IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

STEVEN RANDALL MORGAN,
Appellant.

No. 2 CA-CR 2018-0127
Filed January 31, 2020

Appeal from the Superior Court in Pima County
No. CR20165441001
The Honorable Janet C. Bostwick, Judge

**AFFIRMED IN PART; MODIFIED IN PART;
VACATED IN PART; REMANDED**

COUNSEL

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OPINION

Presiding Judge Eppich authored the opinion of the Court, in which Judge Espinosa and Judge Eckerstrom concurred.

E P P I C H, Presiding Judge:

¶1 Steven Morgan appeals his convictions and sentences for two counts of sexual conduct with a minor, child molestation, two counts of furnishing obscene or harmful items to a minor, public sexual indecency to a minor, and luring a minor for sexual exploitation. He contends (1) the prosecutor improperly vouched by telling the jury that he had committed illegal acts other than those charged; (2) insufficient evidence supported one of the counts of sexual conduct with a minor and one of the counts of furnishing obscene or harmful items to a minor; and (3) the court erred by indefinitely retaining jurisdiction over restitution. For the reasons that follow, we modify Morgan's conviction for sexual conduct with a minor in count three to the lesser-included offense of child molestation and remand that count for resentencing, vacate his conviction and sentence for furnishing obscene or harmful items to a minor in count six, and affirm his other convictions and sentences.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding Morgan's convictions and sentences. *State v. Dansdill*, 246 Ariz. 593, ¶ 2 (App. 2019). In 2016, Morgan, a divorced father, began to sexually abuse his ten-year-old daughter L.M. on weekends that she was in his care. At first, Morgan groomed L.M. for sexual abuse by having her dress characters "more sexy" in an online fashion game she liked to play; this soon escalated to having her view online pornography. While watching pornography with L.M., Morgan would expose his penis to her, masturbate, and ejaculate. On some occasions while masturbating, Morgan would make L.M. manipulate his testicles. On other occasions, Morgan put his hand on L.M.'s vagina or made her masturbate in his presence by inserting vibrators he had provided to her. L.M. eventually told a friend about the sexual abuse; the friend told her mother, and the friend's mother told L.M.'s mother, who contacted police.

¶3 A grand jury indicted Morgan on nine felony counts, alleging Morgan had committed various sexual offenses against L.M. After a five-day trial, a jury found Morgan guilty of two counts of sexual conduct with a minor under twelve, child molestation, two counts of furnishing obscene or harmful items to a minor, public sexual indecency to a minor under fifteen, and luring a minor for sexual exploitation. The trial court imposed a life sentence for one of the sexual conduct counts, plus consecutive and concurrent prison terms totaling 49.5 years for the remaining counts, to be

served consecutively to the life sentence. We have jurisdiction over Morgan's appeal under A.R.S. §§ 13-4031 and 13-4033(A)(1).

Vouching

¶4 In closing, the prosecutor argued that the charged offenses were not "everything [Morgan] did" to the victim. Morgan contends that the prosecutor's comment constituted improper vouching to the jury that he had committed other illegal acts in addition to the ones charged. He concedes he did not object at trial but contends that the improper argument constitutes fundamental, prejudicial error and his convictions therefore must be reversed.

¶5 As the state points out, however, the prosecutor's remarks referred to properly admitted evidence of "other crimes, wrongs, or acts" that were "relevant to show that [Morgan] had a character trait giving rise to an aberrant sexual propensity to commit the offense charged." Ariz. R. Evid. 404(c). The prosecutor's reference to this evidence was not improper vouching. To the contrary, improper vouching occurs when the prosecutor alludes to information not presented to the jury or matters they may not properly consider. *See State v. Dumaine*, 162 Ariz. 392, 401-02 (1989), *disapproved on other grounds by State v. King*, 225 Ariz. 87, ¶¶ 9-12 (2010). No such error occurred here.

Sufficiency of Evidence (Count Three)

¶6 Morgan argues that the evidence was insufficient to support his conviction for sexual conduct with a minor in count three, in which the state alleged he caused L.M. to manipulate his testicles while he masturbated. Although he concedes there was sufficient evidence that the conduct occurred, he contends it only established he committed the lesser-included offense of child molestation. He requests that we modify the conviction accordingly and remand for resentencing on that count.

¶7 We review de novo whether sufficient evidence supports a conviction. *State v. Denson*, 241 Ariz. 6, ¶ 17 (App. 2016). We will reverse a conviction only if no substantial evidence supports it. *Id.* "Substantial evidence is 'such proof that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *Id.* (quoting *State v. Mathers*, 165 Ariz. 64, 67 (1990)).

¶8 The state correctly concedes that the evidence supports only the lesser-included offense of child molestation. Sexual conduct with a minor under A.R.S. § 13-1405(A) requires "oral sexual contact"—which is

clearly not the conduct here—or "sexual intercourse," which is defined as "penetration into the penis, vulva or anus by any part of the body or by any object or masturbatory contact with the penis or vulva." A.R.S. § 13-1401(A)(4). For this count, no penetration was alleged, and although the conduct was clearly masturbatory, the contact between the victim's hand and the defendant's scrotum did not involve his penis or her vulva.

¶9 As both parties acknowledge, the evidence does support a conviction for child molestation, which requires only "sexual contact." *See* A.R.S. § 13-1410 ("A person commits molestation of a child by intentionally or knowingly . . . causing a person to engage in sexual contact."); § 13-1401(A)(3)(a) ("Sexual contact" is "any direct or indirect touching, fondling or manipulating of any part of the genitals . . . or causing a person to engage in such contact."). Accordingly, we modify Morgan's conviction in count three to child molestation and remand for resentencing on that count. *See* Ariz. R. Crim. P. 31.19(d) (appellate court may modify conviction to lesser-included offense and remand for resentencing if evidence does not support conviction but supports the lesser-included offense).

Sufficiency of Evidence (Count Six)

¶10 Morgan contends the evidence was insufficient to support his conviction for furnishing obscene or harmful materials to a minor in count six, in which the state alleged that he provided L.M. a gray vibrator. Again, Morgan concedes that the evidence shows the conduct occurred, but argues that the vibrator did not qualify as a harmful item under the relevant statutes.

¶11 A person furnishes obscene or harmful materials to a minor if he provides a minor with an "item" that is "harmful to minors." A.R.S. § 13-3506. An "item" includes "any material . . . which depicts or describes sexual activity," including an "object" or "novelty device." A.R.S. § 13-3501(2). "Sexual activity" means "[p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated," or "[p]atently offensive representations or descriptions of masturbation, excretory functions, sadomasochistic abuse and lewd exhibition of the genitals." § 13-3501(6). Taken together, these provisions require that the furnished material "depict[] or describe[]" a "patently offensive" "description or representation" of "ultimate sexual acts," "masturbation, excretory functions, sadomasochistic abuse, [or] lewd exhibition of the genitals."

¶12 Even though the device provided—a featureless metallic cylinder with a rounded point at one end—could be said to represent an erect human penis, we fail to see how a person could reasonably conclude it *depicts* one in a *patently offensive* way. To the extent the device can be said to depict an erect penis, its plain metallic finish and lack of distinctive features appear to be designed to make any such depiction as generalized as possible. Although sight of the vibrator could be offensive in some contexts, the offense would not arise from a patently offensive depiction or description linked to the device, but rather from the manner or context in which the device is used. The vibrator is not, therefore, an "item" as defined under § 13-3506, and furnishing it to a minor does not violate that statute.

¶13 The state focuses on other elements of the offense, arguing it is an "object" or "novelty device" and because it represents an erect penis it is "harmful to minors."[1] But for a valid conviction, the state must prove every element of the charged crime beyond a reasonable doubt. *See State v. Johnson*, 247 Ariz. 166, ¶ 149 (2019) (citing *In re Winship*, 397 U.S. 358, 364 (1970)). The state does not explain how the device here depicts or describes sexual activity in a patently offensive way, as required by § 13-3506, § 13-3501(2), and § 13-3501(6). Nor does it cite—and we have not found—any case upholding a conviction under § 13-3506 for furnishing a minor with a similar device. And although the state argues that Morgan "showed

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[1]To be "[h]armful to minors," an item may not have "serious literary, artistic, political, or scientific value for minors," and

> th[e] quality of any description or representation, in whatever form, of nudity, sexual activity, sexual conduct, sexual excitement, or sadomasochistic abuse, . . . [t]o the average adult applying contemporary state standards with respect to what is suitable for minors . . . [must a]ppeal[] to the prurient interest, when taken as a whole, . . . [and p]ortray[] the description or representation in a patently offensive way.

§ 13-3501(1). "'Sexual excitement' means the condition of human male or female genitals when in a state of sexual stimulation or arousal." § 13-3501(8). Because the device here is not an "item" as defined by § 13-3501(2) and required by § 13-3506, we do not reach the question of whether it is "harmful to minors" to determine that it is not covered by § 13-3506.

[L.M.] videos of women using vibrators" and made her "use the vibrator as if it were an erect penis," the fact that Morgan provided L.M. the vibrator within the context of other criminal conduct does not substitute for the necessity that the state prove all required elements of the law to obtain a conviction.

¶14 Because the gray vibrator, while intuitively inappropriate and arguably harmful to a child, does not fall under the specific requirements of § 13-3506, the evidence does not support Morgan's conviction in count six for furnishing obscene or harmful materials to a minor. We therefore must vacate the conviction and sentence for that offense. *See Denson*, 241 Ariz. 6, ¶ 17.

Retention of Jurisdiction of Restitution

¶15 Morgan's sentencing order states:

> With respect to ongoing expenses that continue to accrue, such as counseling and future assessments that may be appropriate and required, the Court will not set a deadline for the issue of restitution to remain open, however, as soon as expenses are known and reasonably known, the State could over time provide those expenses to the Court and they can be awarded if and when documented and appropriate.

¶16 Morgan concedes he did not object to this portion of the order at his sentencing, but now contends the trial court erred by indefinitely retaining jurisdiction over restitution for L.M.'s ongoing counseling expenses. We review de novo a trial court's jurisdiction over restitution. *State v. Zaputil*, 220 Ariz. 425, ¶ 7 (App. 2008). We correct errors in subject-matter jurisdiction even if no objection is raised in the trial court. *State v. Chacon*, 221 Ariz. 523, ¶ 5 (App. 2009) (citing *United States v. Cotton*, 535 U.S. 625, 630 (2002)).

¶17 A crime victim has a right "[t]o receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury." Ariz. Const. art. II, § 2.1(A)(8). "If a person is convicted of an offense, the court shall require the convicted person to make restitution to the person who is the victim of the crime . . . in the full amount of the economic loss as determined by the court . . . ." A.R.S. § 13-603(C). "'Economic loss' means any loss incurred by a person as a result of the commission of an offense . . . includ[ing] lost interest, lost earnings and

other losses that would not have been incurred but for the offense." A.R.S. § 13-105(16). Because mandatory restitution is intended to make the victim whole, the victim's economic loss includes losses incurred after sentencing. *See State v. Howard*, 168 Ariz. 458, 459-60 (App. 1991).

¶18 In *Howard*, we upheld a restitution award under § 13-603(C) based on an estimate of the victim's future medical expenses and lost wages, concluding that "a victim's economic loss includes not only those losses incurred at the time of sentencing, but also those losses reasonably anticipated to be incurred in the future as a result of the defendant's actions." 168 Ariz. at 460. Morgan contends that *Howard* was wrongly decided, arguing that restitution is limited to losses that have already been incurred by the sentencing date. We are not persuaded that restitution is so limited, however. Section 13-603(C) requires the trial court to order restitution "in the full amount of the [victim's] economic loss," without any mention that losses incurred after sentencing are excluded. Nor does the definition of economic loss in § 13-105(16) exclude losses after sentencing. And as this court pointed out in *Howard*, an offender's sentencing date is affected by factors such as whether the defendant enters a plea agreement; limiting a victim's economic loss to losses incurred by that date would arbitrarily cut off restitution, for example, to a victim suffering from major injuries inflicted in a crime whose medical expenses continue beyond sentencing. *See* 168 Ariz. at 459-60. The same is true for a victim such as L.M., whose need for ongoing counseling did not end at sentencing. Limiting her restitution to expenses incurred by the sentencing date would not compensate her for the full amount of her economic loss. *See id.* at 459. Thus, the sentencing order's contemplation of restitution for post-sentencing counseling expenses was not erroneous.

¶19 Morgan nonetheless contends that a trial court lacks post-sentencing jurisdiction to order additional restitution because such an order conflicts with A.R.S. § 13-805(A). That statute states

> The trial court shall retain jurisdiction of the case as follows:
>
> 1. Subject to paragraph 2 of this subsection, for purposes of ordering, modifying and enforcing the manner in which court-ordered payments are made until paid in full or until the defendant's sentence expires.

> 2. For all restitution orders in favor of a victim, including liens and criminal restitution orders, for purposes of ordering, modifying and enforcing the manner in which payments are made until paid in full.

Id. Morgan contends that these provisions cannot be interpreted to provide continuing jurisdiction to order restitution payments because such an interpretation would render the words "the manner in which" superfluous.

¶20 Indeed, § 13-805(A) grants only "jurisdiction to modify the *manner* in which court-ordered payments are made." *State v. Pinto*, 179 Ariz. 593, 596 (App. 1994). But "[i]n light of the legislative and constitutional intent to promote restitution to victims, this statute has been interpreted as expanding, rather than limiting, the trial court's jurisdiction over restitution." *Zaputil*, 220 Ariz. 425, ¶ 15. Nothing in the language of § 13-805(A), which automatically gives the court limited jurisdiction over the manner of payments until the victim's restitution is paid in full, is inconsistent with a court's additional authority to expressly reserve jurisdiction to award restitution after sentencing, which the court exercised here.

¶21 Authority to reserve jurisdiction to order restitution is implicit in the court's obligation, imposed by § 13-603(C), to issue restitution orders for the full amount of the victim's economic loss. Although that authority is generally exercised at sentencing, § 13-603(C) "is silent as to when restitution must be assessed," *State v. Holguin*, 177 Ariz. 589, 591 (App. 1993), and we have concluded that a court may expressly retain jurisdiction to order restitution beyond sentencing, *see, e.g.*, *State v. Grijalva*, 242 Ariz. 72, ¶¶ 11-15 (App. 2017) (upholding restitution award where restitution requested eighteen months after sentencing; court had expressly reserved jurisdiction and set no deadline); *cf. Zaputil*, 220 Ariz. 425, ¶¶ 2-5, 16, 18 (finding trial court had jurisdiction to award restitution almost three years after defendant was placed on probation where court expressly retained jurisdiction).

¶22 Morgan also argues that *Howard* is incorrect because the past-tense word "incurred" in the definition of economic loss precludes restitution for estimated future losses. We need not revisit that conclusion in *Howard* at this time, however, because the case before us does not involve a restitution-based award premised on an estimate of future losses. Nor does the trial court's sentencing order contemplate such an award. It anticipates future awards as expenses materialize, prompting the state to

make restitution requests as the victim's expenses become "reasonably known" and "documented." If the court were to nonetheless issue a restitution order based on estimated future losses, Morgan could raise this issue in an appeal of that order. *See Grijalva*, 242 Ariz. 72, ¶ 11 (post-sentencing restitution orders "separately appealable").

¶23 Morgan further argues that if the trial court sets no deadline for restitution requests, all restitution requests must be made within "at most . . . a reasonable period after sentencing." He cites two juvenile cases, *In re Michelle G.*, 217 Ariz. 340 (App. 2008), and *In re Kevin A.*, 201 Ariz. 161 (App. 2001), for the proposition that a trial court may not retain jurisdiction over restitution indefinitely by failing to set a deadline for claims at sentencing. He notes that in *Michelle G.*, we overturned a restitution order where the court did not set a deadline at the delinquency adjudication and the restitution was requested less than fourteen months later. *See* 217 Ariz. 340, ¶¶ 3-5. We have declined to apply our reasoning in juvenile restitution cases to adult criminal cases, however, because different restitution statutes and policy considerations apply. *See Grijalva*, 242 Ariz. 72, ¶¶ 13-15 (citing *In re Alton D.*, 196 Ariz. 195, n.6 (2000)). Indeed, in *Grijalva*, we expressly declined to apply *Michelle G.* and determine whether the restitution had been requested within a "reasonable time." *Id.* ¶ 15.[2]

¶24 In any event, the trial court's plan for future restitution awards is reasonable. At the time of sentencing, L.M. needed more counseling but the cost was unknown. The court's decision to allow future restitution requests for these expenses ensures that L.M. will receive restitution for the full amount of her economic loss. And the court's decision not to impose a deadline may avoid the necessity of piecemeal awards.

¶25 Finally, Morgan contends that the trial court's decision impermissibly encroaches on his right to a civil trial on money damages, citing *State v. Wilkinson*, 202 Ariz. 27, ¶ 12 (2002). But *Wilkinson* states only that certain types of damages—those not "directly caused by the criminal conduct"—are outside the scope of restitution. *Id.* ¶ 11. Counseling

[2]We observe, however, that "both the trial court and the State have a concurrent obligation to see that restitution claims are not only preserved but adjudicated in a timely fashion." *Zaputil*, 220 Ariz. 425, n.2. As a means to that end, a court "may impose a reasonable deadline within which restitution claims must be filed." *State v. Nuckols*, 229 Ariz. 266, ¶ 5 (App. 2012).

expenses, on the other hand, are properly subject to restitution if the need for counseling is caused by the defendant's crimes. *See State v. Wideman*, 165 Ariz. 364, 369 (App. 1990). Morgan makes no effort to explain why he has a right to a civil trial on the expenses sought here. And although Morgan argues that his interest in finality is thwarted by the court's decision, his lengthy sentence attenuates any such interest and does not overcome the interest in making L.M. whole.

¶26 In sum, the trial court did not exceed its authority in reserving jurisdiction over future restitution requests for L.M.'s counseling and other expenses without setting a hard deadline.

Disposition

¶27 We modify Morgan's conviction for sexual conduct with a minor in count three to the lesser-included offense of child molestation and remand that count for resentencing. We vacate Morgan's conviction and sentence for furnishing obscene or harmful items to a minor in count six. Morgan's remaining convictions and sentences are affirmed.