IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

KEVIN HARRY MONINGER, *Appellant*.

No. 1 CA-CR 19-0353
FILED 6-8-2021

Appeal from the Superior Court in Mohave County
No. S8015CR201801598
The Honorable Derek C. Carlisle, Judge

AFFIRMED IN PART, VACATED IN PART, REMANDED

COUNSEL

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By Casey D. Ball
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Counsel for Appellant

OPINION

Judge Paul J. McMurdie delivered the Court's opinion, in which Judge Maria Elena Cruz joined. Presiding Judge James B. Morse Jr. concurred in part and dissented in part.

M c M U R D I E, Judge:

¶1 Kevin Harry Moninger appeals from his convictions and sentences for three counts of luring a minor for sexual exploitation. Because we conclude the term "solicit" in luring a minor under A.R.S. § 13-3554(A) refers to a course of conduct that may include a series of statements, we hold that the trial evidence established only one violation of the statute, not three. Therefore, we vacate two of Moninger's luring convictions and remand for resentencing.

FACTS AND PROCEDURAL BACKGROUND

¶2 In September 2018, Moninger, a Las Vegas resident in his early sixties, placed an advertisement on a website seeking sexual encounters with women. Users of the site agreed that they were adults, but the site did not monitor or otherwise enforce that requirement.

¶3 As part of an operation targeting child predators, a detective with the Mohave County Sheriff's Office responded to Moninger's advertisement as "Sabrina," whose email handle was "sabrinalteenwitch13." Over the following week, Moninger and Sabrina exchanged a blizzard of more than 1300 text messages. Right away, Sabrina told Moninger she was 13 years old. She said she lived with her mother in Kingman, was not allowed to have a boyfriend, and was too young to drive. Moninger's responses to Sabrina indicated he recognized her young age. On September 30, Moninger suggested they meet in person, and Sabrina immediately responded, "If u want to come down this week Friday [October 5] is good." On October 3, they agreed to try to meet in Kingman that Friday. After Sabrina asked Moninger what they would do when they were able to get together, he texted, "You decide we can hold cuddle kiss if u want to make love u decide just be mine." Sabrina responded, "We can make love just need 2 go slow." On Friday, officers arrested Moninger when he arrived at the arranged meeting place in Kingman. Moninger was carrying clothing and a purse for Sabrina, a "Sabrina the Teenage Witch" doll, and a Viagra pill.

¶4 The State charged Moninger with three counts of luring a minor under the age of 15 for sexual exploitation and one count of attempted sexual conduct with a minor under 15, all class 3 felonies and dangerous crimes against children. *See* A.R.S. §§ 13-1001(C)(2), -1405(B), -3554(C). The State alleged Moninger committed the crime of luring, A.R.S. § 13-3554, by soliciting sexual intercourse with Sabrina on three consecutive days in 2018: October 3 (count one), October 4 (count two), and October 5 (count three). Only the offense date differentiated the three counts.

¶5 Moninger testified at his trial to support an entrapment defense. He admitted he solicited sexual conduct with Sabrina and attempted to have sexual conduct with her while having reason to know she was younger than 15 years old. Moninger did not specifically admit to soliciting Sabrina on any day or through any specific text message. He testified he believed Sabrina was an adult who was simply role-playing as a minor. Given Moninger's testimony claiming he thought Sabrina was an adult, the superior court could have declined to give an entrapment instruction. *See* A.R.S. § 13-206(A) ("To claim entrapment, the person must admit by the person's testimony or other evidence the substantial elements of the offense charged."). However, the State wanted the instruction because jurors might find Moninger not guilty based on entrapment if they did not understand the defense's requirements. The State did not present evidence that Moninger had previously engaged in misconduct involving minors.

¶6 Jurors rejected Moninger's entrapment defense, finding him guilty on all counts. The superior court sentenced him to three consecutive prison terms totaling 22 years for the luring convictions and to a fourth consecutive prison term of 9 years for the attempt conviction. Moninger appealed, and we have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A)(1).

DISCUSSION

A. Moninger Committed Only One Violation of A.R.S. § 13-3554.

¶7 At trial, the State pointed during closing argument to three texts or brief sets of texts; one sent on October 3, one on October 4, and one on October 5, and urged the jury to convict Moninger of three separate offenses based on them. In each of the texts, Moninger described the sex he

and Sabrina would have when they met in Kingman as planned.[1] Based on the three exchanges, the jurors convicted Moninger of committing three separate violations of luring a minor for sexual exploitation under A.R.S. § 13-3554. Moninger contends this court must vacate two of those convictions because he committed only one act of luring. First, he argues his convictions violate the Double Jeopardy Clause because his texts to Sabrina were part of a continuous conversation showing just one violation of the luring statute. In the alternative, Moninger argues there was insufficient evidence that he made separate solicitations of sexual intercourse to support the second and third luring counts. We hold Moninger's luring convictions for counts two and three placed him in double jeopardy because the evidence underlying those counts constituted the same conduct in support of the luring conviction for count one.

1. A.R.S. § 13-3554 Allows Separate Convictions for Distinct Offers or Solicitations of Sexual Conduct.

¶8 Imposing multiple punishments for a single offense runs afoul of the Double Jeopardy Clause and constitutes fundamental error. *Brown v. Ohio*, 432 U.S. 161, 165 (1977); *State v. Jurden*, 239 Ariz. 526, 528–29, ¶¶ 7, 10 (2016); *State v. Soza*, 249 Ariz. 13, 15, ¶ 6 (App. 2020). When a defendant claims to have been punished multiple times under a single statute for committing just one offense, we must determine "the scope of conduct for which a discrete charge can be brought"—or, put another way, the statute's "allowable unit of prosecution." *Jurden*, 239 Ariz. at 529, ¶ 11 (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952)).

¶9 Whether a defendant's conduct "involves one or more distinct 'offenses'" is a matter of statutory interpretation, which we review *de novo*. *Sanabria v. United States*, 437 U.S. 54, 70 (1978); *Jurden*, 239 Ariz. at 528, ¶ 7.

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[1] The October 3 text from Moninger read, "Honey I never want to hurt u every thing slow u get so excited u feel nothing but pleasure." For the October 4 offense, the State pointed to three texts Moninger sent within a span of six minutes: (1) "Tomm we don't have to touch ourselves we do it for each other"; (2) "I'm gonna love u really wet"; and (3) "I promise to pull u so close that I will know ur wet without using fimgers." For the October 5 offense, the State cited three texts Moninger sent within less than 60 seconds: (1) "U can have good sex other times but best is when inlove"; (2) "Won't have to wait to long"; and (3) "We both are sex should be doubly good."

Our purpose is to advance the legislature's intent, *Jurden*, 239 Ariz. at 530, ¶ 15, and our analysis begins with the statute's text, *State v. Burbey*, 243 Ariz. 145, 147, ¶ 7 (2017). Unless the context directs otherwise, we give the words of the statute their ordinary meaning. *State v. Sharma*, 216 Ariz. 292, 296, ¶ 14 (App. 2007). If that meaning is clear and unambiguous, we apply it and terminate our analysis. *Burbey*, 243 Ariz. at 147, ¶ 7. But if the language is reasonably susceptible to different meanings, we consider secondary interpretation methods, including "the context of the statute, the language used, the subject matter, its historical background, its effects and consequences, and its spirit and purpose." *Jurden*, 239 Ariz. at 530, ¶ 15; *see also* A.R.S. § 13-104 (requiring criminal statutes to "be construed according to the fair meaning of their terms to promote justice and effect the objects of the law"); *Universal C.I.T.*, 344 U.S. at 221 (court resolves statutory ambiguity by considering "all the light relevantly shed upon the words and the clause and the statute that express the purpose of [the legislature]").

¶10 A.R.S. § 13-3554(A) reads: "A person commits luring a minor for sexual exploitation by offering or soliciting sexual conduct with another person knowing or having reason to know that the other person is a minor." A defendant may be convicted under A.R.S. § 13-3554 even if the victim is not a minor. A.R.S. § 13-3554(B). The plain language of A.R.S. § 13-3554(A) makes each distinct "offer" or "solicitation" of sexual conduct with a minor a punishable offense. *See Mejak v. Granville*, 212 Ariz. 555, 558, ¶ 18 (2006) (offense under A.R.S. § 13-3554 "is complete when a person offers or solicits sexual conduct with a minor or a peace officer posing as a minor").

2. Soliciting Under A.R.S. § 13-3554 Refers to a Course of Conduct.[2]

¶11 Although A.R.S. § 13-3554 permits separate convictions for each "offer" or "solicitation," that leaves open the more pressing question this case poses—namely, what is the scope of "solicitation" conduct that may give rise to a discrete offense? As the United States Supreme Court stated in *Blockburger v. United States*, "[t]he test is whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately. If the latter, there can be but

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[2] We note that because the State elected to charge Moninger only with soliciting Sabrina for sexual intercourse, our discussion is limited to that means of violating the statute.

one penalty." 284 U.S. 299, 302 (1932) (citation and quotation omitted) (analyzing statute criminalizing "sale" of narcotics).

¶12 The State contends the word "solicit" in A.R.S. § 13-3554(A) "contemplates a singular act," meaning the State could separately prosecute Moninger for "each text message" he sent to Sabrina soliciting sexual conduct because each message was "a separate act." Moninger argues "solicit" refers to a course of conduct that, as applied here, was made up of multiple text messages, all referring to the same proposed sexual encounter, which together constituted a single offense.

¶13 Because the criminal code does not define "solicit," which is used transitively in A.R.S. § 13-3554(A), we look to its dictionary definitions to determine the word's "ordinary meaning." *See State v. Clow*, 242 Ariz. 68, 70, ¶ 10 (App. 2017). The usual, transitive meanings of "solicit" are "seek to obtain by persuasion, entreaty, or formal application" and "petition persistently" or "importune." American Heritage Dictionary of the English Language (5th ed. 2018).

¶14 While "solicit" may refer to a single act, the term is also used to describe repetitive or persistent conduct inherently consisting of multiple actions that may be necessary to achieve a specific result. Because the ordinary meaning of "solicit" does not unambiguously define the unit of punishable conduct under A.R.S. § 13-3554 as either a single statement proposing or requesting sexual behavior or a course of conduct, meaning a series of such statements, we proceed to consider secondary interpretive methods. After weighing additional considerations, including the language and context of A.R.S. § 13-3554, and its history, purpose, and effects, we conclude the use of "solicit" in A.R.S. § 13-3554(A) refers to a course of conduct, meaning a statement or series of statements requesting sexual conduct.

¶15 A.R.S. § 13-3554 falls within the criminal code chapter addressing "Sexual Exploitation of Children," which the legislature enacted in part to "protect all children of this state from being sexually exploited" and to "prohibit any conduct which causes or threatens psychological, emotional or physical harm to children as a result of such sexual exploitation." 1978 Ariz. Sess. Laws, ch. 200, § 2 (2d Reg. Sess.). Together with its language and history, the placement of the luring statute reveals two possible objectives of the statute—i.e., two separate harms it seeks to prevent.

¶16 One identifiable purpose of the statute is to prevent the commission of other more serious sex crimes involving children. Even though a luring offense is completed when the defendant solicits sexual conduct, *see Mejak*, 212 Ariz. at 558, ¶ 18, the language of A.R.S. § 13-3554 has a preparatory quality to it in that it prohibits acts "looking toward the commission of another crime." *United States v. Williams*, 553 U.S. 285, 300 (2008); *see also id.* at 298 (noting that criminalizing speech under solicitation and similar laws does not violate the First Amendment where the speech "is intended to induce or commence illegal activities"); *State v. Padilla*, 169 Ariz. 70, 72 (App. 1991) (statute criminalizing offers to sell prohibited substances served legitimate state interest in preventing the distribution of controlled substances by halting the illegal activity "at the time of an offer to sell a narcotic substance rather than waiting for the consummation of the bargain"). The other crimes A.R.S. § 13-3554 seeks to prevent include sexual conduct with a minor (criminalized under A.R.S. § 13-1405), bestiality (A.R.S. § 13-1411), and sexual exploitation of a minor (A.R.S. § 13-3553). *See* A.R.S. § 13-3551(5), (10) (defining terms applicable to the luring statute); *see also State v. Hollenback*, 212 Ariz. 12, 15, ¶ 7 (App. 2005) (observing that at least some of the conduct criminalized by A.R.S. § 13-3554 could alternatively be punished by a combination of the general solicitation statute, A.R.S. § 13-1002, and other statutes).

¶17 The luring statute also is amenable to a secondary objective, to the extent permitted under the First Amendment, of preventing the mere making of sexually explicit communications to minors, on the theory such communications are harmful to minors *per se*. *See, e.g.*, A.R.S. § 13-3506.01 (penalizing the transmission of obscene material to minors over the internet); A.R.S. §§ 13-3612(1), -3613(A) (contributing to the delinquency of a minor). However, if deterring the transmission of sexually explicit communications to minors was the primary purpose of the luring statute, it risks making A.R.S. § 13-3506.01 partially redundant, a result we should avoid if possible. *See County of Cochise v. Faria*, 221 Ariz. 619, 623, ¶ 13 (App. 2009) ("[W]e assume the legislature knew about existing law, and did not enact a redundant statute." (citation omitted)).

¶18 The statute's objectives do not definitively point in the direction of either a course-of-conduct interpretation of "solicit" or an act-based approach. Punishing the course of conduct would serve the purpose of deterring more severe crimes. Still, an act-based approach would do so and respond to the theory that each sexually explicit statement is harmful.

¶19 Nor does the legislative history of A.R.S. § 13-3554 tip the scale to one side or the other. The statute was introduced as part of a "[c]omputer crimes" bill intended to "modernize[] Arizona's criminal code regarding the use of computer technology and the Internet in [various crimes including] sex crimes." H.B. 2428 Bill Summary, 44th Legis., 2d Reg. Sess. (Jan. 25, 2000). The legislature's goal to address the use of computer technology and the internet in sex crimes is equally served by either an act-based or course-of-conduct interpretation of A.R.S. § 13-3554 because such conduct would be punished under either approach.

¶20 Once we consider the consequences of making every statement separately punishable, however, we are convinced the legislature did not intend "solicit" to refer to singular acts or statements because that interpretation would result in the unintended outcome of subjecting defendants who lure to harsher penalties than would apply had they accomplished the object of the luring. *See Jurden*, 239 Ariz. at 531, ¶ 23; *Cf. State v. Jensen*, 195 P.3d 512, 517, ¶ 20 (Wash. 2008) (because liability for the inchoate crime of solicitation may be based on words alone, without any overt act requirement, the offense carries a risk of an "unduly harsh punishment").

¶21 Consider Moninger's case. After Moninger first suggested that he and Sabrina meet, Sabrina proposed getting together in five days. The next day, she told him that when they met, they could "make love," and the two then exchanged hundreds of texts over the next few days about what acts they might engage in when they saw each other. Under the State's interpretation, in which every text message implying a sex proposal is separately punishable regardless of whether it refers to the same act already proposed, the State could charge Moninger with scores of counts of luring committed over several days, each based on a statement suggesting or anticipating sexual conduct on the coming Friday. In that scenario, each charge could carry a mandatory consecutive prison term even though each of Moninger's texts to Sabrina described the same sexual encounter. By charging him with three counts, the State exposed Moninger to a presumptive sentence of 30 years' imprisonment for luring—a punishment one and half times more severe than the presumptive prison term of 20 years Moninger would face if he had achieved his objective of having sex with Sabrina. *See* A.R.S. § 13-705(C), (E), (M). The severity of outcomes created by an act-based interpretation is inconsistent with the purposes of the luring statute and its place within the legislative scheme criminalizing

the sexual exploitation of children.[3] *See* A.R.S. § 13-101(4) (purpose of criminal code is to "differentiate on reasonable grounds between serious and minor offenses and to prescribe proportionate penalties for each").

¶22 Next, we observe that while a single statement explicitly requesting sexual conduct may constitute a solicitation, in some cases, a defendant's objective may become apparent only by considering a series of statements or other actions that together imply a proposal for sexual conduct. *See State v. Yegan*, 223 Ariz. 213, 221–22, ¶¶ 30-33 (App. 2009) (solicitations of sexual conduct inferable from multiple statements). This court recognized this fact in *State v. Crisp*, 175 Ariz. 281 (App. 1993). There, the defendant brought, *inter alia*, a First Amendment overbreadth challenge to a city of Phoenix ordinance which made a person who "[s]olicits or hires another person to commit an act of prostitution" guilty of a misdemeanor. *Id.* at 282 (alteration in original). This court held that "to solicit or hire means that, by one's words and conduct, one intends to bring about the act solicited or the performance requested," *id.* at 283, and rejected the challenge on the well-settled principle that a "course of conduct" may be made illegal even if it is "in part initiated, evidenced, or carried out by

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[3] Although it is not preserved for this appeal, *State v. Paredes-Solano*, 223 Ariz. 284, 288, ¶ 8 (App. 2009) (failure to raise a duplicity challenge to an indictment waives all but fundamental error), we note a duplicity problem in this case. Each count in the indictment was based on a particular date, but the evidence presented for each date contained more than one text message, indeed scores of them, referring to sexual intercourse. If the State is correct that each text message constituted a separate offense, then the indictment was duplicitous. *State v. Klokic*, 219 Ariz. 241, 244, ¶ 12 (App. 2008) ("When the text of an indictment refers only to one criminal act, but multiple alleged criminal acts are introduced to prove the charge, . . . such a flaw. . . can deprive the defendant of 'adequate notice of the charge to be defended,' create the 'hazard of a non-unanimous jury verdict,' or make it impossible to precisely plead 'prior jeopardy [] in the event of a later prosecution.") (quoting *State v. Davis*, 206 Ariz. 377, 389, ¶ 54 (2003) (alteration in the original)). Because we reverse on other grounds, we do not address the duplicity problem for fundamental error.

means of language." *Id.* (quoting *State v. Lycett*, 133 Ariz. 185, 191 (App. 1982)).[4]

¶23 Arizona law and caselaw from other jurisdictions concerning the general inchoate crime of solicitation also provide helpful insight. Under Arizona law, the crime of solicitation is complete when "a person . . . commands, encourages, requests or solicits another person" to commit a felony or misdemeanor with the requisite intent. A.R.S. § 13-1002(A); *State v. Flores*, 218 Ariz. 407, 410, ¶ 7 (App. 2008) ("[T]he crime of solicitation is complete when the solicitor, acting with the requisite intent, makes the request.").[5]

¶24 Accordingly, to prove a defendant commanded, encouraged, requested, or solicited another person, the State is not required to pinpoint a single act or statement. As aptly described by the Supreme Court of Virginia, "[s]olicitation may comprise a course of conduct, intended to induce another to act, that continues over an extended period." *Pedersen v. City of Richmond*, 254 S.E.2d 95, 99 (Va. 1979). In *Pederson*, a defendant

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[4] Although we do not address the phrase "offering" in A.R.S. § 13-3554, we note that, as in *Crisp*, this court has held that a statute criminalizing an "offer" to sell narcotic drugs was not unconstitutionally overbroad because the statute did not criminalize speech, but a "*course of conduct* that may be carried out by speech." *Padilla*, 169 Ariz. at 72 (emphasis added).

[5] In *Flores*, this court considered a defendant's guilty plea for solicitation to commit human smuggling. 218 Ariz. at 409, ¶ 2. The court concluded that a question of subject matter jurisdiction arose because, in its view, solicitation, unlike conspiracy, was not a continuing offense, and therefore the offense was completed when the defendant engaged another person to smuggle him into the United States. *Id.* at 410, ¶¶ 7–8, 8, n.9. Although this case may appear counter to the conclusions we reach in this decision regarding the nature of solicitation as a course of conduct, it is not for two reasons. First, *Flores* did not address the scope of the conduct that comprises an act of solicitation generally. Instead, it only addressed when the crime of solicitation was complete under the facts of that case. *Id.* at 410, ¶¶ 7–8. Second, the decision supports the unit-of-prosecution analysis we set forth below, as the defendant faced no additional charges for conduct he engaged in concerning the solicitation to commit human smuggling after he arranged in Mexico to be transported into the United States. *Id.* at 409, ¶¶ 2–3.

charged with soliciting a sex crime argued that the jury could only consider evidence of what occurred immediately before his arrest to establish the crime. *Id.* The court held that the jury could reasonably infer "from [the defendant's] actions and words . . . that the solicitation began with [the defendant's] invitation to [an undercover officer] to enter the car, that it continued throughout the time the officer remained in the vehicle, and that it culminated in [the defendant's] response to [the officer's] direct inquiry." *Id.*

¶25 Similarly, in *State v. Jensen*, the Supreme Court of Washington held that Washington's general solicitation statute "punishes a course of conduct, not a single act." 195 P.3d at 520, ¶ 34. "The prohibited course of conduct is attempting to engage another person to participate in a specific crime." *Id.* Accordingly, the Washington court rejected the state's assertion that a defendant could be charged with multiple counts of solicitation to commit murder based upon each conversation concerning the solicited acts that occurred "at a different time and place, and involving a different person." *Id*. at 519–20, ¶¶ 33–34. Instead, the court concluded that a meeting held between the defendant and the solicitee's intermediary to confirm the details of several murders the defendant had already solicited "was part of the same course of conduct comprising" the other solicitation charges. *Id.* at 520, ¶ 36.

¶26 Together, these cases reflect the reality of how one human being may attempt to persuade another to engage in sexual conduct. This process may involve subtlety, subtext, innuendo, and doublespeak in both speech and physical conduct. It would be difficult to isolate a single moment where an act of soliciting occurred in many cases. Only by examining an individual's behavior before, during, and even after a particular interaction or set of interactions can we interpret that individual's attempt to induce another to allow him or her to commit a crime.

¶27 The luring statute criminalizes encouraging a minor to engage in sexual conduct. And an isolated statement referencing sexual behavior might more aptly fall within the conduct prohibited by A.R.S. § 13-3506.01, which proscribes the mere transmission of obscene materials to a child over the internet. Only if the course of conduct surrounding the statement indicates it was intended to request sexual conduct would the luring statute be invoked.

¶28 Moninger's case illustrates the point. Although the State pointed to three isolated text exchanges as the basis for the three luring

charges in its closing argument, it also urged the jury to examine the entire 1000-plus text messages exchanged between Moninger and Sabrina "to realize that he knew she was a minor[] [a]nd that he was asking for sex." Later in its argument, the State asserted:

> Reason 1 why it's important to have all the texts if you want to look through all of them, not just the ones that I told you about is you can look at this and you could make your own decision that [Moninger] was luring a 13-year-old girl to have sex with him.

In other words, and notwithstanding its position on appeal about the nature of the statute, the State prosecuted Moninger by reference to a course of conduct over the three days.

¶29 We find a legislative intent to define "soliciting sexual conduct" under A.R.S. § 13-3554 by reference to a course of conduct because that interpretation is most faithful to the statute's language while giving effect to its purposes and avoiding unintended consequences. *Cf. State v. Hall*, 230 P.3d 1048, 1052–54, ¶¶ 14–18 (Wash. 2010) (defining the unit of prosecution for "attempt[ing] to induce a witness" to testify falsely or withhold testimony as based on a course of conduct because the statute's language and purpose did not show an emphasis on the numerosity of acts performed).

3. Each Additional Offense under A.R.S. § 13-3554 Must Be Shown by Distinct Conduct.

¶30 Our interpretation of the statute does not mean that multiple luring counts may never be charged—or that separate statements will never support separate charges. Having interpreted "solicit" to mean a course of conduct, we must now determine how the State can prove multiple courses of conduct under A.R.S. § 13-3554 that may be separately punished.

¶31 No binding authority directly addresses when a defendant's acts establish multiple violations of A.R.S. § 13-3554, but Arizona caselaw provides a conceptual framework for the analysis. In *State v. Via*, 146 Ariz. 108, 115–16 (1985), our supreme court considered whether the defendant committed only one "scheme or artifice to defraud" by using two stolen credit cards from the same victim at two different locations. The court in *Via* held the defendant was correctly charged with two separate offenses because, even though he "had the same general intent [to defraud] in each count," he undertook "two separate courses of conduct," each showing a

"specific intent to defraud," by using different credit cards issued by different banks. *Id.* at 116.

¶32 The holding in *Via* aligns with the seminal *Blockburger* case, where the United States Supreme Court also touched upon concepts of distinctness and separate intent in describing what differentiates two courses of conduct. The Court considered the defendant's contention that two drug sales made on two consecutive days to the same person constituted a single offense. 284 U.S. at 301–02. The *Blockburger* court reasoned the sales were separate offenses because the "first transaction, resulting in a sale, had come to an end," and "[t]he next sale was not the result of the original impulse, but of a fresh one—that is to say, of a new bargain." *Id.* at 303.

¶33 Decisions from other jurisdictions further demonstrate when a defendant's acts establish more than one punishable course of conduct in a unit-of-prosecution analysis. Nearly universally, courts determine how many prosecution units are appropriate based on a defendant's course of conduct by examining the timing of the defendant's actions, the presence of intervening events, whether a specific criminal impulse arose during the course of conduct, and the number of victims. *See, e.g.*, *People v. McMinn*, 412 P.3d 551, 558, ¶ 22 (Colo. App. 2013) (describing Colorado's non-exhaustive, multi-factor test for determining a unit of prosecution, which includes the timing of the defendant's acts, whether a volitional departure occurred, and the number of victims) (citing *Quintano v. People*, 105 P.3d 585, 591 (Colo. 2005)); *Spain v. United States*, 665 A.2d 658, 660 (D.C. 1995) (describing District of Columbia's "fork in the road" test for unit-of-prosecution cases, which asks whether the defendant "[came] to a fork in the road, and nevertheless decide[d] to invade a different interest") (quoting *Irby v. United States*, 390 F.2d 432, 437–38 (D.C. Cir. 1967) (en banc) (Leventhal, J., concurring)); *State v. Ross*, 845 N.W.2d 692, 705 (Iowa 2014) (detailing list of factors for a unit-of-prosecution analysis of the course of conduct involving intimidation with a dangerous weapon, including the timing of the defendant's actions, the identity of victims, existence of intervening acts, and the defendant's intent); *People v. Rodarte*, 547 N.E.2d 1256, 1261–62 (Ill. App. 1989) (listing similar factors); *State v. Schoonover*, 133 P.3d 48, 79 (Kan. 2006) (adopting non-exhaustive, four-factor test to determine whether a defendant's conduct was "unitary," or arising from the same act, for double-jeopardy claims, including timing and location of the acts, the causal relationship between them, and whether there "is a fresh impulse motivating some of the conduct"); *Vaughn v. State*, 614 S.W.2d 718, 722 (Miss. App. 1981) (similar factors for assessing multiple sexual assaults); *State v. Bernard*, 355 P.3d 831, 840, ¶ 23 (N.M. App. 2015)

(outlining New Mexico's non-exhaustive, six-factor test for the unit-of-prosecution analysis, including the temporal proximity of the acts, the sequencing of events, the defendant's intent, and the number of victims) (quoting *State v. Boergadine*, 107 P.3d 532, 538, ¶ 21 (N.M. App. 2005)); *State v. Itzol-Deleon*, 537 S.W.3d 434, 442–51 (Tenn. 2017) (reviewing out-of-state caselaw and adopting similar factors to those established in Colorado and New Mexico for incidents of sexual assault); *Lopez v. State*, 108 S.W.3d 293, 296, 299–301 (Tex. Crim. App. 2003) (vacating convictions for an offer to sell drugs and possession of the same drugs because charges were all based on one transaction and one criminal impulse); *State v. Anderson*, 580 N.W.2d 329, 334, ¶ 20 (Wis. 1998) (conduct not separated in time may still constitute a separate offense if it constitutes "a new volitional departure in the defendant's course of conduct").

¶34 We find particularly persuasive those out-of-state decisions addressing course-of-conduct offenses meaningfully similar to the luring statute at issue here—namely, crimes based on statements or acts anticipating the commission of a particular crime. In *Jensen*, 195 P.3d 512, the Washington Supreme Court considered when a defendant could be convicted of multiple counts of soliciting another to commit murder. The *Jensen* court held a defendant could be charged with multiple solicitation offenses based on evidence the defendant made "a new or separate and distinct request" that served as a "fresh enticement." *Id.* at 520, ¶ 35. Applying that rule, the court affirmed two of the defendant's solicitation convictions. *Id.* at 521, ¶ 41. The first was based on a series of conversations the defendant had with a cellmate requesting the killing of three people. *Id.* at 519, ¶ 31. The second was based on the defendant's discussion with a different person at a different time and place, offering more money to kill those same three people plus a fourth. *Id.* at 520–21, ¶¶ 39–41. The *Jensen* court rejected the argument that the defendant could be convicted of a third solicitation based on evidence the defendant *confirmed* his first offer to the cellmate with a purported confederate of the cellmate. The court explained that even though the confirmation entailed "a distinct conversation, occurring at a different time and place, and involving a different person," it was not a new solicitation because it did not involve a new offer. *Id.* at 519, ¶¶ 32–33.

¶35 *Jensen*'s analysis is not unique. Before *Jensen*, several other jurisdictions had addressed whether a single course of conduct could give rise to several criminal solicitation charges and reached similar conclusions. The most oft-cited decision is *Meyer v. State*, 425 A.2d 664 (Md. Spec. App. 1981). In that case, the Court of Special Appeals of Maryland considered whether a defendant had committed one act of criminal solicitation to

commit murder or several when, throughout two conversations, he offered to pay a person different sums to kill four other individuals. *Id.* at 666–68. After rejecting the notion that the number of solicitation offenses could be determined purely on a "per conversation" or "per victim" theory, the court phrased the unit-of-prosecution analysis for solicitation as follows: "[T]he question of whether there is but one solicitation or several depends upon the circumstances. What, in other words, is the solicitor asking the solicitee to do?" *Id.* at 670. To answer that question, the court examined the record to see the timing of solicitations within the conversations and the conversations generally, the circumstances surrounding each planned murder, the different fees agreed to be paid for each act, and the motives underlying each murder. It concluded the defendant had engaged in "separate and independent incitements to commit four separate and distinct acts of murder against specific named individuals[.]" *Id.* "[T]hus, neither the separate convictions nor the separate and consecutive sentences were inappropriate." *Id.*

¶36 Since *Meyer*, California, Michigan, and Kentucky have approved and adopted its approach to identifying new and distinct solicitations within a defendant's course of conduct. *People v. Cook*, 199 Cal. Rptr. 269, 270–72 (Cal. App. 1984); *People v. Vandelinder*, 481 N.W.2d 787, 789–90 (Mich. App. 1992); *Wyatt v. Commonwealth*, 219 S.W.3d 751, 759–62 (Ky. 2007). *Jensen*'s analysis and rationale both stand on firm, well-tread ground.

¶37 Contrary to the State's position, this analysis does not conflict with Arizona jurisprudence approving the charging of multiple sex acts during a single transaction as separate crimes in cases of sexual assault and child molestation. Indeed, this caselaw only strengthens our conclusion. Both our supreme court and this court have continually rejected arguments that separate acts of sexual assault or molestation cannot be charged as separate crimes, no matter the time between the acts, *so long as the record establishes the acts were different from one another*. *See, e.g.*, *State v. Griffin*, 148 Ariz. 82, 86 (1986) ("Each felonious act was performed independent of the others and was completed prior to the beginning of the next act. Each act was performed in an entirely different manner and each was accompanied by the use of force and a lack of consent on the victim's part."); *State v. Hill*, 104 Ariz. 238, 238, 240 (1969) (upholding four convictions for several separate sexual acts that occurred over an hour and a half); *State v. McCuin*, 167 Ariz. 447, 449 (App. 1991) ("Here, the evidence offered by the state sufficiently established the separate acts of defendant's placing his finger in the victim's vagina and placing his penis in the victim's vagina."), *vacated in part on other grounds*, 171 Ariz. 171 (1992). In other words, the evidence

presented in each case demonstrated that the defendants embarked on distinct acts or courses of conduct, motivated by different impulses, each time they engaged in a new sex act, even when the time between each act was brief.

¶38 With these considerations in mind, we hold that whether a defendant has committed multiple violations of "soliciting sexual conduct" from the same victim will depend on whether the defendant made statements proposing distinct occasions of sexual conduct. This analysis may turn on the following factors: the form of sexual behavior suggested; whether the defendant employed different strategies in communicating with the victim; the victim's responses to the defendant's proposals; the amount of time separating the defendant's proposals; any intervening events between the requests; and any other facts showing a new or otherwise distinct motivation or criminal impulse. *Cf. McMinn*, 412 P.3d at 558, ¶ 22; *Bernard*, 355 P.3d at 840, ¶ 23; *Schoonover*, 133 P.3d at 79. Of course, these factors are non-exhaustive. A key theme of nearly all jurisprudence addressing unit-of-prosecution analysis is that there can be no definitive test to determine the individual units present in each case. But we believe these factors will help to guide future prosecutions under A.R.S. § 13-3554. *Cf. Herron*, 805 P.2d at 629.

4. Moninger Committed Only One Violation of A.R.S. § 13-3554.

¶39 We must now examine the evidence underlying Moninger's luring convictions to determine whether it shows he separately violated the luring statute on October 3, October 4, and October 5, 2018. The State contends temporal interruptions and topic changes separating the three counts suffice to distinguish those counts as separately prosecutable. The State points to *Yegan*, in which this court affirmed the defendant's four convictions of luring a minor for sexual exploitation, which were based on electronic communications sent on four different days. 223 Ariz. at 214, ¶¶ 1–2. However, Yegan is inapplicable because the defendant, in that case, did not raise the distinctness of his luring convictions on appeal. Instead, Yegan argued the evidence was insufficient to show any of the communications on which his convictions were based satisfied the elements of A.R.S. § 13-3554. *Id.* at 220–21, ¶¶ 25–29.

¶40 Here, Moninger and Sabrina's texts began on September 30, and in short order, they decided to meet in person five days later, the first occasion on which she told him she would be alone in her home. The day after the exchange began, October 1, Moninger texted that he would like

her to be his "lover," and Sabrina texted that she "had thoughts about kissing" Moninger and "would like 2 cuddle and make out." On October 3, after Sabrina asked Moninger what they would do when they met, he texted, "You decide we can hold cuddle kiss if u want to make love u decide just be mine." Sabrina responded, "We can make love just need 2 go slow." On our record, we conclude Moninger committed only one offense because the text messages he sent to Sabrina on October 4 and 5 do not show new or distinct conduct justifying a new luring charge. Instead, after initially proposing that they meet for sex, and after having received Sabrina's consent to do so, each of the scores of messages Moninger sent after that describing what the sex would be like was not additional solicitations for sex but confirmations of the sex that they already had agreed to have. That much is plain from the three sets of exchanges for which the State prosecuted Moninger. *Supra* ¶ 7, n.1. Nothing of substance distinguishes the October 4 and 5 texts from the text Moninger sent on October 3. Each described how much Sabrina would enjoy the sex they had agreed to have.

¶41 The record shows that on October 3, Sabrina accepted Moninger's proposal to have intercourse and never wavered from that acceptance in her communication on October 4 or 5. The mere fact that Moninger sent messages referring to and confirming the same sexual encounter on October 4 and 5 does not establish distinct conduct supporting separate convictions. *Cf. Jensen*, 195 P.3d at 519, ¶¶ 32–33 (subsequent conversation confirming the previous solicitation to commit murder did not establish additional solicitation offense).

¶42 We note that we need not afford greater deference in our analysis to admissions Moninger made while asserting his entrapment defense and the jury's findings of guilt on each of the luring charges. We are not faced with an issue of the sufficiency of the evidence. The evidence presented at trial showed that Moninger engaged in solicitous acts on each date alleged in the indictment. But the relevant question is whether his statements comprise *one* course of conduct justifying one charge or *several* distinct courses of conduct justifying multiple charges. As we stated above, resolving the relevant question, at its core, is a matter of law which we approach *de novo*. *See Jurden*, 239 Ariz. at 528–30, ¶¶ 7, 10–15; *see also Sanabria*, 437 U.S. at 70 ("Whether a particular course of conduct involves one or more distinct 'offenses' under the statute depends on . . . congressional choice.").

¶43 For these reasons, Moninger's entrapment defense and the guilty verdicts do not alter our conclusion. Leaving aside the fact that Moninger's testimony did not properly raise an entrapment defense, his

admission of factual guilt for the luring charges has little bearing on whether those charges violate the Double Jeopardy Clause. Nothing in Moninger's testimony can be construed as an admission that the solicitations on October 3, 4, and 5 were part of distinct courses of conduct. And the Supreme Court has held that even a guilty plea, which involves an admission of factual guilt regarding each crime, cannot stand when a double-jeopardy violation is apparent in the record. *See United States v. Broce*, 488 U.S. 563, 570, 575 (1989); *Menna v. New York*, 423 U.S. 61, 62, n.2 (1975) (Noting that a guilty plea alone is insufficient to waive a facially apparent double-jeopardy claim because that claim asserts that "the State may not convict [the defendant] no matter how validly his factual guilt is established"); *United States v. Pollen*, 978 F.2d 78, 83–87 (3d. Cir. 1992) (applying *Broce* and *Menna* in analyzing whether record available at guilty-plea stage established separate units of prosecution for four counts of tax evasion); *State v. Millianes*, 180 Ariz. 418, 420 (App. 1994) ("A double jeopardy claim is inherently different than the usual claim of error in that double jeopardy is independent of the issue of guilt.").

¶44 The same is true of the jury's guilty verdicts for each count of luring. Again, the issue is not whether Moninger discussed sexual conduct on each date alleged in the indictment but whether those solicitous acts comprised a single course of conduct or several. Of course, the verdicts would be entitled to deference if the jury had been instructed to consider whether Moninger's conduct established one course of conduct or several. But the jury here only received a separate-counts instruction, which informed the jury that "[e]ach count charges a separate and distinct offense," and that it was to decide each count separately from the others. *See State v. Agueda*, 481 P.3d 1179, 1182, ¶ 11, n.3 (App. 2021) ("The principle underlying and conveyed by the separate-counts instruction is that a jury must be allowed to decide each count independently from the other counts charged[.]"). The only distinction between the counts was the offense date. As a result, we cannot infer from the jury's verdicts whether each luring conviction rested on a distinct course of conduct.

¶45 Thus, after considering the factors outlined above, we conclude that the record does not show Moninger engaged in separate, distinct courses of conduct permitting multiple convictions. *See Brown*, 432 U.S. at 169 ("The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units."). Accordingly, Moninger's convictions and sentences for the second and third counts of luring a minor for sexual exploitation must be vacated. Because we cannot determine whether the superior court would have

sentenced Moninger in the same manner based on a single course of conduct, we remand for resentencing on Moninger's other convictions. *See State v. Garza*, 192 Ariz. 171, 176, ¶ 17 (1998) ("Even when the sentence imposed is within the trial judge's authority, if the record is unclear whether the judge knew he had discretion to act otherwise, the case should be remanded for resentencing.").

5. The Dissent Does Not Persuade Us Otherwise.

¶46 The dissent faults our conclusion on various grounds. None withstand careful analysis.

¶47 First, in a footnote, the dissent asserts that comparing the total punishment for multiple convictions of luring with a single conviction for sexual conduct with a minor is not "evidence that the legislature did not intend to punish each act of luring." *Infra* ¶ 65, n.8. At the outset, we note the dissent relies on principles underlying a proportionality analysis under the Eighth Amendment and not a unit-of-prosecution analysis under the Double Jeopardy Clause. *Id.* As a result, the dissent misconstrues the purpose of a unit-of-prosecution analysis, which is to determine what the legislature intended the scope of an "act of solicitation" to be. In contrast, a proportionality analysis examines whether the sentence imposed in a particular case is disproportionate. Within the correct context of a unit-of-prosecution analysis, it is appropriate to consider whether a proposed unit of prosecution would inflate the number of potential charges—and consequently, the total possible punishment—defendants would face in a manner inconsistent with the purpose and structure of the legislative scheme. A.R.S. § 13-101(4).

¶48 An example of the correct approach is *Ladner v. United States* 358 U.S. 169 (1958). In *Ladner*, the Court analyzed whether the prosecution unit for a statute criminalizing assault of a federal officer was the act constituting assault or the number of officers affected by the action. 358 U.S. 169, 173–74 (1958). The Court rejected an officer-focused interpretation, in part, because it would cause defendants to face more charges and greater total punishment for placing several federal officers in fear of injury than actually injuring an officer. *Id.* at 177. Absent clear evidence of legislative intent, the Court hesitated to adopt a reading of the statute that would produce such "incongruous results." *Id.* Given *Ladner*, we reject the dissent's view on this subject.

¶49 Next, the dissent asserts a course-of-conduct interpretation of the term "soliciting" is at odds with A.R.S. § 13-3554's text and purpose,

reasoning the statute is focused on particular, individualized harm—the sexual exploitation of minors. *Infra* ¶¶ 64–68. As a result, the dissent concludes that "[b]ecause every request of a minor to engage in sexual conduct is a separate harm, each such request may be punished" even if they occur serially in the course of a single event. *Id.* Of course, we agree with the dissent that an identifiable purpose of A.R.S. § 13-3554 is to protect individual children against sexual exploitation. But the dissent's contention that each "request" for sexual conduct may be separately punished tells us nothing about the scope and boundaries of the act of "soliciting sexual conduct," which is the gravamen of the crime of luring as charged here. Assuming a "request" is synonymous with "soliciting sexual conduct," the question remains: When does one request end and another begin? The dissent seems to imply a new solicitation occurs each time a minor would be exposed to a new or different emotional, physical, or psychological harm. *Infra* ¶¶ 67–68. However, A.R.S. § 13-3554 defines the crime of luring only by reference to the defendant's actions, not its impact upon the victim, and allows for prosecution of a defendant who solicits sex even from a *fictitious* minor. Thus, a unit-of-prosecution analysis focused on the harms caused by soliciting sexual conduct does not align well with A.R.S. § 13-3554's text.

¶50 For this reason, the dissent's reliance on *State v. Rodriguez*, 484 P.3d 669 (Ariz. App. 2021), also is misplaced. There, this court held that multiple charges could be brought against a defendant for a single course of conduct under a statute criminalizing abuse of a vulnerable adult because the statute's purpose was focused on protecting against individual harm. *Id.* at 673–74, ¶¶ 9–11. But the court came to that conclusion only after finding that the relevant statute unambiguously defined the unit of prosecution for the offense by *each injury* caused by the defendant's conduct. *Id.* at 673, ¶ 11.

¶51 As we exhaustively detailed above, a new violation of A.R.S. § 13-3554 instead occurs when the evidence shows a volitional departure in the defendant's actions. *Supra* ¶¶ 31–45. A distinct impulse to persuade or induce the minor to engage in a new occasion of sexual conduct must be present. The passage of time or another reference to the same sexual encounter alone will rarely form a new unit of prosecution. *Id.* We do not break new ground by imposing this requirement; it is a bedrock principle of the Double Jeopardy Clause's protection against multiplicitous convictions. *See Blockburger*, 284 U.S. at 303. Concluding otherwise risks giving the State carte blanche to divide a continuous conversation into as many luring charges as it wishes. *See Ex parte Snow*, 120 U.S. 274, 282 (1887) (rejecting division of two years and eleven months into three charges for

the crime of "cohabitating with more than one woman" as wholly arbitrary and finding it "was the mere will of the grand jury which divided the time among three indictments, and stopped short of dividing it among 35 [months] or 152 [weeks], or even more").

¶52 The dissent also faults our decision to draw from the inchoate crime of solicitation to aid in our analysis of the term "soliciting," asserting there are meaningful differences in the two statutes defining the crimes. *Infra* ¶¶ 69–74. But the dissent fails to persuasively explain how the differences between luring and inchoate solicitation should alter our conclusions concerning the scope and boundaries of an act of solicitation as understood in criminal law. After all, we must presume that when the legislature defined "luring," it deliberately chose to use the term "solicit" with full knowledge of its usage and meaning within the criminal code. "When [the legislature] uses well-settled terminology of criminal law, its words are presumed to have their ordinary meaning and definition." *Salinas v. United States*, 522 U.S. 52, 63 (1997) (absent specific directive otherwise, use of the phrase "to conspire" in specific conspiracy statute incorporated meaning and principles surrounding general crime of conspiracy); *Sekhar v. United States*, 570 U.S. 729, 733 (2013) ("[A]s Justice Frankfurter colorfully put it, 'if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.'" (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)); *see also State v. Jones*, 94 Ariz. 334, 336 (1963).

¶53 Ultimately, the dissent's dispute is with the results of our analysis, not the analysis itself. We stand by our assessment of the evidence. The text messages recounted throughout this opinion show that Moninger solicited sexual intercourse from Sabrina on October 3, then spent the next two days discussing and reaffirming that sexual encounter and matters ancillary to it, not engaging in new courses of conduct motivated by distinct criminal impulses. And the mere passage of time between the text messages, in and of itself, is not a reasonable basis to divide a single course of criminal conduct into three, as the State did here. *Cf. State v. Klokic*, 219 Ariz. 241, 247, ¶ 32 (App. 2008) (whether events can be grouped within the same criminal transaction or must be separated depends, *inter alia*, on whether a reasonable basis exists to distinguish between the events). Thus, Moninger's convictions for the second and third counts of luring must be vacated.

B. Moninger Invited the Alleged Instructional Error.

¶54 Moninger argues the lone remaining luring conviction must be vacated because the superior court committed fundamental, prejudicial error in instructing the jury of the elements of the crime. Proving Moninger lured a minor for sexual exploitation required the State to show he solicited "sexual conduct." A.R.S. § 13-3554(A). "Sexual conduct" under the luring statute has several meanings, including sexual intercourse, object penetration, bestiality, masturbation, and other acts performed to stimulate the viewer sexually. A.R.S. § 13-3551(10). The State alleged and argued Moninger committed all three violations of A.R.S. § 13-3554 by soliciting "sexual intercourse," but some of Moninger's text messages to Sabrina could have conceivably referred to another form of "sexual conduct."

¶55 The superior court defined "sexual conduct" for the jurors in both its preliminary and final instructions. In both instances, the court defined "sexual conduct" as sexual intercourse, object penetration, or masturbation. Moninger argues those instructions erroneously allowed the jury to convict him based on conduct not charged in the indictment. This argument, however, is unavailing because Moninger invited any error. *See State v. Logan*, 200 Ariz. 564, 565–66, ¶ 9 (2001).

¶56 Before trial, Moninger gave the court his requested jury instructions, including a definition of "sexual conduct." Moninger's proposed instruction defined "sexual conduct" as sexual intercourse, object penetration, masturbation, or sadomasochistic abuse. In discussing its preliminary jury instructions with the parties, the superior court explained that because the luring charges specified Moninger solicited only "sexual intercourse," the court was "fine with just limiting" the "sexual conduct" instruction "to sexual intercourse" if the parties so preferred. Moninger accepted the court's instruction as proposed and did not ask for a narrower version to match the indictment. Likewise, when the court suggested the final jury instructions, Moninger did not object to the court's instruction on "sexual conduct."

¶57 A defendant who requests a jury instruction may not later challenge that instruction on appeal, even for fundamental error. *Logan*, 200 Ariz. at 565–66, ¶¶ 8–9. Because Moninger requested an instruction even broader than the one the superior court gave and then acquiesced in the court's instruction despite being allowed to recommend a narrower definition to match the charges, Moninger invited the alleged error.

C. The Superior Court May Impose a Probation Term for a Luring Conviction.

¶58 Moninger urged the superior court to impose probation instead of prison for all four of his convictions. The State argued that the court lacked the power to impose probation on a defendant convicted of luring. Because we are remanding for resentencing, we address whether probation is an option for a luring conviction under A.R.S. § 13-3554. *Buckholtz v. Buckholtz*, 246 Ariz. 126, 131, ¶ 17 (App. 2019) (court has the discretion to address issues likely to arise on remand); *State v. Abdi*, 226 Ariz. 361, 366, ¶ 18 (App. 2011).

¶59 A.R.S. § 13-705(H) makes defendants convicted of a dangerous crime against children in the first degree ineligible for probation unless the conviction falls under subsection (F). Subsection (F) establishes applicable prison terms for convictions involving sexual abuse or bestiality "if" the defendant is sentenced to prison. Even though A.R.S. § 13-705(H) does not exclude mandatory prison for convictions under subsection (E), which establishes the applicable prison terms for a luring conviction, the language of subsection (E) mirrors that of subsection (F) in that it states what prison terms apply "if" a defendant convicted of luring is sentenced

to prison.[6] Also, the sentencing chart published by the Arizona Supreme Court provides that luring convictions are probation eligible. *See* Arizona Supreme Court, Criminal Code Sentencing Provisions, http://www.azcourts.gov/selfservicecenter/Criminal-Law/Criminal-Law-Authorities. Superior court judges have granted probation to defendants convicted of luring on several occasions—although the issue has not been challenged on appeal. *See, e.g.*, *State v. Regenold*, 227 Ariz. 224, 225, ¶ 2 (App. 2011); *State v. Villegas*, 227 Ariz. 344, 345, ¶¶ 1–2 (App. 2011); *Yegan*, 223 Ariz. at 215, ¶ 4. Given the current sentencing practice on this

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[6] Looking beyond the text of A.R.S. § 13-705 to the legislative history surrounding it does not resolve the issue. Subsection 13-705(E) (then A.R.S. § 13-604.01(E)) was added to the statute in 2007. 2007 Ariz. Sess. Laws, ch. 248, § 2 (1st Reg. Sess.) (H.B. 2342). Even though the provision was drafted to mirror the exact language of A.R.S. § 13-705(F) (i.e., referring to "if" the defendant is sentenced to prison), a fact sheet for the bill states that a conviction for luring would "require[]" a presumptive prison term. Fact Sheet for H.B. 2342, 48th Leg., 1st Reg. Sess. (May 1, 2007); *see also* Ariz. House Summ. for H.B. 2342, 48th Leg., 1st Reg. Sess. (June 12, 2007) (stating that the bill "[k]eeps the same presumptive ten year penalty" as, presumably, A.R.S. § 13-604.01(F) (now A.R.S. § 13-705(F)). There is no specific discussion in the limited available legislative history concerning probation eligibility for luring offenses. Moreover, A.R.S. § 13-705(E) and A.R.S. § 13-705(F) were amended in 2008, but the language of subsection (E) was once again drafted to mirror the language of A.R.S. § 13-705(F). 2008 Ariz. Sess. Laws, ch. 301, § 29 (2d. Reg. Sess.) (H.B. 2207). Therefore, it appears either the legislature mistakenly failed to add A.R.S. § 13-705(E) to the exception provided in A.R.S. § 13-705(H) or mistakenly drafted A.R.S. § 13-705(E) in a way that indicated such offenses are probation-eligible.

Given these facts and the legislature's inaction in the face of court practice, it appears that the statute is, at the very least, ambiguous as to whether luring is probation-eligible. When statutory interpretation methods cannot elucidate ambiguities within a criminal statute, we typically apply the rule of lenity to resolve it in the defendant's favor, although this practice is not without valid criticism. *Jurden*, 239 Ariz. at 529-30, ¶¶ 12–13 (citing, with apparent approval, the proposition that the rule of lenity applies to unit-of-prosecution cases); *State v. Munoz*, 224 Ariz. 146, 148, ¶ 8 (App. 2010); Samuel A. Thumma, *State Anti-Lenity Statutes and Judicial Resistance: "What a Long Strange Trip It's Been,"* 28 Geo. Mason L. Rev. 49, 100, 107–23 (2020) (noting the conflict between the rule of lenity and state anti-lenity statutes, including A.R.S. § 13-104).

subject and the legislature's apparent acquiescence to that practice, we hold that a luring conviction is probation eligible.

¶60 On remand, the superior court may consider a probation term in determining the appropriate sentence to impose.

CONCLUSION

¶61 We vacate Moninger's second and third convictions and sentences for luring (counts two and three). We affirm Moninger's conviction for luring (count one) and attempted sexual conduct with a minor (count four) but vacate the sentences and remand for resentencing.

M O R S E, Judge, concurring in part and dissenting in part:

¶62 I join the majority in rejecting Moninger's claim of instructional error and affirming Moninger's convictions for Counts 1 and 4. Given the majority's decision to vacate counts two and three, I also agree that resentencing is appropriate. I respectfully dissent from the remainder of the opinion.

¶63 The majority's interpretation of A.R.S. § 13-3554 is inconsistent with the statute's text and purpose. Moreover, even under the majority's course-of-conduct model for A.R.S. § 13-3554, vacating Moninger's convictions on Counts 2 and 3 (*supra* ¶¶ 8-45, 61) ignores overwhelming evidence that he committed multiple acts of luring. Finally, the majority's holding (*supra* ¶¶ 58-60) that a luring conviction is probation eligible ignores the plain language of A.R.S. §§ 13-3554, and -705(E), (H), and (O). Accordingly, I would affirm Moninger's convictions and sentences in their entirety.

THE STATUTE PROHIBITS EACH SOLICITATION, EVEN REPEATED SOLICITATIONS FOR THE SAME CONDUCT

¶64 The majority analyzes the text, history, and context of A.R.S. § 13-3554 to determine whether the legislature intended "solicit" to refer to an act-based or course-of-conduct-based offense. *Supra* ¶¶ 8-38.[7] The majority correctly notes that this statute "permits separate convictions for

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[7] The majority's opinion only interprets the word "soliciting" in A.R.S. § 13-3554(A) and does not address whether a unit-of-prosecution analysis applies to a defendant who is charged with "offering" sexual conduct with a minor. *Supra* fn. 2.

each . . . 'solicitation,'" *supra* ¶ 12, but finds the term "solicit" is ambiguous, *supra* ¶ 14, and concludes that the legislature intended "to define 'soliciting sexual conduct' under A.R.S. § 13-3554 by reference to a course of conduct . . . ," *supra* ¶ 29. I respectfully disagree that the statute is ambiguous or that the majority's course-of-conduct formulation is faithful to the statutory text and purpose. *See King v. Burwell*, 576 U.S. 473, 492 (2015) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." (quoting *United Sav. Ass'n. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988))).

¶65 The majority finds ambiguity "[b]ecause the ordinary meaning of 'solicit' does not unambiguously define the unit of punishable conduct . . . as either a single statement . . . or a course of conduct . . . ." *Supra* ¶ 14. Citing *Jurden*, 239 Ariz. at 531, ¶ 23, the majority is "convinced the legislature did not intend 'solicit' to refer to singular acts or statements because" such an interpretation would potentially expose a luring defendant to harsher penalties than someone who engages in sexual conduct with a minor. *Supra* ¶ 20.[8] But *Jurden* dealt with a statute that "had the primary purpose of protecting a broad societal interest," *i.e.*, preventing

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[8] I also decline to join the majority's reliance, *supra* ¶¶ 20-21, on the purported unintended outcome of punishing multiple acts of luring a minor more harshly than a single act of sexual conduct with a minor. The punishment for completed sexual conduct with a minor is significantly greater than the punishment for one act of luring. *Compare* A.R.S. § 13-705(A), (B), (C) (establishing either *life in prison* or a presumptive 20-year prison term for sexual conduct with a minor under ages 12 or 15, respectively), *with* A.R.S. § 13-705(E), (Q)(1)(s) (establishing a 10-year presumptive prison term for luring a minor under age 15). That multiple convictions for luring a minor could lead to a greater punishment than a single conviction for sexual conduct with a minor is not, by itself, evidence that the legislature did not intend to punish each act of luring. *Compare State v. Berger*, 212 Ariz. 473, 478-79, ¶¶ 25-26 (2006) (evaluating sentences for each conviction independently and rejecting excessive punishment argument based on mandatory consecutive sentences arising from multiple convictions), *with id.* at 487-88, ¶ 67 (Berch, V.C.J., concurring in part and dissenting in part) (noting that multiple consecutive sentences for child pornography were greater than sentences for sexual assault of a child); *see also State v. Soto-Fong*, 250 Ariz. 1, 12, ¶ 49 (2020) (rejecting comparison between consecutive sentences for multiple crimes and a sentence arising from a single offense).

resistance to state authority. *Rodriguez*, 484 P.3d at 673, ¶ 11 n.4. In contrast, where the statute is focused on a specific harm, the statute criminalizes each instance in which that harm is inflicted. *See id.* at ¶ 11.

¶66 In *Rodriguez*, the defendant whipped his eighty-two-year-old father and was convicted of four counts of vulnerable-adult abuse under A.R.S. § 13-3623, each relating to a distinct injury caused during the same altercation. *Id*. at 672, ¶¶ 2, 4. The defendant argued that three of the convictions violated the Double Jeopardy Clause because the injuries were inflicted over one course of abuse. *Id*. at ¶ 5. Analyzing the vulnerable-adult-abuse statute, this Court rejected the double-jeopardy arguments because the statute was "focused on a particular harm—injury, abuse, or endangerment" of vulnerable adults. *Id*. at 673, ¶ 11 (citing A.R.S. § 13-3623(A), (B)).

¶67 The majority overlooks this key difference. Like the vulnerable-adult-abuse statute, A.R.S. § 13-3554 is focused on a particular harm—the sexual exploitation of minors—and protects children from the harm caused when a predator solicits sexual conduct. *Supra* ¶ 15. Thus, like the statute in *Rodriguez*, it is "directed at individualized protection." *See Rodriguez*, 484 P.3d at 673, ¶ 11 n.4 (citing *State v. Nereim*, 234 Ariz. 105, 110, ¶ 17 (App. 2014)).

¶68 Soliciting sex from a minor causes no less harm simply because the defendant repeats the request. If anything, repeated requests can magnify the harm to the minor. *See People v. Vara*, 68 N.E.3d 1018, 1025, ¶ 37 (Ill. App. Ct. 2016) ("[G]rooming is commonly understood as a method of building trust with a child or an adult around the child in an effort to gain access to the child, make the child a cooperative participant in the abuse, and reduce the chance that the abuse is detected or disclosed." (citing U.S. Dep't of Justice, *Common Questions*, National Sex Offender Public Website)); *see also* Tom Sorell, *Online Grooming and Preventive Justice*, 11 Crim. L. & Phil. 705, 721 (2017) (discussing the harms associated with online grooming, ranging from "depression, sexual dysfunction, and drug-dependence to difficulty making friends, uncertainty over one's gender or sexual preferences and suicidal and other self-harming tendencies"). Because every request of a minor to engage in sexual conduct is a separate harm, each such request may be punished, "notwithstanding that multiple harms are serially inflicted over the course of a single event." *Rodriguez*, 484 P.3d at 673, ¶ 11.

¶69 The majority draws from the inchoate offense of solicitation, *see* A.R.S. § 13-1002, and cases holding that inchoate solicitation

encompasses a course of conduct rather than a single act, *supra* ¶¶ 22-26. Because inchoate solicitation prohibits a course of conduct, the majority reasons that a similar course-of-conduct unit of prosecution must also apply to A.R.S. § 13-3554. *Supra* ¶¶ 27-29.

¶70 The statutory text and purpose do not support importing the course-of-conduct approach from the inchoate crime of solicitation into the substantive offense of luring a minor for sexual exploitation. The inchoate-solicitation statute, like the resisting-arrest statute in *Jurden*, protects broad societal interests, *infra* ¶ 72, while the luring statute, like the vulnerable-adult abuse statute in *Rodriguez*, protects individual victims, *infra* ¶ 73. Although both A.R.S. §§ 13-1002 and -3554 use a form of the word "solicit," the two statutes are structured differently. A defendant commits inchoate solicitation when he "solicits another person" to commit a felony or misdemeanor. A.R.S. § 13-1002(A). In contrast, a defendant violates A.R.S. § 13-3554 by "soliciting sexual conduct" with a minor. A.R.S. § 13-3554(A). Thus, the crime of inchoate solicitation is defined by the act of soliciting *a person* while the crime of luring a minor is defined by the act of soliciting *conduct*.

¶71 This structural difference is meaningful and reflects the different statutory purposes. Our supreme court has already rejected the attempt to analogize A.R.S. § 13-3554 to inchoate solicitation and other preparatory offenses. *Mejak*, 212 Ariz. at 558, ¶ 18 (rejecting equivalency between A.R.S. § 13-3554 and §§ 13-1001 to -1006). Had the legislature intended to use the same approach as inchoate solicitation, then A.R.S. § 13-3554 would mirror A.R.S. § 13-1002 and provide that a defendant commits luring if he solicits *a minor* to engage in sexual conduct with the defendant. "[W]e assume that when the legislature uses different language within a statutory scheme, it does so with the intent of ascribing different meanings and consequences to that language." *Parker v. City of Tucson*, 233 Ariz. 422, 428, ¶ 12 (App. 2013) (quoting *Comm. for Pres. of Established Neighborhoods v. Riffel*, 213 Ariz. 247, 249-50, ¶ 8 (App. 2006)). The legislature departed from the person-based approach of inchoate solicitation and defined luring a minor for sexual exploitation using an act-based approach. We should not ignore that difference.

¶72 The purposes of the two statutes are also different. In stark contrast to luring a minor for sexual exploitation, inchoate solicitation is not intended to prevent harm to the person being solicited. Inchoate solicitation is not a crime standing alone—it "does not exist without incorporating other laws" and it "depends wholly on the underlying substantive offense." *Murro v. Ariz. Dep't. of Health Servs.*, 246 Ariz. 527, 529,

¶ 6 (App. 2019). Inchoate solicitation and other preparatory offenses are "committed in preparation for committing a completed crime." *Mejak*, 212 Ariz. at 558, ¶ 18. Moreover, inchoate offenses like solicitation and conspiracy are punished because of "the increased danger believed to result from group effort . . . ." *State v. Gunnison*, 127 Ariz. 110, 113 (1980). Because the inchoate crime of solicitation is based on soliciting another individual to commit an underlying crime, it is logical to measure the offense based on the underlying crime to be committed by that individual, *i.e.*, the course of conduct.

¶73 No similar course-of-conduct logic applies to the crime of luring a minor for sexual conduct under A.R.S. § 13-3554. Unlike inchoate solicitation, luring a minor for sexual conduct is intended to protect the person being solicited, even if the solicited conduct would not fit within the statutory definition of the separate offense of sexual conduct with a minor. *See Hollenback*, 212 Ariz. at 15, ¶¶ 6-7 (stating that the definition of sexual conduct in § 13-3554 is broader than sexual conduct with a minor defined in § 13-1405 such that § 13-3554 "cover[s] additional types of offering or requesting conduct not prohibited by the combination of §§ 13-1002 and 13-1405"). Nor does the victimization of a minor via luring raise the same issues involved with co-conspirators or accomplices contemplated in other inchoate crimes. *See Gunnison*, 127 Ariz. at 113. Instead of preventing the underlying crime or group effort, A.R.S. § 13-3554 seeks to prevent the act of the solicitation because of the harm it causes to children. *See supra* ¶¶ 15-18 (explaining that the legislature was attempting to prohibit the sexual exploitation of children and any conduct which threatens accompanying psychological and emotional harm); *see also Paredes-Solano*, 223 Ariz. at 289, ¶ 12 (noting the legislature's stated purpose that it is the "public policy of this state . . . [t]o prohibit any conduct which causes or threatens psychological, emotional, or physical harm to children as a result of such sexual exploitation").

¶74 A predator inflicts harm on the minor victim each time he solicits sexual conduct, and that harm is no less egregious simply because he repeatedly requests an encounter. If a defendant solicits sexual conduct from a minor, even the same sexual conduct over and over again, then a jury may return multiple convictions based on those repeated solicitations.

THE TRIAL EVIDENCE SUPPORTS MONINGER'S CONVICTIONS FOR MULTIPLE COUNTS EVEN UNDER THE MAJORITY'S APPROACH

¶75 The majority acknowledges that "the State can prove multiple courses of conduct under A.R.S. § 13-3554 that may be separately punished." *Supra* ¶ 30. According to the majority, however, multiple offenses may be proven only when a "defendant made statements proposing distinct occasions of sexual conduct." *Supra* ¶ 38. Proof of such multiple offenses may be based on "different strategies in communicating with the victim; the victim's responses to the defendant's proposals; the amount of time between the defendant's proposals; any intervening events between the requests; and any other facts showing a new or otherwise distinct motivation or criminal impulse." *Supra* ¶ 38.

¶76 The majority summarily applies the proof it identifies for establishing multiple offenses to the facts of this case and concludes that "the record does not show Moninger engaged in separate, distinct courses of conduct permitting multiple convictions." *Supra* ¶¶ 39-45. I disagree. The proof adduced at trial showed Moninger used different communication strategies; the victim offered different responses; and time and other intervening events passed between his proposals. These facts showed a new or otherwise distinct motivation or criminal impulse and were sufficient to sustain all three of Moninger's luring convictions.

¶77 Moninger testified that he "offered or solicited sexual conduct with another person," he did so "knowing or having reason to know . . . that she was under the age of 15," and he committed an act in furtherance of the crimes by driving from Las Vegas to Kingman, where Sabrina was said to live. Moninger made these statements in the context of his effort to establish an entrapment defense to all charged counts.[9] His requested entrapment instruction applied to "*the charged offenses* of luring a minor for the purpose of sexual exploitation and attempted sexual conduct with a minor." (emphasis added). Thus, by raising, testifying, and arguing entrapment, Moninger admitted he committed each charged offense but

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[9] The majority asserts that Moninger's testimony was insufficient to establish entrapment because Moninger testified he believed Sabrina was an adult. *Supra* ¶¶ 5, 42-43. Moninger testified he knew or should have known Sabrina was under 15. His testimony was sufficient, as Moninger's subjective belief was not an element of the offense. *See* A.R.S. § 13-3554(A) (requiring "knowing or having reason to know that the other person is a minor").

argued he should not be convicted because "'the idea of committing the offense started with law enforcement officers'" who "induced the person to commit the offense." *Gray*, 239 Ariz. at 479, ¶ 17 (quoting A.R.S. § 13-206(B)(1)-(2)); *see also State v. Soule*, 168 Ariz. 134, 137 (1991) ("The entrapment defense is a relatively limited defense, available only to defendants who have committed all the elements of a proscribed offense." (internal quotation marks omitted)).[10]

¶78 Apart from entrapment, the text messages between Moninger and Sabrina on October 3, 4, and 5 demonstrate distinct enticements, strategies, and responses, along with significant breaks in time and intervening events. Contrary to the majority's assertion, the evidence shows that Moninger did not act as if he believed a scheduled encounter would occur. While the majority focuses on Sabrina's consistency, *see supra* ¶ 41 (noting that Sabrina "never wavered from that acceptance"), Moninger's conduct defines the scope of his crimes. Presumably, the majority's focus on Sabrina leads to rejecting multiple counts because Sabrina repeatedly agreed to Moninger's sexual advances and, impliedly, would support multiple counts if Sabrina had been inconsistent and only said "yes" after initially refusing. But focusing on Moninger's actions and statements demonstrates his consistent doubt that the liaison would take place and his constant work on October 3, 4, and 5 to entice, plan, confirm, and realize a sexual liaison with Sabrina. Thus, even under the majority's course-of-conduct model, we should affirm all three convictions.

Moninger's Activity on October 3

¶79 Moninger began sending text messages to Sabrina on September 30, and those messages quickly evolved into discussions of

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[10] The majority argues that Moninger's entrapment defense is irrelevant because "even a guilty plea, which involves an admission of factual guilt regarding each crime, cannot stand when a double-jeopardy violation is apparent in the record." *Supra* ¶ 43. The cases cited by the majority address situations in which a double-jeopardy violation was "facially apparent" from the charging document or record, despite a guilty plea. *Id*. (citing *e.g., Menna*, 423 U.S. at 62, n.2). As discussed in more detail below, the record in this case does not support the contention that a double-jeopardy violation occurred, let alone that it is facially apparent. Although not dispositive, Moninger's testimony and invocation of the entrapment defense are part of the record and may be considered in determining whether his actions accounted for multiple crimes.

sexual intercourse. *Supra* ¶ 3. On October 3, Moninger proposed an in-person meeting: "Do you want to meet Friday if possible What hours can we be together if I can make it".[11] Sabrina said that her mom worked late and Moninger said spending "8 hours together would be wonderful". They then discussed what would happen during that meeting and Moninger said "You decide we can hold cuddle kiss if u want to make love u decide just be mine".

¶80 Moninger told Sabrina he was "really going to try" to come Friday and promised to "teach u ever so loving and gentle make it am experience u will rember all ur life make it an experience u will want with me always". Throughout the day and early evening on October 3, Moninger sent a series of both romantic and sexually explicit text message to Sabrina. That evening, he repeated that he was "pretty sure I'm coming Friday can't give u a definate till tomm But u can kinda get excited about me coming". Moninger then assured Sabrina that he could not get her pregnant, was free of sexually transmitted diseases, and offered to bring her clothes when he came to visit. He also suggested they could "roll play and act like we want u to get pregnant and want a baby so badly but u won't get pregnant".

¶81 Moninger ended the night with more explicit texts, including one in which he encouraged Sabrina to ask him to do "anything at all anything u may have thought of in the past maybe something us saw online or in a movie Or even something that pops in ur head that turns u on or u think would feel great". Then he asked for Sabrina's address so he could calculate "exactly how long it will take me to drive down and see u".

¶82 Moninger offered Sabrina clothes. He also promised Sabrina a sexual experience she would remember all her life. He sent Sabrina sexually explicit text messages. He assured her that she did not need to fear pregnancy or sexually transmitted diseases and suggested they could role play a pregnancy fantasy. Moninger's solicited sexual conduct with Sabrina throughout the entire day of October 3.

Moninger's Activity on October 4

¶83 Moninger's communications with Sabrina on October 4 evidence new and unique efforts to solicit a sexual encounter with a minor. Rather than simply confirming the finality of an agreement reached on October 3, Moninger expressed uncertainty about their scheduled meeting

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[11] All punctuation, capitalization, spelling, and grammatical errors appear in the original text messages.

and worked throughout October 4 to solicit an encounter with Sabrina. He offered new gifts, elicited new promises, questioned Sabrina's intent and bona fides, and made specific statements about physical acts and emotional ties that went far beyond his statements and efforts on October 3.

¶84 After a four-hour-and-15-minute break from his last text message of October 3, Moninger sent his first text of October 4 to Sabrina at 3:17 a.m. Moninger added a new enticement when he told Sabrina he was going to bring her a gift he had not previously discussed. He also told her he wanted to keep the gift a mystery until they met in person and alluded to a long-term relationship where she would get to take his name:

> I forgot there is something I've had for a little while that I want to bring and give to you Not going to tell u what it is but want you to keep and save it OK I have a vast collection of all sorts of things but this is special for you and I want u to have it If we make it long term then we put it back in the collection when you get my name

¶85 In that same text message, Moninger suggested a new form of communication and said he wanted to speak with Sabrina on the telephone:

> OK I'm going to call u about 9:30 am can only talk about 30 minutes but really want to hear ur voice my guess is u sound like a beautiful songbird or an angel . . . .

Moninger suggested calling Sabrina at least four more times throughout October 4.

¶86 At 4:37 a.m., Moninger sent a picture of himself to Sabrina and requested a different picture of her:

> Oh, I did promise you a picture didn't I Do you think I would let u down break my word to the future love of my life Well just check your email I sent it there, hope u like, can I get a different pic of u now Tonights pic was same as first one u sent

¶87 Afterwards, Moninger texted that he could not call Sabrina at 9:30 and would call later. When Sabrina expressed disappointment, Moninger texted at 11:21 a.m. to confirm that Sabrina still wanted to meet:

> How am I hurting u Do u want to see me tomm I'm trying to get the car ready so I can make it there with no problems that should be my top priority if u want to see me

Minutes later, he texted an apology about missing the call and asked Sabrina to send an address and confirm "what time does mom go to work tomm".

¶88 Moninger's actions on October 4 also demonstrate that he doubted that the scheduled meeting would occur and was concerned law enforcement might be involved. In the afternoon of October 4, Moninger asked Sabrina "to take a selfie right now and send it to me Please I'll love u for ever if u do this". Sabrina originally responded that her camera did not work but later sent three texts to Moninger with links to images. Moninger also asked at least seven times for Sabrina's address or name of the motel in which Sabrina claimed to reside and threatened to cancel the trip or not leave until she provided it.

¶89 Moninger apologized but explained that he was afraid because "Cops set u stings for older guys picking up younger girls," and if "I come down to see u and it's a set up I'll go to prison I can't do that". He then sent a series of text messages about the possibility of prison and being labeled a pedophile before asking Sabrina to "promise" and "swear" that law enforcement was not involved. When Sabrina ultimately responded, "I swear on my mom and dad," Moninger seemed reassured and said "I think I can come see u tomm" if he could take care of "one detail" and cover a "prior commitment". He later explained that the prior commitment was that he had "a daughter she has dance class tomm I have to pick her up Need someone to do that for me". The fact that Moninger had doubts about Sabrina's bona fides and then renewed his enticements after his doubts were allayed provides evidence of a new solicitation.

¶90 Throughout the day, Moninger offered material enticements to Sabrina beyond the promise of clothes made on October 3. As noted above, *supra* ¶ 84, in his first text of the day, he promised to bring a mystery item from his "vast collection" of things. Later, Moninger promised to bring Sabrina's preferred soft drink because "I imagine we will get thirsty". When Sabrina texted that she lived in a hotel while her mom was trying to get enough money to rent a house, Moninger replied "I'm notrich but what I have I share with u". That evening he asked Sabrina to "remind me to bring gift for you Something special I have want u to have and keep, ok".

¶91 Moninger also referenced specific physical acts throughout October 4. He texted that "If it is humanly possible I'm going to hold u in my arms tomm" and said that "after I make love to u share our bodies no one else will do". He also told Sabrina he would "pour [a soft drink] all over ur body lick it off if u like," and place "kisses all over ur body". He texted that "Tomm we dont have to touch ourselves we do it for each other" and he would "pull u so close that I will know ur wet without using fingers" but remain "gentle never worry about that". He also asked if Sabrina had wifi so they could "put on music or porn" while they were together.

¶92 More notably, Moninger dramatically escalated the emotional and psychological enticements he offered to Sabrina. After telling Sabrina he had a daughter, he said "You could be her mom one day". He repeatedly texted that he was in love with Sabrina and promised a long-term and exclusive relationship. Moninger also repeatedly alluded to a future marriage: "I wont ask u to marry me yet" followed immediately by "I said yet". Later, he texted Sabrina that she was his "only possibility" for marriage and "at the top of the list".

¶93 Rather than simply repeating requests previously made, Moninger's texts on October 4 demonstrate that he was unsure that the meeting would occur. His efforts throughout the day show new enticements, both physical and emotional, requests for different forms of sexual activity, and evolving motivations to Sabrina, separate and apart from his actions on October 3. Accordingly, the record amply supports a separate conviction on Count 2.

Moninger's Activity on October 5

¶94 Moninger's communications and actions on October 5 were distinct and support the conviction on Count 3. Again, Moninger's actions on October 5 far exceed simply confirming any prior meeting agreed to on October 3 or 4. Moninger continued to solicit, encourage, and motivate Sabrina, used different strategies, promises, and actions to lure her into sexual conduct, and drove from Las Vegas to Kingman to consummate their agreement.

¶95 Over eight hours after Moninger's last message on October 4, he texted Sabrina, "can't wait to see you". Moninger then sent other texts in which he expressed his love and promised that he would not arrive before Sabrina's mom left for work.

¶96 As their meeting drew near, Moninger actively worked to entice Sabrina physically. He explained that the "Best sex is when ur

inlove," and told Sabrina that because "We both are [in love] sex should be doubly good". He asked if she was "ready for those kisses all over ur hot body". Later, he told Sabrina to "Get ur shower and everything before o come ok" and asked her to "Put ur wetness all over me make me smell just like u". This text alluded to different physical acts than those mentioned on October 3, *supra* ¶ 79, and October 4, *supra* ¶ 91.

¶97 Moreover, the generic promises of clothing made on previous days, *supra* ¶ 80, became much more specific: "I have a couple shirts, pair of boxer shorts and a winter coat for you". He suggested how Sabrina should dress and told Sabrina "to put boxers on Lots of room easy access," and she should "enjoy gifts ur man brings u".

¶98 The emotional motivation continued as well. He asked Sabrina to "be mine babe" and said he would "Some day make u even more permanent". Later, at 10:20 in the morning, Moninger asked for final confirmation from Sabrina: "OK just making sure u really want me to come". Sabrina responded affirmatively and Moninger said: "OK guess I'll come see u I know its fast but feels so right". One minute later he texted "Leaving soon u better appreciate me fo long drive". Then he explained that he would not be sorry because "This is my down payment on my life partner".

¶99 The trial evidence shows that Moninger offered distinct enticements, solicited different forms of sexual activity, and employed evolving motivations to Sabrina on October 5, separate and apart from his actions on October 3 and 4. Accordingly, we should affirm the conviction on Count 3.

PRISON IS MANDATORY

¶100 Because Moninger was convicted of completed crimes under A.R.S. § 13-3554 on Counts 1-3, those offenses are punishable pursuant to A.R.S. § 13-705. *See* A.R.S. § 13-3554(C). Section 13-705(O) provides that completed dangerous crimes against children are "in the first degree." Section 13-705(H) provides that prison is mandatory for all "dangerous crime[s] against children in the first degree," except as provided in A.R.S. § 13-705(F).

¶101 Luring a minor for sexual exploitation is not an offense described in A.R.S. § 13-705(F). Instead, luring is addressed in A.R.S. § 13-705(E). The majority notes the language of A.R.S. § 13-705(E) "mirrors" § 13-705(F) and superior court practice and sentencing charts published by

the Administrative Office of the Courts provide that luring convictions are probation eligible. *Supra* ¶ 59. I respect the rationale for the majority's decision and understand how the similarity between A.R.S. § 13-705(E) and (F) may have created confusion. Nevertheless, the statutory language is unambiguous. Moninger's convictions are for dangerous crimes against children in the first degree. *See* A.R.S. §§ 13-3554, -705(O). Because A.R.S. § 13-705(H) exempts only offenses under A.R.S. § 13-705(F) from mandatory prison, the superior court correctly found that Moninger must be sentenced to prison.

¶102 While I respectfully disagree with the majority about whether prison is mandatory, given the majority's ruling vacating the convictions on Counts 2 and 3, I join its decision to remand for resentencing. I also emphasize that during resentencing, the judge may determine that the loss of two convictions and resulting consecutive sentences is an intervening circumstance that justifies longer prison sentences for the remaining counts. *See* Ariz. R. Crim. P. 26.14 (allowing more severe sentences on remand if "other circumstances exist and there is no reasonable likelihood that an increase in the sentence[s] is the product of actual vindictiveness by the sentencing judge"); *State v. Smith*, 162 Ariz. 123, 125-26 (App. 1989) (affirming a lengthier sentence on remand because original "five-year, mitigated sentence was imposed in part because it was to be served consecutively with the sentence in count one" and Ariz. R. Crim. P. 26.14 does not "tie the hands of the trial court on resentencing when the circumstances after appeal are as different than before as 'apples are to oranges'"); *State v. Thomas*, 142 Ariz. 201, 203 (App. 1984) (finding increased concurrent sentences on remand were proper and not vindictive when court had originally imposed shorter, but improperly consecutive, sentences).

CONCLUSION

¶103 I respectfully dissent from the majority's decision to vacate Counts 2 and 3 and its holding that luring convictions are probation eligible. I would affirm the superior court in all respects.

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