IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

AARON JAMES WELLS,
Appellant.

No. 2 CA-CR 2020-0072
Filed February 9, 2021

Appeal from the Superior Court in Pima County
No. CR20190725001
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Michael J. Miller, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

B R E A R C L I F F E, Judge:

¶1 Aaron Wells appeals from his conviction after a jury trial for one count of attempted voyeurism. The trial court sentenced Wells to 3.75 years' imprisonment. On appeal, Wells contends that the court erred when it did not give the requested instruction on first-degree trespass as a lesser offense of voyeurism and when it, during sentencing, cited his failure to apologize to the victim. He also claims that there was insufficient evidence to support his conviction. We affirm.

Factual and Procedural Background

¶2 One evening in February 2019, at approximately 9 p.m., seventeen-year-old Alice was trying on clothing in her ground-floor bedroom in her family home with her mother, Carol.[1] Alice's bedroom is the only bedroom on the ground floor, and her bathroom is adjacent to it. While Alice was changing, she had her bra and underwear on, but sometimes just her underwear.

¶3 Alice's mother eventually left, and Alice changed into her pajamas, taking off both her bra and underwear, and then used the bathroom. It was dark outside, and Alice's blinds were "as closed as they would get," but there was "a little space in the blinds." Alice's bathroom window has no blinds but is set higher than six feet above the interior floor. A ladder is not required to look through the window into Alice's bedroom, but "even a tall person" would need a stepladder to look through her bathroom window.

¶4 As Alice went to bed, she heard footsteps outside—as if someone were stepping on rocks. She heard the footsteps starting at her bedroom window and then moving to her bathroom window. Alice ran upstairs to tell her parents. Carol went outside, looked around a corner of

[1]Carol and Alice are pseudonyms.

the house, and saw Wells standing on a three-step stepladder under Alice's bathroom window. She recognized Wells because his mother lived across the street. Carol screamed at Wells, who then moved slowly away. Carol went inside and called 9-1-1.

¶5 One of the officers who responded to the call learned that Wells had fled south over the backyard wall. The officer found shoeprints near where, it appeared, someone had used a back wall to enter the neighboring backyard. The shoeprints bore a "unique triangular pattern," and were three-to-four feet apart, which usually indicates running.

¶6 When the officers found Wells, his shoes, bearing a triangular pattern on the soles, had fresh mud on them. Wells first told the officers that he had left the house earlier that night to smoke a cigarette, but he later said he did not go out that evening to smoke. A neighbor's surveillance camera showed Wells leaving his home to smoke a cigarette at approximately 9:04 p.m. that night.

¶7 The officers did not find a stepladder by Alice's windows or at Wells' mother's house. Wells told the officers that he did not own a "stool." But when an officer informed him that his mother had said she used a stool for stargazing, Wells told the officer that he never used it. Wells' stepfather informed the officers that Wells would go outside to smoke cigarettes and sit on the stepladder while smoking. When Wells' stepfather led officers to the stepladder, he discovered it was missing. He described the ladder as a "three-step ladder" between three and six feet tall, depending on whether it is folded up or down.

¶8 Wells was charged with voyeurism and attempted voyeurism. Prior to trial, Wells requested that the jury be instructed on criminal trespass in the first degree as a lesser offense of voyeurism. During trial, Wells argued that *State v. Lua*, 237 Ariz. 301 (2015), requires an instruction on a lesser offense that fits the facts of the case even when it is not a lesser-included offense. The state disagreed, claimed that *Lua* was not that broad, and explained that voyeurism and trespass are "two distinct different offenses with different elements." The trial court denied Wells' request and gave no instruction on criminal trespass. Following Wells' motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., the court dismissed the charge of voyeurism but denied Wells' request as to the charge of attempted voyeurism.

¶9 The jury found Wells guilty of attempted voyeurism. Prior to sentencing, Wells told the trial court about the circumstances of his life—

his father dying when Wells was young, "toxic relationships," and drug use—but stated that these are not excuses or "a justification of any of [his] actions." He also said "sorry to [his] children and to [his] mom" and he "wouldn't be a good son to [his] mom and . . . a good father to [his] children if [he] didn't fight to the very end to at least get back to them as soon as possible." The court found no mitigating or aggravating factors and sentenced Wells to the presumptive term of 3.75 years in prison.

¶10 After it pronounced the sentence, the trial court stated:

> Mr. Wells, it's interesting to me that in your comments to the Court which—in which you indicated, you know, the kinds of things that you've learned about yourself and so forth and your responsibility to your family, not once, not once did you apologize to [Alice's] family or to [Alice] and I think that's real[ly] telling about who you are and how you really think.

Wells appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Analysis

Trespass Instruction

¶11 On appeal, Wells argues that the trial court abused its discretion when it did not give the requested instruction on first-degree criminal trespass. We review the refusal to give a jury instruction for abuse of discretion and will not reverse such a decision absent an abuse of that discretion. *State v. Bolton*, 182 Ariz. 290, 309 (1995). However, we review de novo whether an uncharged offense is encompassed within the charged offense, such that a lesser-included-offense instruction is proper. *Lua*, 237 Ariz. 301, ¶ 5.

¶12 "An instruction on a lesser-included offense is proper if the crime is in fact a lesser-included offense to the one charged and if the evidence supports the giving of the lesser-included instruction." *State v. Miranda*, 200 Ariz. 67, ¶ 2 (2001); *see also State v. Celaya*, 135 Ariz. 248, 251 (1983) (lesser-included offense when "composed solely of some but not all of the elements of the greater crime so that it is impossible to have committed the crime charged without having committed the lesser one"). "A defendant is not entitled to an instruction on an uncharged offense that does not qualify as a lesser-included offense, even if he might have been

charged and convicted of the offense." *State v. Gonzalez*, 221 Ariz. 82, ¶ 8 (App. 2009).

¶13 A person commits voyeurism when he "knowingly invade[s] the privacy of another person without the knowledge of the other person for the purpose of sexual stimulation." A.R.S. § 13-1424(A). Whereas criminal trespass in the first degree is committed when a person knowingly "enter[s] any residential yard and, without lawful authority, look[s] into the residential structure thereon in reckless disregard of infringing on the inhabitant's right of privacy." A.R.S. § 13-1504(A)(3). Wells concedes that trespass is not a lesser-included offense of voyeurism but, again, claims that *Lua*, 237 Ariz. 301, supports his argument of it being a lesser offense warranting an instruction.

¶14 In *Lua*, our supreme court addressed whether a requested instruction on provocation manslaughter may be given over the defendant's objection in a second-degree murder case when not separately charged. *Id.* ¶ 1. The court determined that "[a]llowing a provocation-manslaughter instruction in a second-degree murder trial if the evidence warrants such an instruction comports with the framework of Arizona's homicide statutes, which provide increased punishment for progressively more serious crimes." *Id.* ¶ 9. The court further reasoned that instructing the jury on provocation manslaughter did not "constructively amend[] the indictment" because "provocation manslaughter is not a lesser- or necessarily included offense of second-degree murder, but merely a less serious offense" that "does not substantively change the nature of second-degree murder in a way that requires it to be separately charged." *Id.* ¶¶ 15-16, 18.

¶15 The state argues that *Lua* is limited in its application "to provocation-manslaughter and Arizona's homicide statutes." It argues that "Wells points to no similar statutory structure . . . supporting his theory that the legislature intended trespass to be considered a less-serious charge of voyeurism." We agree.

¶16 Here, unlike provocation manslaughter and second-degree murder, trespass and voyeurism are not part of the same chapter of crimes and thus are not within a cognizable statutory framework. *See* §§ 13-1424, 13-1504. Further, trespass substantively changes the nature of the charge of voyeurism, and the trial court could not give an instruction on such an uncharged offense without effectively amending the indictment. *See State v. Freeney*, 223 Ariz. 110, n.4 (2009) ("An amended indictment that changes

the nature of the offense by alleging new or different elements raises . . . [a] constitutional issue . . . .").

¶17 Wells, however, claims that the legislative history reflects that the voyeurism and trespass statutes, as well as surreptitious photography, were enacted in "one scheme to deal with a set of related offenses." He argues that "voyeurism was enacted to fill gaps in surreptitious photographing," which was, in turn, meant to supplement a portion of the trespass statute. We find no support for this argument. Both voyeurism and surreptitious photography have similar elements. *See* A.R.S. §§ 13-1424, 13-3019. But Wells points to no legislative history of this statute or the trespass statute that demonstrates that the legislature intended for trespass and voyeurism to be part of the same statutory framework as was the case in *Lua*. Wells essentially concedes that none exists in explaining that, given the limited legislative history, "it is only reasonable to believe" that trespass and voyeurism are part of one "framework." Because there is nothing offered but speculation on this point, we cannot conclude that the statutes are part of a recognizable legislative framework.

¶18 Wells further claims that he was entitled to a trespass instruction because his "defense was that the state did not prove sexual motivation . . . so an instruction of first degree trespass would support his theory of the case." Again, this argument is unpersuasive. As stated above, "[a] defendant is not entitled to an instruction on an uncharged offense that does not qualify as a lesser-included offense, even if he might have been charged and convicted of the offense." *State v. Lewis*, 236 Ariz. 336, ¶ 46 (App. 2014) (quoting *Gonzalez*, 221 Ariz. 82, ¶ 8). And simply "characterizing the uncharged offense as a 'theory of the case' does not entitle the defendant to an instruction." *Id.*

¶19 Trespass is not a lesser-included offense of voyeurism and does not fall within the reasoning in *Lua*. The trial court therefore did not abuse its discretion in denying Wells' request for an instruction on trespass.

Sentencing

¶20 On appeal, Wells claims that the trial court erred when, during sentencing, it mentioned Wells' failure to apologize to the victim. He characterizes this as the court impermissibly finding an aggravating factor of "lack of remorse." Wells claims that although the court did not use the word "remorse," that "[was] clearly what it meant."

¶21 Because Wells did not raise this issue before the trial court, we would generally review this purported error for fundamental error. *State*

v. Escalante, 245 Ariz. 135, ¶ 1 (2018). Wells, however, contends that we should review this claim for harmless error and an abuse of discretion, citing *State v. Vermuele*, 226 Ariz. 399 (App. 2011), because he did not have the opportunity to object during or after the pronouncement of the sentence. In *Vermuele*, we reasoned that a defendant cannot forfeit a sentencing claim on appeal when the sentence had become final upon its oral pronouncement and the defendant had "no clear procedural opportunity to challenge the rendition of sentence." *Id.* ¶¶ 8-9. Because we find no error, fundamental or otherwise, we need not determine whether *Vermuele* applies.

¶22 A court commits error if it imposes a sentence based in part on a prohibited aggravating factor. *See State v. Pena*, 209 Ariz. 503, ¶ 22 (App. 2005) (even if court imposed a mitigated sentence, "that does not necessarily mean that the consideration of [an] improper aggravating factor[] was harmless error"). As a general rule, given a defendant's right to remain silent at sentencing, a court may not consider the defendant's lack of expressed remorse or failure to admit guilt as an aggravating factor. *See State v. Trujillo*, 227 Ariz. 314, ¶ 15 (App. 2011); *see also State v. Carriger*, 143 Ariz. 142, 162 (1984) (A convicted defendant's choice "not to publicly admit his guilt . . . is irrelevant to a sentencing determination."). However, no error occurs if it is clear that the sentence would have been imposed absent that factor. *See Trujillo*, 227 Ariz. 314, ¶ 21.

¶23 In *Trujillo*, we concluded that the trial court committed error when it considered the defendant's lack of remorse and failure to admit guilt. *Id.* We reasoned that the court's comments revealed that it had aggravated the sentence, in part, because of the defendant's lack of contrition and that its comments as to remorse were not merely in passing, but—remorse having been mentioned five times during sentencing—reflected its serious concerns. *Id.* ¶¶ 14, 20. Thus, we explained, the court deprived the defendant of a right essential to his defense in considering his lack of remorse. *Id.* ¶ 15.

¶24 Here, however, Wells' argument that the trial court improperly considered his lack of remorse at sentencing is not supported by the record. The court did not find any mitigating or aggravating factors and imposed the presumptive sentence. Unlike in *Trujillo*, the court's one passing comment here, made after it announced Wells' sentence, does not support the claim that it improperly considered Wells' lack of remorse as a factor in sentencing. At most, it seems the court treated Wells' statements of apology to some but not all of those affected as something less than the remorse needed to serve as a mitigating factor. *See State v. Hardwick*, 183

Ariz. 649, 656 (App. 1995) ("Remorse can be a *mitigating* factor with the defendant having the burden of proof by a preponderance of the evidence."). We thus find no error, fundamental or otherwise.

Sufficient Evidence

¶25 Lastly, Wells contends that the trial court erred in denying his motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., due to insufficient evidence. We review de novo the trial court's decision on a Rule 20 motion. *State v. West*, 226 Ariz. 559, ¶ 15 (2011).

¶26 A trial court must enter a judgment of acquittal if "no substantial evidence supports the conviction." *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." *Id.* (alteration in *Davolt*) (quoting *State v. Rodriguez*, 186 Ariz. 240, 245 (1996)). Thus, "the 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." *State v. Mathers*, 165 Ariz. 64, 66 (1990) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

¶27 A person commits attempted voyeurism when he intentionally takes any action that "is any step in a course of conduct planned to culminate," A.R.S. § 13-1001(A)(2), in the knowing invasion of "the privacy of another person without the knowledge of the other person for the purpose of sexual stimulation," § 13-1424(A). "Attempt requires only that the defendant intend to engage in illegal conduct and that he take a step to further that conduct." *Mejak v. Granville*, 212 Ariz. 555, ¶ 20 (2006). An invasion of privacy occurs when a person has a reasonable expectation of not being viewed and is viewed "[w]hile . . . in a state of undress or partial dress," while urinating or defecating, or "[i]n a manner that . . . allows the viewing of the person's genitalia, buttock or female breast . . . that is not otherwise visible to the public." § 13-1424(C).

¶28 Wells argues that the state did not present sufficient evidence that he knew who lived in the ground-floor bedroom or that his actions were for the purpose of sexual stimulation. He points to an out-of-state case, *State v. Wilson*, 948 N.E.2d 515, ¶ 45 (Ohio Ct. App. 2011), in which the court noted that, if evidence of pornography is presented, then a purpose of sexual arousal may be inferred. He contends that, because the state here did not present evidence of masturbatory conduct or pornography, or anything more than mere speculation about his motivation, the jury could,

at the most, only speculate that he acted for the purpose of sexual stimulation. We disagree.

¶29 The evidence here was sufficient to allow the jury to reasonably infer Wells' sexual motivation. The state presented evidence that Wells entered the victim's property in the dark of night, with a ladder tall enough for him to reach and peer through Alice's bathroom window. Evidence showed that he set up the ladder under the bathroom window, climbed the ladder, and then fled after Alice's mother saw him and screamed. Given the almost exclusive, but at a minimum typical, uses of residential bathrooms, this was sufficient evidence for a reasonable jury to conclude that Wells wanted to view Alice or someone in the home either using common bathroom facilities—such as the toilet, bathtub, or shower—in the usual way, or otherwise in some state of undress. And, given that sexual stimulation is the typical, if not exclusive, reason for wanting to do such a thing, it was reasonable for a jury to find that Wells had a sexual motivation.

Disposition

¶30 For the foregoing reasons, we affirm Wells' conviction and sentence.