IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

CALVIN LAMONT SMITH,
Appellant.

No. 2 CA-CR 2020-0089
Filed January 28, 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NOT FOR PUBLICATION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 Cochise County
No. S0200CR201900902
The Honorable James L. Conlogue, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
By Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals, Phoenix
Counsel for Appellee

Harriette P. Levitt, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Espinosa and Vice Chief Judge Staring concurred.

E C K E R S T R O M, Judge:

¶1 After a jury trial, Calvin Smith was convicted of possession of a narcotic drug and sentenced to a twelve-year prison term. On appeal, he argues the trial court erred by imposing a prison term because it was obligated to suspend the imposition of sentence and place him on probation pursuant to A.R.S. § 13-901.01. We affirm.

¶2 Under § 13-901.01(A), a person "convicted of the personal possession or use of a controlled substance or drug paraphernalia is eligible for probation" and, subject to certain exceptions, the trial court is required to "suspend the imposition or execution of sentence and place the person on probation." However, a person "who has been convicted of or indicted for a violent crime as defined in [A.R.S.] § 13-901.03 is not eligible for probation as provided for in this section." § 13-901.01(B). A violent crime, as defined by § 13-901.03(B), "includes any criminal act that results in death or physical injury or any criminal use of a deadly weapon or dangerous instrument."

¶3 Before Smith's trial, the state filed an allegation that Smith was not eligible for probation under § 13-901.01 because he had previously been convicted of a violent crime—misdemeanor assault causing physical injury. The state attached to that allegation a copy of a signed plea agreement stating that, in 2011, Smith had "committed assault by intentionally, knowingly or recklessly causing any physical injury upon [the victim]," violating A.R.S. § 13-1203(A)(1). Smith objected, arguing the allegation was untimely. The court denied that objection and, following trial, sentenced Smith as described above. This appeal followed.

¶4 Smith argues, for the first time on appeal, that assault under § 13-1203(A)(1) is not necessarily a violent crime because it can be committed recklessly. Smith did not raise this argument below. Accordingly, our review is limited to fundamental, prejudicial error. *See*

State v. Escalante, 245 Ariz. 135, ¶ 12 (2018); *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20 (2005). Were Smith entitled to probation, the imposition of a prison term would be such error. *See State v. Cox*, 201 Ariz. 464, ¶ 13 (App. 2002) ("An illegal sentence constitutes fundamental error.").

¶5 In support, Smith relies primarily on *State v. Walden*, 183 Ariz. 595 (1995), and *State v. Fierro*, 166 Ariz. 539 (1990), in which our supreme court determined that for a crime to constitute a violent crime under former § 13-703(F)(2), [1] it could not be committed recklessly, reasoning that violence required intent. *See Walden*, 183 Ariz. at 617, *Fierro*, 166 Ariz. at 550 n.9. But those cases do not address § 13-901.03, which unambiguously states that a crime causing physical injury is a violent crime for the purposes of § 13-901.01—without regard to whether the crime was committed recklessly or otherwise. *See State v. Lee*, 236 Ariz. 377, ¶ 16 (App. 2014) (plain language best indicator of legislative intent).

¶6 Smith's argument asks us to add a requirement to the statutory definition—that the crime also be intentional. We will not do so. *See State v. Gill*, 248 Ariz. 274, ¶ 15 (App. 2020) (refusing to adopt theory "that would require adding to the statute an element not included by the legislature"); *In re Cortez*, 247 Ariz. 534, ¶ 8 (App. 2019) (declining to add requirement to statute). Because a conviction of assault under § 13-1203(A)(1) necessarily means an injury occurred, it is a violent crime under § 13-901.03, rendering Smith ineligible for mandatory probation under § 13-901.01(A).[2]

¶7 Smith's reliance on *State v. Joyner*, 215 Ariz. 134 (App. 2007), is also misplaced. Although that case addressed the definition of a violent crime under § 13-901.01 it does not, as Smith argues, stand for the proposition that a crime causing physical injury does not fall under § 13-901.03(B) if it can be committed recklessly. Instead, the court in *Joyner* addressed the extent to which a court could, in some circumstances, look beyond the elements of an offense in evaluating whether a crime was

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[1]Former § 13-703(F)(2) provided as an aggravated circumstance in capital cases whether the defendant had been "previously convicted of a serious offense." 1988 Ariz. Sess. Laws, ch. 155, § 1. For an offense to be serious, it had to involve the use or threat of violence on another person. *See Fierro*, 166 Ariz. at 548-49.

[2]Smith's previous felony convictions render him otherwise ineligible for probation under A.R.S. §§ 13-703 and 13-3408(C).

violent. *Id.* ¶¶ 15-25. That question is not implicated here—as we have noted, a conviction of aggravated assault under § 13-1203(A)(1) involves physical injury and therefore is a violent crime under § 13-901.03. And, to the extent Smith asserts the state did not adequately demonstrate he had been convicted of assault under § 13-1203(A)(1), he does not meaningfully develop this argument and we decline to address it further. *See State v. Moody*, 208 Ariz. 424, n.9 (2004).

¶8 We affirm Smith's conviction and sentence.