IN THE
# ARIZONA COURT OF APPEALS
**DIVISION ONE**

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STATE OF ARIZONA, *Respondent*,

*v.*

CHRISTOPHER MICHAEL REGENOLD, *Petitioner*.

No. 1 CA-CR 16-0436 PRPC
FILED 3-14-2019

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Petition for Review from the Superior Court in Maricopa County
No. CR2014-113190-001
The Honorable Michael W. Kemp, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Maricopa County Attorney's Office, Phoenix
By Gerald R. Grant
*Counsel for Respondent*

Christopher Michael Regenold, Florence
*Petitioner*

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**MEMORANDUM DECISION**

Judge Michael J. Brown delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Jennifer B. Campbell joined.

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**B R O W N**, Judge:

**¶1** Christopher Michael Regenold petitions this court for review from the dismissal of his of-right petition for post-conviction relief. We have considered the petition for review and, for the reasons stated, grant review but deny relief.

## BACKGROUND

**¶2** The State charged Regenold with ten counts of sexual exploitation of a minor, in violation of Arizona Revised Statutes ("A.R.S.") section 13-3553(A)(2), and alleged the offenses were "dangerous crime[s] against children" pursuant to A.R.S. § 13-705 because the minors depicted in the images were under 15 years old. Regenold pled guilty to one count of sexual exploitation of a minor, a class two felony and dangerous crime against children, and three counts of attempted sexual exploitation of a minor, each a class three felony and dangerous crime against children.

**¶3** At the change of plea hearing, defense counsel offered a brief summary of evidence supporting a factual basis. For the class two felony, defense counsel explained that Regenold "knowingly possessed visual depictions in which a minor under the age of 15 years of age was engaged in exploitive exhibition and sexual conduct behavior." The images were found on his computer and he admitted possessing them. For the class three felonies, Regenold "took steps in furtherance of committing the crimes charged" by attempting to possess additional images "in which a minor under the age of 15 years of age was engaged in exploitive exhibition or other sexual conduct" and he admitted doing so. After Regenold confirmed the veracity of defense counsel's descriptions, the superior court found that Regenold "knowingly, intelligently, and voluntarily entered into the plea agreement and that there [was] a factual basis for the pleas." The court later sentenced Regenold to a 20-year prison term followed by lifetime probation.

**¶4** Regenold timely filed his petition for post-conviction relief pursuant to Arizona Rule of Criminal Procedure ("Rule") 32.1, raising a claim of actual innocence. He asserted the State failed to allege and prove an essential element of the charges by not establishing the identity of any "actual minor" victim in the images he possessed. Thus, according to Regenold, the State's failure resulted in (1) insufficient evidence as a matter of law to support a factual basis for his convictions; (2) a jurisdictionally-defective indictment; and (3) violations of his state and federal constitutional rights to due process. The State countered that neither the

relevant statutes nor case law require proof of the identity of the minors depicted in the images. The superior court summarily dismissed the petition, finding the "statutes in question (A.R.S. § 13-3551 and 13-3553) do not require any such identification." Regenold filed a motion for rehearing, which was denied. This timely petition for review followed.

**DISCUSSION**

**¶5** Regenold re-urges his claim of actual innocence, asserting the factual basis for his plea was insufficient as a matter of law because it did not establish the identities of the victims depicted in the images he possessed or attempted to possess. He further contends the victims' identities constitute an "essential element" of the crimes set forth in the relevant statutes, including the dangerous crime against children designation. We understand Regenold's argument to be that the victims' actual names must be proven.

**¶6** We review a superior court's ruling on a petition for post-conviction relief for an abuse of discretion or error of law, *State v. Gutierrez*, 229 Ariz. 573, 577, ¶ 19 (2012), but review de novo whether a victim is an essential element of § 13-3553, *State v. Olquin*, 216 Ariz. 250, 254, ¶ 19 (App. 2007). This section provides as follows:

> A person commits sexual exploitation of a minor by knowingly . . . possessing . . . any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct.
>
> . . .
>
> Sexual exploitation of a minor is a class 2 felony and if the minor is under fifteen years of age it is punishable pursuant to § 13-705.

A.R.S. § 13-3553(A)(2), (C); *see also* A.R.S. § 13-3551(6) (defining the word "minor"). As we explained in *State v. Hazlett*, 205 Ariz. 523, 531, ¶ 29 (App. 2003), § 13-3553 requires that the "material prohibited under this statute depict an 'actual child' actually engaged in real or simulated sexually exploitive exhibition." *Hazlett*, however, neither holds nor suggests that the State must prove the name of the child in order to prove that the child is an "actual living human being." *Id.* at 527, ¶ 11.

**¶7** Regenold relies on this court's decisions in *Olquin* and *State v. Tschilar*, 200 Ariz. 427 (App. 2001), but neither case supports his position.

In *Tschilar*, we explained that victims are necessary elements for kidnapping and aggravated assault because each offense contemplates that the prohibited conduct "be committed against 'another person.'" 200 Ariz. at 435, ¶ 34 (citation omitted). But we said nothing about whether the victim of such a crime must be named or otherwise identified in a particular manner.

**¶8** In *Olquin*, we addressed the sufficiency of the evidence supporting convictions for aggravated DUI based on the presence of three children who were in the vehicle. 216 Ariz. at 251, 252, ¶¶ 1, 6. The defendant argued that because no evidence was produced at trial regarding the "names" of the children, the evidence was insufficient to support his convictions. *Id.* at 254, ¶ 18. Consistent with *Tschilar*, we recognized that when an offense requires the prohibited conduct be committed against another person, "the victim is a distinguishing factor and the identity of the victim therefore is an element of the offense." *Id.* at ¶ 21. We explained that in such instances, multiple victims are separately distinguished so that "a defendant can be charged and punished separately for each offense" even if the prohibited conduct against each victim is committed simultaneously. *Id.* We held that, by contrast, when prosecuting an aggravated DUI under A.R.S. § 28–1383(A)(3), "the State is not required to prove the identity of the person or persons under the age of fifteen in the vehicle to obtain a conviction under this statute" because the victim is not an essential element of the offense. *Id.* at 255, ¶ 24.

**¶9** *Olquin* does not support Regenold's argument that the factual basis provided to the superior court for his plea needed to include the names of each of the children depicted in the images he possessed or attempted to possess on his computer. Nothing in § 13-3553 suggests that identifying the child is an essential element of the crime of sexual exploitation of a minor. This is not to say that sexual exploitation of a minor is a victimless crime; it is well-established that child pornography results in long-lasting victimization of the children depicted. *See New York v. Ferber*, 458 U.S. 747, 758 (1982) (agreeing that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child"); *State v. McPherson*, 228 Ariz. 557, 564, ¶¶ 19–21 (App. 2012) (recognizing that child pornography "continue[s] to haunt and harm the children depicted"). But even though the children are "victims" does not mean their identities are essential elements of the offense. *See Olquin*, 216 Ariz. at 255, ¶ 25 ("A person can be considered 'a victim' of an offense . . . even where the statute defining the offense does not include a victim as a necessary element of the offense."); *Tschilar*, 200 Ariz. at 435, ¶ 34 (referring to crimes such as burglary in the first degree and fraudulent

schemes and artifices in recognition that "offenses, even if involving victims, do not necessarily refer to the victim as an element of the offense").

**¶10** Moreover, even if § 13-3553 could reasonably be interpreted as requiring the State to prove the identity of the minors, *Olquin* did not establish that proof of a victim's "identity" requires proof of the victim's name, and such an interpretation has been explicitly refuted in a subsequent opinion. *See State v. Villegas-Rojas*, 231 Ariz. 445, 447–48, ¶¶ 8–9 (App. 2012) (discussing *Olquin* and clarifying that "[m]erely because a victim is a necessary element [of the offense] does not mean that the name of the victim is a necessary element of the offense").

**¶11** Regenold correctly notes that designating his offenses "dangerous crimes against children" pursuant to A.R.S. § 13-705 requires the State prove the fact relied upon to enhance his sentences. *See* A.R.S. § 13-705(Q)(1)(a)–(w) (designating twenty-three criminal offenses as "dangerous crimes against children" in order to enhance the sentences for these offenses when the victims are under the age of fifteen); *State v. Schmidt*, 220 Ariz. 563, 565, ¶ 6 (2009) ("The thrust of the [*Apprendi v. New Jersey*, 530 U.S. 466 (2000)] line of cases is that any fact that 'the law makes essential to the punishment' is the 'functional equivalent of an element of the greater offense,' and is to be treated accordingly." (citations omitted)). However, Regenold fails to recognize that the additional fact required by the statute is a victim under the age of fifteen, not the victim's name. *Cf. Wright v. Gates*, 243 Ariz. 118, 121, ¶ 16 (2017) ("[T]he purpose of [A.R.S. § 13-705] was to provide enhanced punishment for offenders who harmed actual—not fictitious—children."); Rev. Ariz. Jury Instr. Statutory Crim. 35.53 cmt. (4th ed. 2018) (explaining that in a jury trial where a defendant is charged with violation of § 13-3553 the judge must instruct the jury to determine whether the State proved beyond a reasonable doubt that the minor is under the age of fifteen because it subjects the defendant to an enhanced sentence). Therefore, this sentencing enhancement exists solely based on the nature of the underlying crime—in other words, it comes into play whenever the legislature has determined it should apply. *See State v. Lantz*, 245 Ariz. 451, 452, ¶ 1 (App. 2018) (explaining that statutes may "independently mandate[]" application of the dangerous crimes against children sentencing statute).

**¶12** "Before entering judgment on a guilty plea, the trial court must determine whether a factual basis exists for each element of the crime to which defendant pleads." *State v. Salinas*, 181 Ariz. 104, 106 (1994). Here, the factual basis was sufficient to support the convictions of sexual exploitation of a minor and attempted sexual exploitation of a minor, as

dangerous crimes against children if it established that (1) the defendant possessed and attempted to possess visual depictions containing a minor engaged in exploitive exhibition or other sexual conduct, A.R.S. § 13-3553(A), and (2) the depicted minor was under the age of fifteen, A.R.S. §§ 13-705, -3553(C). The factual basis to which Regenold expressed his agreement satisfied these requirements. *See supra* ¶ 3. Consequently, Regenold's plea was supported by a sufficient factual basis and the judge did not err in summarily dismissing his petition.

## CONCLUSION

**¶13** Based on the foregoing, we grant review but deny relief.


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