IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

BAYRON PEREZ AGUEDA, *Appellant*.

No. 1 CA-CR 20-0020

FILED 2-11-2021

Appeal from the Superior Court in Maricopa County
No. CR2018-112053-001
The Honorable George H. Foster, Judge (retired)

REVERSED AND REMANDED IN PART

COUNSEL

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

Maricopa County Public Defender's Office, Phoenix
By Scott L. Boncoskey
Counsel for Appellant

OPINION

Presiding Judge Paul J. McMurdie delivered the Court's opinion, in which Judge Cynthia J. Bailey and Judge Lawrence F. Winthrop joined.

M c M U R D I E, Judge:

¶1 Bayron Perez Agueda asks this court to reverse one of his convictions for sexual conduct with a minor under age 15, claiming that the superior court abused its discretion by denying his request for a lesser-included offense instruction. We hold that contributing to the delinquency of a minor is a lesser-included offense of sexual conduct with a minor under age 15. Because there was sufficient evidence to support the lesser-included offense instruction, the superior court erred by failing to give it. Therefore, we reverse Perez Agueda's conviction on Count 5 and remand to the superior court for further proceedings consistent with this opinion. We affirm the remaining convictions and sentences.

FACTS[1] AND PROCEDURAL BACKGROUND

¶2 In 2014, when Perez Agueda was 27 years old, he met the victim, Maya,[2] who was 13 or 14 years old at the time. Perez Agueda and Maya engaged in at least one instance of sexual intercourse while she was 14, and she gave birth in July 2015. Perez Agueda was listed as the father on the baby's birth certificate, and DNA testing confirmed his paternity. When Maya was 15, she moved into an apartment with Perez Agueda. Maya and Perez Agueda lived together for another year until Maya moved out in June 2017. Perez Agueda and Maya continued having sexual intercourse during their cohabitation.

¶3 After Maya moved out, Perez Agueda and Maya's mother argued over custody of the baby. After speaking with Maya's mother, police officers initiated a sex-crimes investigation. During the investigation, a detective conducted a forensic interview with Maya's younger sister, Julia. Julia told the detective that Perez Agueda had sexual intercourse with her as well.

¶4 A detective interviewed Perez Agueda. During the interview, Perez Agueda admitted to having sex with Maya. He claimed she became pregnant at age 14 because of a single act of intercourse and that he did not

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1 We view the facts in the light most favorable to upholding the verdicts. *State v. Mendoza*, 248 Ariz. 6, 11, ¶ 1, n.1 (App. 2019).

2 To protect the identity of the victim and her sister, who were minors when the crimes were committed, we refer to them by pseudonyms.

have sex with her again until she was 15. He denied ever touching Julia and claimed the actions she alleged never happened.

¶5 The State charged Perez Agueda with four crimes committed against Julia: two counts of sexual abuse, one count of molestation of a child, and one count of sexual conduct with a minor. For his conduct with Maya, the State charged Perez Agueda with four counts of sexual conduct with a minor. One of those charges, Count 5, charged him with committing the offense between January 30, 2014, and January 29, 2015, while she was under the age of 15 and specified "(TO WIT: first time when victim was fourteen)." Count 6 referenced the same date range in Count 5 but specified "(TO WIT: time which resulted in victim getting pregnant)." Count 7 charged him with committing the offense between January 30, 2015, and January 29, 2016 "(TO WIT: first time when victim was fifteen)." And Count 8 charged him with committing the offense between January 30, 2016, and January 29, 2017 "(TO WIT: first time when victim was sixteen)."

¶6 At the trial, Maya testified that when she was 14, she and Perez Agueda began going out and holding hands and kissing. She also testified that she and Perez Agueda started having sex when she was 14 and had sex more than once before discovering she was pregnant.

¶7 Julia testified that, around her 11th birthday, she visited Maya and Perez Agueda at their apartment. She said that when Maya left the house to pick up her birthday cake, Perez Agueda took her to his bedroom, where they had sexual intercourse. She also testified that she went to a movie with Perez Agueda and Maya and that while Maya was getting popcorn, Perez Agueda asked her to be his girlfriend and kissed her and touched her chest under her clothes.

¶8 Perez Agueda also testified. He claimed that Maya became pregnant after their first and only sexual intercourse while she was 14. He admitted she moved in with him after their baby's birth, and they had sex while living together. He denied he ever touched or had sex with Julia.

¶9 Before the closing arguments, Perez Agueda requested an instruction on contributing to the delinquency of a minor as a lesser-included offense to sexual conduct with a minor under 15. The court denied the requested instruction, explaining it rejected the instruction for Count 5 because Perez Agueda denied committing that offense. Regarding Count 6, Perez Agueda admitted during the trial he had sex with Maya when she was 14 resulting in the pregnancy; therefore, the court reasoned, he was not entitled to a lesser-included instruction on that count. *See State*

v. Dugan, 125 Ariz. 194, 195–96 (1980) ("The determination which must be made before the lesser included instruction is proper is whether on the evidence the jury could rationally find that the state failed to prove an element of the greater offense. Such element must be required to convict of the greater, but not to convict of the lesser offense. It must be an element which necessarily distinguishes the greater from the lesser.").

¶10 During its closing argument, the State emphasized that Counts 5 and 6 were based on separate acts. It noted Maya's testimony that she did not become pregnant because of the first instance of intercourse. The State explained:

> So with [Maya], you have Count five, which is the first time when she was 14, and [Count 6] the time she became pregnant when she was 14. So two separate instances there identified as Counts five and six.

The jury instructions did not inform the jurors they had to determine if separate acts supported Count 5 from Count 6.

¶11 During deliberations, the jury asked if "Counts 5 and 6 happen[ed] at the same time" or if they were "considered separate events." The court discussed the question with counsel, and the State indicated that it would be appropriate to tell the jury the two counts were based on separate events. Instead, the court proposed referring the jury back to the separate-counts instruction and reiterating that the jury would have to

determine the facts based on the evidence presented. Counsel for both parties agreed.[3]

¶12 Shortly after receiving the court's response, the jury asked what steps should be taken if not all jurors agreed on a count. The court responded that if the jury could not decide on a count, it should advise the bailiff, and the court would give it further instructions. The jury then informed the court that it could not agree on one count, and the court provided an impasse instruction. *See* Ariz. R. Crim. P. 22.4. After

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[3] Perez Agueda argues on appeal that the court's failure to specifically answer the jurors' question amounted to fundamental error on Count 5. We do not reach the issue because we vacate the conviction on Count 5 on a separate basis. However, the separate-counts instruction did not answer the jurors' question. 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, even if the resulting verdicts appear to be inconsistent with one another. *State v. Zakhar*, 105 Ariz. 31, 32 (1969). This principle is unrelated to whether counts relate to or require separate acts and does not address the issue of double jeopardy. *See State v. Soza*, 249 Ariz. 13, 15, ¶ 6 (App. 2020) (Imposing multiple punishments for the same act violates the Double Jeopardy Clause, which constitutes fundamental error.). When multiple criminal acts are used to prove one charge, the trial court must normally "require the state to elect the act which it alleges constitutes the crime" or "instruct the jury that they must agree unanimously on a specific act that constitutes the crime." *State v. Klokic*, 219 Ariz. 241, 244, ¶ 14 (App. 2008) (quotation omitted).

When "the jury appears to be confused about a legal issue, and the resolution of the question is not apparent from an earlier instruction, the trial judge has a 'responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria.'" *State v. Ramirez*, 178 Ariz. 116, 126 (1994) (quotation omitted) (quoting *Bollenbach v. United States,* 326 U.S. 607, 612 (1946)). However, failing to answer a jury question does not necessarily amount to fundamental error. *See State v. Gunches*, 240 Ariz. 198, 206, ¶ 37 (2016) ("Even if the trial court's response misstated the law, however, it would not be grounds to vacate Gunches's death sentence because he has not shown prejudice."). In this case, the failure to correctly answer the jurors' question was error, but we do not need to address whether the error was prejudicial because we are reversing the conviction on a separate basis.

deliberating further, the jury acquitted Perez Agueda on the counts relating to his alleged conduct with Julia and convicted him on the four counts relating to Maya. The court sentenced Perez Agueda to mitigated 15 years' imprisonment on Counts 5 and 6 to be served consecutively.

¶13 Perez Agueda appealed, and we have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A)(1).

DISCUSSION

¶14 Perez Agueda argues the superior court abused its discretion by denying his request for a lesser-included offense instruction on contributing to the delinquency of a minor. We agree.

¶15 We review the superior court's denial of a requested jury instruction for an abuse of discretion. *State v. Price*, 218 Ariz. 311, 316, ¶ 21 (App. 2008). "On request by any party and if supported by the evidence, the court must submit forms of verdicts to the jury for[] all offenses necessarily included in the offense charged[.]" Ariz. R. Crim. P. 21.4(a)(1). An offense is necessarily included for jury instruction purposes if it is a lesser-included offense under *Blockburger*'s same-elements test and there is sufficient evidence to support giving the instruction. *State v. Carter*, 249 Ariz. 312, 316, ¶ 10 (2020); *see also Blockburger v. United States*, 284 U.S. 299, 304 (1932). "An offense is lesser included when the greater offense cannot be committed without necessarily committing the lesser offense." *Carter*, 249 Ariz. at 316, ¶ 10 (quotation omitted) (quoting *State v. Wall*, 212 Ariz. 1, 3, ¶ 14 (2006)).

¶16 Under the *Blockburger* test, molestation is a lesser-included offense of sexual conduct with a minor under 15. *State v. Ortega*, 220 Ariz. 320, 328, ¶ 25 (App. 2008). Our supreme court has held that contributing to a minor's delinquency is a lesser-included offense of molestation. *State v. Sutton*, 104 Ariz. 317, 319 (1969). It logically follows that contributing to the delinquency of a minor is a lesser-included offense of sexual conduct with a minor under 15. *See State v. Kinkade*, 147 Ariz. 250, 253 (1985) (Theft is a lesser-included offense of robbery and robbery is a lesser-included offense of armed robbery; therefore, theft is a lesser-included offense of armed robbery.).

¶17 The State argues that *Sutton* is no longer good law due to the supreme court's *Carter* decision.[4] In *Carter*, the court explained that "*Blockburger*'s same-elements test is the only permissible interpretation of the double jeopardy clause." 249 Ariz. at 316, ¶ 9 (quotation omitted). The same-elements test asks "whether each provision requires proof of a fact which the other does not." *Id.* (quoting *Blockburger*, 284 U.S. at 304).

¶18 To prove a defendant has contributed to the delinquency of a minor, the State must prove that a defendant has acted to "debase or injure the morals, health or welfare of a child" with general criminal intent.[5] A.R.S. §§ 13-3612(1), -3613(A). In *Sutton*, the court concluded that "a person who molests a child necessarily performs an act which tends to debase or injure the morals, health or welfare of a child." 104 Ariz. at 319 (quotation omitted).

¶19 After *Sutton*, the legislature amended the molestation statute. It now requires proof that one has "intentionally or knowingly engag[ed] in or caus[ed] a person to engage in sexual contact, except sexual contact with the female breast," with a child under 15.[6] A.R.S. § 13-1410. Although amended, it remains true that one who molests a child necessarily performs an act that tends to debase or injure the child's morals, health, or welfare. Accordingly, a conviction for molestation of a child does not require proof

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[4] The courts of this state are bound by the Arizona Supreme Court's decisions and do not have the authority to modify or disregard its rulings. *State v. Smyers*, 207 Ariz. 314, 318, ¶ 15, n.4 (2004); *State v. Chavez*, 243 Ariz. 313, 318, ¶ 17 (App. 2017). While statutory changes may vacate a prior decision of the supreme court, a decision of that court is impliedly vacated *only* when the precedent is clearly irreconcilable with intervening authority. *See Blevins v. Gov't Emps. Ins.*, 227 Ariz. 456, 462, ¶ 25 (App. 2011) (statutory changes did not implicitly vacate prior precedent when the statute and caselaw were reconcilable). The State notes the statutes have changed but offers no reasoning why the modifications are not reconcilable with the prior holding of our supreme court.

[5] Though *Sutton* did not discuss the *mens rea* element of contributing to the delinquency of a minor, the offense requires only a general criminal intent that is satisfied by the requirement of intentional or knowing conduct for molestation. *State v. Cutshaw*, 7 Ariz. App. 210, 221–22 (1968); A.R.S. § 13-1410(A); A.R.S. § 13-105(10)(a), (b).

[6] *Compare* 1965 Ariz. Sess. Laws, ch. 20, § 3, *with* A.R.S. § 13-1410.

of a fact that is not necessary to prove contributing to the delinquency of a minor. Because evidence of the elements of molestation will always be sufficient to prove the elements of contributing to the delinquency of a minor, contributing to the delinquency of a minor remains a lesser-included offense of molestation. And molestation remains a lesser-included offense of sexual conduct with a minor under age 15. *Ortega*, 220 Ariz. at 328, ¶ 15.

¶20 Here, the superior court denied the request for a lesser-included offense instruction on Count 5. It reasoned that because Perez Agueda claimed the count's alleged act (i.e., sexual intercourse separate and apart from the misconduct described in Count 6) had not occurred, he was not entitled to the instruction. "A trial court abuses its discretion when it misapplies the law or predicates its decision on incorrect legal principles." *State v. Jackson*, 208 Ariz. 56, 59, ¶ 12 (App. 2004); *Hammett v. Hammett*, 247 Ariz. 556, 559, ¶ 13 (App. 2019).

¶21 However, a defendant's denial of an offense alone is not a sufficient ground to deny a lesser-included instruction. *Wall*, 212 Ariz. at 6, ¶ 30. A court must instruct on a lesser-included offense if there is evidence sufficient to allow a jury to reasonably conclude that the defendant committed only the lesser offense. *Id*. at 4, ¶ 18. Admittedly, "[w]hen a defendant asserts an all-or-nothing defense such as alibi or mistaken identity, there will 'usually [be] little evidence on the record to support an instruction on the lesser included offenses.'" *Id.* at 6, ¶ 29 (alteration in original) (quoting *State v. Caldera*, 141 Ariz. 634, 637 (1984)). Nonetheless, if the evidence is sufficient to require a lesser-included offense instruction, it must be given. *Id.* ¶ 30.

¶22 Applying that principle here, Perez Agueda was entitled to the instruction if the evidence presented was sufficient to allow a jury to reasonably conclude he contributed to Maya's delinquency but had not engaged in sexual intercourse with her separate from the sexual conduct involved in Count 6. At trial, Perez Agueda denied engaging in sexual intercourse with Maya on more than one occasion while she was under 15. But he admitted that while she was 14, before the first sexual act, he thought of her as his girlfriend and hugged and kissed her repeatedly. Maya also confirmed the couple hugged and kissed before their sexual relationship began.

¶23 The State argues the evidence cannot prove the offense of contributing to a minor's delinquency. However, we have previously held that, under certain circumstances, evidence that the defendant kissed and hugged a minor is sufficient to allow a jury to convict the defendant of

contributing to the delinquency of a minor. *See State v. Hixson*, 16 Ariz. App. 251, 253–54 (1972). In this case, the evidence showed that Perez Agueda was 27 years old when he hugged and kissed the 14-year-old victim, ultimately leading to sexual intercourse. On these facts, if the jurors found there was only one act of sexual intercourse while Maya was 14, they could have nonetheless found Perez Agueda guilty of contributing to a minor's delinquency as a lesser-included offense for Count 5. Therefore, contributing to the delinquency of a minor was a necessarily included offense, and the court abused its discretion by failing to provide the instruction. *State v. Dugan*, 125 Ariz. at 195–96.

¶24 We generally vacate a conviction when a defendant has not received a warranted lesser-included offense instruction unless the State proves beyond a reasonable doubt the error was harmless. *State v. Burch*, 247 Ariz. 376, 379–80, ¶ 10 (App. 2019). The State did not meet that burden here; therefore, we vacate Perez Agueda's Count 5 conviction.

CONCLUSION

¶25 We reverse Perez Agueda's Count 5 conviction and remand to the superior court for further proceedings consistent with this opinion. We affirm the remaining convictions and sentences.

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