NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

TRINT KLEINMAN, *Appellant*.

No. 1 CA-CR 22-0008
FILED 11-1-2022

Appeal from the Superior Court in Navajo County
No. S0900CR201800105
The Honorable Dale P. Nielson, Judge

AFFIRMED AS MODIFIED

COUNSEL

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By Michael O'Toole
Counsel for Appellee

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By Christian C. Ackerley
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Brian Y. Furuya delivered the decision of the Court, in which Judge Jennifer B. Campbell and Judge Paul J. McMurdie joined.

F U R U Y A, Judge:

¶1 Defendant Trint Kleinman appeals his prison sentences for convictions arising from three counts of sexual conduct with a minor, all Class 2 felonies and Dangerous Crimes Against Children ("DCAC"). For the following reasons, we affirm the sentences as to Counts 1 and 2 but modify the sentence on Count 3.

FACTS AND PROCEDURAL HISTORY

¶2 Kleinman had sexual contact with the victim, who was his sibling, three times between 2009 and 2011. At the time of the incidents, he was 12 or 13 years old, and the victim was five or six. In 2017, when the victim was 13 years old, she told her mother about the events, who reported them to the police.

¶3 In early 2018, a grand jury indicted Kleinman, then 20, on three counts of sexual conduct with a minor under 15 years of age, Class 2 felonies and DCAC offenses. *See* Arizona Revised Statutes ("A.R.S.") § 13-705 (2020).[1] After the trial, the jury found Kleinman guilty as charged. Given the victim's age at the time of the offenses, the fact that the convictions were DCAC offenses, and because Kleinman was an adult when he was arrested, the mandatory minimum sentence for each conviction was 13 years in prison—flat time and without the possibility of early release—to be imposed consecutively. *See* A.R.S. § 13-705(B), (M). The superior court imposed the sentences and awarded Kleinman 65 days of presentence incarceration credit.

¶4 Kleinman appealed the sentences, arguing they were cruel and unusual in violation of the Eighth Amendment of the United States Constitution, and the State agreed. Given the parties' agreement, we vacated the sentences and remanded for the court to resentence the

[1] Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

convictions as Class 2 non-dangerous felony offenses under A.R.S. §§ 13-701, -702, and -703. *State v. Kleinman*, 250 Ariz. 362, 365 ¶ 16 (App. 2020). We highlighted the State's concession that the sentences were grossly disproportionate because of "the unique facts and circumstances surrounding this case," including Kleinman's age when he committed the acts, the non-violent nature of the acts, his exposure to sexual misconduct within the family, the trial prosecutor's recommendation of a five-year imprisonment, the victim's request for leniency, and the court's comments that the sentences were "clearly disproportionate." *Id.* at 365–66 ¶ 16.

¶5 Upon remand, the court sentenced Kleinman to concurrent mitigated sentences of 3.0 years, 4.5 years, and 10.5 years for Counts 1, 2, and 3, respectively. *See* A.R.S. § 13-703. The court also correctly awarded Kleinman 505 days of presentence incarceration credit for each count.

¶6 Kleinman timely appealed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A).

DISCUSSION

I. Based on the State's Concession, We Modify the Sentence to the Minimum Authorized Sentence.

¶7 Because Kleinman did not object at the sentencing, we review his claims for fundamental error. *State v. Joyner*, 215 Ariz. 134, 137 ¶ 5 (App. 2007). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in [the] case caused [the defendant] prejudice." *Id.* (quoting *State v. Henderson*, 210 Ariz. 561, 567 ¶ 20 (2005)). A sentence that does not conform with the mandatory sentencing statutes makes the resulting sentence illegal, and the imposition of an illegal sentence constitutes fundamental error. *Id.* (citations omitted). Using a sentencing range other than that "mandated for the offense[] in question" is also fundamental error. *State v. Cox*, 201 Ariz. 464, 468 ¶ 13 (App. 2002). "[W]hether the trial court applied the correct sentencing statute is a question of law, which we review de novo." *Joyner*, 215 Ariz. at 137 ¶ 5. Under A.R.S. § 13-4037(A), if this court finds that an "illegal sentence has been imposed" it "shall correct the sentence to correspond to the verdict or finding."

¶8 Kleinman was sentenced to 10.5 years for Count 3, consistent with a sentence for a category three offender under the 2020 version of A.R.S. § 13-703. A.R.S. § 13-703(C), (J). However, a defendant must be sentenced according to the laws in effect when the defendant commits the

offense. *State v. Newton*, 200 Ariz. 1, 2 ¶ 3 (2001). And A.R.S. § 13-703(B)(1) requires courts to sentence defendants "convicted of three or more felony offenses that were not committed on the same occasion but that . . . are consolidated for trial purposes" as category two repetitive offenders. A.R.S. § 13-703(B) (2009).[2] Therefore, Kleinman should have been classified as a category two offender under the 2009 version of A.R.S. § 13-703, which indicates a corresponding minimum 4.5-year sentence. *Id.* § 13-703(B), (I). The State concedes the court's treatment of Kleinman as a category three offender under the 2020 statute was fundamental error, and we accept that concession.

¶9 Kleinman further requests that we direct the court to resentence him under A.R.S. § 13-702 for non-dangerous, non-repetitive felonies. However, his convictions arose from three repetitive events and were felony offenses consolidated for trial purposes, so the court must sentence him under A.R.S. § 13-703. Thus, we reject this argument.

¶10 We need not remand for clarification of a sentence when we can ascertain the intent of the court from the record. *State v. Lopez*, 230 Ariz. 15, 18 ¶ 9 n. 2 (App. 2012). This record permits us to do so here.

¶11 During the sentencing hearing, the court stated it intended to impose the shortest sentence allowable by law and was "troubled by" the 10.5-year sentence it mistakenly thought it was required to impose. Indeed, the court hesitated to impose any prison sentence at all and explained that juvenile offenders for these kinds of offenses do not typically receive substantial prison sentences. From these circumstances, we can infer the court intended to impose the lowest possible sentence.

¶12 As discussed, the shortest permissible sentence is 4.5 years. A.R.S. § 13-703(B), (I). On appeal, the State also concluded that 4.5 years is the minimum sentence allowable for Count 3 and does not object to that sentence. We accept this agreement to impose the minimum sentence.

¶13 We therefore vacate Kleinman's 10.5-year sentence as to Count 3 and modify the sentence to 4.5 years with presentence credit of 505 days.

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[2] There are no material revisions between the 2009 and 2011 versions of A.R.S. § 13-703. Since the actions occurred between these years, we will refer to the 2009 version.

II. Constitutional Challenge.

¶14 Kleinman contends the length of his 10.5-year sentence constitutes a miscarriage of justice. He relies on *Davis*, where our supreme court found the defendant's sentences cruel and unusual under the Eighth Amendment. *See State v. Davis*, 206 Ariz. 377, 379 ¶ 1 (2003). However, we decline to consider constitutional arguments when we can resolve an action on other grounds. *Katherine S. v. Foreman ex rel. Cnty. of Maricopa*, 197 Ariz. 371, 378 ¶ 16 (App. 1999). Because we vacate Kleinman's 10.5-year sentence based on our application of A.R.S. § 13-703, we need not address his constitutional challenge.

CONCLUSION

¶15 Accordingly, we modify Kleinman's 10.5 years' sentence on Count 3 to 4.5 years. We affirm the other sentences imposed.

AMY M. WOOD • Clerk of the Court
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