DIVISION ONE
FILED: 05-27-2010
PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 08-0995
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	
	)	(Not for Publication –
ANTHONY JON CERVANTES,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2001-003989-001 DT

The Honorable Larry Grant, Judge

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

Park Law Office, PLC — Phoenix
by James Sun Park
Attorneys for Appellant

W E I S B E R G, Judge

¶1 Anthony Jon Cervantes ("Defendant") appeals from his convictions following a jury trial on two counts of sexual

exploitation of a minor and from the sentences imposed. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Defendant was indicted on four counts of sexual exploitation of a minor, class 2 felonies and dangerous crimes against children. Each count alleged that on March 2, 2001, Defendant knowingly possessed a photograph of a male child under the age of fifteen years ("J.A."), in which the minor was engaged in explicit exhibition and other sexual conduct as those terms are defined. Prior to trial, pursuant to the State's motion, the court dismissed Count 2 of the indictment.

¶3 The evidence presented at trial showed that in 2001, Defendant was the house manager of a residential group home for children. He lived in a separate room in the garage. The parties stipulated that J.A. was born on September 23, 1990 and resided at the home from January 9, 1998 to March 13, 2001.

¶4 On March 7, 2001, the owner of the home placed Defendant on leave. On March 13, 2001, he directed two staff members to prepare the home for a fire inspection. While cleaning out Defendant's room, the two staff members found three or four photographs of J.A. performing sexual acts. They notified the owner of the home and called the police.

¶5 Police officers arrived at the scene and secured it. Pursuant to a warrant, the police searched Defendant's room and

seized the photographs of J.A and a videotape depicting sexual acts between Defendant and J.A.[1] Although Defendant did not testify at trial, his defense was that the State failed to prove beyond a reasonable doubt that he possessed the photographs on March 7, 2001.

¶6 After the close of evidence and without objection, the jury was instructed that "Sexual Exploitation of a Minor, in Counts 1, 2 and 3 . . . requires proof that the defendant knowingly possessed any photograph in which a minor was engaged in explicit and other sexual conduct." The verdict forms referred to the charge of "Sexual Exploitation of a Minor" and described each of the three photographs of a "male child" engaged in specific sexual conduct. Defendant did not object to the verdict forms. The jury was not asked to determine nor did it find beyond a reasonable doubt that the male child depicted in the photographs was under the age of fifteen.

¶7 The jury convicted Defendant on Counts 1, 2 and 4 of the indictment (renumbered for trial as Counts 1, 2 and 3). After the verdict, the State moved to dismiss Count 3 of the indictment. The judge found two aggravating factors, namely that Defendant held a position of trust and the impact on the victim. The court sentenced Defendant on Counts 1 and 4 to aggravated

[1]The police seized over 100 photographs and several videotapes involving other young boys performing sexual acts.

terms of imprisonment of 24 years on each count, the sentences to run consecutively, and awarded 2,800 days of presentence incarceration credit.[2] Defendant timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001), and 13-4033 (A) (2001).

DISCUSSION

¶8 Defendant argues for the first time on appeal that because the jury did not find that the victim was under the age of fifteen, Defendant was not guilty of the offenses that are punishable under former A.R.S. § 13-604.01 (2001) governing sentences for dangerous crimes against children. He contends that his sentences are illegal, that this constitutes fundamental, reversible error and that he must be resentenced without regard to this statute. The State responds that even assuming it was error to fail to submit the victim's age to the jury, such error does not require reversal. We agree.

¶9 Because Defendant failed to object to the alleged sentencing error, we review only for fundamental error. Ariz. R. Crim. P. 21.3(c); *State v. Henderson,* 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). "To prevail under this standard

[2]Defendant was indicted in March 2001 but was not convicted and sentenced until 2008 due to procedural matters not relevant to this appeal.

of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* at ¶ 20. To establish fundamental error, a defendant must show that the "error complained of goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *Id.* at 568, ¶ 24, 115 P.3d at 608. The showing of prejudice is a "fact-intensive" inquiry and "differs from case to case." *Id.* at ¶ 26. In *Henderson,* for example, our supreme court determined fundamental error occurred when the trial judge, applying a preponderance of the evidence standard, found aggravating factors used to enhance the defendant's sentence when under the Sixth Amendment, those factors should have been found by a jury beyond a reasonable doubt. *Id.* ¶ 25. In deciding whether there was prejudice, the court held that the defendant "must show that a reasonable jury, applying the appropriate standard of proof, could have a reached a different result." *Id.,* 210 Ariz. at 569, ¶ 27, 115 P.3d at 609.

¶10 Section 13-3553(A)(2010) provides in part that, "[a] person commits sexual exploitation of a minor by knowingly . . . possessing . . . any visual depiction in which a minor is

engaged in exploitive exhibition or other sexual conduct."[3] Former A.R.S. § 13-1553(D) provided that "Sexual exploitation of a minor is a class 2 felony and if the minor is under fifteen years of age it is punishable pursuant to section 13-604.01" (now section 13-705). Under former A.R.S. § 13-604.01(L)(1)(g), "'[d]angerous crime against children' means any of the following that is committed against a minor who is under fifteen years of age . . . Sexual exploitation of a minor."

¶11 Defendant relies on *State v. Ortega,* 220 Ariz. 320, 327, ¶¶ 20-21, 206 P.3d 769, 776 (App. 2008), which held that "under fifteen years of age" is an essential element of the offense of sexual conduct with a minor under A.R.S. § 13-1405(B) and that this element must be proven beyond a reasonable doubt and submitted to a jury for its verdict. He argues that by analogy, the age of the victim under A.R.S. § 13-3553 is an essential element of the offense and must be submitted to the jury for its determination. Although acknowledging that he stipulated that the victim was under the age of fifteen, he relies on *State v. Virgo,* 190 Ariz. 349, 353, 947 P.2d 923, 927 (App. 1997), which held that a stipulation of fact concerning an element of an offense is not binding on the jury and "[i]f a jury verdict does not include an offense element, any stipulated

[3]We cite the current version of subsection A of A.R.S. § 13-3553 because no revisions material to this decision have since occurred.

facts related to the element may not be considered proven, and a sentencing judge may not rely on the stipulation to supply the element." In that case, although the parties stipulated that the defendant possessed more than four pounds of marijuana, because the jury did not determine beyond a reasonable doubt the weight of the marijuana, the judge could only sentence defendant for a class 6 felony, rather than a class 4 felony. *Id.* at 354, 947 P.2d at 928.

¶12 Assuming without deciding that the victim's age is an essential element of A.R.S. § 13-3553 and it was error to fail to instruct the jury on this element and to include it in the verdict forms, such error was not fundamental, reversible error under *Henderson*. Here, the victim's age was not a contested issue in the case. Defendant stipulated to J.A.'s date of birth which indisputably established that he was under the age of fifteen when Defendant committed the offenses. During closing argument, defense counsel told the jury that "[t]he sole issue in this case is possession, whether Mr. Cervantes possessed those three photographs."

¶13 The United States Supreme Court in *Neder v. United States,* 527 U.S. 1, 16-17 (1999), held that omission of an element from the jury instructions is not structural error and is subject to harmless error review. There, the Court determined that although the materiality of falsehood was an

essential element of a federal tax offense and the jury was not instructed on this element, such omission was harmless beyond a reasonable doubt because the omitted element was not contested and there was overwhelming evidence to support it. *Id.* at 19-20. *See also Washington v. Recuenco,* 548 U.S. 212, 220-222 (2006) (failure to submit to jury sentencing factor of "armed with a gun" not structural error and subject to harmless error review); *State v. Finch,* 202 Ariz. 410, 415, ¶ 20, 46 P.3d 421, 426 (2002)(court's failure to instruct jury on proximate cause was not fundamental error because causation was not at issue in case); *State v. Fullem*, 185 Ariz. 134, 139, 912 P.2d 1363, 1368 (App. 1995) (failure to instruct jury on intent not fundamental error where that element of offense not a contested issue).

¶14 In *State v. Garcia,* 200 Ariz. 471, 474-75, ¶¶ 20-24, 28 P.3d 327, 330-31 (App. 2001), this court considered a similar issue to the one presented here. Defendant was convicted of, among other crimes, indecent exposure under A.R.S. § 13-1402. Defendant argued on appeal that the conviction should be reduced from a felony to a misdemeanor under section 1402(B) because the jury was neither instructed on, nor found as an essential element of the offense that the victim was under fifteen. The victim testified at trial, however, that she was born on December 23, 1988. The indictment alleged that the offense occurred between December 23, 1994 and December 1996, and

defendant did not dispute the vicitm's age at trial or even on appeal. *Id.* ¶¶ 21. This court noted that the undisputed evidence was that the victim was at most eight years old when the offense occurred and that the defendant did not contest this fact. It concluded that any error in failing to instruct the jury on this presumed element of felony indecent exposure was harmless beyond a reasonable doubt. *Id.* at 475, ¶ 24, 28 P.3d at 331.

¶15 Similarly, in this case, Defendant did not dispute that the victim was under fifteen years old when the offenses occurred and stipulated to this fact. He did not contest this issue at trial or even on appeal. His sole defense was that the State failed to prove beyond a reasonable doubt that he possessed the photographs. Under *Henderson,* Defendant has not shown that any error in failing to instruct the jury on the victim’s age went to the foundation of the case, deprived him of a right that was essential to his defense and was of such magnitude that he could not possibly have received a fair trial. Thus, the alleged error was not fundamental. Further, Defendant cannot show prejudice. On this record, even if properly instructed, no reasonable jury could have failed to find beyond a reasonable doubt that the victim was under fifteen years of age when Defendant committed the offenses.

¶16 We agree with the State that because *Virgo* was decided prior to *Neder, Recuenco and Henderson,* it may not reflect the most current jurisprudence on this issue. Furthermore, the result in *Virgo* was based in part upon the facts of the case. In determining that a stipulation as to the weight of the marijuana was not proof beyond a reasonable doubt as to its weight, the court stated that "[t]his is particularly true when the evidence reflects that the vehicle also contained another person and other marijuana of a smaller quantity." *Virgo,* 190 Ariz. at 354, 947 P.2d 928.

¶17 Defendant has failed to show that any error in the jury instructions and verdict forms regarding the victim's age was fundamental, reversible error. Accordingly, the trial court did not err in sentencing Defendant for sexual exploitation of a minor, a dangerous crime against children, subject to the provisions of A.R.S. § 13-604.01.[4]

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[4]In a footnote in his opening brief, Defendant states that he also objects to the aggravated sentences imposed and contends that his sixth amendment rights were violated because the judge, not the jury, found the aggravating factors. Under Rule 31.13(c)(1)(iv), (vi), Arizona Rules of Criminal Procedure, opening briefs must contain a statement of facts with "appropriate references to the record" and arguments with "citations to the authorities, statutes and parts of the record relied on" and must set forth the "proper standard of review on appeal". Failure to properly present and argue an issue under Rule 31.13 (1) constitutes an abandonment and waiver of that claim. *State v. Carver,* 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989). Defendant has failed to preserve these issues for appellate review.

CONCLUSION

¶18 For the foregoing reasons, we affirm Defendant's convictions and sentences.

/s/_____
SHELDON H. WEISBERG, Judge

CONCURRING:

/s/_____
MICHAEL J. BROWN, Presiding Judge

/s/_____
JON W. THOMPSON, Judge