

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Appellee,*

*v.*

GABRIEL HUANTE,  
*Appellant.*

No. 2 CA-CR 2020-0130  
Filed September 29, 2021

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Appeal from the Superior Court in Pinal County  
No. S1100CR201603043  
The Honorable Delia R. Neal, Judge

**AFFIRMED**

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COUNSEL

Mark Brnovich, Arizona Attorney General  
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals  
By Joshua C. Smith, Assistant Attorney General, Phoenix  
*Counsel for Appellee*

Michael Villarreal, Florence  
*Counsel for Appellant*

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**OPINION**

Presiding Judge Eppich authored the opinion of the Court, in which  
Chief Judge Vásquez and Judge Brearcliffe concurred.

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E P P I C H, Presiding Judge:

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¶1 Gabriel Huante appeals from his conviction and sentence for negligent homicide. On appeal, Huante solely challenges his sentencing. He asserts the trial court erred by impermissibly considering a prior felony conviction to enhance his sentence. For the following reasons, we affirm Huante’s conviction and sentence.

**Factual and Procedural Background**

¶2 We view the facts in the light most favorable to sustaining the conviction, resolving all reasonable inferences against Huante. *See State v. Felix*, 237 Ariz. 280, ¶ 2 (App. 2015). On November 16, 2016, Huante went to J.L.’s home looking for him. N.C., J.L.’s roommate, told Huante that J.L. was outside. Huante went outside and shortly thereafter, N.C. heard “a scuffling.” About fifteen minutes later, N.C. found J.L. laying at the bottom of the stairs, face-down, with a “bit of blood trickling down the side of [his] face.” There was a cement block with blood on it next to his head. Huante later told detectives that he had “stoned [J.L.]” because “it was the Lord’s will.”

¶3 J.L. died from his injuries on November 20, 2016 and Huante was indicted for first-degree murder. The jury found him guilty of the lesser-included offense of negligent homicide. At the priors trial and sentencing, the trial court found the state had proven Huante had two historical prior felony convictions and, as a result, sentenced him to nine years’ imprisonment—a slightly mitigated term as a category-three repetitive offender. This appeal followed. We have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

**Discussion**

¶4 Before trial, the state alleged Huante had two historical prior felony convictions – possession of narcotic drugs for sale, a class-two felony committed on August 23, 2011, and a drug paraphernalia violation, a class-six felony committed on April 15, 2011. The state argued the trial court could use these prior convictions to sentence Huante as a category-three repetitive offender. It asserted the possession of narcotic drugs for sale conviction was a historical prior because it had been committed within ten years of the present offense, *see* A.R.S. § 13-105(22)(b), and that although the drug paraphernalia violation had been committed more than five years before the present offense, it qualified as a historical prior conviction once the court excluded time Huante had spent incarcerated, *see* § 13-105(22)(c).

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It further argued this was true regardless of whether the court included or excluded partial days in calculating Huante's time incarcerated.

¶5 Huante argued the trial court should exclude partial days in its calculation of his time incarcerated, and that because he had been taken into custody for the present offense on November 17, 2016, the conviction for the paraphernalia offense could not qualify as a historical prior. After holding a bench trial on the prior convictions, the court found the state had proven the convictions. The court found the negligent homicide had been "committed 5 years and 216 days after the April 15, 2011 [drug paraphernalia] offense." The court observed that it could include partial days in calculating Huante's time incarcerated, but giving him "the benefit of not including the partial days," it found that Huante had spent 216 days in custody, and therefore the offense was a "historical prior felony conviction for the purposes of sentencing."

¶6 On appeal, Huante, relying on the negligent homicide statute, asserts for the first time that the trial court erred in concluding the offense had occurred on November 16, 2016, because J.L. died on November 20, 2016. Huante does not challenge how the court calculated the time between the two offenses or his time incarcerated,<sup>1</sup> but asserts that the court should have sua sponte amended the indictment to the jury's verdict and found the negligent homicide offense occurred on November 20, 2016, thereby precluding a finding that his April 15, 2011 drug paraphernalia offense could serve as a historical prior felony. The state counters that the plain language of the negligent homicide statute does not support Huante's interpretation because it is focused on the defendant's conduct in "caus[ing]" death, as opposed to when the victim died. See A.R.S. § 13-1102(A).

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<sup>1</sup>On appeal, the state notes that it appears the prosecutor's calculation of the time between the two offenses may have been erroneous. Given Huante's claim on appeal and our disposition, we need not reach this assertion. Cf. *State v. Johnson*, 247 Ariz. 166, n.3 (2019) (not considering issue not raised in opening brief); *State v. Wood*, 180 Ariz. 53, 72 (1994) (declining to address issue unnecessary to disposition); *State v. Dawson*, 164 Ariz. 278, 282-83 (1990) (declining to address issue not in support of the judgment raised in state's brief absent cross-appeal). For the same reasons, we do not reach the state's claim that we should affirm because the trial court could have considered partial days in calculating Huante's time incarcerated.

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¶7 Although Huante objected to the use of this prior conviction to enhance his sentence below, he did not do so on these grounds, and we therefore review solely for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005) (fundamental error review when defendant fails to object); *Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 450 (1982) (“The purpose of the rule requiring specificity of objection is to enable the adversary to obviate the objection if possible and to permit the trial court to make an intelligent ruling and rectify error if possible.”). If a court improperly uses two prior convictions rather than one to enhance a sentence, however, it is fundamental error. *State v. Rasul*, 216 Ariz. 491, ¶ 20 (App. 2007); *see State v. Thues*, 203 Ariz. 339, ¶ 4 (App. 2002) (“Imposition of an illegal sentence constitutes fundamental error.”).

¶8 To determine whether the trial court fundamentally erred in using the date of the offense rather than the date of the victim’s death to calculate whether the offense was a historical prior felony conviction, we consider the statutory definitions of “historical prior felony conviction” and “offense.” § 13-105(22), (27). The primary purpose of statutory interpretation is to “find and give effect to legislative intent.” *State v. Ross*, 214 Ariz. 280, ¶ 22 (App. 2007) (quoting *UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327, ¶ 11 (2001)). When reviewing a question of statutory interpretation, we first begin with the plain text of the statute, as it is the most reliable indicator of its meaning. *State v. Christian*, 205 Ariz. 64, ¶ 6 (2003). “When the plain text of a statute is clear and unambiguous there is no need to resort to other methods of statutory interpretation to determine the legislature’s intent because its intent is readily discernable from the face of the statute.” *Id.*

¶9 For the purposes of calculating a historical prior felony, the trial court must determine “the date of the present offense.” *See* § 13-105(22)(c) (Subject to exceptions inapplicable here, historical prior felony conviction includes “[a]ny class 4, 5 or 6 felony . . . that was committed within the five years immediately preceding the date of the present offense. Any time spent . . . incarcerated is excluded in calculating if the offense was committed within the preceding five years.”). The statutory definition of “offense” is “conduct for which a sentence to a term of imprisonment . . . is provided.” § 13-105(27). “‘Conduct’ means an act or omission and its accompanying culpable mental state.” § 13-105(6). Here, the present offense is negligent homicide, statutorily defined as when “with criminal negligence the person causes the death of another person, including an unborn child.” § 13-1102(A).

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¶10 We conclude these statutes are unambiguous for the purpose of the trial court determining the date of Huante’s present offense. Huante’s conduct, statutorily defined as “an act,” occurred when he “stoned” J.L. on November 16, 2016. *See* § 13-105(6), (27). As we have previously discussed in a case where we concluded the Arizona homicide statutes applied to the death of a newborn when the homicidal conduct was inflicted *in utero*, Arizona’s homicide statutes “do not require that all the elements of the offenses be immediately satisfied at the time of the defendant’s conduct.” *State v. Cotton*, 197 Ariz. 584, ¶¶ 2, 16 (App. 2000). Rather, it “is axiomatic that a homicide conviction, requiring the death of the victim as an element of the offense, may stand even though the victim’s death is not instantaneous with the defendant’s conduct but results from that conduct at a later time.” *Id.* ¶ 16 (quoting *Cuellar v. Texas*, 957 S.W.2d 134, 139 (Tex. App. 1997)). Although Huante’s conduct did not become punishable by the negligent homicide statute until J.L.’s death occurred on November 20, 2016, the date of J.L.’s death does not change the date of Huante’s offense. *See* § 13-105(6), (27); § 13-1102(A).

¶11 Moreover, the plain meaning of “present offense” is consistent with the legislative purpose of the “repetitive offenders” statute. *See* § 13-105(22)(c); A.R.S. § 13-703. The statute is intended to punish those with certain prior felony convictions more harshly than those without. *State v. Garcia*, 189 Ariz. 510, 514 (App. 1997) (interpreting A.R.S. § 13-604); *see* 2008 Ariz. Sess. Laws, ch. 301, §§ 15, 27 (section 13-604 is the former version of § 13-703). And time spent incarcerated is excluded so “that an offender does not elude repetitive status merely because imprisonment has rendered him unable to commit further crimes.” *State v. Derello*, 199 Ariz. 435, ¶ 23 (App. 2001). Our conclusion that the date of Huante’s negligent conduct was the date from which the prior conviction should have been calculated furthers this legislative purpose. *See id.* (statutory scheme intended to punish repetitive offenders more severely). Accordingly, Huante has not shown that the trial court committed error, fundamental or otherwise, by calculating his prior offense from November 16, 2016.

**Disposition**

¶12 For the foregoing reasons, we affirm Huante’s conviction and sentence.