IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

RONALD JOHN BRUGGEMAN,
Petitioner.

No. 2 CA-CR 2015-0422-PR
Filed September 8, 2016

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NOT FOR PUBLICATION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. 31.24.

Petition for Review from the Superior Court in Pima County
No. CR20120237001
The Honorable Deborah Bernini, Judge

REVIEW GRANTED; RELIEF GRANTED

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines and Nicolette Kneup, Deputy County Attorneys, Tucson
Counsel for Respondent

Law Offices of Erin E. Duffy, P.L.L.C., Tucson
By Erin E. Duffy
Counsel for Petitioner

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Eckerstrom concurred.

M I L L E R, Judge:

¶1 Ronald Bruggeman seeks review of the trial court's order summarily denying his petition for post-conviction relief brought pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court clearly abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We grant review to address this court's case law regarding whether an attempt conviction under A.R.S. § 13-1001 stands alone, or is integrally related to the completed offense under the sex crimes statutes at issue in this case for sentence enhancement purposes. For the reasons that follow, we grant relief and remand for an evidentiary hearing.

¶2 After a jury trial, Bruggeman was convicted of public sexual indecency to a minor under the age of fifteen. The trial court found the state had proven prior convictions in four cause numbers and noted the state had "elected to use" the convictions in two of those cause numbers—CR51327 and CR20071159—for sentence enhancement purposes. The court then imposed a presumptive, enhanced, ten-year prison term pursuant to A.R.S. § 13-1403(D).[1] We affirmed Bruggeman's conviction and sentence on appeal. *State v. Bruggeman*, No. 2 CA-CR 2013-0041, ¶ 23 (Ariz. App. Jan. 30, 2014) (mem. decision).

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[1]The trial court referred to A.R.S. § 13-1402(D) at sentencing, which governs enhanced sentences for convictions of indecent exposure. Bruggeman was convicted under § 13-1403, which contains a materially identical sentence enhancement provision.

¶3 Bruggeman then sought post-conviction relief, arguing his enhanced sentence was improper because his conviction in CR51327 was for attempted public sexual indecency instead of a completed offense, and his sentence therefore was not eligible for enhancement under § 13-1403(D). He additionally claimed his trial and appellate counsel had been ineffective for failing to raise the issue. The trial court summarily denied relief, concluding that Bruggeman's sentence was properly enhanced. This petition for review followed.

¶4 Bruggeman was convicted on two counts of public sexual indecency in 1987 in CR021996 and on another count in 1990 in CR32858, all involving a minor under the age of fifteen. In CR51327, although the police officer testifying at Bruggeman's priors trial stated the conviction had also been for public sexual indecency to a minor under the age of fifteen, the judgment shows the offense was "attempted public sexual indecency to a minor under fifteen," committed in 1995. In CR20071159, Bruggeman was convicted of having committed indecent exposure to a minor[2] under the age of fifteen in 2007. Bruggeman's convictions in CR51327 and CR20071159 are historical prior felony convictions as defined in A.R.S. § 13-105(22)(d).

¶5 Pursuant to § 13-1403(D), a person convicted of public sexual indecency to a minor under the age of fifteen is subject to an enhanced sentence if that person "has two or more historical prior felony convictions for a violation of this section or § 13-1402 involving indecent exposure or public sexual indecency to a minor who is under fifteen years of age." Bruggeman asserts, as he did in

[2]In its ruling denying post-conviction relief, the trial court observed the state had alleged Bruggeman was convicted in CR20071159 of two counts of public sexual indecency to a minor under fifteen. In our decision affirming Bruggeman's convictions in that cause number, however, we noted that Bruggeman had appealed from convictions for "one misdemeanor count of indecent exposure and one felony count of indecent exposure to a minor under the age of fifteen." *State v. Bruggeman*, No. 2 CA-CR 2009-0082, ¶ 1 (Ariz. App. Nov. 25, 2009) (mem. decision).

his petition for post-conviction relief, that because "the statute does not reference attempt," his conviction in CR51327 does not qualify him for an enhanced sentence.

¶6 To the extent Bruggeman raises a sentencing claim pursuant to Rule 32.1(c), Ariz. R. Crim. P., the claim is precluded because he could have raised it on appeal and did not do so. *See* Ariz. R. Crim. P. 32.2(a)(3). Nonetheless, we examine whether the attempt conviction permits sentence enhancement under § 13-1403(D) to assess whether he made a colorable claim that his trial and appellate counsel were ineffective for failing to raise this issue.

¶7 Sentencing claims involving statutory construction are reviewed de novo. *See State v. Bomar*, 199 Ariz. 472, ¶ 5, 19 P.3d 613, 616 (App. 2001); *see also State v. Johnson*, 210 Ariz. 438, ¶ 8, 111 P.3d 1038, 1040 (App. 2005) (challenges to legality of sentence reviewed de novo). When interpreting a statute, we look first to the language as the best indicator of the legislature's intent, and "'when the language is clear and unequivocal, it is determinative of the statute's construction.'" *State v. Hansen*, 215 Ariz. 287, ¶ 7, 160 P.3d 166, 168 (2007), *quoting Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, ¶ 8, 152 P.3d 490, 493 (2007).

¶8 In support of his argument, Bruggeman relies primarily on *State v. Peek*, 219 Ariz. 182, 195 P.3d 641 (2008). In that case, our supreme court determined that, pursuant to the version of A.R.S. § 13-902(E) in effect at the time of Peek's offenses, a trial court could not impose lifetime probation for an attempt conviction even when the completed offense would permit lifetime probation. *Peek*, 219 Ariz. 182, ¶¶ 11-19, 195 P.3d at 643-44. The court reasoned that, because the plain language of the statute encompassed only "'a felony offense that is included in chapter 14 of [Title 13],'" it did not include attempt offenses, which are instead found "in chapter 10 of Title 13." *Id.* ¶¶ 11-12, *quoting* former § 13-902(E); *see* 1993 Ariz. Sess. Laws, ch. 255, § 17; 1994 Ariz. Sess. Laws, ch. 317, § 4.

¶9 We agree with Bruggeman that the same reasoning applies here. Admittedly, the statute addressed in *Peek* contained different language than § 13-1403(D)—referring to "a felony offense that is included in chapter 14 of [Title 13]" instead of a "violation of

this section or § 13-1402." Even if we concluded that difference was meaningful, however, the *Peek* court relied on two cases addressing language essentially identical to that of § 13-1403(D). It cited with approval *State v. Wise*, in which this court determined that the reference in the then-current version of A.R.S. § 13-3408(E) to "a violation of . . . this section" did not include a conviction for an attempted violation. 164 Ariz. 574, 578, 795 P.2d 217, 221 (1990); *see Peek*, 219 Ariz. 182, ¶ 15, 195 P.3d at 643. And the court relied on *State v. Tellez*, which reached the same conclusion. 165 Ariz. 381, 382-83, 799 P.2d 1, 2-3 (App. 1990); *see Peek*, 219 Ariz. 182, ¶ 15, 195 P.3d at 653. "[S]entencing options for a substantive offense do not automatically apply to related preparatory offenses." *Peek*, 219 Ariz. 182, ¶ 14, 195 P.3d at 643. Section 13-1403(D) refers only to a "violation of this section or § 13-1402." Our supreme court has made clear that an attempt offense does not violate the underlying subsection, but instead violates § 13-1001.[3] *Peek*, 219 Ariz. 182, ¶ 12, 195 P.3d at 643. "When the legislature intends to include attempts, it knows how to do so." *Id.* ¶ 19.

¶10 In a detailed and comprehensive ruling, the trial court distinguished *Peek* on the basis that the case only "examined a distinctive issue regarding a particular statute during a specific time period." The court was referring to our supreme court's observation

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[3]The state suggests the court in *Peek* erred by drawing a distinction between an attempted and completed offense in determining that attempt falls under chapter 14 of Title 13 irrespective of the statute defining the completed offense. The state concludes that a "violation of [the attempt statute] standing alone means nothing." We do not have authority to "revisit[]" *Peek*, as the state suggests we should. *See State v. Smyers*, 207 Ariz. 314, n.4, 86 P.3d 370, 374 n.4 (2004). But the state's argument is incorrect in any event because it ignores that "[a]n attempt is substantively different from a completed crime because an attempt to commit an offense does not require that all the elements be present for the commission of the offense." *Mejak v. Granville*, 212 Ariz. 555, ¶ 20, 136 P.3d 874, 878 (2006). Thus, there is no reason to treat an attempted offense under § 13-1001 identically to a completed offense.

in *Peek* that the legislature had vacillated between excluding or expressly including attempt offenses in the statute. *See* 219 Ariz. 182, ¶¶ 7-10, 195 P.3d at 642-43. These changes, the court reasoned, rendered the "final language [of the statute addressed in *Peek*] ambiguous and unclear." But the *Peek* court did not find the statutory language unclear. It instead recognized, based on the amendments, that the legislature knew how to expressly include attempt offenses in a sentence enhancement statute. *Id.* ¶ 19.

¶11 The trial court found the reasoning in several of our cases to be more directly on point. *See State v. Lammie*, 164 Ariz. 377, 793 P.2d 134 (App. 1990); *State v. Cory*, 156 Ariz. 27, 749 P.2d 936 (App. 1987) (per curiam). Specifically, it reasoned that because *Lammie* and *Cory* affirmed sex offender registration for "defendant[s who] pled to a violation of both A.R.S. § 13-1001 and the underlying offense of sexual assault," attempted public sexual indecency to a minor under fifteen is analogous, thus requiring sentence enhancement pursuant to § 13-1403(D).

¶12 In *Lammie*, we determined the statute in effect at that time governing sex-offender registration required registration for those convicted of attempted offenses although the statute referred only to a violation of specific chapters not encompassing § 13-1001. 164 Ariz. at 378-79, 381-82, 793 P.2d at 135-36, 138-39. We noted that "[a]n 'attempt' is generally recognized as being part of a completed offense" that "cannot be committed in isolation of the substantive offense." *Id.* at 379-80, 793 P.2d at 136-37. In *Cory*, we similarly concluded that, despite only being convicted of attempt, a defendant was required to register because "[i]t would have been impossible for [him] to plead guilty to solely a violation of A.R.S. § 13-1001 since that chapter must always be viewed together with a substantive offense." 156 Ariz. at 28, 749 P.2d at 937.

¶13 The holdings in *Lammie* and *Cory*—to the effect that attempt cannot be an offense separate from the underlying, reference offense—were rejected in *Peek.* Our supreme court expressly found *Lammie* and *Cory* "unpersuasive" because they "allowed an interpretation at odds with the plain language of the statute." *Peek*, 219 Ariz. 182, ¶¶ 16-17, 195 P.3d at 643-44. Applying

them here would similarly disregard the language of § 13-1403(D).[4] The *Peek* court determined that whether "attempts are part of the completed offense or cannot be committed in isolation from the substantive offense" does not inform the question whether the "statute in question encompasse[s] attempted offenses." 219 Ariz. 182, ¶ 13, 195 P.3d at 643. And it is not relevant whether the factual basis for Bruggeman's conviction in CR51327 described a violation of § 13-1403. In that cause number, he was convicted only of a violation of § 13-1001, not § 13-1402 or § 13-1403. Thus, his attempt conviction does not constitute a historical prior felony conviction under § 13-1403(D).

¶14 The trial court noted in its order denying relief that even if Bruggeman were resentenced there are "two other prior convictions for public sexual indecency to a minor under fifteen." We note, however, that a trial court must determine whether a felony conviction is a "third or more prior felony conviction" under § 13-105(22)(d) by considering the chronological order of the felonies. *See State v. Garcia*, 189 Ariz. 510, 511-12, 943 P.2d 870, 871-72 (App. 1997). The court did not address whether Bruggeman's multiple convictions in at least one cause number render him eligible for sentence enhancement under § 13-1403(D). Bruggeman argues there are record anomalies and that the 1987 convictions constitute only one conviction for the purposes of § 13-105(22)(d). At oral argument, the state indicated that it had limited its focus on review to the attempt conviction as a result of the court's ruling. Because questions regarding the other convictions were not fully addressed by the parties and the appellate record available to us arguably conflicts with portions of the court's factual recitation, we

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[4]The trial court nonetheless concluded it could follow *Lammie* and *Cory* because those cases "have not been reversed." The statutes addressed in those cases were not before our supreme court in *Peek*. More important, our supreme court flatly rejected the reasoning in those cases—the very reasoning the trial court and state sought to apply here. *Peek*, 219 Ariz. 182, ¶¶ 16-17, 195 P.3d at 643-44. In light of *Peek*, we agree with Bruggeman that *Lammie* and *Cory* have no persuasive value in the matter before us.

cannot determine whether other convictions render Bruggeman eligible for an enhanced sentence under § 13-1403(D). Thus, limiting our evaluation to the attempt conviction, we turn to whether trial and appellate counsel should have objected to the use of that conviction to enhance the sentence.

¶15 "To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006), *citing Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prevail on such a claim, a defendant must overcome the "strong presumption" that counsel performed "within the wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689, and must show counsel's errors or omissions were not the result of reasoned tactical decisions but "of 'ineptitude, inexperience or lack of preparation,'" *State v. Denz*, 232 Ariz. 441, ¶ 7, 306 P.3d 98, 101 (App. 2013), *quoting State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984). To establish prejudice, a defendant must "show a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Bennett*, 213 Ariz. 562, ¶ 25, 146 P.3d at 69, *quoting Strickland*, 466 U.S. at 694.

¶16 The trial court concluded Bruggeman had "failed to satisfy either prong" of *Strickland* because "there was no sentencing issue" to raise. As we have explained, because the court expressly relied on an attempt conviction to enhance Bruggeman's sentence under § 13-1403(D), that conclusion was incorrect. Moreover, Bruggeman provided an affidavit from appellate counsel in which counsel stated he had not considered the issue. *Cf. Hinton v. Alabama*, ___ U.S. ___, ___, 134 S. Ct. 1081, 1088-89 (2014) (counsel required to make reasonable investigation of legal issues; "ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance"); *Bennett*, 213 Ariz. 562, ¶¶ 24, 30, 146 P.3d at 69-70 (appellate counsel's failure to challenge sufficiency of evidence to prove fundamental element of offense "at

least suggests" deficient performance, entitling defendant to evidentiary hearing). And, based on the record before us, we can discern no tactical reason for either trial or appellate counsel to have foregone raising the issue. *Cf. Denz*, 232 Ariz. 441, ¶ 11, 306 P.3d at 102 ("Strategic decisions are 'conscious, reasonably informed decision[s] made by an attorney with an eye to benefitting his client.'"), *quoting Pavel v. Hollins*, 261 F.3d 210, 218 (2d Cir. 2001) (alteration in *Denz*). Sentence enhancement under § 13-1403(D) exposed Bruggeman to a significantly increased sentencing range than that which he faced had he been sentenced as a category three repetitive offender pursuant to A.R.S. § 13-703(C) and (J). In these circumstances, we conclude Bruggeman is entitled to an evidentiary hearing for the trial court to determine whether trial and appellate counsel's failure to raise this sentencing issue fell below prevailing professional norms.

¶17 We grant review and relief. We remand the case to the trial court for proceedings consistent with this decision.