IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. GARY LAMONT LEWIS, Petitioner.	2 CA-CR 2008-0384-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20053714

Honorable Michael J. Cruikshank, Judge

REVIEW GRANTED;
RELIEF DENIED IN PART AND GRANTED IN PART AND REMANDED

Barbara LaWall, Pima County Attorney
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Tucson
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Gary Lamont Lewis
Florence
In Propria Persona

P E L A N D E R, Chief Judge.

¶1 Pursuant to a plea agreement, petitioner Gary Lamont Lewis pled guilty to three counts of sexual conduct with a minor in the second degree, preparatory dangerous crimes against children and class three felonies. He pled no contest to a fourth such count. The trial court sentenced him to consecutive, presumptive terms of ten years' imprisonment on the first two counts, suspended the imposition of sentence on the remaining counts, and placed Lewis on lifetime probation, to begin following his incarceration. Lewis filed a notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., and his counsel filed a petition that the trial court treated as a notice in lieu of a petition under *Montgomery v. Sheldon*, 181 Ariz. 256, 260, 889 P.2d 614, 618 (1995). *See* Rule 32.4(c)(2). The trial court subsequently denied Lewis's supplemental petition for post-conviction relief. We grant review to determine whether the trial court abused its discretion. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We grant relief in part and remand this matter for partial resentencing.

¶2 Relying on this court's decision in *State v. Gonzalez*, 216 Ariz. 11, 162 P.3d 650 (App. 2007), Lewis argued in his petition below that he had been improperly sentenced on counts one and two under A.R.S. § 13-604.01,[1] which, he contended, did not apply to attempted crimes other than attempted murder.[2] The state responded that, under the analysis

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[1]Section 13-604.01 has since been amended and renumbered as § 13-705. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 17, 29. We refer in this decision to the version of the statute in effect at the time of Lewis's offenses. *See* 2001 Ariz. Sess. Laws, ch. 334, § 7.

[2]Lewis also contended that his sentences were illegal under the holding in *Blakely v. Washington*, 542 U.S. 296 (2004). But he had expressly waived his right to trial, "including

in *Gonzalez*, § 13-604.01 "provided a sentence of imprisonment for preparatory crimes if the victim was at least twelve years old." The state asserted that Lewis had been sentenced appropriately on both counts under § 13-604.01, but it appears to have ignored the factual basis established for count two, including that the victim of that count had been only "[e]leven something." The trial court denied relief. Although its reasoning is unclear, it appears to have mistakenly believed that Lewis had been convicted of completed, rather than preparatory, offenses.

¶3 "A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age." A.R.S. § 13-1405(A). "Sexual conduct with a minor who is under fifteen years of age is a class two felony," § 13-1405(B), and attempt is a class three felony. *See* A.R.S. § 13-1001(C)(2). Section 13-604.01(L)(1) classified sexual conduct with a minor as a dangerous crime against children "in the first degree if it [was] a completed offense and . . . in the second degree if it [was] a preparatory offense." 2001 Ariz. Sess. Laws, ch. 334, § 7; *see also* A.R.S. § 13-705(O). Lewis's plea agreement identifies counts one and two as

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a jury determination of aggravating factors beyond a reasonable doubt," and agreed to the court's determination of "aggravating or mitigating circumstances . . . based on any evidence or information submitted to the Court prior to sentencing." Moreover, the court did not expressly find any aggravating circumstances and sentenced Lewis to the presumptive terms of imprisonment, making *Blakely* inapplicable in any event. *See State v. Munninger*, 209 Ariz. 473, ¶ 20, 104 P.3d 204, 211 (App. 2005) (right to jury finding of aggravating factors beyond a reasonable doubt only applies if factors increase sentence beyond statutory maximum, which in Arizona is presumptive sentence).

"sexual conduct with a minor in the second degree," class three felonies, and "preparatory dangerous crime[s] against children." The agreement describes Lewis's conduct charged in these counts as "intentionally or knowingly attempting to engage in an act of sexual intercourse with [the victim,] a minor under the age of fifteen years . . . by penetrating the victim's anus with his penis." At the change of plea hearing, Lewis admitted having "attempted" to penetrate each victim's anus with his penis. Unquestionably, Lewis was convicted of attempted sexual conduct with the minors, preparatory dangerous crimes against children. *See generally State v. Newell*, 212 Ariz. 389, n.13, 132 P.3d 833, 849 n.13 (2006) ("attempt is considered a preparatory offense"). Contrary to the trial court's suggestion in its ruling denying post-conviction relief, the nature of Lewis's convictions was not altered by the omission of § 13-1001 from the statutes listed in the plea agreement and sentencing minute entry.

¶4 Like current § 13-705, former § 13-604.01 provided enhanced sentences for offenders convicted of dangerous crimes against children. Subsection I of the statute provided in relevant part that a person "convicted of a dangerous crime against children in the second degree pursuant to subsection C or D of this section . . . is guilty of a class 3 felony and shall be sentenced to a presumptive term of imprisonment for ten years." 2001 Ariz. Sess. Laws, ch. 334, § 7. Subsections C and D, however, referred to sexual conduct with a minor "twelve, thirteen or fourteen years of age"and made no provision for sexual conduct with a minor under the age of twelve. *Id*.

¶5 The defendant in *Gonzalez*, like Lewis, had been convicted of attempted sexual conduct with a minor under the age of fifteen. He challenged his sentence under § 13-604.01, contending the statute did not apply to his offense because his victim had been only eleven years old. *Gonzalez*, 216 Ariz. 11, ¶ 3, 162 P.3d at 651. In granting relief, this court recognized that the legislature had enacted § 13-604.01 "to more severely punish the type of offense involved" and that it "defie[d] logic to punish an offender who [had] comitt[ed] a crime against a twelve-year-old victim more severely than one . . . who [had] committ[ed] that very same act against an eleven-year-old victim"; however, the court determined that it was constrained by the plain language of the statute, which did not include a sentence for attempted sexual conduct with a minor under the age of twelve.[3] *Gonzalez*, 216 Ariz. 11, ¶¶ 9, 13-14, 162 P.3d at 652-53, 653-54.

¶6 In *Gonzalez*, there appeared some question whether the victim had been eleven years old at the time of the offense, and the court remanded the case for the trial court to determine the victim's age. *Id.* ¶ 15. In this case, there appears to have been no question that the victim in count one had been twelve years old, but the age of the victim in count two is unclear from the record. As mentioned above, Lewis stated at the change-of-plea hearing that the victim was "[e]leven something." The state expressed its satisfaction with the factual basis Lewis gave but, at the state's request, the court also incorporated the transcript of the

[3]As mentioned, the statute has since been amended, and current § 13-705(J) applies to attempted dangerous crimes against children under the age of twelve.

grand jury proceedings in the factual basis. There a police detective had testified that the victim of count two was twelve years old. It is unclear if she meant the victim was twelve at the time of the offense or at the time of the grand jury proceeding. Therefore, we find the trial court abused its discretion by summarily denying post-conviction relief on this count. As we did in *Gonzalez*, we remand the case for an evidentiary hearing to determine the victim's age. *See id*. If the court determines the victim was eleven years old at the time of the offense, it shall resentence Lewis in accordance with the plea agreement and the applicable sentencing statutes. Because the record is clear, however, that the victim in count one was twelve years old at the time of the offense, Lewis's contention that he was illegally sentenced under § 13-604.01 on that count is incorrect, and we deny relief as to count one.[4]

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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PHILIP G. ESPINOSA, Judge

[4]To the extent Lewis raises additional issues in his petition for review that he presented for the first time in his reply to his petition for relief below and that were not considered by the trial court, we do not address them. *See* Rule 32.5 (defendant shall include in petition "every ground known to him or her for vacating, reducing, correcting or otherwise changing all judgments or sentences imposed"); Rule 32.9(c)(1)(ii) (petition for review shall contain "[t]he issues which were decided by the trial court . . . which the defendant wishes to present" for review).