

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/02/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 11-0246
)
Appellee,) DEPARTMENT S
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
RICHARD DANIEL FOERSTER,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause Nos. CR2009-167593-001 SE
CR2010-006143-001 DT
(Consolidated)

The Honorable Christopher Whitten, Judge

AFFIRMED IN PART, MODIFIED AND VACATED IN PART, REMANDED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Division Chief Counsel
Joseph T. Maziarz, Section Chief Counsel
and Katia Méhu, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Eleanor S. Terpstra, Deputy Public Defender
Attorneys for Appellant

W I N T H R O P, Chief Judge

¶1 Richard Daniel Foerster ("Appellant") appeals his
sentence for one of forty felony convictions, arguing that the

trial court imposed an illegal sentence for Count 26 by ordering him to serve a life sentence for that count, ostensibly because the court mistakenly classified Count 26 as a class two felony. Appellant maintains Count 26 should be classified as a class three felony punishable by no more than 7.5 years' imprisonment, the State confesses error, and we agree.

¶2 A jury convicted Appellant of forty counts, including: two counts of sexual abuse (Counts 11 and 26), one count of molestation of a child, two counts of kidnapping, twenty-three counts of sexual conduct with a minor, one count of public sexual indecency with a minor, and eleven counts of sexual exploitation of a minor. The jury also found each crime was a dangerous crime against children. The trial court sentenced Appellant to fourteen terms of life imprisonment, ten terms of twenty (flat) years' imprisonment, and fourteen terms of seventeen (flat) years' imprisonment, with all terms to be served consecutively. The court also suspended sentencing as to two counts and ordered Appellant placed on lifetime probation upon his release from prison.

¶3 Appellant filed a timely notice of appeal. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona

Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (West 2012),¹ 13-4031, and 13-4033(A).

¶4 On Counts 11 and 26, Appellant was found guilty of sexual abuse, a class three felony, in violation of A.R.S. § 13-1404. At sentencing and in its April 4, 2011 sentencing minute entry, however, the court listed the counts as class two felonies. The court sentenced Appellant to lifetime probation for Count 11 and life imprisonment for Count 26.

¶5 Appellant notes the court erred by classifying Counts 11 and 26 as class two felonies rather than class three felonies, and argues the court consequently imposed an illegal sentence of life imprisonment for Count 26. Because Appellant did not raise this objection in the trial court, we review for fundamental, prejudicial error. See *State v. Henderson*, 210 Ariz. 561, 567-68, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005); *State v. Payne*, 223 Ariz. 555, 560, ¶ 13, 225 P.3d 1131, 1136 (App. 2009). "The failure to impose a sentence in conformity with mandatory sentencing statutes makes the resulting sentence illegal." *State v. Cox*, 201 Ariz. 464, 468, 37 P.3d 437, 441 (App. 2002) (citations omitted). "An illegal sentence constitutes fundamental error." *Id.*

¹ We cite the current version of the statutes as they appear in Westlaw if no changes material to our decision have since occurred.

¶16 Arizona Revised Statutes § 13-1404(B) classifies sexual abuse as a class five felony unless the victim is under fifteen years of age, in which case sexual abuse is a class three felony punishable pursuant to A.R.S. § 13-705. Sentences for a first offense under § 13-705 range from 2.5 to 7.5 years' imprisonment and are probation eligible. See A.R.S. § 13-705(F), (H). In this case, the jury found Appellant guilty of Count 26 in violation of A.R.S. § 13-1404, and the jury found the victim was under the age of fifteen, making the violation a class three felony. Accordingly, the trial court erred in classifying Count 26 as a class two felony and sentencing Appellant to life imprisonment.² We therefore vacate Appellant's sentence with respect to Count 26 and remand to the trial court for resentencing as to that count. In all other respects, Appellant's sentences are affirmed.

_____/S/_____
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

_____/S/_____
PETER B. SWANN, Judge

_____/S/_____
JON W. THOMPSON

² Because the trial court also incorrectly classified Count 11 as a class two felony, we modify the court's April 4, 2011 sentencing minute entry to reflect that Count 11 is a class three felony. See A.R.S. § 13-4036; *State v. Ochoa*, 189 Ariz. 454, 462, 943 P.2d 814, 822 (App. 1997).