NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

FELICIANO VEGA PORTILLO, *Appellant*.

No. 1 CA-CR 15-0706
FILED 10-4-2016

Appeal from the Superior Court in Maricopa County
No. CR2014-128776-001 DT
The Honorable Christopher Coury, Judge

CONVICTIONS AFFIRMED; SENTENCES AFFIRMED IN PART, REMANDED IN PART

COUNSEL

Arizona Attorney General's Office, Phoenix
By Michael F. Valenzuela
Counsel for Appellee

Michael J. Dew, Phoenix
By Michael J. Dew
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Michael J. Brown delivered the decision of the Court, in which Judge Patricia A. Orozco and Judge Jon W. Thompson joined.

B R O W N, Chief Judge:

¶1 Feliciano Vega Portillo appeals from his convictions and sentences for two counts of child molestation, two counts of sexual abuse, one count of furnishing harmful materials to a minor over the internet, and one count of involving a minor in a drug offense. He argues the trial court committed fundamental prejudicial error at sentencing for the two child molestation counts by considering Portillo's failure to express remorse or apologize. The State concedes the error.

¶2 At the sentencing hearing, the prosecutor recommended that the trial court impose a 26-year sentence for the molestation and drug counts, followed by lifetime probation for the other three counts. The prosecutor noted that she did not believe the case was appropriate for "a fully-mitigated term" on either the molestation counts or the drug offense. After receiving brief comments from defense counsel and Portillo, the trial court stated:

> Your case was indefensible. The recordings are what they were. They were presented to the Court, and *the one thing I'm not hearing coming from you is an apology to the victims.*
>
> . . . .
>
> As for counts 1 and 2 [child molestation], again, your mitigating history is your lack of criminal history. *I'm going to reluctantly go along with what the State has stated. I would be giving you less time if I was hearing genuine [remorse] or a sincere apology from you.* What I'm hearing is nothing of that, sir.

(Emphasis added.) The court then sentenced Portillo to mitigated (but not the minimum) concurrent terms of 13 years' imprisonment for the child molestation counts; the minimum term of 13 years' imprisonment (flat time) for the drug count, to be served consecutively to the sentence on the child molestation counts; and lifetime probation on the other three counts, starting upon release from prison.

¶3 Portillo argues the trial court's comments about his failure to apologize and express remorse were improper. Because Portillo failed to object to the court's statements at sentencing, he has the burden of establishing that fundamental error occurred, which is error that goes to the foundation of the case, deprives a defendant of a right essential to his defense, and is of such magnitude that he could not possibly have received a fair trial. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19 (2005). Portillo has met that burden here. The trial court committed fundamental error when it considered Portillo's failure to apologize or express remorse in sentencing him on the child molestation counts. *See State v. Trujillo*, 227 Ariz. 314, 318, ¶ 15 (App. 2011) (holding that the trial court committed fundamental error in considering the defendant's lack of remorse and failure to admit guilt because it deprived him of a right essential to his defense – his Fifth Amendment privilege against self-incrimination).

¶4 Portillo must also demonstrate that the error caused him prejudice. *Henderson*, 210 Ariz. at 567, ¶ 26. Determining whether prejudice exists "involves a fact-intensive inquiry, and the showing required to establish prejudice therefore differs from case to case." *Id.* Portillo bears the burden of showing that if the trial court had not improperly considered his lack of remorse and failure to apologize, the court could have reasonably imposed a lighter sentence. *See id.*

¶5 Given that the State did not seek to prove any aggravating factors, the trial court could have imposed a minimum prison term of 10 years and a presumptive prison term of 17 years. *See* Ariz. Rev. Stat. § 13-705(D). In sentencing Portillo to 13 years, the court explained that it was "reluctantly going along" with the State's recommendation and made it clear that a lesser sentence would have been imposed if Portillo had expressed remorse or apologized to the victim. Considered together, those statements indicate there is a reasonable likelihood that a sentencing judge, without looking to the absence of remorse or an apology, could have imposed sentences more favorable to Portillo. *See Trujillo*, 227 Ariz. at 319, ¶ 21.

¶6 Because we accept the State's concession of error, we remand this matter for resentencing as to the two child molestation counts. We otherwise affirm Portillo's convictions and sentences.

AMY M. WOOD • Clerk of the Court
FILED: AA