statute, § 13-711, does not disfavor concurrent sentences, the court appears to have relied on an incorrect interpretation. This seems particularly likely given that the statute had only recently been amended, and its previous versions have caused confusion over the years. *See, e.g.*, *Garza*, 192 Ariz. 171, ¶¶ 8-12 (discussing court of appeals cases with differing interpretations on existence of statutory presumption). Alternatively, even if, as the state speculates, the court was referring to *Perkins* when it mentioned "statutes and our case law," *Perkins* does not suggest that concurrent sentences are disfavored for separate crimes on separate occasions. *See* 144 Ariz. at 598.[5]

¶21 As the state points out, the trial court sentenced Fletcher to concurrent terms regarding the first robbery for multiple victims. However, this does not resolve the court's apparent belief that concurrent sentences were disfavored. Even if it knew it had the discretion to reject a "favor[ed]" outcome, its comments suggest it incorrectly began its

[5]*Perkins* was overruled to the extent it suggested A.R.S. § 13-604, which at the time governed sentence enhancement, "in any way limits a judge's ability to impose consecutive sentences." *Noble*, 152 Ariz. at 287-88. *Noble* did not suggest that concurrent sentences are disfavored but only that it is within a judge's authority to impose consecutive, enhanced sentences for crimes committed on the same occasion. *Id.*

sentencing calculus on a scale already balanced toward consecutive sentences, and consistent with that scale, ordered consecutive sentences for the crimes committed on separate occasions. It is unclear on this record whether the court would have imposed the same sentences absent this misunderstanding, given the complex balancing of mitigating and aggravating factors that a trial court must carry out to "impose a proper sentence—one that is not excessive or unduly harsh and that fits the crime and the criminal." *Garza*, 192 Ariz. 171, ¶¶ 17-18.

¶22 Our dissenting colleague argues that "[w]e should not blithely reverse a legal sentence, supported by the evidence, that falls within the trial court's discretion." We agree. But the issue here is not whether the evidence is sufficient to support consecutive sentencing, or whether the court had the discretion to impose such a sentence. Rather, we are faced with a situation in which, based on the court's comments, we cannot say with confidence that it correctly interpreted the law in deciding how to exercise its discretion. And while we generally presume a court knows and correctly applies the law, *State v. Williams*, 220 Ariz. 331, ¶ 9 (App. 2008), that presumption must yield when the record suggests an error has occurred, *see Hart v. Hart*, 220 Ariz. 183, ¶ 18 (App. 2009), particularly where, as here, the law at issue has been amended a number of times and has proven confusing in the past.

¶23 The dissent relies upon dictionary distinctions between the words "favor" and "disfavor." But the record is silent as to whether the trial court was making those same distinctions. Indeed, while the dissent offers that, absent further proof, the court did not *necessarily* mean that the law disfavored concurrent sentences and favored consecutive ones, it concedes that the court *could have* meant that.[6] This is precisely the type of ambiguous situation requiring clarification under *Garza*. *See* 192 Ariz. 171, ¶ 17. Accordingly, we must vacate Fletcher's sentences and remand for

[6] In an effort to neutralize the trial court's comments, by distinguishing them from "disfavored," our dissenting colleague overlooks essentially identical language in case law. *See Piner v. Superior Court*, 192 Ariz. 182, ¶ 8 (1998) ("We do not favor accepting special action jurisdiction to review the propriety of interlocutory orders and pretrial rulings, such as orders granting or denying partial summary judgment."); *Dixon v. Picopa Constr. Co.*, 160 Ariz. 251, 256 (1989) ("court does not favor bestowing immunities from tort liability for negligence on preferred classes of defendants").

resentencing, without expressing an opinion on what those sentences should be. *See id.* ¶¶ 17-18.

Disposition

¶24 For the foregoing reasons, we affirm Fletcher's convictions but vacate his sentences and remand for resentencing.

B R E A R C L I F F E, Judge, concurring in part and dissenting in part:

¶25 I concur in the decision in all but its conclusion that the sentencing was improper and in its consequent remand.

¶26 There is no basis to say that the sentence the trial court meted out is illegal or, as the majority concludes, *potentially* an improper exercise of the trial court's sentencing discretion. In its decision, the majority endeavors to read the court's mind to reach a conclusion at odds with the plain meaning of its statements at sentencing. The majority determines that the court did not exercise its sentencing discretion at all, but instead imposed consecutive sentences because it felt constrained to do so. The record does not reflect that and the reasoning the majority uses to find error and vacate the sentence is both incorrect and contrary to traditional use of this court's appellate power.

¶27 The question here is whether the statements made by the trial court regarding concurrent versus consecutive sentencing betray a misunderstanding of its power. That is, whether the court necessarily believed that the consecutive sentences for certain counts were required by law. On review, we are supposed to view the facts and all reasonable inferences therefrom in the light most favorable to upholding the convictions and sentences. *State v. Morgan*, 248 Ariz. 322, ¶ 2 (App. 2020); *see also State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2 (App. 2008). The relevant "facts" we are called to review here as to the allegedly erroneous sentences are the sentences actually given and the statements made by the court at the time of sentencing regarding the breadth of its discretion.

¶28 The majority decision initially states: "We agree with Fletcher that, *to the extent the court believed such a presumption existed*, it was mistaken." (Emphasis added.) Having determined—correctly—that a court believing such a presumption exists would be mistaken, the majority then takes the factual leap that the trial court *did* believe such a presumption existed and thus erred. But it can only make such a leap by failing to

construe the evidence (that is, the record) in the light most favorable to upholding the sentence.

¶29 The majority states:

> Although the sentences imposed were within the trial court's authority, its explanation that "statutes and our case law do not favor giving concurrent sentences," indicates the court believed concurrent sentences were *disfavored* for crimes with "separate harm to separate people on separate occasions." Because the applicable sentencing statute, § 13-711, does not disfavor concurrent sentences, the court appears to have relied on an incorrect interpretation.

¶30 But the trial court's statement that the law does "not favor" concurrent sentences does not, as the majority surmises, indicate that the court misunderstood the law to *disfavor* concurrent sentences. "To disfavor" something is "[t]o view or treat with dislike or disapproval." The American Heritage Dictionary 517 (5th coll. ed. 2011). Alternatively, "to favor" something is to show it "[u]nfair partiality" or "favoritism." The American Heritage Dictionary 644 (5th coll. ed. 2011). To say, as the court did here, that the law does "not favor" concurrent sentences, is not the same as saying the law *disfavors* them or *favors* an alternative. It certainly does not *necessarily* mean the court believed the law disfavored concurrent sentences and favored consecutive ones. Of course, the court *could have* meant that, but it did not *necessarily* mean that and, absent further proof, we ought not assume that it did and vacate a lawful sentence supported by the evidence when we could take its statement at face value. Instead, we are charged to view the court's statement in the light most favorable to upholding its validity. We should assume that the court meant the law *neither favors nor disfavors* concurrent sentences—which also has the benefit of being true. *State v. Williams*, 220 Ariz. 331, ¶ 9 (App. 2008) (we presume the court knows and follows the law). What the majority does here abandons our charge and views the facts and reasonable inferences in the light *least favorable* to upholding the sentence.

¶31 But still more problematically, when faced with obvious contradictory facts—namely that the trial court gave concurrent sentences for convictions involving separate victims where it (apparently) believed the law directed it not to—the majority doubles down:

> As the state points out, the trial court sentenced Fletcher to concurrent terms regarding the first robbery for multiple victims. However, this does not resolve the court's apparent belief that concurrent sentences were disfavored. Even if it knew it had the discretion to reject a "favor[ed]" outcome, its comments suggest it incorrectly began its sentencing calculus on a scale already balanced toward consecutive sentences, and consistent with that scale, ordered consecutive sentences for the crimes committed on separate occasions.

¶32 If the trial court truly believed that concurrent sentences for crimes against separate victims were disfavored or that it was bound not to impose them, it would logically not have sentenced Fletcher to concurrent terms for the January 31 robbery against three different victims—J.T., K.S., and their employer. Nor would it have imposed concurrent sentences for the robbery on February 4 against two different victims—J.R. (aka M.R.) and her employer. Nonetheless, even where the facts clearly belie the majority's supposition as to what the court believed, it nonetheless persists in declaring error.

¶33 This court is of course bound by *State v. Garza*, 192 Ariz. 171 (1998). But this case is not *Garza*. In *Garza*, the trial judge plainly stated that he was bound by a legal presumption of consecutive sentencing. The judge—with no interpretation needed—stated at the conclusion of the sentencing hearing that he felt the sentence he was giving was "clearly excessive" but that he was "bound by the law to [sentence] in the fashion that I am doing it" "because of the presumption that the sentences have to run consecutively." *Id.* ¶ 7. The judge went further by entering a special order allowing the defendant "to seek relief from the board of executive clemency because he found the sentence 'clearly excessive.'" *Id.* ¶ 6. In ultimately reversing the sentence, and vacating the court of appeals affirmance, the supreme court held that there was no such legal presumption, and that because the law "creates no presumption of consecutive sentences, the judge wrongly felt himself confined by a non-existent presumption." *Id.* ¶ 14.

¶34 Although the supreme court acknowledged there, as here, that the court's inconsistent sentencing could have indicated it was aware of its discretion—as the Court of Appeals concluded—it held that there was

no other way to interpret the trial court's statements: "Although parts of the record may be open to a variety of interpretations, one point is clear: the judge felt bound to impose a sentence he did not wish to impose." *Id.* ¶ 15. The supreme court further stated:

> Examining the sentencing proceeding, we conclude that one of two things occurred: Either the judge knew he had discretion and failed to exercise it, thus imposing a sentence he thought harsh and excessive and referring the case to the board of executive clemency for review, or he did not realize the extent of the discretion available to him. Ultimately, it does not matter which actually occurred because in either instance the judge failed to properly exercise his discretion.

Id. ¶ 16.

¶35 Although one of *Garza's* holdings is that "if the record is unclear whether the judge knew he had discretion to act otherwise, the case should be remanded for resentencing," another is equally apropos here: "When a judge has discretion and fails to recognize his obligation to use that discretion to avoid imposing a sentence he believes is excessive, we must conclude he abused or failed to exercise that discretion." *Id.* ¶ 18. In *Garza*, there was no question that the trial court felt bound by a legal presumption that did not exist. Here, while the court used an arguably ambiguous phrase in stating that the law did "not favor" concurrent sentences, nowhere did the court claim it was bound or even believed it was bound by a legal presumption or statute and had no discretion. Certainly the concurrent sentencing on other counts belies any claim that the court felt legally bound by such a presumption and sufficiently settles any doubt that might have arisen from the court's otherwise accurate statement of the law.

¶36 We should not blithely reverse a legal sentence, supported by the evidence, that falls within the trial court's discretion. Because the majority mistakenly puts the worst possible gloss on the trial court's statements, and fails to credit the record in full, I respectfully dissent in part.