IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

PATRICK MICHAEL WINKLER,
Appellant.

No. 2 CA-CR 2019-0284
Filed June 29, 2021

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20183949001
The Honorable James E. Marner, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

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MEMORANDUM DECISION

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

V Á S Q U E Z, Chief Judge:

¶1 After a jury trial, Patrick Winkler[1] was convicted of ten counts of sexual exploitation of a minor, two counts of luring a minor for sexual exploitation, three counts of unlawful age misrepresentation, and failure to register as a sex offender. The trial court sentenced her to consecutive and concurrent, presumptive prison terms totaling 173.5 years. On appeal, Winkler argues the court erred by ordering restitution for one of the sexual exploitation victims and by denying her motion for a judgment of acquittal because the state failed to present sufficient evidence to support her luring and age-misrepresentation convictions. Winkler also challenges the constitutionality of the luring statute, contending it is overbroad. For the following reasons, we affirm in part and vacate in part.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the convictions and the trial court's restitution order. *State v. Hollenback*, 212 Ariz. 12, ¶ 2 (App. 2005); *State v. Lewis*, 222 Ariz. 321, ¶ 2 (App. 2009). In 2017, Winkler was on parole and housed at a reentry center "primarily for sex offenders." As part of her parole and admission to the center, she was subject to certain conditions, including being prohibited from visiting "adult websites or websites known to cater to criminal behavior."

¶3 Winkler briefly moved to another facility before returning to the reentry center in March 2018. Upon her return, Winkler provided her parole officer, who was responsible for electronic monitoring, with updated information that included an "on-line identifier." Investigation of this identifier led the parole officer to conclude that Winkler was in violation of her parole by "using the Internet to lure minors." When confronted with this information, Winkler "just kind of . . . grunted yes . . . admitting to what happened." At this point, the parole officer's supervisor obtained a warrant

[1]We use the pronouns she/her to refer to Winkler, consistent with her preference as reflected in the trial court.

and searched Winkler's phone, revealing "downloaded pornographic material" and two "concerning" text messages, one that included a profile of a minor female and another with an image of a "naked upper torso."

¶4 The phone was then turned over to the police for further investigation. The Internet Crimes Against Children Unit conducted a "download and analysis" of the phone's contents that uncovered "over 650 images and videos" of child pornography, internet searches containing "terms that corresponded to child pornography," visits to websites that "appeared consistent with child pornography," and "98 chats of a sexual nature" in Whisper, a private messaging application. Winkler was indicted on ten counts of sexual exploitation of a minor, four counts of luring a minor for sexual exploitation, three counts of unlawful age misrepresentation, and one count of failure to register as a sex offender. She was tried, convicted, and sentenced as described above. On the state's motion, the trial court ordered Winkler to pay restitution to one of the victims depicted in the child pornography. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1), (3).[2]

[2] Winkler's notice of appeal designates the transcript from the sentencing hearing, which included the restitution hearing, as an additional record but failed to specifically refer to the restitution order as an order being appealed. *See Hoffman v. Chandler*, 231 Ariz. 362, ¶ 7 (2013) (recognizing § 13-4033(A)(3) would authorize direct appeal from post-judgment restitution order unless order entered pursuant to plea agreement). The state has not argued that it was prejudiced by any lack of notice and, indeed, Winkler challenged restitution below and the parties filed memoranda with the trial court addressing the issue. We conclude Winkler's failure to refer to the restitution order in her notice of appeal was a technical deficiency that does not defeat the appeal of the restitution order. *See State v. Rasch*, 188 Ariz. 309, 311 (App. 1996) ("A 'mere technical error[],' however, does not render the notice ineffective, unless the appellee shows that the error prejudiced him." (alteration in *Rasch*) (*quoting State v. Good*, 9 Ariz. App. 388, 392 (1969))). In conjunction with the full record, it appears that Winkler was attempting to appeal the restitution order and that the state has not demonstrated surprise or prejudice. Accordingly, we have jurisdiction of Winkler's appeal from the order.

Restitution

¶5 Winkler contends the trial court erred by ordering restitution because her conduct was not the "but-for" cause of the victim's economic losses. She further maintains that even if there were a showing of causation, her act of viewing the image did not directly cause any damages. We review a restitution order for an abuse of discretion, viewing the evidence in the light most favorable to sustaining the court's order. *Lewis*, 222 Ariz. 321, ¶ 5. However, we review de novo questions of statutory interpretation. *State v. Lapan*, 249 Ariz. 540, ¶ 30 (App. 2020).

¶6 The trial court shall order a defendant once convicted 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); *see* Ariz. Const. art. II, § 2.1(8) (victims have right to receive restitution from person convicted of crime that caused victim's harm). "'Economic loss' means any loss incurred by a person as a result of the commission of an offense," including "lost interest, lost earnings and other losses that would not have been incurred but for the offense" but not "consequential damages." A.R.S. § 13-105(16). Damages are consequential when "the loss results from the concurrence of some causal event other than the defendant's criminal conduct." *State v. Wilkinson*, 202 Ariz. 27, ¶ 7 (2002). In calculating restitution, "the court shall consider all losses caused by the criminal offense or offenses for which the defendant has been convicted." A.R.S. § 13-804(B).

¶7 The mere existence of child pornography causes its victim ongoing harm. *See State v. Paredes-Solano*, 223 Ariz. 284, ¶ 11 (App. 2009). This harm is not only caused by the victim's actual abuser or those involved in the production and distribution of child pornography, but by possessors as well. *See Paroline v. United States*, 572 U.S. 434, 457 (2014) ("The unlawful conduct of everyone who reproduces, distributes, or possesses the images of the victim's abuse . . . plays a part in sustaining and aggravating this tragedy."). The victim "must go through life knowing that the [photo] is circulating within the mass distribution system for child pornography," "pos[ing] an even greater threat to the child victim than [the] sexual abuse." *New York v. Ferber*, 458 U.S. 747, 759 n.10 (1982) (quoting Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 Wake Forest L. Rev. 535, 545 (1981)). The possession of child pornography is a direct cause of this harm. *See State v. Berger*, 212 Ariz. 473, ¶ 18 (2006) ("[c]hild pornography not only harms children in its production" but also by continued possession of such images); *United States v. Norris*, 159 F.3d 926, 930 (5th Cir. 1998) ("The consumer who 'merely' or 'passively' receives or

possesses child pornography directly contributes to this continuing victimization."); *United States v. Sherman*, 268 F.3d 539, 547 (7th Cir. 2001) ("The possession . . . of child pornography directly victimizes the children portrayed by violating their right to privacy . . . .").

¶8 The jury found Winkler guilty of possessing an image from the "Vicky Series," which is one of the most commonly traded child pornography series online.[3] After Winkler's conviction, the victim sought restitution, providing the trial court with a victim impact statement that detailed the extent of her ongoing harm caused by continued consumption of her images and an accounting of her medical, psychological, and vocational losses in this case.

¶9 In the trial court, Winkler argued that "neither [her] offense nor any of [her] other conduct caused the victim's economic losses." Citing *Wilkinson*, she further argued that any damages suffered by the victim as a result of her viewing the image are unrecoverable consequential damages because the victim was unaware that Winkler possessed it. *See* 202 Ariz. 27, ¶ 7. The court rejected these arguments and found the evidence supported the restitution award because the victim's "knowledge about the ongoing distribution, downloading, and/or viewing of these videos by people, including the defendant, continue[d] to cause significant emotional harm."

¶10 Winkler raises these same general arguments on appeal. Winkler first contends that the United States Supreme Court's decision in *Paroline* does not apply in Arizona because § 13-105(16) requires "but-for" causation, which cannot be established in this case, and thus the victim is not entitled to restitution. In *Paroline*, the Court addressed the "causal relationship [that] must be established between the defendant's conduct and a victim's losses for purposes of determining the right to, and the amount of, restitution under" the federal statute requiring restitution for "child-pornography possession." 572 U.S. at 439; *see* 18 U.S.C. § 2259. In addressing the first part of this inquiry, the Court found that the statute is "intended to compensate victims for losses caused by the offense of conviction" and that strict but-for causation is not required for a victim to be entitled to restitution. 572 U.S. at 445, 450-52. Similarly, in Arizona, neither §§ 13-603(C), 13-804(B), nor 13-105(16) explicitly require but-for

[3] "Vicky Series" refers to a collection of child pornography of a previously unknown child that was provided a placeholder name by the National Center for Missing and Exploited Children's Child Victim Identification Program while they were trying to identify the victim.

causation to have a right to restitution. Although § 13-105(16) "includes" several types of losses "that would not have been incurred but for the offense," it encompasses "any loss incurred by a person as a result of the commission of an offense." The victim's losses in this case were caused by Winkler's possession of the photo. *See Berger*, 212 Ariz. 473, ¶ 18; *Paroline*, 572 U.S. at 457. Section 13-603(C) requires restitution to such a victim in the "full amount of [her] economic loss."

¶11 We disagree with Winkler's interpretation of the "but-for" causation requirement under § 13-105(16). *See Wilkinson*, 202 Ariz. 27, ¶ 7 (losses awarded as restitution must be "economic," ones that the victim would "not have incurred but for the defendant's criminal offense," and the "criminal conduct must directly cause the economic loss"). In Arizona, restitution to a victim is mandatory, *see* §§ 13-603(C), 13-804(B); *see also* Ariz. Const. art. II, § 2.1(8), and, "the standard for establishing causation on restitution claims is not a strict 'but for' standard," *Lewis*, 222 Ariz. 321, ¶ 11. The victim is entitled to recover the full amount of economic losses that are a result of the defendant's offense. *See* § 13-105(16). A strict but-for standard would produce absurd results in the context of a child pornography possession case by foreclosing statutorily and constitutionally required restitution for victims. Such a narrow reading would render superfluous the language in § 13-105(16) that "'[e]conomic loss' means any loss incurred by a person as a result of the commission of an offense." *See State v. Johnson*, 171 Ariz. 39, 42 (App. 1992) ("[A] statute will be given such an effect that no clause, sentence, or word is rendered superfluous, void, contradictory or insignificant." (quoting *State v. Arthur*, 125 Ariz. 153, 155 (App. 1980))).

¶12 Furthermore, requiring strict but-for causation in these cases would frustrate the legislature's intent in making restitution mandatory. *See Collins v. State*, 166 Ariz. 409, 415 (App. 1990) ("Statutes must be given a sensible construction which accomplishes the legislative intent behind them and which avoids absurd results."). In Arizona, restitution is intended to both rehabilitate the offender and make the victim whole. *See State v. Iniguez*, 169 Ariz. 533, 536 (App. 1991). Awarding restitution to victims of child pornography possession "would serve the twin goals of helping the victim achieve eventual restitution for all her child-pornography losses and impressing upon offenders the fact that child-pornography crimes, even simple possession, affect real victims." *Paroline*, 572 U.S. at 457. Reading §§ 13-105(16), 13-603(C), and 13-804(B) in harmony therefore requires restitution here. *See State v. Jernigan*, 221 Ariz. 17, ¶ 15 (App. 2009) ("Statutes on the same subject matter are to be construed in harmony together.").

¶13 Citing *Wilkinson*, Winkler further maintains that the victim's knowledge of Winkler's offense came from the victim's attorney and not any action by Winkler, which constitutes an "unforeseeable intervening cause" that bars restitution. *See* 202 Ariz. 27, ¶¶ 7-10. But *Wilkinson* is distinguishable. In that case, the defendant was convicted of contracting without a license. *Id.* ¶ 3. In interpreting §§ 13-603(C), 13-105(16), and 13-804(B), our supreme court determined that restitution may only be awarded for "damages that flow directly from the defendant's criminal conduct, without the intervention of additional causative factors." *Id.* ¶ 7. Applying this standard, the court found that restitution could be awarded to the victims for the amounts they paid to the contractor but not for losses arising from any incomplete or poorly done work because they "would not have occurred without the concurrence of a second causal event, [the contractor]'s unworkmanlike performance." *Id.* ¶¶ 9-10. Here, the victim's ongoing trauma and related economic losses are caused by Winkler and others who possess and view her image. *See Berger*, 212 Ariz. 473, ¶ 18. We are not aware of, and Winkler does not cite to, any authority suggesting that a person who informs a victim that she has been victimized is an intervening cause of the victim's harm.

¶14 Although Winkler challenges the amount of the restitution award because it bears no reasonable relationship to the loss sustained, *see State v. Dixon*, 216 Ariz. 18, ¶ 11 (App. 2007), she did not make this claim below. We are therefore limited to fundamental, prejudicial error review. *See State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018); *Lewis*, 222 Ariz. 321, ¶ 13. And because she does not argue or establish that the trial court committed fundamental error, the issue is waived. *See State v. Vargas*, 249 Ariz. 186, ¶ 22 (2020); *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008); *Escalante*, 245 Ariz. 135, ¶ 21. In sum, the trial court did not err in awarding the victim restitution.

Sufficiency of the Evidence

¶15 Winkler argues the trial court erred by denying her motion for a judgment of acquittal because there was insufficient evidence to support her luring and age-misrepresentation convictions. We review the sufficiency of the evidence de novo. *State v. West*, 226 Ariz. 559, ¶ 15 (2011). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* ¶ 16 (quoting *State v. Mathers*, 165 Ariz. 64, 66 (1990)). We will reverse only if no substantial evidence supports the conviction. *State v. Pena*, 209 Ariz. 503, ¶ 7 (App. 2005). "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.'" *State v. Sharma*, 216 Ariz. 292, ¶ 7 (App. 2007) (quoting *Mathers*, 165 Ariz. at 67). Substantial evidence may be direct or circumstantial. *West*, 226 Ariz. 559, ¶ 16. If "reasonable minds may differ on inferences drawn from the facts," then substantial evidence exists, and we will affirm. *State v. Mendoza*, 234 Ariz. 259, ¶ 5 (App. 2014) (quoting *State v. Lee*, 189 Ariz. 590, 603 (1997)).

Luring a Minor for Sexual Exploitation Convictions

¶16 Under A.R.S. § 13-3554, "[a] person commits luring a minor for sexual exploitation by offering or soliciting sexual conduct with another person knowing or having reason to know that the other person is a minor." It is not a defense if the other person is not a minor. *Id.* Although "offering" or "soliciting" are not defined in the statute, we have determined that a defendant's statements need not "have a precise degree of certainty or involve any particular sexual language." *State v. Yegan*, 223 Ariz. 213, ¶ 28 (App. 2009). If, when evaluating conversations as a whole, "particular words and phrases can reasonably be interpreted as offering or soliciting sexual conduct with a minor," substantial evidence of luring exists. *Id.* "Sexual conduct" includes "actual or simulated . . . [s]exual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex." A.R.S. § 13-3551(10)(a).

¶17 Sufficient evidence supports Winkler's luring conviction for Count Seventeen involving a conversation with Whisper user "Bluey." After Bluey had stated she was only fifteen, Winkler detailed the sexual acts she would like to perform on Bluey, including oral sex. Specifically, Winkler asked "would you let me" perform oral sex for "maybe 5 or 6 hours," to which Bluey replied, "I'll be honest with you, would never do that." When Bluey explained why she would not want to engage in oral sex for that amount of time, Winkler tried to persuade her to change her mind. For example, when Bluey indicated that she "d[idn't] see the appeal," Winkler responded, "Don't knock it till you try it." And when Bluey said, "[B]ut I mean, even masturbating, if I do it for too long it ends up hurting, too much friction and too much stimulating," Winkler replied that "it's a matter of how it's done[;] the technique would actually have to be demonstrated" and that "[i]t's easier to show th[a]n tell." At one point Winkler suggested "voice chat," which Bluey declined because anything beyond "text . . . starts getting too real."

¶18 Winkler argues that "there can be no doubt from this dialogue that neither party believed anything [would] happen, or was even

possible," suggesting that both parties knew they were merely fantasizing. But whether Winkler's repeated invitations to engage in sexual acts amounted to fantasy or "offering or soliciting sexual conduct" with a minor was a question for the jury. *See Yegan*, 223 Ariz. 213, ¶ 29. Winkler also suggests that luring did not occur because she and Bluey engaged in "nothing but talk" and did not seek to arrange a meeting. But this court has rejected the argument that a meeting must be arranged to support a conviction, stating that "a luring offense is completed when the defendant [offers or] solicits sexual conduct" with a minor. *State v. Moninger*, No. 1 CA-CR 19-0353, ¶ 16, 2021 WL 2327979 (Ariz. Ct. App. June 8, 2021) (citing *Mejak v. Granville*, 212 Ariz. 555, ¶ 18 (2006)).

¶19 Winkler also denies there was evidence that she knew or had reason to know that Bluey was a minor because Whisper requires its users to certify they are over the age of eighteen and Bluey's "real age[was] not proven." The relevant question is not whether the state proved Bluey was an actual minor, but whether Winkler knew or had reason to know she was a minor. *See* § 13-3554(B). We thus find this argument unpersuasive. Even if Bluey had certified her age as eighteen or above to secure a Whisper account, Winkler also knew that many Whisper users, including Winkler herself, misrepresented their ages. In fact, Bluey started the conversation by informing Winkler that her stated age on Whisper was incorrect and that she was "15 actually." Winkler also admitted several times, including in her conversation with Bluey, that she used Whisper to get underage users to send explicit messages. Therefore, the state presented sufficient evidence that Winkler knew or had reason to know that Bluey was under eighteen years old. *See State v. Davolt*, 207 Ariz. 191, ¶ 87 (2004) ("If reasonable [persons] may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial." (alteration in original) (quoting *State v. Rodriguez*, 186 Ariz. 240, 245 (1996))). In sum, there was sufficient evidence for a reasonable jury to find Winkler guilty of luring Bluey.

¶20 As to the luring conviction for Count Eleven, the state concedes that there is insufficient evidence. For the following reasons, we agree. There was no evidence that Winkler had knowledge that Whisper user "starringeldoggo" was a minor when she offered or solicited sexual conduct with him. Once starringeldoggo revealed he was seventeen, Winkler stated that he was "a bit young for [her] taste" and made no further requests to engage in sexual conduct. The luring conviction and sentence for Count Eleven are therefore vacated.

Unlawful Age Misrepresentation Convictions

¶21 To convict Winkler of unlawful age misrepresentation, the state had to show that she was at least eighteen years old and "use[d] an electronic communication device to knowingly misrepresent [her] age for the purpose of committing any sexual offense involving the recipient," "knowing or having reason to know that the recipient of a communication [was] a minor." A.R.S. § 13-3561. The sexual offenses include luring a minor for sexual exploitation and sexual exploitation of a minor. A.R.S. §§ 13-3561(A), 13-3821(A). As relevant here, sexual exploitation under A.R.S. § 13-3553 requires proof that the defendant knowingly possessed "any visual depiction in which a minor was engaged in exploitive exhibition," meaning "the actual or simulated exhibition of the genitals or pubic or rectal areas of any person for the purpose of sexual stimulation of the viewer," § 13-3551(5), or "other sexual conduct," § 13-3553(A)(2). As with luring, it is not a defense that the recipient was not an actual minor. § 13-3561(B).

¶22 The state presented sufficient evidence to support all of Winkler's unlawful age misrepresentation convictions. In the three Whisper conversations that are the bases for these convictions, Winkler represented herself as either an eleven- or sixteen-year-old.

¶23 The evidence established that Winkler misrepresented her age for the purpose of persuading the recipients to send her explicit pictures for sexual stimulation. In determining whether conversations amount to a crime under the sexual exploitation of children statutes, we are not confined to examining only the conversation at issue and may look at the defendant's course of conduct. *See Moninger*, 2021 WL 2327979, ¶ 26 ("Only by examining an individual's behavior before, during, and even after a particular interaction or set of interactions can we interpret that individual's attempt to induce another to allow him or her to commit a crime."). In this case, Winkler described her plan to obtain sexually explicit photographs from minors in multiple Whisper chats. Winkler, apparently listing herself under the fifteen- to seventeen-year-old age range on Whisper, revealed during one conversation that she was "actually a 43 y[ea]r old m[ale] [who] just pretend[s] to be 15 to get younger girls to sext." In another chat, she disclosed that she "say[s she is] 15 to get young girls to send [her] nudes" and confirmed that "they actually do it." This evidence established Winkler's plan: stating she was a minor to get nude photographs from underage Whisper users. Although Winkler argues there was insufficient evidence to convict her of luring relating to these

convictions, the evidence amply showed that she misrepresented her age to gain possession of sexually exploitive images, which also suffices.

¶24 In the conversation relating to Count Twelve, starringeldoggo asked to see what Winkler looks like and said "I'll show me if you show you." Winkler replied by asking if starringeldoggo had Cipher, a communication application that allows the transfer of encrypted pictures, video, and messages between users, and said that the application allowed her to "share all [her] nastiest pictures." After declining to engage in sexual conduct with starringeldoggo, Winkler again offered to "show [starringelddoggo her] naked pictures on Cipher." Although Winkler did not expressly ask starringeldoggo to send an explicit photo, this conversation is consistent with Winkler's stated purpose of misrepresenting her age to "trick [minors] to send [her] nudes," and thus sufficient evidence exists to uphold her conviction.

¶25 As to Winkler's conviction for Count Fourteen, the evidence established that she requested and received photographs from "IDC_ookie" that were for Winkler's sexual stimulation. Winkler argues that the evidence is nonetheless insufficient because the state did not prove "nude photographs were involved." But from the conversation, a jury could reasonably infer that at least part of IDC_ookie's breasts were exposed from Winkler's statement, "I like your boobs from what I can see of them." The state also presented testimony that this is "consistent with the planned chats . . . laid out earlier about misrepresenting age in order to get young girls to send nudes." Whether Winkler actually received a nude photograph is not dispositive. The offense required only that she misrepresented her age for the purpose of receiving such a photograph. Here, the combination of the flirtatious nature of the conversation, Winkler's request for a photograph, and her strategy to get "younger nudes" by pretending to be a minor demonstrate that she misrepresented her age for the purpose of obtaining a photograph from IDC_ookie for her sexual stimulation.

¶26 Similarly, in the conversation relating to Count Sixteen, Winkler engaged in dialogue of a sexual nature with "human" stating that she was up all night because she was "extremely horny." Then, after representing herself as a sixteen-year-old, Winkler expressed her frustration that she had not "been able to find a girlfriend" and sent a photograph that "purports to be a young girl showing her breasts or touching herself over her clothes." Although Winkler argues the evidence was insufficient because "there was no mention of getting a picture from the recipient, human," the state presented evidence that this course of

conduct is consistent with "the plan . . . Winkler laid out to obtain nude photos from young girls." Again, because a conviction under § 13-3561 does not require the sexual offense to be completed, sufficient evidence supports the conviction.

Constitutionality of Luring Statute

¶27 Alternatively, Winkler argues that the luring statute is unconstitutionally overbroad because it encompasses mere fantasy, violating the First Amendment. A statute is overbroad if it is "designed to burden or punish activities which are not constitutionally protected, but . . . includes within its scope activities which are protected by the First Amendment." *State v. Jones*, 177 Ariz. 94, 99 (App. 1993) (quotation omitted).

¶28 Arizona courts have carved a narrow exception to "challenge a statute as overbroad if the law 'substantially abridges the First Amendment rights of other parties not before the court.'" *State v. Musser*, 194 Ariz. 31, ¶ 5 (1999) (quoting *Village of Schaumburg v. Citizens*, 444 U.S. 620, 634 (1980)). However, "applying the overbreadth exception is considered 'strong medicine' only to be employed 'as a last resort.'" *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). Generally, a person does not have standing to challenge a statute on overbreadth grounds if the person's "conduct falls squarely within the constitutionally legitimate prohibitions of the [statute] at issue." *State v. Kessler*, 199 Ariz. 83, ¶ 17 (App. 2000). Stated differently, "overbreadth attacks are directed to the application rather than to the facial validity of the statute and therefore may be mounted only by a defendant who has standing—that is, one whose conduct is within the ambiguous area." *State v. Tocco*, 156 Ariz. 116, 119 (1988). Because Winkler asserts that § 13-3554 is facially overbroad, we must first determine whether she has standing. *See Musser*, 194 Ariz. 31, ¶¶ 5-9. A court considers several factors in determining whether to apply the standing exception, including whether the purported overbreadth is real and substantial when compared to the statute's legitimate reach, whether the statute regulates conduct as well as speech, and if so, whether the expressive conduct regulated by the statute falls under a legitimate interest of the state in "maintaining comprehensive controls over harmful, constitutionally unprotected conduct." *Id.* ¶¶ 6-9 (quoting *Broadrick*, 413 U.S. at 615).

¶29 Here, Winkler's overbreadth challenge does not warrant applying the standing exception. Winkler argues that the statute is overbroad because it "covers speech that is merely a fantasy" and "applies

when the person receiving the message is not even a child." Although barring mere fantasy between consenting adults would be a possible impermissible application of the statute, this does not outweigh the statute's legitimate reach, which is to prevent children from being sexually exploited. *See Ferber*, 458 U.S. at 756 ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982))). Winkler also fails to demonstrate that this impermissible application is likely to occur. Because we "presume that Arizona's courts, if faced with an application of the statute that exceeds its valid reach, would not give the statute an impermissibly broad interpretation," we conclude that any apparent threat to other parties not before the court is insufficient to apply the standing exception in this case. *Id.* ¶ 6.

¶30 Moreover, this court has determined that "offering or soliciting" under § 13-3554 can be shown by "statements or other actions that together imply a proposal for sexual conduct." *Moninger*, 2021 WL 2327979, ¶ 22; *see State v. Crisp*, 175 Ariz. 281, 283 (App. 1993) (under criminal solicitation statute "solicit . . . means that, by one's words and conduct, one intends to bring about the act solicited . . ."). "Because the statute regulates conduct as well as speech, we are less likely to apply the standing exception to permit appellant to assert the rights of others." *Musser*, 194 Ariz. 31, ¶ 8. The state's interest in prohibiting the exploitation of children also weighs against applying the standing exception to Winkler. The stated purpose of the sexual exploitation of children statutes, which contain the luring statute, include "protect[ing] all children of this state from being sexually exploited" and "prohibit[ing] any conduct which causes or threatens psychological, emotional or physical harm to children as a result of such sexual exploitation." 1978 Ariz. Sess. Laws, ch. 200, § 2(B)(1)-(2). There is a legitimate state interest in prohibiting luring a minor for sexual exploitation, as stated above. *See Ferber*, 458 U.S. at 756. We thus decline to apply the exception and find Winkler has no standing to assert her overbreadth challenge.

Disposition

¶31 For the foregoing reasons, we vacate Winkler's conviction and sentence for Count Eleven, a class three felony pursuant to § 13-3554. Winkler's remaining convictions and sentences are affirmed.