

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ALVIN LEE CHATMAN,
Appellant.

No. 2 CA-CR 2015-0397
Filed June 27, 2016

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NOT FOR PUBLICATION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. 31.24.

Appeal from the Superior Court in Pinal County
No. CR201401235
The Honorable Kevin D. White, Judge

AFFIRMED AS CORRECTED

COUNSEL

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STATE v. CHATMAN
Decision of the Court

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Following a jury trial, Alvin Chatman was convicted of two counts each of sexual conduct with a minor and child molestation. The trial court sentenced him to two terms of lifetime imprisonment for the sexual-conduct counts and two terms of twenty-four years for the molestation counts, all to be served consecutively. On appeal, Chatman argues that two of his convictions violate double jeopardy because they are for the same offense. He also contends that his lifetime sentences are illegal under the dangerous crimes against children (DCAC) statute, A.R.S. § 13-705. For the reasons stated below, we affirm as corrected.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to upholding Chatman's convictions. *See State v. Allen*, 235 Ariz. 72, ¶ 2, 326 P.3d 339, 341 (App. 2014). In April 2014, six-year-old A.H. and her mother T.R. were living with A.H.'s maternal grandmother and step-grandfather, Chatman. When T.R. had to work, Chatman would watch A.H. T.R. was initially concerned about leaving A.H. alone with Chatman because, when T.R. was younger, Chatman touched her inappropriately. However, T.R. "let [her] guard down."

¶3 One night in June 2014, A.H. told her mother that Chatman "shows [her] his private part, and he makes [her] touch it, and he makes [her] put it in [her] mouth and swallow his milk." T.R. contacted the Pinal County Sheriff's Office, and a detective arranged for a forensic interview and medical examination of A.H. The detective also set up a "confrontation call" between T.R. and Chatman to see if he would discuss what A.H. had said. In a text

STATE v. CHATMAN
Decision of the Court

message following that call, Chatman told T.R., “I apologize for hurting everyone. There’s nothing more I can say or do.”

¶4 Chatman was subsequently indicted for two counts of sexual conduct with a minor, two counts of child molestation, and one count of sexual exploitation. At trial, the court granted the state’s motion to dismiss the sexual-exploitation count. The jury found Chatman guilty of the remaining charges and also found A.H. was under twelve years of age. The court sentenced Chatman as described above.¹ This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Double Jeopardy

¶5 Chatman argues that two of his convictions violate the Double Jeopardy Clauses of the United States and Arizona Constitutions because they are for “the same offense.” Chatman acknowledges he failed to raise this argument in the trial court. He has therefore forfeited review for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Nevertheless, a violation of double jeopardy is such error. *State v. Price*, 218 Ariz. 311, ¶ 4, 183 P.3d 1279, 1281 (App. 2008).

¶6 “The Double Jeopardy Clauses of the United States and Arizona Constitutions protect criminal defendants from multiple convictions and punishments for the same offense.” *State v. Ortega*, 220 Ariz. 320, ¶ 9, 206 P.3d 769, 772 (App. 2008); *see* U.S. Const. amend. V; Ariz. Const. art. II, § 10. Generally, “the test to be applied

¹The sentencing minute entry indicates that the sentence for count four, sexual conduct, is twenty-four years. However, the trial court orally sentenced Chatman to “lifetime imprisonment” for that count. Generally, “[o]ral pronouncement in open court controls over the minute entry.” *State v. Whitney*, 159 Ariz. 476, 487, 768 P.2d 638, 649 (1989). Moreover, the parties agree that a lifetime term was imposed. We therefore correct the sentencing minute entry to show a lifetime term as the sentence for count four. *See State v. Ovante*, 231 Ariz. 180, ¶ 38, 291 P.3d 974, 982 (2013).

STATE v. CHATMAN
Decision of the Court

to determine whether there are two offenses or only one . . . is whether each provision requires proof of a fact which the other does not.” *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *see also State v. Eagle*, 196 Ariz. 188, ¶ 6, 994 P.2d 395, 397 (2000). “Because greater and lesser-included offenses are considered the ‘same offense,’ the Double Jeopardy Clauses forbid the imposition of a separate punishment for a lesser offense when a defendant has been convicted and sentenced for the greater offense.” *State v. Garcia*, 235 Ariz. 627, ¶ 5, 334 P.3d 1286, 1288 (App. 2014); *accord Price*, 218 Ariz. 311, ¶ 5, 183 P.3d at 1281.

¶7 Chatman relies on *Ortega*, in which this court said: “Molestation is a lesser included offense of sexual conduct with a minor under the age of fifteen.” 220 Ariz. 320, ¶ 25, 206 P.3d at 777. He points out that he was convicted of child molestation under count two for “touching the victim’s genitals with his penis” and of sexual conduct with a minor under count four for “placing his penis in the victim’s genitals.” He therefore asserts that by penetrating the victim’s genitals he “necessarily also” touched the victim’s genitals.

¶8 However, as the state points out, double jeopardy is implicated only when a violation of two distinct criminal statutes, such as a greater and lesser offense, is based upon the “same act or transaction.” *Blockburger*, 284 U.S. at 304; *State v. Anderson*, 210 Ariz. 327, ¶ 139, 111 P.3d 369, 399 (2005). For example, in *Ortega*, the defendant penetrated the victim’s vulva with his penis, serving as the basis for a charge of sexual conduct with a minor. 220 Ariz. 320, ¶¶ 3, 5, 27, 206 P.3d at 771-72, 778. But the same act of penetration, rather than a separate touching, was also the basis for a molestation charge. *Id.* Thus, this court concluded that the defendant’s convictions for both the greater offense—sexual conduct—and lesser offense—child molestation—based on the same act violated double jeopardy. *Id.* ¶¶ 24-25.

¶9 Here, by contrast, Chatman committed separate acts. *See State v. Martinez*, 226 Ariz. 221, ¶ 12, 245 P.3d 906, 908 (App. 2011) (convictions must be supported by substantial evidence). A.H. testified that Chatman “put his private part in [her] private part” and that “his private part was by [her] private part . . . every day.” The examining pediatrician also testified that A.H. told her, “[H]e

STATE v. CHATMAN
Decision of the Court

put his private in my private . . . a lot.” Although count two and count four both involved the same general conduct—Chatman touching or penetrating A.H.’s genitals with his penis—they were nonetheless based on distinct and separate acts. *Cf. State v. Noble*, 152 Ariz. 284, 287, 731 P.2d 1228, 1231 (1987) (defendant forcing victim to fondle his penis, placing his hand on her genitals, and attempting to place his penis inside her vagina were all separate acts); *State v. Miranda*, 198 Ariz. 426, ¶ 17, 10 P.3d 1213, 1217 (App. 2000) (each shot fired by defendant constituted separate act). Consequently, Chatman has not met his burden of showing fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607.

Sentencing

¶10 Chatman also contends that his “life sentences” for the two sexual-conduct convictions are “illegal” under the DCAC statute, § 13-705. Chatman again concedes that he did not raise this argument below, forfeiting review for all but fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. However, the imposition of an illegal sentence—that is, one that does not conform with our mandatory sentencing statutes—constitutes such error. *State v. Joyner*, 215 Ariz. 134, ¶ 5, 158 P.3d 263, 266 (App. 2007).

¶11 Under § 13-705(A), “[a] person who is at least eighteen years of age and who is convicted of a dangerous crime against children in the first degree involving . . . sexual conduct with a minor who is twelve years of age or younger shall be sentenced to life imprisonment.” Chatman points out that, on the verdict forms for sexual conduct with a minor, the jury indicated it had found, “beyond a reasonable doubt, that [Chatman] was . . . under 18 years of age.” Although Chatman admits these findings “defy logic,” given that he is a 55-year-old grandfather, he nevertheless reasons that he could not be sentenced pursuant to § 13-705(A) and that his “consecutive life sentences as to these counts” must “be vacated.”

¶12 However, the DCAC statute is not limited to subsection (A). Section 13-705(B) provides that “a person who is at least eighteen years of age or who has been tried as an adult and who is

STATE v. CHATMAN
Decision of the Court

convicted of a dangerous crime against children in the first degree involving . . . sexual conduct with a minor who is under twelve years of age . . . may be sentenced to life imprisonment.” Because Chatman was tried as an adult, his life sentences are permissible under subsection (B). *See Joyner*, 215 Ariz. 134, ¶ 5, 158 P.3d at 266.

¶13 Indeed, although the sentencing minute entry does not expressly state that Chatman was sentenced pursuant to § 13-705(B), the record supports that conclusion. In the presentence report, the probation officer noted that “the jury found [Chatman] was under 18 years of age, which impacts the range of sentencing.” But the probation officer explained, because Chatman “was tried as an adult and convicted of a dangerous crime against children in the first degree,” the court could “impose a sentence of lifetime imprisonment,” pursuant to § 13-705(B). The issue was again brought up at the sentencing hearing when the prosecutor stated:

But for the jury finding the defendant was under 18 years of age at the time of the offenses, he would be mandatory lifetime. Under subsection (B) of 13-705, the Court has the discretion to impose those lifetime terms, and the State’s asking that the Court do so based on the aggravators found by the jury.

The court then adopted each of the state’s sentencing recommendations. Chatman has therefore failed to show fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607.

Disposition

¶14 For the reasons stated above, we affirm Chatman’s convictions and sentences as corrected.