IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

CARLOS V. MUNOZ,
Appellant.

No. 2 CA-CR 2018-0309
Filed August 21, 2020

Appeal from the Superior Court in Santa Cruz County
No. CR17017
The Honorable Thomas Fink, Judge

AFFIRMED IN PART;
VACATED IN PART AND REMANDED

COUNSEL

Mark Brnovich, Arizona Attorney General
Michael T. O'Toole, Chief Counsel
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

Scott A. Martin, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

E P P I C H, Presiding Judge:

¶1 Carlos Munoz appeals from his convictions and sentences for continuous sexual abuse of a child, sexual conduct with a minor under fifteen, sexual assault, and child molestation. He raises six issues, contending that: (1) the trial court grossly misinformed him about the sentence he faced if he "lost at trial"; (2) the court and prosecutor misinformed the jury that the state argues last because it has the burden of proof at trial; (3) the court erroneously sentenced him under A.R.S. § 13-705(A) on the sexual assault and sexual conduct counts; (4) the court erred in sentencing him to consecutive sentences for offenses that the jury likely based on a single act; (5) the court erroneously imposed mutually consecutive sentences; and (6) the court erroneously aggravated his sentence based on a factually incorrect factor. Because the trial court erred in sentencing Munoz under § 13-705(A), we vacate his life sentences for sexual assault and sexual conduct with a minor and remand for resentencing under § 13-705(C) on those counts. To correct error in imposing mutually consecutive sentences, the trial court's amended order should specify the order in which Munoz is to serve his consecutive sentences. We otherwise affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the jury's verdict." *State v. Murray*, 247 Ariz. 447, ¶ 2 (App. 2019). In June 2015, twelve-year-old A.M. was watching television in her parents' bedroom when Munoz—her stepfather—came into the room, locked the door, and performed various sexual acts on her, ignoring her plea to stop and overcoming her attempt to get away. Afterward, when A.M. told Munoz that she would report the abuse to her mother, he replied that her mother would not believe her if she reported it, and he already knew what he was going to say. A.M. did not tell anyone about the abuse.

¶3 A few days later, Munoz abused A.M. again, and then over the next year and a half, repeatedly sexually abused and assaulted her two or three times a week. He also coerced her silence by closely monitoring

her communications, tightly restricting her travel outside the home, and threatening that he would hurt her mother and sisters or cause her grandmother to go to jail or prison by reporting her legal issues to police. In December 2016, A.M. nonetheless told a trusted aunt of the abuse, which was reported to police the next day.

¶4 The state charged Munoz with separate counts of continuous sexual abuse of a child, sexual conduct with a minor under fifteen, sexual assault, and child molestation. After a five-day jury trial, Munoz was convicted on all counts. The trial court sentenced him to consecutive and concurrent sentences of imprisonment totaling life plus twenty-seven years. Munoz timely appealed. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Donald Hearing

¶5 Munoz contends that at his *Donald* hearing,[1] the trial court grossly misinformed him about the sentence he faced if he were convicted at trial. In that hearing, the court stated that Munoz would be eligible for "parole" after thirty-five years if the maximum life sentence were imposed on the sexual conduct and sexual assault counts, failing to inform Munoz that he was not eligible for parole because parole had been abolished. *See State v. Dansdill*, 246 Ariz. 593, n.10 (App. 2019) (parole eliminated for all offenses committed after January 1, 1994). The court also did not mention that he faced mandatory consecutive sentences on some counts.

¶6 Munoz acknowledges that such claims are generally raised in a proceeding under Rule 32, Ariz. R. Crim. P., and he raises it here only in an abundance of caution that the issue might be deemed waived for failure to raise it on appeal. Indeed, to determine how errors in the trial court's advisement affected Munoz, we would need to consider trial counsel's performance. Therefore, to the extent that this claim is not mooted by our disposition of other issues in this appeal, Munoz must raise it in a Rule 32 proceeding. *See State ex rel. Thomas v. Rayes*, 214 Ariz. 411, ¶ 16 (2007) ("[A] request for reinstatement of a plea offer under *Donald* must be premised on

[1] A *Donald* hearing is a pretrial hearing in which a defendant is informed of any outstanding plea offer and the consequences of conviction; the purpose of the hearing is to create a record of the defendant's rejection of the plea offer to avoid ineffective assistance of counsel claims. *State v. Mendoza*, 248 Ariz. 6, ¶ 18 (App. 2019) (citing *State v. Donald*, 198 Ariz. 406, ¶ 46 (App. 2000)).

a showing of ineffective assistance of counsel."); *State v. Spreitz*, 202 Ariz. 1, ¶ 9 (2002) (ineffective assistance of counsel claims not cognizable on direct appeal and must be raised in Rule 32 proceeding). His mention of the issue here has no preclusive effect in such a proceeding. *Spreitz*, 202 Ariz. 1, ¶ 9.

Remarks about Burden of Proof

¶7 Munoz argues that structural or fundamental error occurred when the trial court gave the jury an instruction—highlighted by the state in its closing argument—that the state has the right to argue last because it has the burden of proof at trial. Munoz argues that the instruction erroneously implied that the state had a constitutional right to argue last.

¶8 Munoz concedes he did not object at trial. But beyond that, as the state points out, Munoz actually requested the complained-of instruction. He thus invited any error, and any claim of error is deemed waived. *See State v. Logan*, 200 Ariz. 564, ¶ 8 (2001) ("[W]hen a party requests an erroneous instruction, any resulting error is invited and the party waives his right to challenge the instruction on appeal.").

Sentencing under A.R.S. § 13-705(A)

¶9 Munoz contends that the trial court erred in sentencing him for sexual assault and sexual conduct with a minor under § 13-705(A). He points out that § 13-705(A) does not apply to offenses involving masturbatory contact and the jury was instructed that masturbatory contact can constitute those offenses. He argues that because the charging document does not identify the specific acts constituting sexual assault or sexual conduct and no jury interrogatory establishes that the jury based its verdicts for those counts on non-masturbatory contact, jurors could conceivably have based those verdicts on the victim's testimony of masturbatory contact—Munoz's manipulation of her vagina with his fingers—rather than her testimony that Munoz penetrated her vagina with his penis. He therefore maintains that he should have been sentenced for those offenses under § 13-705(C), not § 13-705(A).

¶10 Under the Sixth Amendment to the United States Constitution, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict*," unless the defendant

admitted the facts. *Blakely v. Washington*, 542 U.S. 296, 303 (2004).[2] "When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority." *Id.* at 304 (quoting 1 J. Bishop, *Criminal Procedure* § 87, p. 55 (2d ed. 1872)).

¶11 Because Munoz did not object in the trial court, we review for fundamental error only. *See State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005). "[T]he first step in fundamental error review is determining whether trial error exists." *State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018). If error exists, the defendant shows that the error is fundamental "by showing that (1) the error went to the foundation of the case, (2) the error took from the defendant a right essential to his defense, *or* (3) the error was so egregious that he could not possibly have received a fair trial." *Id.* If fundamental error is established under the first or second prong, the defendant must make a separate showing of prejudice from the error. *Id.* A sentencing error under *Apprendi* constitutes fundamental error because it denies a defendant "the right to have certain facts decided by a jury beyond a reasonable doubt" and thus goes to the foundation of the case. *Henderson*, 210 Ariz. 561, ¶ 25. To show prejudice from an *Apprendi* error, the defendant "must show that a reasonable jury, applying the appropriate standard of proof, could have reached a different result than did the trial judge" in finding the fact that exposed him to the aggravated sentence. *Id.* ¶ 27.

¶12 Section 13-705, A.R.S., provides enhanced penalties for dangerous crimes against children, including sexual assault and sexual conduct with a minor. Under § 13-705(A), an adult defendant who is convicted of first-degree sexual assault of, or sexual conduct with, a minor twelve years old or younger must be sentenced to a life sentence. Section 13-705(A) "does not apply to masturbatory contact," however. If convictions for these crimes is based on masturbatory contact with a twelve-year-old victim, § 13-705(C), which applies "[e]xcept as otherwise provided in this section," provides a more lenient sentence. Thus, the statutory maximum sentence under *Apprendi* for these offenses is provided in § 13-705(C). *See also State v. Brown*, 212 Ariz. 225, ¶ 7 (2006) (Arizona's statutory maximum for *Apprendi* purposes is presumptive sentence).

¶13 Sexual assault under A.R.S. § 13-1406(A) includes non-consensual "sexual intercourse," which is defined under A.R.S. § 13-1401(A)(4) as "penetration into the penis, vulva or anus by any part of the

[2]Munoz did not admit to facts relevant to the sentencing issue here.

body or by any object or masturbatory contact with the penis or vulva." Sexual conduct with a minor under A.R.S. § 13-1405(A) also includes "sexual intercourse," and thus similarly includes masturbatory contact with the penis or vulva. Therefore, both offenses may be committed via masturbatory contact. "Masturbatory contact" is not defined, but the plain meaning of the word "masturbatory" indicates that the contact must involve erotic stimulation, *see State v. Florez*, 241 Ariz. 121, ¶ 15 (App. 2016), and it can be inferred that masturbatory contact includes non-penetrative contact with the penis or vulva, *see* § 13-1401(A)(4).

¶14 At trial, the state presented evidence of penetrative contact constituting sexual intercourse: A.M. testified that Munoz "put his private part in [her] private part," for example. The described contact clearly was sufficient to support the sexual assault and sexual conduct convictions; were the jury to have based its guilty verdicts for those counts on that contact, life sentences would be required under § 13-705(A). But A.M. also testified to masturbatory contact constituting sexual intercourse, describing Munoz reaching into her shorts and rubbing her vagina with his fingers. This masturbatory contact also satisfied the contact element of both offenses; if the verdicts were based on this contact, Munoz must be sentenced under § 13-705(C).

¶15 The contact on which the jury based its verdicts of guilt for sexual assault and sexual conduct is neither explicit not implicit in the verdicts. The verdict forms did not specify, through interrogatories or otherwise, the contact on which the verdicts are based; they described the contact only as "sexual intercourse or oral sexual contact"—language from § 13-1406(A) and § 13-1405(A) that encompasses both the penetrative and masturbatory contact described by the victim. The charging document used the same statutory term to describe the alleged contact constituting sexual assault and sexual conduct, as did the jury instructions for those counts. Finally, the instruction on the definition of sexual intercourse also mirrored the statutory definition, expressly including both "masturbatory contact with the penis or vulva" and penetrative contact. In sum, whether the jury based its verdict on masturbatory contact or penetrative contact is not "reflected in the jury verdict." *See Blakely*, 542 U.S. at 303. Therefore, fundamental error occurred when the trial court imposed an enhanced sentence under § 13-705(A) based on an implicit finding of penetrative contact.

¶16 We further conclude that the error was prejudicial, because a reasonable jury could have failed to find that penetrative contact occurred. The trial court explicitly instructed jurors that they "may accept everything

a witness says, or part of it, or none of it." Although it is clear from the verdicts that all jurors accepted some of the victim's testimony about the abusive contact, we cannot know that all jurors accepted all of it. A reasonable juror may have accepted the victim's testimony of masturbatory contact and convicted Munoz on that basis, and yet had a reasonable doubt about the victim's testimony of penetrative contact. *See Adams v. Indus. Comm'n*, 147 Ariz. 418, 420 (App. 1985) ("Credibility is not readily discernible by one who merely reads a cold record.").

¶17 The state maintains that there is no reasonable possibility that a juror would have done so because the prosecutor explained in closing argument that the penetrative contact was the contact constituting sexual assault and sexual conduct. Indeed, the prosecutor did clearly explain the state's theory of guilt for each count, arguing that the "sexual intercourse incident where [Munoz] put his penis inside [A.M.'s] vagina" supported the sexual assault and sexual conduct counts, while the masturbatory contact supported the child molestation count. But "[t]he jury is not bound by the prosecutor's arguments; it is free to apply the law to the facts as instructed by the trial judge." *State v. Washington*, 132 Ariz. 429, 433 (App. 1982). Based on the trial court's instructions here, a reasonable juror could have found Munoz guilty based on the masturbatory contact, despite the prosecutor's arguments suggesting a different theory of guilt.

¶18 The state cites no authority suggesting to us that the outcome here should turn on the prosecutor's arguments. The only case the state cites, *State v. Valverde*, 220 Ariz. 582, ¶¶ 15-17 (2009), *abrogated on other grounds by Escalante*, 245 Ariz. 135, ¶¶ 15-16, involved a materially distinguishable situation where the trial court's omission of an instruction on the defendant's burden of proof to show self-defense did not prejudice the defendant because, among other things, neither party argued in closing that the defendant had any burden at all. *Valverde* is inapposite here.

¶19 In sum, Munoz's sentences under § 13-705(A) for sexual assault and sexual conduct with a minor constitute fundamental, prejudicial error under *Apprendi*. He must therefore be resentenced for these counts under § 13-705(C).

Consecutive Sentences—A.R.S. § 13-116 and Double Jeopardy Clause

¶20 Munoz contends that the trial court erred in sentencing child molestation consecutively to sexual assault and sexual conduct with a minor. For the same general reason he argued that sentences under § 13-705(A) were improper—the lack of jury interrogatories or other clear

indication of the contact on which each verdict was based—Munoz maintains that there is a possibility the jury based its verdict for sexual assault, sexual conduct, and child molestation all on the same masturbatory contact, and therefore those counts "must be all presumed to be based on" the masturbatory contact. He contends he must therefore be sentenced concurrently under A.R.S. § 13-116, which generally prohibits consecutive sentences for multiple convictions arising from a single act, and under the double jeopardy clauses of the Fifth Amendment and Arizona constitution, which prohibit multiple punishments for the same offense. Again, Munoz did not object on these bases in the trial court; we review for fundamental error, which a sentence rendered illegal by § 13-116 or double jeopardy would constitute. *See Henderson*, 210 Ariz. 561, ¶ 19; *Escalante*, 245 Ariz. 135, ¶ 21; *State v. McDonagh*, 232 Ariz. 247, ¶¶ 6-7 (App. 2013) (single act); *State v. Siddle*, 202 Ariz. 512, n.2 (App. 2002) (double jeopardy).

¶21 As Munoz acknowledges, we are bound on the single-act issue by our supreme court, which has held that consecutive sentences for dangerous crimes against children under § 13-705(M) apply even when the offenses would constitute a single act under § 13-116. *See State v. Jones*, 235 Ariz. 501, ¶¶ 7-8, 11 (2014) (citing § 13-705(M)). We do not address Munoz's contention that this holding is erroneous, which he has asserted here only to preserve the issue. *See State v. Smyers*, 207 Ariz. 314, 318 n.4 (2004) ("The courts of this state are bound by the decisions of [the Arizona Supreme] court and do not have the authority to modify or disregard this court's rulings.").

¶22 Munoz contends that his sentence constitutes double jeopardy because molestation is a lesser-included offense of sexual assault, and it cannot be ruled out from the jury verdicts that his conviction for molestation was based on the same masturbatory contact as the sexual assault conviction. He maintains that the circumstances on this issue are materially distinguishable from those in *Jones*, where neither of the consecutively sentenced offenses was a lesser-included offense of the other. *See* 235 Ariz. 501, ¶ 13 (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

¶23 Munoz does not cite, and we have not found, any authority stating that molestation is a lesser-included offense of sexual assault. But even if not a lesser-included offense of sexual assault, molestation is a lesser included offense of sexual conduct with a minor under the age of fifteen, an offense the trial court also sentenced consecutively to molestation here. *See State v. Ortega*, 220 Ariz. 320, ¶ 25 (App. 2008). In circumstances where a conviction for an offense and its lesser-included offense is based on the

same conduct, we would vacate the conviction for the lesser-included offense, rather than mandate a concurrent sentence. *See id.* ¶¶ 25-27. But we generally will not disturb the conviction for the lesser offense if substantial evidence supports both that conviction and the conviction for the greater offense based on different conduct for each. *See id.* ¶¶ 26-28 (analyzing whether sufficient evidence supported separate convictions for sexual conduct with a minor and molestation); *State v. Duarte*, 246 Ariz. 338, ¶ 16 (App. 2018) ("We will uphold a conviction if it is supported by substantial evidence."). Here, substantial evidence supported a separate molestation conviction based on the theory the state put forth in closing argument: the victim's testimony to masturbatory contact supported the molestation count, while her testimony of penetrative contact supported the other counts. The jury returned a guilty verdict for molestation separate from the other offenses, which is generally sufficient to sustain an otherwise valid conviction. *See* Ariz. R. Crim. P. 23.2(a), (c). Indeed, Munoz does not argue that his molestation conviction must be vacated.[3] We therefore uphold it.

[3]The risk of a non-unanimous verdict may arise from a duplicitous charge when the state "charge[s] as one count separate criminal acts that occurred during the course of a single criminal undertaking [when] those acts might otherwise provide a basis for charging multiple criminal violations." *State v. Klokic*, 219 Ariz. 241, ¶ 14 (App. 2008). The charges here, which did not specify the precise contact on which each charge was based, inhered such a risk. The risk of error is remedied, however, if the state "'elect[s] the act which it alleges constitutes the crime.'" *Id.* (quoting *State v. Schroeder*, 167 Ariz. 47, 54 (App. 1990) (Kleinschmidt, J., concurring)).

Munoz does not contend that the charges against him were duplicitous; in his reply brief, he cites *Klokic*, but only to argue that the duplicitous charges there present an "analogous context" to the situation here. Any argument that the molestation charge was duplicitous is therefore waived. *See State v. Carver*, 160 Ariz. 167, 175 (1989) ("Failure to argue a claim usually constitutes abandonment and waiver of that claim."). We therefore need not address whether the state sufficiently elected which conduct applied to which charge via its closing argument, in which it indicated that the penetrative contact applied to the sexual assault and sexual contact charges and the non-penetrative contact applied to the molestation charge.

¶24 The lack of a jury finding does not create any issue with sentencing molestation consecutively, as there is no Sixth Amendment requirement that juries find facts justifying consecutive prison terms. *See Oregon v. Ice*, 555 U.S. 160, 168 (2009) (*Apprendi* does not apply to "the imposition of sentences for discrete crimes"); *State v. Lambright*, 243 Ariz. 244, ¶ 29 (App. 2017) (no requirement that juries find facts justifying consecutive sentences). We therefore uphold the trial court's ruling sentencing molestation consecutively to sexual assault and sexual conduct with a minor.

Mutually Consecutive Sentences

¶25 Munoz argues the trial court erred by sentencing him to mutually consecutive sentences, resulting in "a mobius loop of a sentencing timeline and an infinite sentence that can never begin or end." A defendant must be sentenced such that "the defendant will know . . . the order in which the sentences . . . are to be served." *State v. Hancock*, 27 Ariz. App. 164, 166 (1976) (quoting *Benson v. United States*, 332 F.2d 288, 292 (5th Cir. 1964)). Here, the sentencing order is unclear as to which sentence is to be served first, because it states that counts one and four are consecutive to counts two and three but also states that counts two and three are consecutive to counts one and four. On remand, the court's order should clearly indicate the order in which the sentences are to be served.

Evidentiary Support for Aggravator

¶26 Before trial, the state alleged that Munoz "committed these crimes against [A.M.] for more than one year" as an aggravating factor under A.R.S. § 13-701(D)(27), a "catch-all" aggravator that allows a court to consider at sentencing "[a]ny other factor that the state alleges is relevant . . . to the nature or circumstances of the crime."[4] At trial, the jury found that the state had proved Munoz "committed these crimes against [A.M.] for one year or more." The trial court considered this factor, among several others, in imposing maximum sentences for continuous sexual abuse and child molestation.

¶27 Munoz argues that he was erroneously sentenced because the evidence did not support that aggravating factor. He points out that A.M. testified that the first act of abuse occurred on some day in June 2015 and the last date of any alleged crime in the charging document is June 1, 2016,

[4]Absent material change after the relevant date, we cite the current version of a statute or rule.

the day the Munoz family moved to Mexico. He acknowledges that there was evidence that abuse continued to occur in Mexico until December 2016—the victim testified that Munoz abused her for a year and a half, until shortly before she reported it in December 2016. But he maintains that the words "these crimes" on the verdict forms referred to the charged crimes, which, given the victim's testimony about when the abuse started and the latest date in the charging document, did not extend to a full year.

¶28 Given A.M.'s testimony that Munoz repeatedly sexually abused her for a year and a half, and the charged crimes all referred to some portion of that course of criminal conduct, the term "these crimes" in the aggravator can be reasonably interpreted to refer to the entire course of abuse, not just the instances of abuse underlying the charges. Interpreted this way, the aggravator is amply supported by A.M.'s testimony. There is no reason to believe that the jury adopted a more restrictive interpretation that is not supported. *Cf. State v. Acuna Valenzuela*, 245 Ariz. 197, ¶ 37 (2018) (to avoid being unconstitutional for vagueness, statutory aggravator need only have "some common-sense core of meaning . . . that criminal juries should be capable of understanding" (quoting *Tuilaepa v. California*, 512 U.S. 967, 973 (1994))).

¶29 Munoz additionally suggests that using the evidence of abuse in Mexico to support an aggravator presents a "jurisdictional problem," and therefore it cannot support a finding that Munoz committed the crimes against A.M. for more than a year. But he does not cite, and we have not found, any authority to support his suggestion that such a jurisdictional problem exists. Indeed, § 13-701(D) explicitly provides for consideration of the defendant's out-of-jurisdiction conduct as an aggravating factor. *See* § 13-701(D)(11) (providing for use of convictions in other jurisdictions as an aggravating factor). Evidence of conduct outside the jurisdiction may even be used to support a conviction by proving elements of an offense. *See State v. Poland*, 132 Ariz. 269, 275 (1982) (citing A.R.S. § 13-108(A)(1)) ("When the elements of a crime are committed in different jurisdictions, any state in which an essential part of the crime is committed may take jurisdiction."). We see no principled reason why a court would nonetheless be prohibited from considering a defendant's out-of-jurisdiction criminal conduct under § 13-701(D)(27).

Disposition

¶30 We vacate Munoz's life sentences for sexual assault and sexual conduct with a minor and remand for resentencing under § 13-705(C) on those counts. On remand, the trial court's sentencing order

should clearly indicate the order in which Munoz must serve his consecutive sentences. In all other respects, we affirm Munoz's convictions and sentences.