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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ROBERTO VINCENT BEJARANO, Appellant.	2 CA-CR 2012-0073 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20103025001

Honorable Christopher Browning, Judge
Honorable Michael O. Miller, Judge

AFFIRMED AS CORRECTED

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz and Diane Leigh Hunt
Tucson
Attorneys for Appellee

Lori J. Lefferts, Pima County Public Defender
By Lisa M. Hise
Tucson
Attorneys for Appellant

V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, Roberto Bejarano was convicted of luring a minor for sexual exploitation and attempted sexual conduct with a minor, the latter designated a dangerous crime against children (DCAC) pursuant to A.R.S. § 13-705. The trial court suspended the imposition of sentence and placed Bejarano on consecutive, five-year terms of probation. On appeal, Bejarano argues the court erred by denying his motion to dismiss the DCAC allegation and by imposing consecutive terms of probation. For the reasons set forth below, we affirm the convictions and affirm the probationary terms as corrected.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding Bejarano's convictions. *See State v. Molina*, 211 Ariz. 130, ¶ 2, 118 P.3d 1094, 1096 (App. 2005). In August 2010, Tucson Police Department Detective Daniel Barry was browsing a classified-advertisements website when he noticed a personal advertisement reading, "looking for nsa sex with a girl." Barry responded to the advertisement, posing as a fourteen-year-old girl named "Becky." Within a few hours, Barry received a reply from an electronic mail (email) address later identified as belonging to Bejarano. Through email communication that day, Bejarano confirmed Becky was fourteen years old, told her he was twenty-three years old, asked her what she was "looking for," and offered to "help [her] do more," like "going the full way for sex."

¶3 Over the next several days, Bejarano continued to communicate with Becky—as portrayed by Barry and a female detective—through email, telephone, and electronic text messages. They also exchanged photographs. Bejarano solicited various

sexual acts from Becky, including digital penetration, masturbation, and oral and anal intercourse. Bejarano and Becky arranged to meet at a park for "sexual fun." The day before their meeting, Bejarano instructed Becky to remind him to bring condoms and lubricant. When Bejarano showed up at the park, he was arrested.

¶4 The state charged Bejarano with luring a minor for sexual exploitation and attempted sexual conduct with a minor under the age of fifteen, each alleged to be a DCAC. Bejarano filed a pretrial motion to dismiss the DCAC allegations as to both counts because there was "no actual victim under the age of [fifteen] involved." The state agreed that the DCAC allegation for the luring charge should be dismissed, but, as to the attempted sexual conduct charge, the state argued the DCAC statute applied because factual impossibility is not a defense to an attempted offense. After hearing oral argument, the trial court granted Bejarano's motion on the luring charge and denied it as to the attempted sexual conduct charge.

¶5 Bejarano was convicted and sentenced as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

DCAC Allegation

¶6 Bejarano first contends the "trial court erred in refusing to dismiss the DCAC allegation as to attempted sexual conduct with a minor under fifteen, where no actual victim under fifteen existed." We review for an abuse of discretion a trial court's denial of a motion to dismiss, but, to the extent it presents a question of statutory

interpretation, our review is de novo. *State v. Villegas*, 227 Ariz. 344, ¶ 2, 258 P.3d 162, 163 (App. 2011).

¶7 The DCAC statute provides an enhanced sentencing scheme for specifically enumerated offenses, including sexual conduct with a minor, when the offense is "committed against a minor who is under fifteen years of age." § 13-705(P)(1). Bejarano relies on this language in support of his argument that the DCAC statute "requires that the victim actually be a person under the age of fifteen" before the enhanced sentencing scheme applies. But, as Bejarano acknowledges, we previously have rejected this argument in *State v. Carlisle*, 198 Ariz. 203, 8 P.3d 391 (App. 2000).

¶8 In *Carlisle*, the defendant solicited sex over the internet from a television reporter posing as a fourteen-year-old boy and again when he met an adult actor portraying the boy. 198 Ariz. 203, ¶¶ 2-6, 8 P.3d at 393-94. The defendant was charged with two counts of attempted sexual conduct with a minor, both DCAC. *Id.* ¶ 8. But the trial court dismissed the DCAC allegations because there was no victim under fifteen. *Id.* After a bench trial, the defendant was convicted of one count. *Id.* On the state's cross-appeal, we vacated the defendant's sentence, finding the court had erred by dismissing the DCAC allegations and not applying the enhanced sentencing scheme. *Id.* ¶ 19. We recognized that the legislature specifically classified preparatory offenses such as attempt as DCAC in the second degree. *Id.* ¶ 17; *see also* § 13-705(O). We reasoned that because "factual impossibility is not a defense to attempt," it also does not render the DCAC sentencing scheme inapplicable to an attempted offense. *Carlisle*, 198 Ariz. 203, ¶ 17, 8 P.3d at 396. We also pointed out that the defendant "specifically targeted a victim

he believed to be under the age of fifteen and then attempted a crime," which is "precisely the type of conduct" that the legislature sought to address with the DCAC statute. *Id.* ¶ 18.

¶9 Although the legislature has renumbered the DCAC statute, it has made no substantive changes to § 13-705 since *Carlisle* that would change our analysis. *Compare* 2000 Ariz. Sess. Laws, ch. 50, § 1, *with* § 13-705. We therefore find the reasoning of *Carlisle* applicable here. Accordingly, "[t]he absence of an actual victim under the age of fifteen does not preclude an attempted crime from being a dangerous crime against children." *Carlisle*, 198 Ariz. 203, ¶ 17, 8 P.3d at 395; *see also* A.R.S. §§ 13-1001(A)(2), 13-705(P)(1).

¶10 Bejarano, however, questions the "continuing validity" of *Carlisle* in light of our supreme court's decision in *State v. Sepahi*, 206 Ariz. 321, 78 P.3d 732 (2003). He contends *Sepahi* "made clear that . . . the victim [must] actually be a person under the age of fifteen" for the DCAC statute to apply. Bejarano's reliance on *Sepahi* is misplaced. In that case, the defendant was convicted of two counts of aggravated assault for shooting a fourteen-year-old girl. 206 Ariz. 321, ¶¶ 3-4, 78 P.3d at 732-33. The trial court found the offenses were DCAC and enhanced the defendant's sentences accordingly. *Id.* ¶ 5. On appeal, this court vacated the sentences, holding that the DCAC statute did not apply because "there was no evidence that [the defendant was] 'peculiarly dangerous to children' or otherwise 'pose[d] a direct and continuing threat to the children of Arizona.'" *State v. Sepahi*, 204 Ariz. 185, ¶ 14, 61 P.3d 479, 483 (App. 2003), *quoting State v. Williams*, 175 Ariz. 98, 102-03, 854 P.2d 131, 135-36 (1993).

¶11 In vacating that decision, our supreme court stated our "interpretation in effect amend[ed] the statute to require proof of elements not set forth by the legislature." *Sepahi*, 206 Ariz. 321, ¶ 15, 78 P.3d at 735. The court then reaffirmed its prior holding that "in order to prove that a defendant has committed a dangerous crime against a child, the [s]tate must prove that the defendant committed one of the statutorily enumerated crimes and that his conduct was 'focused on, directed against, aimed at, or target[ed] a victim under the age of fifteen.'" *Id.* ¶ 19, *quoting Williams*, 175 Ariz. at 103, 854 P.2d at 136. And, because the defendant targeted a victim under the age of fifteen by shooting directly at her, the court concluded he was properly subjected to enhanced sentencing pursuant to the DCAC statute. *Id.* Thus, the issue in *Sepahi* was the extent to which a defendant's conduct must "target" a child for the DCAC statute to apply. *Id.* ¶ 14. Although the court stated the defendant must "target a victim under the age of fifteen," the court was simply restating the statute's language in describing the victim. *Id.* ¶ 19. The court did not address the question presented here—whether there must be an actual child victim. Thus, we are not persuaded by Bejarano's argument that *Sepahi* requires an actual victim under the age of fifteen for application of the DCAC statute.

¶12 Bejarano also maintains that our decision in *Villegas* "questioned the continued vitality of *Carlisle*." In *Villegas*, the defendant was convicted of luring a minor for sexual exploitation, a DCAC. 227 Ariz. 344, ¶¶ 1-2, 258 P.3d at 163. On appeal, we found the trial court had erred in denying Villegas's motion to dismiss the DCAC allegation. *Id.* ¶ 5. Relying on the plain language of A.R.S. § 13-3554 and § 13-705, we determined that the DCAC statute does not apply to a luring offense where the

victim was not under the age of fifteen. *Id.* ¶ 3. We recognized the result in *Carlisle* but found that case distinguishable. *Id.* ¶ 4. We explained that *Carlisle* was based in part on the conclusion that factual impossibility is not a defense to the DCAC sentencing scheme for an attempted offense—reasoning not applicable to a completed offense like luring a minor for sexual exploitation. *Id.*

¶13 Bejarano lastly contends, "[t]he distinction that the act of luring a minor, a completed offense, cannot be enhanced by a DCAC allegation, but that the act of attempted sexual conduct, a non-completed offense, can be enhanced, creates an incongruity." We agree. Nonetheless, as the state points out, this problem is one for consideration by the legislature, not this court.

Consecutive Terms of Probation

¶14 Bejarano next argues the "trial court erred in ordering consecutive terms of probation for each count, where each count arose from the same conduct." He contends the imposition of consecutive terms violates Arizona's double punishment statute—A.R.S. § 13-116—and the state and federal prohibitions against double jeopardy. We review de novo whether a trial court has complied with § 13-116, *State v. Urquidez*, 213 Ariz. 50, ¶ 6, 138 P.3d 1177, 1179 (App. 2006), and whether the principle of double jeopardy applies, *State v. Powers*, 200 Ariz. 123, ¶ 5, 23 P.3d 668, 670 (App. 2001).

¶15 Section 13-116 provides as follows: "An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." Our analysis under this statute "focuses on the 'facts of the transaction' to determine if the defendant committed

a single act." *State v. Siddle*, 202 Ariz. 512, ¶ 17, 47 P.3d 1150, 1155 (App. 2002), *quoting State v. Gordon*, 161 Ariz. 308, 313 n.5, 778 P.2d 1204, 1209 n.5 (1989). To determine whether conduct constitutes a single act, we apply the *Gordon* test:

> First, we must decide which of the two crimes is the "ultimate charge—the one that is at the essence of the factual nexus and that will often be the most serious of the charges." Then, we "subtract[] from the factual transaction the evidence necessary to convict on the ultimate charge." If the remaining evidence satisfies the elements of the secondary crime, the crimes may constitute multiple acts and consecutive sentences would be permissible. We also consider whether "it was factually impossible to commit the ultimate crime without also committing the secondary crime." Finally, we consider whether the defendant's conduct in committing the lesser crime "caused the victim to suffer a risk of harm different from or additional to that inherent in the ultimate crime."

Urquidez, 213 Ariz. 50, ¶ 7, 138 P.3d at 1179 (alteration in original; citations omitted), *quoting Gordon*, 161 Ariz. at 315, 778 P.2d at 1211.

¶16 Applying the *Gordon* test here, we conclude the trial court properly ordered Bejarano to serve consecutive rather than concurrent terms of probation. As Bejarano suggests, we treat attempted sexual conduct with a minor as the ultimate charge. To convict him of that offense, the state had to prove Bejarano intentionally took "any step in a course of conduct planned to culminate" in "sexual intercourse or oral sexual contact with any person who is under eighteen years of age," under the circumstances as he believed them to be. A.R.S. §§ 13-1001(A)(2), 13-1405(A). The evidence established that Bejarano arranged to meet Becky—whom he believed was a fourteen-year-old girl—at a park to engage in various sexual activities, including sexual intercourse, and Bejarano in fact showed up at the park at the agreed-upon time with condoms.

¶17 Subtracting those facts from the entire transaction, sufficient evidence exists to establish the luring offense. To prove luring a minor for sexual exploitation, the state had to prove that Bejarano had "offer[ed] or solicit[ed] sexual conduct" with a minor or a peace officer posing as a minor. § 13-3554(A)-(B). Bejarano posted a personal advertisement on the internet soliciting sex from "a girl"; Detective Barry responded to the advertisement, posing as fourteen-year-old Becky; and, Bejarano and Becky communicated through email, telephone, and text message for approximately two weeks, during which time, Bejarano solicited and offered various sexual acts, including digital penetration, masturbation, and intercourse.

¶18 Bejarano nevertheless insists he "could not have committed attempted sexual conduct with a minor without also committing luring a minor for sexual exploitation." Although Bejarano's personal advertisement and subsequent communications with Becky to arrange the meeting at the park may have enabled him to commit attempted sexual conduct, it was not "factually impossible" for him to commit that offense without also committing the luring offense. *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. Even disregarding the initial solicitation in Bejarano's personal advertisement, he made numerous discrete offers and solicitations for sexual acts that were not necessary for the commission of attempted sexual conduct with a minor. *Cf. State v. Boldrey*, 176 Ariz. 378, 382-83, 861 P.2d 663, 667-68 (App. 1993) (not factually impossible for defendant to have committed sexual abuse without committing remaining crimes). Moreover, every offer and solicitation for a sexual act posed a different and an

additional risk of harm separate from the attempted sexual conduct. Accordingly, the trial court's imposition of consecutive terms of probation does not violate § 13-116.

¶19 Bejarano also maintains that his "convictions relate to the same series of facts" and the imposition of consecutive terms therefore violates the prohibition against double jeopardy. The double jeopardy clauses of the state and federal constitutions prohibit the imposition of multiple punishments for the same offense.[1] *State v. Ortega*, 220 Ariz. 320, ¶ 9, 206 P.3d 769, 772 (App. 2008); *see also* U.S. Const. amend. V; Ariz. Const. art. II, § 10. "Distinct statutory provisions constitute the same offense if they are comprised of the same elements." *Siddle*, 202 Ariz. 512, ¶ 10, 47 P.3d at 1154. Accordingly, "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *see also State v. Eagle*, 196 Ariz. 188, ¶ 6, 994 P.2d 395, 397 (2000). In this context, unlike our analysis under § 13-116, we look to the elements of the offenses and not the particular facts used to prove them in determining whether offenses are the same. *State v. Price*, 218 Ariz. 311, ¶ 5, 183 P.3d 1279, 1281 (App. 2008).

¶20 Contrary to Bejarano's assertion, this case is distinguishable from *State v. Powers*, 200 Ariz. 363, 26 P.3d 1134 (2001). There, our supreme court held the defendant could not be convicted of two counts of leaving the scene of an accident

[1]Although the language of the two clauses varies slightly, they have been held to generally grant the same protections to criminal defendants. *State v. Eagle*, 196 Ariz. 188, ¶ 5, 994 P.2d 395, 397 (2000). Therefore, we need only analyze Bejarano's argument under the federal constitution.

pursuant to A.R.S. § 28-661, based upon one accident involving two victims. *Powers*, 200 Ariz. 363, ¶¶ 3, 10, 26 P.3d at 1134-35. Thus, *Powers* did not involve an application of the *Blockburger* test. In contrast, Bejarano's convictions involve two distinct statutory provisions, and, applying the *Blockburger* test, we find no double jeopardy violation. Luring specifically requires an "offering or soliciting," while attempted sexual conduct does not. *See* §§ 13-3554(A); 13-1405(A); 13-1001(A)(2). Moreover, any of the actual or simulated sexual activities listed in A.R.S. § 13-3551(9) will satisfy the requirements of § 13-3554(A). On the other hand, attempted sexual conduct with a minor requires an attempt to "engag[e] in sexual intercourse or oral sexual contact." § 13-1405(A). Because luring a minor for sexual exploitation and attempted sexual conduct with a minor are different offenses, involving distinct elements, the trial court properly imposed consecutive terms of probation. *See Eagle*, 196 Ariz. 188, ¶ 6, 994 P.2d at 397.

¶21 As a final matter, the state requests that we amend the sentencing minute entry because a portion of it conflicts with the trial court's imposition of consecutive terms of probation. Although the minute entry states the five-year terms of probation "shall be consecutive," it also provides that both terms begin on the same date, March 13, 2012. *See State v. Young*, 106 Ariz. 589, 591, 480 P.2d 345, 347 (1971) (manifestly impossible for consecutive sentences to begin on same date).

¶22 We need not remand this matter to the trial court for clarification because the court made clear at the sentencing hearing its intent to impose consecutive terms of probation, so specifying in the minute entry notwithstanding the problematic starting date. *See State v. Stevens*, 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992) ("Upon

finding a discrepancy between the oral pronouncement of sentence and a minute entry, a reviewing court must try to ascertain the trial court's intent by reference to the record."). Moreover, when there is a conflict between the oral pronouncement and the sentencing minute entry, the oral pronouncement generally controls. *State v. Whitney*, 159 Ariz. 476, 487, 768 P.2d 638, 649 (1989). Additionally, Bejarano never has disputed that the court intended to impose consecutive terms of probation, challenging only the propriety of consecutive terms. We therefore correct the sentencing minute entry to reflect that the term for count two shall begin after Bejarano has completed the five-year term on count one. *See State v. Ovante*, 231 Ariz. 180, ¶ 39, 291 P.3d 974, 982 (2013) (correcting similar error).

Disposition

¶23 For the foregoing reasons, we affirm Bejarano's convictions and the consecutive terms of probation, correcting the sentencing minute entry as provided herein.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge