IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

VERNON MICHAEL LANGLOSS,
Appellant.

No. 2 CA-CR 2012-0352
Filed November 19, 2013

Appeal from the Superior Court in Pima County
No. CR41697
The Honorable Richard D. Nichols, Judge

AFFIRMED

COUNSEL

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz, Section Chief Counsel, Phoenix
and Amy Pignatella Cain, Assistant Attorney General, Tucson

Counsel for Appellee

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By Cynthia A. Brubaker

Counsel for Appellant

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Howard concurred.

M I L L E R, Judge:

¶1 Vernon Langloss appeals from his resentencing on two counts of molestation of a child and one count of sexual conduct with a minor. He contends his new sentences violate state and federal constitutional prohibitions against double jeopardy and his rights to due process, and that the trial court erred in sentencing him under the statute for dangerous crimes against children. We affirm the sentences.

Factual and Procedural Background

¶2 Following a jury trial in 1993, Langloss was convicted of multiple sexual crimes against a single child. In his opening brief, he accurately summarizes his convictions as follows:

> Count Four, Sexual Conduct with a Minor under 14, inserting his penis into the victim's vulva, nonrepetitive and a dangerous crime against children[;]
>
> Count Five, Molestation of a Child, Victim under 14, touching victim's genitals with his hand, a predicate felony and repetitive under A.R.S. § 13-604.01 to Count Four[;]

> Count Six, Attempted Sexual Conduct with a Minor under 14, attempting to put his penis in the victim's mouth, nonrepetitive and a dangerous crime against children[;]
>
> Count Seven, Molestation of a Child, Victim under 14, making the victim touch his penis, a predicate felony and repetitive under A.R.S. § 13-604.01 to Count Six[;]
>
> Count Eight, Sexual Conduct with a Minor under 14, kissing the victim's vulva, a predicate felony and repetitive under A.R.S. § 13-604.01 to Counts Six and Seven[.]

¶3 Langloss was sentenced to two twenty-year terms, two twenty-eight-year terms, and one life sentence without possibility of release for thirty-five years, all to be served consecutively. He filed a direct appeal as well as a petition for review pursuant to Rule 32, Ariz. R. Crim. P., which we consolidated. We affirmed Langloss's convictions and sentences and denied post-conviction relief. *State v. Langloss*, Nos. 2 CA-CR 94-0027, 2 CA-CR 95-0635-PR (consolidated) (memorandum decision filed Oct. 31, 1996).

¶4 In May 2009, Langloss filed a successive petition for post-conviction relief, arguing, among other things, that he was illegally sentenced under the wrong sentencing statute, and significant changes in the law affected his sentences. The state conceded that Langloss's convictions on counts four, six, and seven should not have been treated as predicate felonies to enhance his sentences on counts five, seven, and eight, pursuant to A.R.S. § 13-604.01. The trial court granted post-conviction relief on that claim and re-sentenced Langloss to seventeen years for counts five and seven (reduced from twenty-eight years) and twenty years for count eight (reduced from life imprisonment). The court denied relief as to Langloss's other claims.

¶5 Langloss filed a petition for review of his Rule 32 petition, and we granted review but denied relief, limiting review to the trial court's denial of relief on some of his claims. *State v. Langloss*, No. 2 CA-CR 2011-0038-PR (memorandum decision filed June 9, 2011). We stated in a footnote, "The trial court's grant of relief on this claim is not before us on review. Neither is the legality of the sentence the court imposed at resentencing . . . . The court's resentencing order is subject to review by direct appeal." *Id.*

¶6 Langloss filed a third petition for post-conviction relief, seeking an order granting a delayed appeal. The trial court granted relief, and Langloss filed this appeal.

Discussion

¶7 Langloss first argues that his sentences on counts five and seven violate the prohibitions against double jeopardy under the federal and state constitutions because they are lesser-included offenses of other counts. We first consider whether we may address these claims in this appeal from his resentencing.

¶8 The validity of an underlying conviction that was previously affirmed on appeal is beyond the scope of a direct appeal after resentencing. *See State v. Dann*, 220 Ariz. 351, ¶ 26, 207 P.3d 605, 613 (2009) (refusing to address appellant's claim regarding his convictions because the convictions were already affirmed on first direct appeal); *see also State v. Hartford*, 145 Ariz. 403, 405, 701 P.2d 1211, 1213 (App. 1985) (propriety of appellant's underlying conviction not properly before trial court on a remand for resentencing). Consequently, our review here is limited to those issues that relate only to the resentencing on counts five, seven, and eight. *See State v. Schackart*, 190 Ariz. 238, 255, 947 P.2d 315, 332 (1997) (issues waived if not raised in first appeal). In resentencing Langloss on those three counts, the trial court imposed shorter prison terms but did not make any other changes to the sentences.

¶9 Langloss argues that he is challenging only his new sentences rather than the underlying convictions, conceding "such a

claim is subject to preclusion for failure to assert the claim on direct appeal."[1] It is apparent from his arguments, however, that he is effectively challenging the underlying convictions.

¶10 First, Langloss relies on *Blockburger v. United States*, 284 U.S. 299 (1932), and its progeny to argue that we should look to the elements of the offenses to determine whether his sentences violate double jeopardy, without reference to the underlying facts. He contends that the prohibition of successive "punishments" in those cases refers to the sentences, independent of the underlying convictions. Langloss argues, "Where Appellant was convicted of lesser included offenses, such convictions may be allowed to stand, so long as Appellant is not punished separately for those convictions." A double jeopardy claim based on *Blockburger*, however, cannot be resolved without vacating underlying convictions, because the punishment is the conviction. *See Ball v. United States*, 470 U.S. 856, 861, 864 (1985) (concluding concurrent sentences did not remedy double jeopardy issue and noting, "[f]or purposes of applying the *Blockburger* test . . . 'punishment' must be the equivalent of a criminal conviction and not simply the imposition of sentence"); *see also State v. Brown*, 217 Ariz. 617, ¶ 13, 177 P.3d 878, 882 (App. 2008) ("[W]hen a defendant is *convicted* more than once for the same offense, his double jeopardy rights are violated even when . . . he receives concurrent sentences.").

¶11 Further, Langloss relies on opinions of this court, *State v. Ortega*, 220 Ariz. 320, ¶ 9, 206 P.3d 769, 772 (App. 2008) and *In re Jerry C.*, 214 Ariz. 270, 151 P.3d 553 (App. 2007), to argue that counts five and seven are lesser-included offenses of other counts. Both of those cases, however, addressed whether underlying convictions were lesser-included offenses of other offenses and violated the prohibition against double jeopardy, not just whether the sentences

[1]Langloss alternates between requests to vacate the convictions and requests to vacate the sentences and remand for resentencing, but contends in his reply brief that he is challenging only the sentences.

were unconstitutional. *See Ortega*, 220 Ariz. 320, ¶ 25, 206 P.3d at 777; *In re Jerry C.*, 214 Ariz. 270, ¶ 5, 151 P.3d at 555.

¶12 Finally, Langloss requests that we vacate the convictions, despite his assertions that he is only challenging the sentences. He also appears to ask this court to vacate the sentences completely and does not request that they be concurrent or reduced, suggesting he is asking that there be no sentences at all. We conclude Langloss's double jeopardy arguments challenge the underlying convictions, which we may not address on this appeal. *Hartford*, 145 Ariz. at 405, 701 P.2d at 1213.

¶13 Langloss also argues that the trial court violated his right to due process in resentencing him when it refused to make an independent determination of whether the sentences violated the prohibition against double jeopardy, deferring instead to this court's 1996 memorandum decision and the discussion of predicate prior convictions and double punishment to determine that the acts were separate. We need not address this argument further given that it would have been improper for the court to consider a challenge to the underlying convictions upon resentencing. *See Hartford*, 145 Ariz. at 405, 701 P.2d at 1213.

¶14 Langloss's final argument on appeal is that the trial court erred when it sentenced him pursuant to A.R.S. § 13-604.01,[2] the scheme for dangerous crimes against children, instead of A.R.S. §§ 13-701 and 13-702.[3] Langloss sets out an extensive argument tracing the statutory construction of § 13-604.01, contending the enhancements under that section do not apply to first offenders

[2]We refer throughout to the statutes in effect in 1993, at the time of Langloss's crimes.

[3]Arguably, Langloss could have challenged the use of § 13-604.01 in his first direct appeal. We address the argument only to the extent Langloss challenges the legality of the three new sentences. *See* A.R.S. § 13-4033(A)(4) (defendant may appeal "sentence on the grounds that it is illegal or excessive").

unless the felony involved use or exhibition of a deadly weapon or dangerous instrument, or the infliction of serious physical injury.

¶15 Sentencing claims involving constitutional law or statutory construction are reviewed de novo. *State v. Bomar*, 199 Ariz. 472, ¶ 5, 19 P.3d 613, 616 (App. 2001); *see also State v. Johnson*, 210 Ariz. 438, ¶ 8, 111 P.3d 1038, 1040 (App. 2005) (challenges to legality of sentence reviewed de novo). The imposition of an illegal sentence is fundamental, reversible error. *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013). When interpreting a statute, we look first to the language as the best indicator of the legislature's intent, and "'when the language is clear and unequivocal, it is determinative of the statute's construction.'" *State v. Hansen*, 215 Ariz. 287, ¶ 7, 160 P.3d 166, 168 (2007), *quoting Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, ¶ 8, 152 P.3d 490, 493 (2007).

¶16 The convictions subject to resentencing were for two counts of molestation of a child in violation of A.R.S. § 13-1410, and one count of sexual conduct with a minor under the age of fourteen, in violation of A.R.S. § 13-1405. In 1993, § 13-1410 stated, "A person who knowingly molests a child under the age of fourteen years . . . is guilty of a class 2 felony and is punishable pursuant to § 13-604.01." 1990 Ariz. Sess. Laws, Ch. 384, § 4. Section 13-1405(B) stated, "Sexual conduct with a minor under fourteen years of age is a class 2 felony and is punishable pursuant to § 13-604.01." 1990 Ariz. Sess. Laws, Ch. 384, § 2. The plain language of the statutes directed sentencing under § 13-604.01, without any requirement that the offense involve a weapon, result in serious physical injury, or that the offender be a repeat offender.

¶17 Likewise, the 1993 versions of §§ 13-604.01(A) and (B) specifically enumerated the sentences for convictions of the crimes of sexual conduct with a minor and molestation of a child without reference to weapons or physical injury, with increased terms to those sentences for repeat offenders. *See, e.g.*, 1993 Ariz. Sess. Laws., Ch. 33, § 1 ("[A] person . . . who stands convicted of a dangerous crime against children in the first degree involving . . . sexual assault . . . shall be sentenced to a presumptive term of imprisonment for

twenty years. If the convicted person has been previously convicted of one predicate felony the person shall be sentenced to . . . thirty years.").

¶18 The statutes for molestation and sexual conduct with a minor plainly direct the trial court to sentence the offender pursuant to § 13-604.01; an additional finding of dangerousness is not required. *See State v. Smith*, 156 Ariz. 518, 525, 753 P.2d 1174, 1181 (App. 1987) (where state alleges and crime qualifies as a dangerous crime against children, separate allegation of dangerousness not required), *disapproved on other grounds by State v. Jonas*, 164 Ariz. 242, 249, 792 P.2d 705, 712 (1990). Further, § 13-604.01 is "a *separate* sentencing scheme for certain types of crimes committed against children under the age of 15 years." *Id*. at 525, 753 P.2d at 1181 (emphasis added). The trial court did not err in resentencing Langloss pursuant to § 13-604.01.

Disposition

¶19 For the foregoing reasons, we affirm Langloss's sentences.