IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

STEVEN MORA, *Appellant*.

No. 1 CA-CR 19-0342
FILED 9-28-2021

Appeal from the Superior Court in Maricopa County
No. CR 2018-000891-001
The Honorable John C. Rea, Judge (Retired)

CONVICTIONS AFFIRMED; SENTENCES VACATED IN PART; REMANDED FOR RE-SENTENCING

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joshua C. Smith
Counsel for Appellee

Brown & Little PLC, Chandler
By Matthew O. Brown
Counsel for Appellant

OPINION

Judge Michael J. Brown delivered the opinion of the Court, in which Presiding Judge Jennifer M. Perkins and Judge David B. Gass joined.

B R O W N, Judge:

¶1 Steven Mora challenges the sentences imposed on his child molestation convictions, asserting the superior court erred when it found his Texas prior convictions were predicate felonies that compelled enhancement of his sentences to life in prison. Alternatively, he argues a jury should have made that determination.

¶2 We conclude the court properly held that offenses committed in other jurisdictions can serve as predicate felonies under A.R.S. § 13-705, and that whether such an offense qualifies as a "sexual offense" is a question of law. But the court committed fundamental, prejudicial error when it implicitly concluded the statute underlying the Texas convictions had a statutory analog in Arizona. Thus, we vacate the sentences imposed on the molestation counts and remand for re-sentencing.

BACKGROUND

¶3 As pertinent here, a jury convicted Mora of two counts of child molestation; on appeal, Mora challenges neither of those convictions. Before trial, the State alleged Mora had prior felony convictions, including two from Texas for "Indecency with a Child - Contact." The victims of the Texas crimes testified at Mora's trial under Arizona Rule of Evidence 404(C). During the trial proceedings, Mora argued his Texas offenses were not predicate felonies requiring an enhanced sentence under A.R.S. § 13-705(Q)(2). The superior court disagreed, finding the State proved by clear and convincing evidence the two Texas prior convictions were "sexual offenses" that qualified as predicate felonies. The court based its ruling on documents confirming the Texas convictions and testimony from the Texas victims. At sentencing, the court denied Mora's renewed objection that he had no predicate felonies and imposed two consecutive life sentences. This timely appeal followed, and we have jurisdiction under A.R.S. § 12-120.21(A)(1).

¶4 After our initial review of the appellate briefs, we ordered supplemental briefing on whether Mora's Texas felonies strictly conform with any Arizona felony offenses. *See State v. Fernandez*, 216 Ariz. 545, 554, ¶ 32 (App. 2007) ("Although we do not search the record for fundamental error, we will not ignore it when we find it."). Mora argued the superior court fundamentally erred in finding his Texas convictions were predicate felonies and re-sentencing is necessary; the State agreed. Thus, the issues before us have become moot. Generally, we do not decide mooted issues. *In re Leon G.*, 204 Ariz. 15, 17, ¶ 2 n.1 (2002). But when such issues are of public importance or capable of recurring, we may properly address them, and we do so here. *See State v. Reed*, 248 Ariz. 72, 77, ¶ 17 (2020) (recognizing that because "courts are not constrained to decide only appeals with active controversies," an appeal need not be dismissed when it is moot).

DISCUSSION

¶5 Under Arizona law, dangerous crimes against children are subject to special sentencing requirements under A.R.S. § 13-705. Subsection 13-705(I) states that a person convicted of child molestation "who has been previously convicted of two or more predicate felonies shall be sentenced to life imprisonment." "Predicate felony," for the purpose of this section, is defined as:

> any felony involving child abuse pursuant to § 13-3623, subsection A, paragraph 1, *a sexual offense*, conduct involving the intentional or knowing infliction of serious physical injury or the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument, or a dangerous crime against children in the first or second degree.

A.R.S. § 13-705(Q)(2) (emphasis added). The superior court enhanced Mora's sentence under § 13-705(I) and (Q)(2) because it concluded that Mora's Texas felonies fell into the "sexual offense" category of predicate felonies.

A. Foreign Convictions

¶6 The question of whether a foreign conviction constitutes a felony in Arizona is an issue of law, subject to our de novo review. *State v. Smith*, 219 Ariz. 132, 134, ¶ 10 (2008). We also review de novo the interpretation of a statute. *State v. Burbey*, 243 Ariz. 145, 146, ¶ 5 (2017). "To determine a statute's meaning, we look first to its text." *Id.* at 147, ¶ 7. When construing a particular provision, we consider "the context and related statutes on the same subject." *Nicaise v. Sundaram*, 245 Ariz. 566,

568, ¶ 11 (2019). We do not employ secondary construction principles "if the statute is subject to only one reasonable interpretation." *Glazer v. State*, 237 Ariz. 160, 163, ¶ 12 (2015).

¶7 Mora argues that foreign convictions cannot serve as predicate felonies under § 13-705(I) and (Q)(2), pointing to the absence of supporting language in § 13-705(Q)(2). He contends that if the legislature intended otherwise, it would have used language to that effect, especially considering the statute's consequences—imposition of a mandatory life sentence. Mora correctly notes that several other statutes relating to prior convictions specifically include references to convictions from other jurisdictions. *See, e.g.*, A.R.S. § 13-706(F)(1) (offenses committed "outside this state" can qualify as a "[s]erious offense"); § 13-1423(A) (offenses committed "outside this state" can qualify as historical convictions for the crime of "violent sexual assault"); § 13-105(22)(d), (e), (f) (offenses committed "outside the jurisdiction of this state" can qualify as "[h]istorical prior felony conviction[s]").

¶8 The language of § 13-705(Q)(2), however, read in context with the criminal code's definition section, supports the conclusion that foreign convictions may constitute predicate felonies. Subsection 13-705(Q)(2) defines predicate felony as "any felony" that fits into one of the listed categories. The phrase "any felony" is not commonly understood to mean only a felony committed in Arizona. *See State v. Korzep*, 165 Ariz. 490, 493 (1990) ("We give words their usual and commonly understood meaning unless the legislature clearly intended a different meaning."). Further, the legislature has defined "felony" as an "*offense* for which a sentence to a term of imprisonment in the custody of the state department of corrections is authorized by any law *of this state*." A.R.S. § 13-105(18) (emphasis added). The definition of "offense" includes "conduct for which a sentence to a term of imprisonment or of a fine is provided by any law *of the state in which it occurred*." A.R.S. § 13-105(27) (emphasis added). Reading the plain text of § 13-705(Q)(2) in context with the related definitions means that "any felony" involving "a sexual offense" includes felonies committed in foreign jurisdictions.

¶9 Mora, nonetheless, argues the term "any felony" does not necessarily include foreign offenses. In support, he directs us to A.R.S. § 13-105(22)(d), which states that a historical prior felony conviction means "[a]ny felony conviction that is a third or more prior felony conviction. For the purposes of this subdivision, 'prior felony conviction' includes any offense committed *outside the jurisdiction of this state* that was punishable by that jurisdiction as a felony." (Emphasis added.) Mora argues that if "any

felony" necessarily means any felony offense committed in a foreign jurisdiction, the language in § 13-105(22)(d) would be superfluous. According to Mora, the absence of such language in § 13-705 means the legislature did not intend § 13-705(Q)(2) to apply to foreign convictions.

¶10 In Arizona, however, foreign felonies must generally have an Arizona analog to qualify as a predicate felony or sentence-enhancing conviction. *See State v. Large*, 234 Ariz. 274, 281, ¶ 21 (App. 2014). Section 13-105(22)(d), on the other hand, varies from the general rule, stating that sentence-enhancing convictions include "any offense committed outside the jurisdiction of this state that was *punishable by that jurisdiction as a felony*." (Emphasis added.) The standard definitions of "felony" and "offense" already incorporate foreign convictions. Thus, § 13-105(22)(d) does not support Mora's argument because it merely requires that the out-of-state conviction be a felony in the foreign jurisdiction, omitting the analog requirement.

¶11 Mora also relies on *In re Casey G.*, 223 Ariz. 519 (App. 2010). In that case, a juvenile admitted the charge of "sexual conduct with a minor under fifteen" as part of a plea agreement. *Id.* at 519, ¶ 1. In the delinquency petition, the State alleged the charge was a "dangerous crime against children," which would subject the juvenile to a sentence enhancement under § 13-705 if charged with certain crimes in the future as an adult. *Id.* at 520, ¶¶ 1, 3. Before the disposition hearing, the superior court denied the juvenile's motion to strike the enhancement allegation. *Id.* at ¶ 1. On appeal, we reversed the denial, explaining that if the legislature intended a predicate felony under § 13-705 "to include delinquency adjudications for acts that otherwise would constitute dangerous crimes against children if committed by an adult," it would have said so explicitly. *Id.* at 521, ¶ 7. Mora argues the same logic applies here; if the legislature intended § 13-705 to include foreign convictions, it would have included express language.

¶12 Mora's reliance on *Casey G.* is misplaced because the sentence enhancement language in § 13-705 is triggered only by prior convictions, and juvenile adjudications are not convictions. *See Casey G.*, 223 Ariz. at 521, ¶ 7. Thus, in *Casey G.* we refused to extend § 13-705 to juvenile adjudications without an explicit directive from the legislature. *See id.* The concerns at issue in that case are not present here. We hold that foreign offenses can qualify as predicate felonies under § 13-705(I), assuming they fall under one of the enumerated categories in § 13-705(Q)(2).

B. Application of *Apprendi*

¶13 When the superior court enhanced Mora's sentence under § 13-705(I), it did so under the theory that Mora's Texas prior convictions were sexual offenses under § 13-705(Q)(2). Mora argues that because "sexual offense" is not a defined term, whether a prior offense qualifies as a "sexual offense" is a question of fact a jury must decide. Because Mora did not raise this issue at trial, we review for fundamental error only. *See State v. Escalante*, 245 Ariz. 135, 140, ¶ 12 (2018).

¶14 In *Apprendi v. New Jersey*, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000). Prior convictions are the exception to the general rule because they have already been proven beyond a reasonable doubt. *See Almendarez–Torres v. United States*, 523 U.S. 224, 243–44 (1998); *Apprendi*, 530 U.S. at 487–88. The State can therefore designate a prior conviction as a sentencing factor to be decided by the trial court rather than an element of the crime decided by the jury. *See Cherry v. Araneta*, 203 Ariz. 532, 533–34, ¶ 5 (App. 2002).

¶15 Mora acknowledges the trial court can decide the fact of a prior conviction, i.e., whether a defendant committed a qualifying felony. But to qualify as a predicate felony under § 13-705(I), the prior conviction must fall under one of the categories listed in § 13-705(Q)(2). Because "sexual offense" is not defined, Mora contends that whether a defendant's prior conviction constitutes a "sexual offense" is a factual question beyond the mere existence of a preexisting felony.

¶16 To support his position, Mora relies on our supreme court's decision in *State v. Atwood*, which held that the term "sexual offense" was "sufficiently specific" to guide the jury's determination: "[o]rdinary words and phrases in statutes require no definition because they are presumed to be understood by the jurors." 171 Ariz. 576, 625 (1992). Mora interprets *Atwood* to mean that whether conduct qualifies as a "sexual offense" is a question of fact. *Atwood*, however, addressed the adequacy of a jury instruction, not statutory interpretation. *See id.*

¶17 Moreover, we are not persuaded by Mora's argument that the absence of a specific definition of "sexual offense" in § 13-705(Q)(2) means the jury must decide the issue. Rather, we follow the approach adopted in *Cherry*, 203 Ariz. at 534–35, ¶¶ 7–14. There, we addressed whether the trial

court could decide as a matter of law whether the defendant's prior conviction was a "violent crime" for purposes of sentence enhancement under A.R.S. § 13-901.01(B). *Cherry*, 203 Ariz. at 533, ¶ 1. We held the trial court could make this determination "by looking to the statutory definition of the prior offense." *Id.* at 535, ¶ 14. For sentence enhancement purposes, a "violent crime" was statutorily defined as "any criminal act that results in death *or physical injury* or any criminal use of a deadly weapon or dangerous instrument." *Id.* at 534, ¶ 7 (emphasis added). The defendant's prior assault conviction required proof he had caused a "physical injury" as a necessary statutory element. *Id.* at 535, ¶ 12. We therefore concluded the trial court could decide the issue as a matter of law. *Id.* at ¶ 14.

¶18 Applying a similar analysis here, a trial court can determine as a matter of law whether a prior conviction is a "sexual offense" by focusing on the statutory elements of the prior offense. In Texas, Mora was convicted of two counts of "Indecency with a Child - Contact," which is described as engaging, or causing a child under 17 years old to engage, in "sexual contact." Tex. Penal Code Ann. § 21.11(a)(1) (2017).[1] "Sexual contact" is defined as the touching of specified body parts "with the intent to arouse or gratify the sexual desire of any person." *Id.* at § 21.11(c). Mora's Texas offenses necessarily involved "sexual" conduct, and the superior court correctly characterized them as "sexual offenses" for purposes of A.R.S. § 13-705(Q)(2), assuming Mora's convictions have an analog to an Arizona felony as discussed below. Thus, the court did not err when it decided this issue itself rather than present it to the jury.

C. Comparing Texas and Arizona Statutory Elements

¶19 The final issue we address is whether Mora's Texas prior convictions constitute sexual offenses under § 13-705(Q)(2), and in turn, predicate felonies for sentence enhancement purposes under § 13-705(I). Generally, to serve as a predicate felony for purposes of sentence enhancement, a foreign offense must be analogous to an Arizona felony. *See supra* at ¶ 10. This requirement comes from the fact that a "felony" is defined as "an offense for which a sentence to a term of imprisonment in the custody of the state department of corrections is *authorized by any law of*

---

[1] Mora committed these offenses in 2004 and 2005, in violation of the 2001 version of the Texas statute. 2001 Tex. Sess. Law Serv. Ch. 739 (S.B. 932). Because no revisions material to this opinion have since occurred, we cite the current version of the statute.

this state." A.R.S. § 13-105(18) (emphasis added). Because a "felony" is specifically defined by punishment in accordance with the laws of Arizona, Mora could be subject to an enhanced sentence only if his Texas offenses were punishable as felonies in Arizona. *See Large*, 234 Ariz. at 281, ¶ 21 (holding that enhancing a presumptive sentence based on a foreign conviction under A.R.S. § 13-708(A) requires an analog to an Arizona felony).

¶20 To determine whether a foreign offense would be punishable as an Arizona felony, a court "must first conclude that the foreign conviction includes 'every element that would be required to prove an enumerated Arizona offense.'" *State v. Crawford*, 214 Ariz. 129, 131, ¶ 7 (2007) (quoting *State v. Ault*, 157 Ariz. 516, 521 (1988)). A "court makes this determination by comparing the statutory elements of the foreign crime with those in the relevant Arizona statute." *Id.* In comparing the elements, "[t]here must be strict conformity between the elements of the foreign offense and an Arizona felony." *Large*, 234 Ariz. at 282, ¶ 27. Thus, the facts underlying the foreign conviction are irrelevant when making this comparison. *Crawford*, 214 Ariz. at 131, ¶ 8.

¶21 The State concedes that Mora's prior convictions do not strictly conform to any Arizona felony offenses. At first glance, the statute underlying Mora's convictions most closely aligns with two Arizona offenses, A.R.S. § 13-1404(A), (C) ("sexual abuse") and A.R.S. § 13-1410 (A)-(B) ("child molestation"). Though the Arizona and Texas statutes are similar, they apply to conduct committed against victims of different ages. Arizona's statutes criminalize conduct committed against a minor under age 15, but the Texas statute criminalizes conduct committed against a minor under age 17. *Compare* A.R.S. §§ 13-1404(A), -13-1410(A) *with* Tex. Penal Code Ann. § 21.11(a)(1). The age discrepancy creates a range of offenses that are crimes under the Texas statute but not crimes under the corresponding Arizona statutes; specifically, crimes involving victims between the ages of 15 and 17. *See Large*, 234 Ariz. at 282, ¶ 27; *see also State v. Colvin*, 231 Ariz. 269, 272, ¶ 9 (App. 2013) (holding that "although we do not examine the underlying factual basis, we must determine whether there is any scenario under which it would have been legally possible" to violate the foreign statute without violating an Arizona statute). And our review of Arizona's criminal code reveals no other felony offenses that could potentially conform to the Texas statute. Because a person may violate the Texas statute without committing an Arizona sexual offense, the court erred as a matter of law when it found that Mora's Texas prior convictions were predicate felonies under § 13-705(I).

¶22 Re-sentencing, however, is required only if Mora shows the error was fundamental and prejudicial. Fundamental error is established by showing that "(1) the error went to the foundation of the case, (2) the error took from the defendant a right essential to his defense, *or* (3) the error was so egregious that he could not possibly have received a fair trial." *Escalante*, 245 Ariz. at 142, ¶ 21. Prejudice is presumed under prong three. *Id.* The error here falls under the third prong because Mora could not have received a fair sentencing without the necessary statutory comparison under *Crawford*. *See Smith*, 219 Ariz. at 136, ¶ 22 (2008) (holding that "improper use of a prior foreign conviction to enhance a prison sentence goes to the foundation of a defendant's right to receive a valid and legal sentence and is 'of such magnitude that the defendant could not have possibly received' a fair sentencing"); *State v. McCurdy*, 216 Ariz. 567, 574, ¶ 18 n.7 (App. 2007) (finding "substantial prejudice inherent in an improperly enhanced prison term."). The error is fundamental, and Mora is not required to make a separate showing of prejudice. *See Escalante*, 245 Ariz. at 142, ¶ 21.

CONCLUSION

¶23 We affirm Mora's convictions but vacate both life sentences on the molestation counts and remand for re-sentencing on those counts.

AMY M. WOOD • Clerk of the Court
FILED: AA