IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. ERIC JAMES SPENCER, Petitioner.	)	2 CA-CR 2011-0212-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20093758001

Honorable Clark W. Munger, Judge

REVIEW GRANTED; RELIEF DENIED

Eric J. Spencer — Florence
In Propria Persona

H O W A R D, Chief Judge.

¶1 Petitioner Eric Spencer seeks review of the trial court's order denying his of-right petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Spencer has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Spencer was convicted of two counts of sexual conduct with a minor under fifteen years old, preparatory dangerous crimes against a child, for having "attempt[ed] to engage in an act of sexual intercourse" with his then-seven-year-old daughter. The trial court imposed a partially aggravated, 12.5-year sentence on the first count and suspended sentence and placed Spencer on lifetime probation for the second count. Spencer initiated post-conviction relief proceedings and appointed counsel filed a notice of review, stating she had reviewed the record and "was unable to find any claims to raise in Rule 32 post-conviction proceedings." The court granted her request for additional time for Spencer to file a pro se petition.

¶3 In his pro se petition, Spencer claimed 1) "an illegal term of imprisonment was imposed," 2) the prosecutor had committed misconduct "relating to the penalty," 3) trial counsel had been "incompetent or ineffective on [the] term of imprisonment," and 4) Rule 32 counsel "was incompetent or ineffective on [the] term of imprisonment." The trial court summarily denied relief, concluding the sentence imposed was correct and Spencer's other claims, which relied on his sentencing claim, failed because he had not established any error in regard to that claim. Spencer moved for rehearing, and the trial

court denied the motion, stating Spencer had not raised any issue not addressed in its earlier ruling.

¶4 On review, Spencer essentially reurges the arguments he made below, and also alleges that the trial court abused its discretion "by failing to conduct an adequate investigation into facts relevant to [his] sentencing," and that the court's ruling was "the functional equivalent of amending statutory language in excess of [its] lawful jurisdiction." Spencer's primary argument on review, as below, is that the sentence he received under A.R.S. § 13-705, Arizona's dangerous crimes against children statute, was illegal because the state failed to prove the offense was a "dangerous offense" within the meaning of A.R.S. §§ 13-105(13) and 13-704. According to Spencer, "§ 13-705[']s predecessor [A.R.S.] § 13-604.01 [wa]s not a free-standing, independent penalty provision," but rather was "fully integrated subpart" of former § 13-604, and "the mere renumbering of the statutory provisions does not alter the substance of the law one iota." He apparently maintains that because, according to legislative history materials he quotes, legislators at one point discussed adding the dangerous crimes against children enhancement to former § 13-604 as lettered subsections and referred to the material as proposed amendments to former § 13-604, the legislature intended that the "enhanced penalty ranges of § 13-604.01, now § 13-705, c[ould]not be imposed without first satisfying the factual prerequisites of § [13-]604," now § 13-704.

¶5 Because Spencer failed to object at sentencing, we review only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Imposing an illegal sentence constitutes fundamental error, *State*

v. Munninger, 213 Ariz. 393, ¶ 11, 142 P.3d 701, 705 (App. 2006), but here we agree with the trial court that "[n]o finding of dangerous nature is necessary to impose an enhanced sentence pursuant to [§] 13-705."

¶6 When interpreting a statute, our review is de novo, *State v. Lewandowski*, 220 Ariz. 531, ¶ 6, 207 P.3d 784, 786 (App. 2009), and "[i]f the language of a statute is clear and unambiguous, we must give it effect without resorting to any rules of statutory construction." *State v. Johnson*, 171 Ariz. 39, 41, 827 P.2d 1134, 1136 (App. 1992). The language of § 13-705 defines dangerous crimes against children and sets forth the sentencing ranges required for each such offense. Nothing in that definition requires that the state prove the crime was a "dangerous offense" within the meaning of §§ 13-704 and 13-105(13). Rather it merely requires that the offense committed be one enumerated in the statute and that the offense be committed against "a minor who is under fifteen years of age." § 13-705(P)(1). Because this language is clear, we need not consider the legislative history of the statute or employ other methods of construction. *See Johnson*, 171 Ariz. at 41, 827 P.2d at 1136.

¶7 Furthermore, this court rejected an argument similar to Spencer's in *State v. Smith*, 156 Ariz. 518, 525, 753 P.2d 1174, 1181 (App. 1987). In that case Smith argued the state was required to separately allege dangerousness in order for him to be properly sentenced under former § 13-604.01. 156 Ariz. at 525, 753 P.2d at 1181. We concluded that because the dangerous crimes against children statute "constitutes a separate sentencing scheme for certain types of crimes committed against children under the age of 15 years," "no separate allegation of dangerousness is required." *Id.*

¶8 In any event, the mere fact that, at some point, the dangerous crimes against children enhancement was included in the same statute as the other enhancement statutes does not require that the state prove an offense was dangerous or repetitive. Indeed, the dangerous offense and repetitive offender enhancements included in §§ 13-703 and 13-704 were both formerly included in § 13-604. *See* 1999 Ariz. Sess. Laws, ch. 261, § 5. But a sentence may be enhanced either because the offender was a repetitive offender or because the crime of conviction was dangerous without reference to the other enhancement. *See* §§ 13-703, 13-704.[1]

¶9 We also reject Spencer's argument that the trial court failed "to conduct an adequate investigation into [the] facts relevant to [his] sentencing." He apparently alleges the state failed to allege the facts necessary to support the enhanced sentence imposed. But, because we reject his argument that proof of dangerousness was required, this argument fails. The state merely was required to establish Spencer had committed an enumerated offense and the victim was under fifteen years of age. *See* § 13-705(P)(1). Spencer's admissions establishing the factual basis for his plea were sufficient to prove both of those facts. Likewise, because the court properly sentenced Spencer under § 13-705, we reject his argument that the court exceeded its jurisdiction.

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[1]Spencer also cites double jeopardy cases relating to whether two offenses are the same offense for double jeopardy purposes. We find those cases inapposite. He also states that "misapplication" of the dangerous crimes against children statute "implicates a violation of cruel and unusual punishment protections." He does not, however, develop this argument and he did not raise it below, so we do not address it. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain "[t]he issues which were decided by the trial court and which the defendant wishes to present" for review).

¶10 Spencer also maintains that sentencing under § 13-705 is permissive rather than mandatory for offenses under A.R.S. § 13-1405, which provides that such offenses are "punishable" as dangerous crimes against children. But, as the trial court ruled, the dangerous crimes against children "sentence enhancement provision is mandatory" in this context. *See State v. Bartlett*, 171 Ariz. 302, 303, 830 P.2d 823, 824 (1992) (noting dangerous crimes against children statutes required "court to impose mandatory consecutive sentences" on charges of sexual conduct with a minor), *disapproved on other grounds by State v. DePiano*, 187 Ariz. 27, 926 P.2d 494 (1996); *see also State v. Hollenback*, 212 Ariz. 12, ¶¶ 13-14, 126 P.3d 159, 163-64 (App. 2005); *Smith*, 156 Ariz. at 525, 753 P.2d at 1181. And, even if Spencer were correct, the trial court made clear it would have imposed the same sentence even if the statute were permissive.

¶11 Because we reject his sentencing arguments, Spencer's claims of prosecutorial misconduct and ineffective assistance of trial and Rule 32 counsel also fail. As the trial court pointed out, each of these claims is "dependent on the . . . claim that he should not have been sentenced pursuant to [§] 13-705." Because we agree with the trial court that "sentencing was correct," Spencer's claim the prosecutor committed misconduct in urging the court to sentence him under § 13-705 is without merit. *See State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998) (to obtain reversal for prosecutorial misconduct "defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process'"), *quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Likewise, trial and Rule 32 counsel were not, as Spencer contends, ineffective for having failed to raise

the issue. *See State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006) ("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."). Therefore, although we grant the petition for review, we deny relief.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge