IN THE PASCUA YAQUI COURT OF APPEALS
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

FELICIANO CRUZ, Appellant, v. PASCUA YAQUI TRIBE, Appellee.	)	Cause No. CA-23-002 (CR-21-077) **ORDER CLARIFIYING OPINION AND ORDER**

For the Appellant: Mark F. Willimann, Pascua Yaqui Public Defender
For the Appellee: Malena Acosta, Coleen Thoene, Russel Boatwright, Pascua Yaqui Office of the Prosecutor

Martinez, Associate Justice

Concurring: Chief Justice Miller and Associate Justice Plevel

On May 15, 2024, the Parties filed a Joint Request for Clarification of this Court's Opinion and Order in the above-referenced matter.

The Parties' Joint Request for Clarification informed this Court of an error in regard to the citation of a Pascua Yaqui Tribal Code provision referencing the requirements of a criminal complaint. *Cruz v. Pascua Yaqui Tribe*, CA-23-002, at 4-5 (PYT Ct. App. 2024). As requested, this Court provides the following clarification.

In evaluating the sufficiency of a criminal complaint in this case this Court should have correctly referenced the prior Pascua Yaqui Tribal Code 3 PYTC § 2-2-90(A) July 27, 2022, whose language is nearly identical to the current version of the Pascua Yaqui Tribal Code governing the contents of criminal complaints 3 PYTC § 2-290(B)(1) October 27, 2023.

This error in citation, however, does not change this Court's analysis in its Opinion and Order issued on April 30, 2024.

Submitted this 18th day of July2024.

Justice Kendra A. Martinez

We CONCUR:

Interim Chief Justice Robert J. Miller

Hon. Rebecca Plevel

PASCUA YAQUI TRIBE
Office of the Prosecutor
7777 S. Cmo. Huivisim
Bldg. A, 2nd floor
Tucson, AZ 85757

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA

Feliciano Cruz, **Appellant,** **vs.** Pascua Yaqui Tribe Appellee	Case No: CA-23-002 Tribal Court Case No: CR-21-077 Joint Request for Clarification

The Pascua Yaqui Tribe, by and through Coleen Thoene and Russell Boatwright, and Counsel for the Appellant, Mark Willimann, jointly request clarification of this Court's April 30th, 2024 Opinion and Order.

Following the issuance of this Court's April 30, 2024, opinion in this case, the Tribe requested that a status conference be set before the trial court to address matters of sentencing that had been stayed pending appeal. A status conference was held on May 14, 2024. At that status conference, the trial court indicated that it had a question regarding this Court's Opinion; specifically, language contained on page 4, Section 1, paragraph 3. The trial court indicated that the paragraph included a citation to the recently amended Pascua Yaqui criminal procedure rules, and that it also contained a reference to a felony. An additional citation to the same rule appears in the first full paragraph on page 4 of the Opinion. The trial court asked the parties to seek clarification from this Court regarding the language used.

Specifically, the Court's Opinion reads as follows:

> "The Pascua Yaqui Rules of Criminal Procedure require that for a felony criminal complaint the prosecutor or law enforcement officer must provide 'a written statement of the essential facts constituting a public offense that is either signed by a prosecutor or made by a law enforcement officer under oath before a judge.' 3 PYTC § 2-2-90(B)(1)."

The Defendant's case was decided under the version of the Pascua Yaqui Tribal Code in effect before October 1, 2022. Prior to that date, the Code did not allow for the prosecution of felony offenses. Under the older version of the Code, 3 PYTC § 2-2-90(A) included nearly identical language to the current version of § 2-2-90(B)(1) cited in this Court's Opinion. Specifically, § 2-2-90(A) stated:

> "All criminal prosecutions for violation of the Pascua Yaqui Tribe Criminal Code shall be initiated by the filing of a complaint in the Tribal Court. A complaint is a written statement of the essential facts constituting an offense, signed by a law enforcement officer or a prosecutor, or made upon oath before a judge, and charging that a named individual has committed a particular criminal offense."

The old code also contained a subsection (B)(1) which required complaints to contain "[a] written statement, describing in ordinary language the offense committed, including the time and place as nearly as may be determined, and the name or description of the person alleged to have committed the offense." *See* 3 PYTC § 2-2-90(B)(1) (version prior to Oct. 2022 amendment)

Accordingly, the parties — at the direction of the trial court — respectfully seek clarification as to whether this Court's reference to the current version of 3 PYTC § 2-2-90(B)(1) is correct. The parties seek further clarification as to whether the Court's opinion in this case would differ if the old version of 3 PYTC § 2-2-90(A) were applied instead.

The Trial Court has set the matter for another status conference on June 13, 2024 to address whether the Defendant's conviction for sexual abuse continues to remain affirmed so that it may determine whether sentencing-related stays may be lifted.

Respectfully submitted this 15th day of May, 2024,

FOR

Coleen Thoene

Russell Boatwright
Deputy Prosecutors
Pascua Yaqui Office of the Prosecutor
Coleen.Thoene@pascuayaqui-nsn.gov
Russell.Boatwright@pascuayaqui-nsn.gov

Mark Willimann
Attorney for Appellant
Pascua Yaqui Public Defender's Office
Mark.Willimann@pascuayaqui-nsn.gov

ORIGINAL of the forgoing filed/e-filed this 15th day of May, 2024, with:

Clerk of the Court
Pascua Yaqui Tribal Court
Pascua Yaqui Tribal Court of Appeals

Copy of the foregoing delivered/mailed/emailed provided to:

Mark Willimann
Pascua Yaqui Public Defender's Office
Attorney for the Defendant/Appellant

Hon. Veronica Darnell
Judge, Pascua Yaqui Tribal Court

IN THE PASCUA YAQUI COURT OF APPEALS
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

FELICIANO CRUZ, Appellant, v. PASCUA YAQUI TRIBE, Appellee.	)	Cause No. CA-23-002 (CR-21-077) **OPINION AND ORDER**

For the Appellant: Mark F. Willimann, Pascua Yaqui Public Defender
For the Appellee: Malena Acosta, Coleen Thoene, Russel Boatwright, Pascua Yaqui Office of the Prosecutor

Martinez, Associate Justice

Concurring: Chief Justice Miller and Associate Justice Plevel

This matter comes before the Pascua Yaqui Court of Appeals on appeal from the trial court's decision finding the Appellant guilty of two criminal counts. Following a bench trial held on April 27, 2022, the trial court found the Appellant guilty of a Liquor Violation pursuant to 4 PYTC § 1-640(A) and Sexual Abuse pursuant to 4 PYTC § 2-40(A). Appellant appeals his sexual abuse conviction (4 PYTC § 2-40(A)). Oral argument was held on March 26, 2024.

Jurisdiction

The Pascua Yaqui Tribe Court of Appeals has jurisdiction to hear this matter pursuant to 3 PYTC §§ 1-1-l0(A) & 2-3-30 *et seq.* The trial court found that based on the evidence presented during the bench trial that Appellant was guilty of sexual abuse pursuant to 4 PYTC § 1-640(A) and imposed a criminal sentence. A criminal defendant has the right to appeal a conviction and any sentence imposed by the trial court. *See generally Mesquita v. Pascua Yaqui Tribe*, CA-21-001 (PYT Ct. App. 2021).

Standard of Review

Where a defendant fails to raise a procedural error to the trial court during trial and sentencing, the standard of review on appeal is plain error. *Mesquita v. Pascua Yaqui Tribe*, CA-21-001, at 3; *United States v. Rangel*, 697 F.3d 795, 800 (9th Cir. 2012); *United States v. Lloyd*, 807 F.3d 1128, 1139-40 (9th Cir. 2015). Under the plain error standard, relief is warranted where

the trial court committed an error that is plain and affected substantial rights. *United States v. Olano*, 507 U.S. 725, 732 (1993); *United States v. Lloyd*, 807 F.3d at 1139.

This Court reviews questions of fact "under a deferential, clearly erroneous" standard. *United States v. Lang*, 149 F.3d 1044, 1046-47 (9th Cir. 1998), *amended by* 157 F.3d 1161 (9th Cir. 1998). The reason for this, is that the trial court "is in a superior position to 'judge the accuracy of witnesses' recollections and make credibility determinations in cases in which live testimony is presented.'" *United States v. Lang*, 149 F.3d at 1046 (quoting *United States v. McConney*, 728 F.2d 1195, 1200 (9th Cir.1984))

Issues Presented

1. Did plain error occur when the complaint used the word "touch" instead of "fondle or manipulate" to describe the sexual contact that the Appellant allegedly engaged in that amounted to sexual abuse pursuant to 4 PYTC § 1-640(A)?

2. Was the trial court clearly erroneous in finding that the evidence presented at trial, specifically the victim's testimony, was sufficient to prove that Appellant's actions amounted to sexual abuse pursuant to 4 PYTC § 1-640(A)?

Background

At around 4:40 a.m. on February 14, 2021, Pascua Yaqui Police Officers responded to a call from a fourteen-year-old female victim, who reported that the Appellant had sexually assaulted her at his residence. Probable Cause Statement, at 2. When interviewed by the responding police officer, the victim stated that she was sitting on the couch in Appellant's living room along with her adult sister, the Appellant, and another adult female. Probable Cause Statement, at 2. The victim reported that the Appellant had touched and rubbed her back, the side of her body and moved his hand underneath her underwear to rub and touch her buttocks. Probable Cause Statement, at 2. The victim stated that when she tried to move away from the Appellant, he would pull her back to him and continue touching and rubbing her buttocks. Probable Cause Statement, at 2. The victim notified her adult sister, who was with her, and the two left the Appellant's home and went to a nearby neighbor's home. Trial Transcript, at 63-65. The neighbor had them call the police to report the incident. Trial Transcript, at 120.

As a result of the aforementioned police response, Appellant was taken into custody and charged with four criminal counts: 1) 4 PYTC § 1-80(A) Contributing to the Delinquency of a Minor; 2) 4 PYTC § 1-640(A) Liquor Violation; 3) 4 PYTC § 2-30(A)(1) Public Sexual Indecency; Public Sexual Indecency to a Minor/ 4 PYTC § 100-110 Sexual Offenses and Sexual Crimes; 4) 4 PYTC §2-40(A) Sexual Abuse/4 PYTC § 100-110 Sexual Offenses and Sexual Crimes. Criminal Complaint, February 14, 2021.

Through the course of the criminal proceedings, the prosecutor amended the complaint twice. First, to change the charging language of the fourth count 4 PYTC §2-40(A), which corrected the term "sexual conduct" to the correct term "sexual contact." Motion to Amend Complaint, December 19, 2021. The second time, to remove the first count: 4 PYTC § 1-80(A)

Contributing to the Delinquency of a Minor and to amend the time for when the crimes took place. Amended Criminal Complaint, January 6, 2022. The other three remaining criminal counts remained and were the charges subject of Appellant's bench trial on April 27, 2022.[1] Amended Criminal Complaint, January 6, 2022; Ord. Bench Trial, April 27, 2022.

At issue here, is the third count of "sexual abuse." The amended complaint references the correct charging statute and describes the "sexual contact" as the touching of the buttocks of a minor. Amended Criminal Complaint, January 6, 2022. The complaint does not provide more descriptive language beyond "touched" when referencing the *actus reus* of the crime nor does it utilize the language statutorily provided in the definition of "sexual contact" in 4 PYTC §2-10(N). Amended Criminal Complaint, January 6, 2022. However, the accompanying probable cause statement does provide a description of the "touch" which the victim described as the rubbing of her buttocks underneath her underwear. Probable Cause Statement, at 2.

Appellant's bench trial was held on April 27, 2022. At the trial, the victim testified that on February 14, 2021, that she, her adult sister, Appellant, and another adult female were sitting on the couch watching a movie. Trial Transcript, at 58. The victim was sitting next to the Appellant who began moving closer to her and put his hand underneath the blanket she was using to keep warm. Trial Transcript, at 57-60. The victim then described how the Appellant began rubbing her buttocks, first, by putting his hand in the back pocket of her jeans. Trial Transcript, at 60. The victim testified that she kept trying to move away from the Appellant but that the Appellant kept pulling her back closer to him by pulling on the belt loop of her jeans. Trial Transcript, at 60-66. The victim testified that the Appellant then put his hand in her pants first over her underwear and then under her underwear, rubbing her buttocks everywhere, despite her continual attempts to move away from him. Trial Transcript, at 66-70.

Following the bench trial, the court issued its order finding the Appellant guilty of two of three counts, including the count of sexual abuse. Ord. Bench Trial, April 28, 2022. In its order, the court made factual findings that it used to support its finding that the Appellant had committed sexual abuse. These factual findings include, that the Appellant touched the "buttocks of a minor" and that touching based on the victim's testimony, included Appellant putting his hands inside the back of the victim's jeans and inside of her underwear where he proceeded to rub her buttocks. Ord. Bench Trial, at 2.

Shortly after the bench trial, the Appellant filed a "Motion to Reconsider Verdict" where he argued that the court's guilty verdict was inconsistent with the facts and testimony presented during the bench trial. Motion to Reconsider Verdict, May 25, 2022. The court denied the motion on August 17, 2022. Ord. Motion/Sentencing Hearing, August 17, 2022. Appellant failed to appear at his August 17, 2022, sentencing hearing and a bench warrant was issued by the trial court. Ord. Motion/Sentencing Hearing, August 17, 2022. The Appellant was arrested pursuant to the bench warrant on May 4, 2023, and was ultimately sentenced on May 22, 2023. Bench Warrant, BW-22-075; Ord. Sentencing Hearing, June 14, 2023. As to the count of sexual abuse,

[1] The Amended Criminal Complaint filed on January 6, 2022, contained the following criminal counts: 1) 4 PYTC § 1-640(A) Liquor Violation; 2) 4 PYTC § 2-30(A)(1) Public Sexual Indecency; Public Sexual Indecency to, a Minor/ 4 PYTC § 100-110 Sexual Offenses and Sexual Crimes; 3) 4 PYTC §2-40(A) Sexual Abuse/4 PYTC § 100-110 Sexual Offenses and Sexual Crimes.

Appellant was ordered to serve eight months of detention and to register as a tier 3 sex offender. Ord. Sentencing Hearing, June 14, 2023.

Discussion

1. Sufficiency of the Criminal Complaint

In review of the procedural history leading up to the bench trial, the trial transcripts and the trial court's final order there is no indication that the Appellant ever raised an objection to what he now alleges, for the first time on appeal, the improper use of the word "touch" in the complaint. There were in fact several motions for mistrial made by the Appellant's counsel during the bench trial, which were all denied, none of which challenged the *actus reus* language in the sexual abuse count. Ord. Bench Trial, at 2-3. Additionally, the Appellant filed a "Motion to Reconsider Verdict" shortly after the bench trial. Motion to Reconsider Verdict, May 25, 2022. The motion for reconsideration focused entirely on the sufficiency of the evidence presented and whether the trier of fact had sufficient evidence to find the Appellant guilty of sexual abuse beyond a reasonable doubt. Motion to Reconsider Verdict, May 25, 2022.

Given the procedural history in this case, we review the sufficiency of the criminal complaint for plain error. *Mesquita v. Pascua Yaqui* Tribe, No, CA-21-001, at 3; *United States v. Rangel*, 697 F.3d at 800; *United States v. Lloyd*, 807 F.3d at 1139-40. Under the plain error standard, relief is warranted if the trial court committed error that is plain and affected substantial rights. *United States v. Olano*, 507 U.S. at 736; *United States. v. Lloyd*, 807 F.3d at 1139. Plain error review involves a four step analysis: (1) there must be an error or defect- some sort of deviation from a legal rule that has not been waived; (2) the legal error must be clear or obvious; (3) the error must have affected substantial rights; and (4) if the above three prongs are satisfied, a court of appeals has discretionary authority to remedy the error, discretion which should only be exercised if the error "'seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings.'" *Puckett v. United States*, 556 U.S. 129, 135 (2009); *United States v. Olano,* 507 U.S. at 736 (quoting *United States v. Atkinson,* 297 U.S. 157, 160 (1936)).

In evaluating the sufficiency of a criminal complaint, this Court must look to the Pascua Yaqui law governing the contents of a criminal complaint. The Pascua Yaqui Rules of Criminal Procedure require that for a felony criminal complaint the prosecutor or law enforcement officer must provide "a written statement of the essential facts constituting a public offense that is either signed by a prosecutor or made by a law enforcement officer under oath before a judge." 3 PYTC § 2-2-90(B)(1).

This Court, however, has not addressed whether plain error occurs when the language used in a criminal complaint describing the *actus reus* of a crime does not mirror the language provided in the statutory definitions. For guidance, we look to relevant federal case law. *See PYT v. Miranda*, CA-08-015, at 22 (PYT Ct. App. 2009). The United States Supreme Court has addressed errors in criminal complaints and has held that formal defects in criminal complaints that are non-prejudicial will be disregarded. *Hagner v. United States*, 285 U.S. 427, 431 (1932). The Court in *Hagner* further held that the test of the sufficiency of a criminal indictment is whether it contains the elements of the offense intended to be charged, provides sufficient notice

to the defendant of what he is charged with, and whether the record is sufficient to enable the defendant to plead a former acquittal or conviction. *Hagner v. United States.*, 285 U.S. at 431. Circuit courts have applied *Hagner* to their review of the sufficiency of criminal indictments and have held that absent a showing of prejudice, a criminal indictment is sufficient "if necessary facts appear in any form, or by fair construction can be found within the terms of the indictment." *Keys v. United States,* 126 F.2d 181, 184 (1942); *United States v. Kahn*, 381 F.2d 824, 829 (1967).

In reviewing the sufficiency of a criminal complaint, we must read the complaint together with the supporting probable cause statement.[2] 3 PYTC § 2-2-90(B)(1). The complaint in this case clearly meets the statutory requirements, in that it contained detailed factual statements regarding Appellant's actions which constituted crimes pursuant to the laws of the Pascua Yaqui Tribe. The complaint was signed by the prosecutor and the probable cause statement was signed by the responding police officer, under the penalty of perjury. The complaint also meets the standards provided by federal courts, the complaint and accompanying probable cause statement outlined the offenses the Appellant was charged with, the elements of those offenses and the probable cause statement clearly laid out detailed facts on which the criminal charges were based, which gave the Appellant sufficient notice of what crimes he was being charged with and was sufficient to enable the Appellant to plead a prior acquittal or conviction.

As to the choice of language in the complaint, Appellant argues that the sexual abuse count was improperly charged and therefore, the complaint was fatally flawed because the prosecutor used the word "touch" instead of "fondle or manipulate" when describing the sexual contact[3] the Appellant engaged in when he committed sexual abuse. Appellant's Opening Brief, at 9. We do not agree.

In evaluating the choice of words, the Pascua Yaqui Tribal Code's principles of construction state that words in the code "shall be given their plain meaning and technical words shall be given their usually understood meaning where no other meaning is specified." 1 PYTC § 2-30(A). Arguably, "touch" and "fondle" are forms of contact.[4] What differentiates a mere touch from a sexual touch is the type of touching and which part of the body is touched. *See* 4 PYTC § 2-10(N). The complaint alleged that the Appellant touched the minor victim's buttocks. Amended Criminal Complaint January 6, 2022, at 1. The probable cause statement provided details as to the type of touching, it stated that the Appellant put his hand in the victim's pants and underwear and touched and rubbed her buttocks. Probable Cause Statement, at 2. The fact that the prosecutor used the word "touch" instead of "fondle" or "manipulate" did not prejudice

---

[2] The Amended Criminal Complaint filed by the prosecutor on January 6, 2022, states that the complaint is "based on information and belief, and the attached Affidavit and Verification or signed statement." The charges in the complaint are supported by the facts and statements made in the accompanying probable cause statement, which were made by the arresting officer, and filed with the court under the penalty of perjury.

[3] Pascua Yaqui Tribal Code defines "sexual contact" as "any direct or indirect fondling or manipulating any part-of the genitals, anus, groin, inner thigh, buttocks or female breast." 4 PYTC § 2-10(N).

[4] Touch and contact are synonyms, and fondle is a form of touch. *Contact Synonyms,* Merriam-Webster.com Thesaurus, Merriam-Webster, https://www.merriam-webster.com/thesaurus/contact (last visited April 14, 2024); *Fondle Synonyms,* Merriam-Webster.com Thesaurus, Merriam-Webster, https://www.merriam-webster.com/thesaurus/fondle (last visited April 15, 2024).

the Appellant in any way. The Appellant had sufficient notice of the criminal charges he was facing and the factual basis of those charges. We, therefore, find no plain error.

2. Sufficiency of the evidence

Appellant argues that the trial court erred in finding the Appellant guilty of sexual abuse because he believes the court based the finding of guilt on the language in the complaint which alleged that the Appellant "touched the buttocks of a minor..." Amended Criminal Complaint, January 6, 2022, at 1. Appellant argues that the trial court did not make factual findings sufficient to hold that the Appellant "fondled" or "manipulated" the minor victim's buttocks. Appellant's Opening Brief, at 9.

Looking at the trial court's order, the court made several findings of fact related to where and how the Appellant touched the victim, which were all supported by the victim's direct testimony during the bench trial. Trial Transcript, at 57-70. These findings include:

> J.M. testified that the Defendant then put his hands on the back pocket of her jeans. She testified that she tried to move away and he pulled her closer to him by the belt loop of her jeans. She testified that the Defendant again pulled her closer and then put his hand inside the back of her jeans. She stated that again he pulled her back to him and then he put his hands on the inside of her underwear on her bottom. She stated she again pulled away from him and again he pulled her closer, rubbing her buttocks lower and lower.

Ord. Bench Trial, at 2.

The trial court's factual findings support Appellant's conviction for sexual abuse. The court heard direct testimony from the victim about the circumstances surrounding the touch, the nature of the touch and the parts of her body that were the subject of Appellant's touching. The evidence demonstrated that the touching amounted to fondling and was sexual in nature. All of which led the trial court to conclude that the Appellant engaged in sexual contact with the victim and that contact amounted to sexual abuse beyond a reasonable doubt. Ord. Bench Trial, at 2. The trial court's findings were supported by the evidence and the record before it and were not clearly erroneous.

Conclusion

We hold that the complaint was sufficient and without plain error. We also hold that the trial court was not clearly in error in concluding that it had sufficient evidence before it when it made its factual findings on which the Appellant's criminal convictions and sentences were based, and thus we affirm the trial court's decision.

Submitted this 30th day of April 2024.

Justice Kendra A. Martinez

We CONCUR:

Hon. Rebecca Plevel

Interim Chief Justice Robert J. Miller

IN THE PASCUA YAQUI COURT OF APPEALS
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Appellee, vs. CRUZ, FELICIANO, Appellant.	APPELLATE CASE NO. CA-23-002 PASCUA YAQUI TRIBAL COURT NO.: CR-21-077

REPLY

Mark F. Willimann, Esq.
Pascua Yaqui Bar No. 10391
PASCUA YAQUI PUBLIC DEFENDER
4725 W. Calle Tetakusim, Building B
Tucson, AZ 85757
(520) 883-5013

Attorney for Appellant

In its Answer, the Tribe provided this Court with a definition for "fundamental error." The Tribe suggested a three-part test to establish whether a fundamental error exists in the record. [1]

(1) Was there an error that went to the foundation of the case?

(2) Did the error deny defendant's ability to argue against **an essential element** of the offense charged?

(3) Was the error so egregious that it denied him a fair trial?

Using this definition of "fundamental error," Feliciano Cruz submits that he met all of these elements.

First, there is NO CRIME that proscribes the "touching" of a 14-year-old girl's buttocks in the PYT Criminal Code. As a result, the Indictment was fundamentally flawed from the onset when the Tribe alleged the crime of "sexual abuse," and it believed that this element could be satisfied with a "touch" instead of what the Code actually proscribes: The "fondling" or "manipulating" of a 14-plus-year-old girl's buttocks.

---

[1] Answer at 2.

Second, because the Indictment set forth elements of an offense that does not exist in the Code resulted in Cruz having no way to defend against this "non-criminal" act. Essentially, Cruz could have argued to the Court that he only "touched" J.M.'s buttocks, but he did not "fondle" or "manipulate" it, which if the trial Court had agreed with him, would have earned him a "not guilty" verdict. Instead, because the Indictment was fundamentally flawed, Cruz was denied this avenue of defense.

Third, given that the Indictment failed to describe a criminal act recognized in the Code, the trial Court's guilty verdict that he "touched" J.M.'s buttocks substantiate his claim that he did not have a fair trial. Had he had a fair trial, and that the trial Court understood the elements of "Sexual Abuse," the trial Court would have found him not guilty.

In addition to the foregoing, Cruz suggests another reason why "fundamental error" exists in this record to complement the Tribe's definition set forth, *supra.*

> Fundamental error therefore occurs when a person is convicted of "a crime when the evidence does not support a conviction." (quoting *State v. Stroud*, 209 Ariz. 410, n.2, 103 P.3d 912 (2005)); *State v. Gray*, 227 Ariz. 424, n.1, 258 P.3d 242 (App. 2011) ("[T]he state's failure to prove each element of an offense of conviction would be fundamental error, as it constitutes 'error going to the foundation of the case' and would

> necessarily deprive a defendant of a fair trial." (quoting *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601)); Zinsmeyer, 222 Ariz. 612, ¶ 27, 218 P.3d 1069 ("A conviction based on insufficient evidence constitutes fundamental error."), overruled on other grounds by *Bonfiglio*, 231 Ariz. 371, 295 P.3d 948. [2]

In its Answer, the Tribe argues that the Indictment language after "to wit" does not change the elements of the offense. Cruz agrees. Nevertheless, the Indictment is the proper criminal process used to give "notice" to a defendant as to what criminal conduct constitutes a criminal offense.

Thus, Cruz argues that when the Tribe alleged criminal conduct that does not exist under the code, it denied giving him adequate notice of the offending conduct. To support his argument, Cruz submits the plain language found in 4 PYTC § 1-10, which sets forth the "Purpose" for the criminal code. As written therein: (4 PYTC § 1-10)

> (A) To proscribe conduct that unjustifiably and inexcusably causes or threatens substantial harm to individual, public, or Cultural interest.

---

[2] *State v. Clark*, 249 Ariz. 528, 533, ¶ 16 (App. 2020).

(B) **To give fair warning of *the nature of the conduct proscribed*** and of the sentences authorized upon conviction.

(C) To define the act or omission and the accompanying mental state which constitute each offense and limit the condemnation of conduct as criminal when it does not fall with the purpose set forth.

Given the plain language outlining the "Purpose" for the Code, the "Sexual Assault" allegation failed to set forth any notice of the actual "conduct proscribed" much less a "fair notice" of the offending conduct.

At the risk of being repetitive, the Tribal Code specifically proscribes criminal conduct provided under the FORMER 4 PYTC § 2-40(A)(B), (CURRENT 4 PYTC 1-515), 4 PYTC § 2-10- Sexual Abuse / 4 PYTC § 4-100-110 Sexual Offenses and Sexual Crimes, where the elements of the offense are:

(1) A person commits sexual abuse by intentionally or knowingly engaging in **sexual contact** with any person 14 years of age without consent of that person or with any person who is under the age of 14 years of age if the sexual contact involves only the female breast.

Then, in accord with FORMER 4 PYTC § 2-10, CURRENT, 4 PYTC § 2-500, the Code defines "sexual contact," as proof to support the "direct or indirect fondling or manipulating any part of the genitals, anus, groin, inner thigh, buttocks, or female breast."

It is undeniable that the trial Court found Cruz guilty because he ***"touch[ed]*** the buttocks of a minor, J.M., DOB 06-03-2006." (This comes directly from the trial Court's April 28, 2023, "ORDER BENCH TRIAL.")

It is also equally undeniable that Cruz could not commit "sexual contact" by "touching" a 14-plus year-old girl's buttocks when the Code require evidence that he "manipulated" or "fondled" it.

From a fundamental error perspective, the precipitant question is: Did the Tribe prove the elements of an actual offense as written in the Pascua Yaqui Code? The answer is: No. The reason is that the offense alleged in Count 3 of the Indictment *does not exist,* and still, Feliciano Cruz was convicted of this non-existent offense, and he is currently being punished for it.

In sum, the Tribe mischaracterized the appropriate actus reus for the offense codified as "Sexual Abuse." The trial Court found that the Tribe proved the

"touching" component; thus, the guilty verdict. And now, the Tribe wants this Appellate Court to affirm the trial Court's ruling knowing that "touching" is not synonymous with "fondling" or "manipulating."

For the foregoing reasons, Feliciano Cruz respectfully requests that this Appellate Court reverse his conviction and remand it to the trial Court.

DATED this 12th day of October 2023.

/s/ Mark F. Willimann
Mark F. Willimann, Esq.
Deputy Public Defender

CERTIFICATE OF SERVICE

I hereby certify that Feliciano Cruz's Opening Brief e-mailed to:

Clerk of the Court of Appeals
Pascua Yaqui Court of Appeals
7474 South Camino de Oeste
Tucson, AZ 85757

and that one (1) copy of Feliciano Cruz's Opening Brief was e-mailed to:

Deputy Tribal Prosecutor
Office of the Prosecutor of the Pascua Yaqui Tribe
7474 South Camino de Oeste
Tucson, AZ 85757

DATED this 12th day of October 2023.

PASCUA YAQUI PUBLIC DEFENDER

/s/ Mark F. Willimann
Mark F. Willimann, Esq
Deputy Public Defender

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA

Feliciano Cruz Appellant vs. PASCUA YAQUI TRIBE, Appellee	APPELLATE CASE NO: CA-23-002 TRIBAL COURT CASE NO: CR-21-077

Notice of Lower Court Filing

Malena Acosta,
Chief Prosecutor
Coleen Thoene,
Russell Boatwright
Deputy Prosecutors
Pascua Yaqui Office of the Prosecutor
7777 S. Camino Huivisim
Bldg. A, 2nd Floor
Tucson, AZ 85757
Telephone: (520) 876-6251
Malena.Acosta@pascuayaqui-nsn.gov
Coleen.Thoene@pascuayaqui-nsn.gov
Russell.Boatwright@pascuayaqui-nsn.gov

Attorneys for the Pascua Yaqui Tribe

The Pascua Yaqui Tribe, by and through counsel undersigned, respectfully submits a copy of the Appellee's Motion to Clarify and/or Enforce Terms of Sentence filed with the Pascua Yaqui Tribal Court on January 24, 2024. The pleading relates to solely to whether the Appellant's sentence may be enforced during the pendency of the current appeal. It does not concern or expand the record regarding the issues previously briefed by the parties. A copy of the lower court pleading is being submitted solely as a courtesy and to ensure the completeness of the appellate record.

RESPECTFULLY submitted this 24th day of January, 2024.

Malena Acosta
Chief Prosecutor

Coleen Thoene
Deputy Prosecutor

Russell Boatwright
Deputy Prosecutor

CERTIFICATE OF SERVICE

I hereby certify that the Tribe's pleading was delivered this date to:

Benjamin Casey
Ben.Casey@pascuayaqui-nsn.gov
Clerk of the Court of Appeals
Pascua Yaqui Court of Appeals
7777 S. Camino Huivisim
Tucson, AZ 85757

And that one (1) copy of the Tribe's pleading was delivered, this date to:

Mark Willimann
Mark.Willimann@pascuayaqui-nsn.gov
Pascua Yaqui Office of the Public Defender
7474 S. Camino de Oeste
Tucson, AZ 85757

And that one (1) copy of the Tribe's pleading was delivered this date to:

Associate Judge Veronica Darnell
Pascua Yaqui Tribal Court
7777 S. Camino Huivisim
Tucson, AZ 85757

Dated this 24th day of January, 2024.

PASCUA YAQUI PROSECUTOR

Malena Acosta
Chief Prosecutor

Coleen Thoene
Deputy Prosecutor

Russell Boatwright
Deputy Prosecutor

Sworn before me this 24th day of January, 2024

Yvette L. Gradillas
Notary Signature

YVETTE L GRADILLAS
Notary Public - Arizona
Pima County
Commission # 585864
My Comm. Expires Jul 13, 2024

Copy of Lower Court Filing

PASCUA YAQUI TRIBE
Office of the Prosecutor
7777 S. Cmo. Huivisim
Bldg. A, 2nd floor
Tucson, AZ 85757

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA

PASCUA YAQUI TRIBE, **Plaintiff,** **vs.** Feliciano Cruz Defendant	Case No: CR-21-077 Motion to Clarify and/or Enforce Terms of Sentence (Expedited Hearing Requested)

The Pascua Yaqui Tribe, by and through counsel undersigned, respectfully moves this Court to clarify and/or enforce the terms of the sentence imposed in this matter. This Motion is being filed based on information forwarded to the Tribe from the Pascua Yaqui Probation Department on January 23, 2024, which consists of an email communication from defense counsel regarding whether the Defendant is required to follow this Court's order regarding probation and registration requirements.

I. Relevant Facts and Procedural History:

The Defendant was convicted at a bench trial of once count each of liquor violation and sexual abuse. Both crimes involved the minor aged victim, J.M. On May 22, 2023, this Court sentenced the Defendant to eight months of incarceration as to the sexual abuse conviction under Count Three of the original complaint. *See* Tribe's Attachment B, Order: Sentencing Hearing, *PYT v. Cruz,* CR-21-077 (June 14, 2023). The Defendant was released from custody on December

27, 2023.[1] As to the liquor violation conviction under Count One, the Defendant was ordered complete one year of probation. *Id.* His probation term for Count One was to begin immediately upon his release from custody, and he was ordered to report to probation within forty-eight hours of his release.[2] *Id.* The Defendant was further ordered to register as a Tier 3 sex offender under 4 PYTC §§ 2-240 & 250.[3] *Id.* Nothing in this Court's sentencing order indicates that the imposition of sentence—or any individual component of it—were to be stayed. *Id.*

On June 27, 2023, the Defendant filed a timely notice of appeal. *See* Tribe's Attachment C, Notice of Appeal, *PYT v. Cruz*, CR-21-077 (June 27, 2023). The notice of appeal did not include any request to stay the imposition of any aspect of the Defendant's sentence.

On July 27, 2023, the Pascua Yaqui Court of Appeals issued a notice indicating that the trial court record had been received. The notice then set a briefing schedule for the appeal. *See* Tribe's Attachment D, Notice, *Cruz v. PYT*, CA-23-002 (July 27, 2023). Nothing in the Court of Appeals' notice indicates that any aspect of the Defendant's sentence was to be stayed pending resolution of the appeal.[4] The parties submitted timely briefs, including a reply which was filed on October 12, 2023. The sole issue on appeal relates to the propriety of the Defendant's sex abuse conviction under Count Three. No arguments have been raised on appeal as to the Defendant's sentence or conviction as to pursuant to Count One. As of the date of this Motion's filing, no orders

---

[1] The Defendant's release date was confirmed with detention Sergeant J. Hernandez on January 24, 2024.
[2] At the time of sentencing, the Defendant signed a document listing the conditions of his probation, which included, in part, such things as participation in treatment, testing, and physically reporting to the probation office.
[3] Based on the date of offense, the Defendant's case is covered by the previous version of the Pascua Yaqui Tribal code, which was amended October 1, 2022.
[4] On July 20, 2023, the Defendant filed a Motion to Set Appeal Bond with this Court. In it, the Defendant asked that a bond pursuant to 3 PYTC § 2-2-490 and indicated that the Tribe objected to the request. The Defendant's Motion did not include any sort of request to stay imposition of sentence. No order was received regarding the Defendant's Motion.

have been received from the Court of Appeals either setting the matter for oral argument or issuing a ruling based on the record and pleadings. Similarly, there have been no requests filed nor orders issued regarding a stay of sentence.

On January 23, 2024, the defendant's assigned probation officer forwarded an email he received from defense counsel to the Tribe. *See* Tribe's Attachment A, "Probation Email Dated January 23, 2024." The email indicates that the "Tribal Court's ruling that he is guilty and the sentence to jail and probation are 'stayed' pending the end of the appeal process." *Id.* The email further asks the probation officer to not enforce the terms and conditions of the Defendant's probation sentence[5] or order the Defendant to register as a sex offender. *Id.*

At this time, irrespective of any proceedings currently pending with the Court of Appeals, there is an active sentencing order from this Court that requires the Defendant to follow certain probation conditions and register as a Tier 3 sex offender. For the reasons discussed below, the Tribe respectfully requests that the terms of this Court's sentencing order be enforced. The Tribe further requests that an emergency hearing regarding this motion be set considering the nature of the case and the short length of the Defendant's probationary term.

II. Law:

Contrary to the contents of Tribe's Attachment A, the filing of an appeal with the Pascua Yaqui Court of Appeals does not result in an automatic stay of a trial court's order except in certain very limited situations. Instead, a party must request a stay. 3 PYTC § 2-3-250(A)(1)[6] provides

---

[5] Specifically, the email indicates that the Defendant should not be charged probation fees, should not be ordered to attend treatment, and should not be required to physically go to the probation office. *Id.*

[6] Although the Pascua Yaqui Tribal Code was amended in October, 2022, the Pascua Yaqui Rules of Appellate Procedure (PYTRAP) were unaffected by those amendments.

that an appellant — in this case, the Defendant — "may file with the trial court a motion for a stay of execution of its judgment, order, or conviction at any time after the decision is final." If the trial court denies the request for stay, the reason(s) for the denial "shall be set forth in writing." "If the trial court denies the motion for stay, and only in such case, a petition for a stay may be filed with the appellate court clerk, and the chief justice may grant the stay upon any conditions that protect the interests of the parties. 3 PYTC § 2-3-250(C)(1); *see also* 4 PYTC § 4-220 (pre-2022 sentencing code indicating that the trial court "*may* stay the execution of judgment" upon the filing of an appeal) (*emphasis added*); *c.f. Amador v. Leyva*, CA-15-001 (PYT Ct. App. 2015) (dismissal of a civil appeal where the appellant failed to file a copy of the notice of appeal with the trial court and noting the discretionary nature of stays).

While local appellate procedural rules do not allow for automatic stays of criminal cases, the pre-2022 criminal procedure rules[7] included allows for a sentence to be stayed in certain specific and limited situations. None of those situations apply to this case. Former 3 PYTC § 2-2-490(A) indicates that, "[a]t the time of sentencing, the trial court may" allow a defendant to post an appellate bond, to allow a defendant to remain on their own recognizance pending an appeal or may deny the issuance of an appellate bond. The execution of a defendant's sentence is stayed *only* "when [a] defendant posts an appeal bond in accordance with the order of the trial court, or when the appeal is taken on the defendant's own recognizance." 3 PYTC § 2-2-490(B). If a defendant's request for an appellate bond is denied, the defendant may then petition the Court of Appeals "to stay the execution of sentence," or to modify the defendant's release conditions. 3

---

[7] The current criminal procedure rules include a similar mechanism within 3 PYTC § 2-2-850. The current rule is substantially similar to the pre-2022 version.

PYTC § 2-2-490(C). In this case, although the Defendant filed a motion requesting the issuance of an appellate bond, that motion did not include a request for a stay of his sentence or his reporting and registration requirements. The Defendant also neglected to pursue the matter with this Court once the motion was filed.

Both the trial court and appellate court records lack any indication that the Defendant's sentence is to be stayed pending resolution of his appeal. Indeed, the Defendant has finished serving the incarceration portion of his sentence. This Court's Sentencing Order remains valid, and it is inappropriate for either party — *ex parte* or otherwise — to seek its selective enforcement outside of the normal judicial process. The Tribe, therefore, respectfully requests that this Court order that the Defendant comply with all remaining terms of his sentence. Specifically, the Tribe requests that the Defendant be directed to comply with the sex offender registration requirements associated with his sexual abuse conviction under Count Three. The Tribe further requests that the Defendant be required to comply with all conditions and reporting requirements of the probation sentence imposed as to his liquor violation conviction under Count One.

As noted above, an appeal has been pending in this matter since June of 2023, and final briefing was submitted in October of 2023. Because an appeal is pending, a courtesy copy of this Motion will be submitted to the Court of Appeals to ensure completeness of the record.

Respectfully submitted this 24th day of January, 2024,

Coleen Thoene
Deputy Prosecutor
Pascua Yaqui Prosecutor's Office
Coleen.Thoene@pascuayaqui-nsn.gov

Russell Boatwright
Deputy Prosecutor
Pascua Yaqui Prosecutor's Office
Russell.Boatwright@pascuayaqui-nsn.gov

ORIGINAL of the forgoing filed/e-filed this 24th day of January with:

Clerk of the Court
Pascua Yaqui Tribal Court

Copy of the foregoing delivered/mailed/emailed provided to:

Mark Willimann
Attorney for the Defendant

Attachment A

Probation Email Dated January 23, 2024

Coleen Thoene

From: Daniel Tirpak II
Sent: Tuesday, January 23, 2024 3:07 PM
To: Coleen Thoene
Subject: Fw: PYT v. Cruz, on appeal...

Here it is

From: Mark Willimann <mark.willimann@pascuayaqui-nsn.gov>
Sent: Tuesday, January 23, 2024 12:00 PM
To: Daniel Tirpak II <Daniel.TirpakII@pascuayaqui-nsn.gov>
Subject: PYT v. Cruz, on appeal...

Good morning, Daniel!

Here is the story on Mr. Feliciano Cruz. Technically, he has filed an Appeal with the PYT Appellate Court. This means, the Tribal Court's ruling that he is guilty and the sentence to jail and probation are "stayed" pending the end of the appeal process.

I told him that I did not want to have to fight this out in court, and for the time being, to report to you so you can be aware of his residence, at the same time, I would ask you NOT TO DO THE FOLLOWING UNTIL THE APPEAL PROCESS IS OVER:

1. Charge him probation fees.
2. Order him to treatment.
3. Order him to register as a sex offender.
4. Physically go to the probation office.

The reason why: An "appeal" suspends all lower court rulings until it is finally decided. The only reason that I did not file to suspend his jail sentence was because by the time I had the basis to argue for release, he had only 45 days left to serve, and it would be ridiculous for him to get out and then go back in if his appeal was rejected.

I invite you to call me at 5103 if you have any questions.

Be well,

Mark

Attachment B

Sentencing Order, *PYT v. Cruz*, CR-21-077
(June 14, 2023)

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE Plaintiff,	**CASE NO. CR-21-077**
vs.	**ORDER**
CRUZ, FELICIANO, JR. Defendant.	**SENTENCING HEARING**

On May 22, 2023, the above matter came before the Court for a Sentencing Hearing. Coleen Thoene and Russell Boatwright appeared for the Tribe. Yvette Alvarez appeared from Pretrial Services/Probation. Also appearing were Sonia Laventure with Victim Services, and the victim and her family. The Defendant appeared in custody with his Legal Counsel, Alonzo Corral. The Court heard recommendations from the Tribe, the Defense, and Probation. The parties presented aggravating and mitigating factors to support their recommendations.

IT IS ORDERED that the Defendant, Feliciano Cruz, Jr., having been found guilty of Count One (1), Liquor Violation and Count Three (3), Sexual Abuse, shall be sentenced as follows:

CR-21-077, Count One, (1), Liquor Violation:

1) One year of detention suspended for one year of supervised probation;
2) Detention days shall run CONSECUTIVELY to the detention days imposed in Count Three (3) in the above captioned case number.
3) Defendant shall report to the Probation Department within 48 hours of his release from Detention days imposed in Count Three (3);
4) Defendant shall abide by all standard and special conditions of probation;
5) Defendant shall pay probation fees to be determined by probation department and due the first of each month;

6) **DEFENDANT SHALL HAVE NO CONTACT WITH VICTIM/MINOR J.M. (DOB: 06/03/2006) AND HER RESIDENCE, EFFECTIVE IMMEDIATELY, TO LAST THROUGHOUT THE ENTIRE DURATION OF HIS PROBATION.**

CR-21-077, Count Three, (3), Sexual Abuse:

1) 8 Months of detention to serve;

2) Detention days shall run CONSECUTIVELY to the detention days imposed in Count One (1) in the above captioned case number.

3) Defendant shall register as a Tier 3 Sex Offender.

IT IS FURTHER ORDERED that the Defendant shall receive credit for time served in the amount of 24 days. As eight (8) months of detention equals 243 days, the total days to serve shall be 219, which includes the 24 days of credit for time served being applied. THEREFORE, THE DEFENDANT'S RELEASE DATE IS:

WEDNESDAY, DECEMBER 27, 2023, AT 8:00 A.M.

IT IS FURTHER ORDERED that if the parties wish to argue to the Court that the calculation is incorrect, they have leave to file the appropriate pleading.

IT IS FURTHER ORDERED that the $1,000.00 bond is exonerated.

IT IS FURTHER ORDERED that the issue of restitution shall be held in abeyance for 60 days. The Tribe shall file a request for restitution or a motion to waive restitution before the expiration of the 60 days or any requests for restitution will be denied.

SO ORDERED ON THE 22ND DAY OF MAY, WITH A WRITTEN ORDER ISSUED ON JUNE 14, 2023.

Veronica Darnell
Judge, Pascua Yaqui Tribal Court

Cc:
Date: 06/15/23
✓ Tribe ✓ Defendant/Counsel ✓ Pre-trial/Probation ✓ Detention ___ Victim Advocate
Clerk: KM

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA

Pascua Yaqui Tribe

Vs.

Defendant: Cruz, Feliciano

STANDARD CONDITIONS OF PROBATION/PAROLE

Docket No: CR-21-077

1. Obey all laws and court orders. Notify the probation officer within 24 hours of contact with any law enforcement agency.
2. Report to the probation officer as directed by the Tribal Court or probation officer. Obey the lawful orders of the probation officer.
3. To participate in education, training, treatment and/or counseling programs as directed by the court or probation officer. Sign any release of information forms required by the agency and/or probation officer.
4. Not associate with any person who is in violation of the law or any convicted felon or any person on probation or parole in any jurisdiction
5. Not possess or control any firearm(s), ammunition and/or prohibited weapons. Shall report all and any types of weapons located at their given address to the probation officer.
6. To grant the probation officer safe access to your residence and property, to submit to search and seizure as directed by the probation officer.
7. Be subject to arrest without a warrant, by the probation officer or law enforcement officer, if there is reason to believe I may have violated any condition(s) of probation. Waive extradition for any probation revocation proceedings.
8. Notify the probation officer of current address or change of address within 72 hours. Not leave the State of Arizona without first securing approval of the court and/or probation officer.
9. Not possess or use marijuana, dangerous drugs, narcotics, or drug paraphernalia, except as prescribed for you by a physician or dentist in accordance with the laws of the Pascua Yaqui Tribe. Shall be subject to random urinalysis or oral fluid collection testing by the DT Lab Services or any certified lab facility or lab technician as directed by the probation officer or law enforcement.
10. Shall not indulge in the use of intoxicating liquor. Shall be subject to random breathalyzer testing as directed by the probation officer.
11. I understand the probation officer will be preparing monthly reports as to my compliance with these conditions and these conditions and that those reports will be submitted to both the tribal court and the prosecutor's office.
12. I understand that the probation officer can modify any condition of probation at any stage during the probation term.
13. I will provide a valid state or tribal I.D. within two weeks to the probation officer
14. I have personally read, understand, and agree to abide by all of the proceedings terms and conditions of standard probation as of today's date. I understand that my failure to comply with one or more of the above conditions could result in my arrest and/or return to tribal court. I also understand that my continued violation of any one or more of the above conditions while on probation may result in an unsatisfactory discharge from probation at the conclusion of my Court ordered probation period.

Defendant's signature — 5/22/2023 Date

Veronica Daweed — 5-22-2023 Judge's signature Date

Attachment C

Notice of Appeal, *PYT v. Cruz*, CR-21-077
(June 27, 2023)

Pascua Yaqui Public Defender
4725 W Calle Tetakusim, Building B
Tucson, Arizona 85757
(520) 883-5013

Mark F. Willimann, Esq.
PYT Bar No: 10391 AZ Bar No: 017556

THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,

Plaintiff,

vs.

CRUZ, FELICIANO, JR.,

Defendant.

CR-21-077

NOTICE OF APPEAL

Feliciano Cruz, Jr., Defendant, by and through the Pascua Yaqui Public Defender's Office, Rafael Gallego, Esq., Chief Defender, and his Deputy Public Defender, Mark F. Willimann, Esq., respectfully submits this Notice of Appeal of all of the Tribal Court's pre-trial and trial rulings, the finding of sufficiency of the evidence to support guilty verdicts, and the sentence imposed.

//

//

This Notice is timely as it was filed within 30-days of the Tribal Court's June 14, 2023, "ORDER: Sentencing Hearing.

RESPECTFULLY SUBMITTED this 27 June 2023.

Rafael Gallego
Pascua Yaqui Chief Public Defender

/s/ Mark F. Willimann
Mark F. Willimann, Esq.
Attorney for Feliciano Cruz, Jr.

Attachment D

Notice, *Cruz v. PYT*, CA-23-002 (July 27, 2023)

CA-23-002

PASCUA YAQUI TRIBE COURT OF APPEALS

Feliciano Cruz Jr., Appellant

Vs.

Pascua Yaqui Tribe, Appellee,

NOTICE

Appeal of a decision of the Pascua Yaqui Tribal Court in Case Number CR-21-077, the Honorable Veronica Darnell presiding.

Coleen Thoene, Pascua Yaqui Office of the Prosecutor, Tucson, AZ 85757, for the Appellee

Rafael Gallego, Pascua Yaqui Public Defenders Office, Tucson, AZ 85757 for the Appellant

****

Pursuant to 3 PYTRAP Rule 120(a) the Clerk (Acting) of the Pascua Yaqui Court of Appeals hereby gives notice that the record in the above-captioned matter has been received and is complete. The appellant shall submit his brief thirty (30) days from the 27th day of July 2023.

Benjamin Casey, Administrative Attorney

Sent via electronic mail this 27th day of July 2023 to:

Rafael Gallego: rafael.gallego@pascuayaqui-nsn.gov

Mark Willimann: mark.willimann@pascuayaqui-nsn.gov

Colleen Thoene: coleen.thoene@pascuayaqui-nsn.gov

Russell Boatwright: russell.boatwright@pascuayaqui-nsn.gov

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA

Feliciano Cruz Appellant vs. PASCUA YAQUI TRIBE, Appellee	APPELLATE CASE NO: CA-23-002 TRIBAL COURT CASE NO: CR-21-077

APPELEE'S RESPONSE BRIEF

Malena Acosta,
Chief Prosecutor
Coleen Thoene,
Russell Boatwright
Deputy Prosecutors
Pascua Yaqui Office of the Prosecutor
7777 S. Camino Huivisim
Bldg. A, 2nd Floor
Tucson, AZ 85757
Telephone: (520) 876-6251
Malena.Acosta@pascuayaqui-nsn.gov
Coleen.Thoene@pascuayaqui-nsn.gov
Russell.Boatwright@pascuayaqui-nsn.gov

Attorneys for the Pascua Yaqui Tribe

TABLE OF CONTENTS-

TABLE OF AUTHORITIES

REQUEST FOR ORAL ARGUMENT

Defendant/Appellant raises a single issue on appeal, which appears to contain a number of subsidiary issues. Appellant has not requested an oral argument be set. However, the Tribe believes that oral arguments would be beneficial given that the issues raised by this appeal are matters of first impression for this Court. The Tribe, therefore, requests that the matter be set for an oral argument pursuant to 3 PYTC § 2-3-180.

STATEMENT OF JURISDICTION

The Pascua Yaqui Tribal Rules of Appellate Procedure grant parties the right to appeal in most, but not all, circumstances. *See generally* 3 PYTC § 2-3-30, *et seq.* A criminal defendant has the right to appeal his conviction and any sentence imposed by the trial court. *See generally PYT v. Valenzuela*, CA-19-001, p.1 (App. 2019). Appellant is an enrolled member of the Pascua Yaqui Tribe and was convicted of offenses that occurred within the physical boundaries of the Pascua Yaqui Reservation. Thus, this Court has jurisdiction over this appeal.

STANDARD OF REVIEW

Pure questions of law are to be reviewed *de novo, PYT v. Soto,* CA-06-010 (App. 2007). Questions of fact are reviewed "under a deferential, clearly erroneous standard" in recognition that the trial court "is in a superior position to judge the accuracy of witnesses' recollections and make credibility determinations in cases in which live testimony is presented." *United States v. Lang*, 149 F.3d 1044, 1046–47 (9th Cir.), *amended by* 157 F.3d 1161 (9th Cir. 1998) (*citations and quotations omitted*). However, this case adds an additional element to the Court's analysis because one of the issues raised by Appellant in his appeal was never raised at the trial court level. This issue specifically concerns the sufficiency of the charging document and its incorporated "to-wit"

language." Based on the Tribe's research, it does not appear that this Court has ever addressed the appropriate standard of review when an argument is raised for the first time on appeal. In the absence of relevant local precedent, the Court may look to relevant state and federal law as persuasive authority. *PYT v. Miranda*, CA-08-015, p.22 (App. 2009). Looking to the Arizona and federal systems, it is clear that any issue not raised at the trial court level may only be reviewed for fundamental or plain error.

Arizona uses the term, "fundamental error." When a defendant fails to object to errors at the trial court level, he is not entitled to appellate relief "unless the court committed error that was both fundamental and prejudicial." *State v. Escalante*, 245 Ariz. 135, 140, 425 P.3d 1078, 1083 (2018); *State v. Hood*, 251 Ariz. 57, 61, 484 P.3d 636, 640 (App. 2021). "[T]he first step in fundamental error review is determining whether trial error exists." *Escalante, 245 Ariz.* at 142, 425 P.3d at 1085. If an error occurred, the reviewing court must next consider whether the error was fundamental. *Id.* "A defendant establishes fundamental error by showing that (1) the error went to the foundation of the case, (2) the error took from the defendant a right essential to his defense, or (3) the error was so egregious that he could not possibly have received a fair trial." *Id.*[1]

While federal courts typically use the term "plain error," their review is similar to that of Arizona. Under federal law, an error is plain "when: (1) there was error, meaning a deviation from a legal rule that is not waived; (2) the error is plain, meaning clear or obvious; (3) the error was prejudicial, meaning a reasonable probability exists that it affected the outcome of the [lower] court proceedings; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Tydingco*, 909 F.3d 297, 304 (9th Cir. 2018) (quoting

---

[1] The *Escalante* court went on to note that if a defendant makes a showing of error that fits within either of the first two prongs, the defendant must then make an additional showing of prejudice." *Id.*

United States v. Conti, 804 F.3d 977, 981 (9th Cir. 2015), and *United States v. Olano*, 507 U.S. 725, 734, 736 (1993)) (*internal quotations omitted*).

The Tribe urges this Court to employ a similar fundamental or plain error analysis in this case with regards to Appellant's argument as to the form or sufficiency of the complaint. Such argument could have been raised at some point during the lengthy period that this case was pending at the trial court level.[2]

ISSUES PRESENTED FOR REVIEW

1. Did the trial court err as a matter of law in finding Appellant guilty of the crime of Sexual Abuse when evidence introduced at trial showed that Appellant had touched and rubbed the buttocks of the fourteen-year-old victim, J.M., without her consent?

2. Does language contained in a "to wit" section of a charging document remove the requirement that the prosecution prove all of the statutory elements of an offense at trial, or otherwise require the fact finder to ignore evidence establishing proof of guilt beyond a reasonable doubt?

[2] Appellant's case was initiated via a criminal complaint in February of 2021. Trial occurred in April of 2022, and Appellant was sentenced in May of 2023 after having been arrested on a bench warrant.

STATEMENT OF THE CASE

I. Facts and Proceedings Below:

A. Facts:

The facts discussed below are taken from the transcript of the bench trial that was held on April 27, 2022. Appellant's brief relies upon the probable cause statement attached to the original criminal complaint, which was filed in this matter on February 14, 2021. It is the Tribe's understanding that Appellant has electronically transmitted the full trial transcript to this Court's appellate clerk.

The victim in this case, J.M., was born in 2006, Transcript, Trial, *PYT v.* Cruz, CR-21-077, p.24 (April 27, 2022) [*hereinafter* "Transcript"]. She was fourteen years old at the time of the charged offenses. *Id.* at 187. She knew Appellant, Feliciano Cruz, because he had previously been in a relationship with her "Tia," Erica Mendoza. *Id.* at p.28.[3] J.M. had met Appellant a couple of years prior to the charged incident. *Id.* at 29. Her older sister, Alicia Montano, also knew Appellant. *Id.* at 30. J.M. had been to Appellant's house[4] prior to February, 2022, while Appellant and Erica were still in a relationship. *Id.* at 33. J.M. had last visited the residence about a year prior to the offense date. *Id.*

Appellant was ultimately charged for offenses that occurred during the early morning hours of February 14, 2021; however, the circumstances leading up to the offense actually began the day prior. On February 13, J.M. was hanging out with her sister, Alicia, at home. *Id.* at 31. At some point, Alicia asked J.M. if she wanted to go with her to Appellant's house. *Id.* at 32. Alicia had wanted to get a tattoo from Appellant. *Id.* at 145. J.M. decided to go after obtaining permission from her mother. *Id.* at 34-35. The sisters arrived at Appellant's house sometime that evening. *Id.*

---

[3] Erica Mendoza was not involved in Appellant's case and was not called to testify at trial.
[4] Appellant's residence was located on the Pascua Yaqui reservation. *Id.* at 36.

at 37. An adult female, Diana, was also at the house with the sisters and Appellant. *Id.* at 39-40.[5] Early in the evening, Alicia obtained a tattoo from Appellant, a process which took approximately an hour. *Id.* at 154-55. The group ate pizza before sitting on a couch in the residence to watch a movie. *Id.* at 41. J.M. was sitting next to her Alicia, who was laying on an extended edge section of the couch. *Id.* at p. 42-43.

At some point, Diana left the house and was gone for approximately fifteen to twenty minutes. She was walked out by Appellant. *Id.* at 41, 43, 157. After walking Diana out, Appellant returned and sat next to J.M. on the couch on the side opposite from Alicia. *Id.* at 41, 43. Although J.M. described Appellant as initially not being "that close" to her, she testified that "he kept getting close." *Id.* at 43, 45, 47.[6] When Diana returned to the residence, everyone but J.M. got off the couch. *Id.* at 48-49, 160. The adults talked for an unknown period of time before sitting back down on the couch and taking the same places they had occupied previously. *Id.* at 50. According to J.M., when Appellant sat down, he was in the same position he had been in earlier at the point where he had moved closer to J.M. *Id.* at 50-51.

Appellant told J.M. and Alicia that they could get a blanket if they wanted one. *Id.* at 51. J.M. got up to use a bathroom and was about to get a blanket when Appellant told her he and Diana would get it, instead, because there were items on the bed. *Id.* at 51, 56. J.M. returned to her spot on the couch but moved closer to her sister. She did this because Appellant's earlier attempts to sit ever closer to her made her feel uncomfortable. *Id.* at 51-54. Appellant handed J.M. a blanket, which J.M. put over herself, and Appellant sat back down next to her. *Id.* at 56, 57. The group then continued watching the movie. *Id.* at 58.

---

[5] J.M. could not remember Diana's name while testifying on direct, only that her name started with a "D." *Id.* at 40. She later agreed during cross-examination that the woman's name could have been Diana. *Id.* at 152

[6] Based on the contents of the trial transcript, J.M. visually demonstrated the distance Appellant was initially from her using the edge of the witness stand as a point of reference from where she was seated while testifying. *Id.* at 44.

About 2:00 a.m. on February 14, *Id.* at 123-124, 139, as the group continued to watch the movie, Appellant again moved closer to J.M. and put his hand under the blanket. Appellant then started "rubbing" J.M.'s buttocks and put his hand into the right rear pocket of the jeans she was wearing. J.M. tried to "scoot[] away, only to have the Appellant pull her back towards him while keeping his hand under the blanket. *Id.* at 60-61, 161. When asked to describe at trial how Appellant had touched her, J.M. testified that Appellant's hand was "moving," and "was rubbing [her] butt...." *Id.* at 63.

J.M. again tried to move away from Appellant and closer to her sister, who was occupied looking at her phone. Appellant pulled J.M. back towards him by her pants' belt loop. *Id.* at 63-65. Appellant then put his hand "in [J.M.'s] underwear." *Id.* at 66-69. J.M. testified at trial that Appellant "put his hands inside [her] pants, and then he started going down and rubbing" her buttocks. *Id.* at 66. She described how he was rubbing "everywhere," and said Appellant pulled her back towards him whenever she tried to move away. *Id.* at 67.[7] J.M. testified that she "didn't want [Appellant]" to touch her and that his actions made her feel "scared" and "uncomfortable." *Id.* at 70, 113. The entire time Appellant was touching J.M.'s buttocks and pulling her towards him, his hand remained under the blanket covering J.M. *Id.* at 71.

Feeling unable to get away, J.M. texted her sister, Alicia, and told her that she wanted to leave but did not give a reason a why. *Id.* at 115. Alicia asked J.M. to come with her to the restroom. *Id.* at 115. Once in the relative safety of the restroom, J.M. told Alicia what Appellant had done to her. *Id.* at 117. Alicia told J.M. to get her belongings, and they both prepared to leave. Alicia confronted Appellant about what he had done. The sisters left Appellant's house and went to the nearby residence of one of Alicia's acquaintances[8] to call 911. *Id.* at 120. After speaking

---

[7] J.M. also described that, in addition to rubbing her buttocks, Appellant attempted to touch her vagina but did not penetrate her. *Id.* at 67-69, 94-95, 178

[8] The residence belonged to the mother of Alicia's ex-boyfriend. *Id.* at 120.

with police, J.M. was taken to a nearby hospital for evaluation.[9] No forensic evidence was ever collected or tested.

Two Pascua Yaqui law enforcement officers testified at trial. An officer who initially responded to the scene testified that J.M. was visibly distressed and crying when he first saw her on February 14th. *Id.* at 283. A detective testified that he was present during an FBI interview of the Appellant. During that interview, Appellant claimed that neither J.M. nor her sister were at his residence, which was different than what he had previously told other officers. *Id.* at 365, 370. J.M.'s sister, Alicia, also testified at trial; however, her testimony was stricken in its entirety.[10]

B. Procedural History:

On February 14, 2021, the Appellant was charged with the following offenses: 1) Contributing to the Delinquency of a Minor, committed in violation of 4 PYTC § 1-80(A); 2) Liquor Violation, committed in violation of 4 PYTC § 1-640(A); 3) Public Sexual Indecency to a Minor, committed in violation of 4 PYTC § 2-30(A)(1); 4) Sexual abuse, committed in violation of 4 PYTC § 2-40(A). *See* Criminal Complaint, *PYT v. Cruz*, CR-21-077 (Feb. 14, 2021). An initial hearing was held that same date, at which probable cause was found based on the probable cause statement attached to the criminal complaint. Initial Hearing and Order Setting Arraignment Hearing, *PYT v. Cruz*, CR-21-077 (Feb. 14, 2021). The case was initially set for a jury trial but was later converted to a bench trial at Appellant's request. The Defendant ultimately requested that the matter be set for a bench trial. Order Motion to Vacate Jury Trial/Motion to Convert Jury Trial to Bench Trial, PYT v. Cruz, CR-21-077, (Jan. 6, 2022)

---

[9] In addition to describing the manner in which Appellant touched and rubbed her buttocks, J.M. also described how Appellant had given her a Pepsi. Although she had taken a sip of the soda, she noticed that it some type of fruity or cucumber-tasting liquor was mixed in with it. She ultimately set the drink on the floor near where she was sitting on the sofa. *Id.* at 124-128, 141, 185.

[10] Alicia's trial testimony was stricken because court security had witnessed her mother appear to nod and shake her head at Alicia while she was testifying. According to the record, this behavior only occurred when Alicia was testifying about the timing of J.M.'s hospital visit. The mother did not exhibit similar behavior when J.M. testified, or when Alicia described events that happened in Appellant's residence. *Id.* at 292-339.

On December 9, 2021, the Tribe moved to amend the language listed for Count Four of the February 14, 2021 complaint to bring that charge into conformity with the language of 4 PYTC § 2-40(A), which references "sexual contact" as opposed to "sexual conduct." *See* Motion to Amend Complaint, *PYT v. Cruz*, CR-21-077, p.1 (Dec. 9, 2023). The trial court granted the motion to amend on December 22, 2021. Order: Motion to Amend Complaint, *PYT v. Cruz*, CR-21-077 (Dec. 22, 2021).

On January 6, 2022, the Tribe filed a second amended complaint that removed the Contributing to the Delinquency of a Minor charge that had been originally listed as Count 1 and renumbered the remaining counts. *See* Amended Criminal Complaint, *PYT v. Cruz*, CR-21-077 (Jan. 6, 2022). The amended complaint also included a new time range for when the offenses were committed. *Id.*; *also* Motion to Dismiss without Prejudice/Amend Complaint, *PYT v. Cruz*, CR-21-077 (Jan. 6, 2022). The trial court granted the motion to amend. Order: Motion to Dismiss without Prejudice/Amend Complaint, *PYT v. Cruz*, CR-21-077 (Jan. 6, 2022).[11]

A bench trial was held on April 27, 2022, where the facts as described above were elicited. The trial court took the matter under advisement and ultimately found Appellant guilty of the following crimes: Count 1, Liquor Violation, and Count 3, Sexual Abuse. Order: Bench Trial, *PYT v. Cruz*, CR-21-077 (Apr. 28, 2022).[12] Specifically as to its finding of guilt as to the Sexual Abuse charge, the trial court stated, in part, as follows:

> J.M. testified that the Defendant sat beside her on the couch at the Defendant's home and put his hands under a blanket that he had provided her after providing her with liquor. J.M. testified that the Defendant then put his hands on the back pocket of her jeans. She testified that she tried to move away and he pulled her closer to him by the belt loop of her jeans. She testified that the Defendant again pulled her closer and then put his hand inside the

---

[11] After the final amendment and renumbering of listed offenses, the Defendant faced the following charges: 1) Liquor Violation, committed in violation of 4 PYTC § 1-640(A); 2) Public Sexual Indecency to a Minor, committed in violation of 4 PYTC § 2-30(A)(1); and 3) Sexual abuse, committed in violation of 4 PYTC § 2-40(A).

[12] While the Tribe agrees in principle with Appellant's statement in his opening brief, *see* Opening Brief at p.5, that his acquittal as to Count 2 was the result of a misinterpretation of 4 PYTC § 2-30(A)(1), it is the Tribe's belief that proof of that count would have relied in no small part on Alicia's testimony. Because Alicia's testimony was stricken in its entirety, the Tribe elected to not file a cross appeal on that issue and asks that the court not consider the propriety the trial court's interpretation of 4 PYTC § 2-30(A)(1) at this time.

> back of her jeans. She stated that he again pulled her back to him and then he put his hands on the inside of her underwear on her bottom. She stated she again pulled away from him and again he pulled her closer, *rubbing her buttocks lower and lower*.

Id. at p.2 (*emphasis added*)

Prior to sentencing, Appellant filed a motion asking the trial court to reconsider its verdict. Motion to Reconsider Verdict, *PYT v. Cruz*, CR-21-077 (May 25, 2022). Appellant's Motion to Reconsider focused on the perceived credibility of witnesses and whether sufficient evidence supported his convictions. *Id.*[13] Appellant's Motion was denied on August 17, 2022. Order: Motion/Sentencing Hearing, *PYT v. Cruz*, CR-21-077 (Aug. 17, 2022). The Appellant failed to appear for sentencing and a warrant issued for his arrest on August 17, 2022. *Id.* He was ultimately arrested on May 5, 2023, and was subsequently sentenced on May 22, 2023. As to the Sexual Abuse charge, Appellant was ordered to serve eight months of detention and to register as a Tier 3 sex offender upon his release. For the Liquor Violation charge, Defendant was ordered to serve one year of supervised probation consecutive to his term of incarceration. One year of additional jail time was suspended as a condition of that probation. Order: Sentencing Hearing, *PYT v. Cruz*, CR-21-077 (May 22, 2023).

II. Summary of the Argument

Appellant correctly notes in his opening brief that "the Tribe was obligated to prove to the trial [c]ourt that Cruz 'fondl[ed] or minipulat[ed] [*sic*] J.M.'s buttocks without her consent." Opening Brief, p. 11 (*alterations in original*). The Tribe did precisely that. The Tribe elicited testimony from J.M. at trial showing that Appellant repeatedly touched and rubbed her buttocks, first over her jeans and in her pocket. J.M. also described how Appellant then moved his hand lower, reaching under her jeans and underwear to continue to rub her buttocks. Because the testimony showed that Appellant's actions met the statutory definition of unconsented sexual

---

[13] Appellant's motion to reconsider did not address either the definitions of fondling or manipulation, or whether there were any legal issues with the charging document.

contact, his conviction of Sexual Abuse under 4 PYTC § 2-40(A) was both factually and legally supported. For this reason, Appellant's conviction should be affirmed.

Appellant additionally claims that the manner in which the complaint was drafted allowed the trial court to convict Appellant of behavior that did not meet the statutory definition of "sexual contact." Appellant's argument fails for two reasons. First, although the Pascua Yaqui Court of Appeals has never addressed this issue, persuasive authority from other jurisdictions has held that language contained in a "to wit" does not change the statutory elements of an offense. Second, the trial court based its ruling on specific evidence showing that Appellant had repeatedly rubbed J.M.'s buttocks. Under any standard of review, plain error or otherwise, it is clear that no error occurred. Accordingly, Appellant's request for relief should be denied and his conviction for Sexual Abuse should be affirmed.

LAW AND ARGUMENT[14]

I. Evidence Introduced at Trial Demonstrated Beyond a Reasonable Doubt that Appellant's Actions Met the Statutory Definition of Sexual Contact, and the Statutory Elements of Sexual Abuse.

Appellant's argument that his conviction as to the Sexual Abuse charge should be overturned hinges upon the statutory definition of "sexual contact" and whether there was evidence presented to the trial court supporting a finding that his conduct met that statutory definition. Contrary to what he argues on appeal, evidence introduced at trial demonstrates that his conduct on February 14, 2021, met the statutory threshold under Pascua Yaqui law.

---

[14] The offenses at issue in this case occurred prior to changes to changes to the Pascua Yaqui Tribal Code that went into effect in October of 2022. Accordingly, unless otherwise specified, all citations to the Tribal Code in this pleading are to the older version that was in effect at the time the offenses were committed.

A. Under a plain language interpretation of Pascua Yaqui law, the act of repeatedly touching and rubbing a person's buttocks constitutes sexual contact within the meaning of 4 PYTC § 2-10(N).

Under Pascua Yaqui law, "[a] person commits sexual abuse by intentionally or knowingly engaging in sexual contact with any person 14 or more years of age without consent of that person or with a person who is under 14 years of age if the sexual contact involves only the female breast. 4 PYTC § 2-40(A). "Sexual Contact" is, in turn, defined as "any direct or indirect fondling or manipulating any part of the genitals, anus, groin, inner thigh, buttocks or female breast." 4 PYTC § 2-10(N). There is no Pascua Yaqui case law interpreting either statute, nor is there any caselaw defining the terms "fondling" or "manipulating" in the context of sexual offenses.

4 PYTC § 2-40(A) is nearly identical to the current Arizona sexual abuse statute. A.R.S. § 13-1404(A) differs only in that it requires a showing that the victim was at least fifteen years old at the time of the offense unless the contact at issue "involves only the female breast." Arizona defines "sexual contact" as "any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing any person to engage in such contact." A.R.S. § 13-1401(A)(3).[15] As with Pascua Yaqui, Arizona law is silent as to any statutory definition of "fondling" or "manipulating." Even so, the Arizona Court has indicated that "because there is no indication that the Legislature intended that either word be given an extraordinary meaning, reference to an established, widely respected dictionary for the ordinary meaning of these words is acceptable." *State v. Wise*, 137 Ariz. 468, 470, 671 P.2d 909, 911 (1983). In doing so, the Arizona Supreme Court in *Wise* defined "fondle" as "to handle or touch lovingly affectionately, or tenderly." *Id.*[16] It defined "manipulate" as "to handle, manage, or

---

[15] Arizona's law, unlike that of Pascua Yaqui at the time this case was charged, also included sexually motivated touching within its definition of sexual contact. *Id.*

[16] The definition used in *Wise* is similar to the one proposed by Appellant in his Opening Brief, at p.13.

use, esp. with skill, in some process of treatment, or performance." *Id.*[17] *Wise* similarly noted that "[t]hough fondling denotes tenderness or gentleness, manipulating does not." *Id.*

Pascua Yaqui similarly supports reliance on an ordinary or plain meaning analysis when statutory definitions are lacking. For instance, 1 PYTC § 2-30(A) indicates that "[w]ords shall be given their plain meaning and technical words shall be given their usually understood meaning where no other meaning is specified." The Tribal Code "shall be construed as a whole to give effect to all its parts in a logical, consistent manner." 1 PYTC § 2-30(B). "Criminal offense ordinances shall be construed according to the fair import of their terms, *with a view to affect their object and promote justice*." 1 PYTC § 2-30(H) (*emphasis added*). In the event that the meaning of a particular term used within the Tribal "Code is not clear on its face or in the context of the Code, such term shall have the meaning given to it by the laws of the State of Arizona, *unless* such meaning would undermine the underlying principles and purposes of this code. 1 PYTC § 2-30(H). The Tribe submits that the terms "manipulating" and "fondling" should be given their ordinary, common sense meanings.

So, then, the question in this case becomes whether Appellant's actions in this case — described by J.M. at trial as his hand repeatedly "rubbing" her buttocks "everywhere" even as he moved his hand lower in an attempt to touch her genitalia — constituted "manipulating" or "fondling." As will be discussed in more detail below, both the Tribal Code and common sense clearly dictate an affirmative answer.

---

[17] The Tribe notes that in proposing a dictionary definition for the term, "manipulating," Appellant lists only one of the potential definitions included in the Merriam-Webster entry for this term. According to Merriam-Webster, "manipulating" includes the following additional definitions: 1) "to treat or operate with or as if with the hands or by mechanical means especially in a skillful manner," 2) "to manage or utilize skillfully," and "3) to change by artful or unfair means so as to serve one's purpose." *See* "http/merriam-webster.com/dictionary/manipulate", (last visited Sept. 26, 2023).

B. Under a plain language interpretation of Pascua Yaqui law, Appellant's conduct amounted to sexual abuse of J.M.

Pure questions of law are generally reviewed *de novo*. *See Soto,* CA-06-010 at p.8. "A primary reason for showing no deference on pure legal questions is that appellate judges are freer to concentrate on legal questions." *United States v. Lang*, 149 F.3d 1044, 1046–47 (9th Cir.), *amended by* 157 F.3d 1161 (9th Cir. 1998) (*internal citations and quotations omitted*). However, this is not the case when it comes to reviewing the sufficiency of the evidence supporting a conviction. When examining the propriety of a defendant's conviction, "the standard of review is whether there is substantial evidence" supporting said conviction. *United States v. Douglass*, 780 F.2d 1472, 1476 (9th Cir. 1986) Specifically, the Court of Appeals "must determine whether a reasonable jury, after *viewing the evidence in the light most favorable to the government*, could have found the defendants guilty beyond a reasonable doubt of each essential element of the crime charged." *Id.* (*emphasis*). Questions of fact are reviewed "under a deferential, clearly erroneous standard" in recognition that the trial court "is in a superior position to judge the accuracy of witnesses' recollections and make credibility determinations in cases in which live testimony is presented." *Lang*, 149 F.3d at 1046–47 (citations and quotations omitted).[18]

Looking at all of the evidence introduced at trial in the light most favorable to sustaining the verdict, it is clear that Appellant's physical contact with J.M.'s buttocks constituted far more than — as he attempts to characterize it — a simple act of touching. It amounted to sexual contact within the meaning of 4 PYTC § 2-10(N). J.M described how, as she was sitting under a blanket, Appellant put his hand under the blanket. She described how he touched her buttocks. When asked to describe Appellant's actions in more detail, J.M. testified that his hand was "rubbing," "moving," and "was rubbing [her] butt." Transcript at 60-61, 63, 161. At some point, Appellant

[18] Insofar as Appellant argues that there was insufficient evidence to support his conviction at trial, this was an argument that was raised, briefed, and argued before the trial court as part of a motion to reconsider, and which defense counsel argued extensively over the course of the trial.

moved his hands under her pants and, ultimately, lower still to touch her under her underwear. *Id.* at 66-69. J.M. testified that when Appellant "put his hands inside [her] pants," and continued rubbing "everywhere." *Id.* She further testified that his hand continued to move lower as if to touch her genitalia, but that she was able to move away enough to prevent any penetration. *See* Order: Bench Trial,. *Cruz*, CR-21-077 at p.2.

Appellant's hand movements during the incident should not be considered in a vacuum but, rather, in conjunction with his other actions. Every time J.M. tried to pull away under the blanket to be closer to her sister, Appellant used the belt loop of her jeans to pull her back towards him. *Id.* at 63-65. This act of pulling J.M. closer to him so that he could continue touching and rubbing her buttocks also demonstrates that the physical contact that his hand had with J.M. amounted to sexual contact.

When the totality of the evidence introduced at trial is considered in conjunction with a common sense reading of 4 PYTC § 2-10(N), and construed "according to the fair import of [its] terms with a view to affect [its] object and promote justice," 1 PYTC § 2-30(H), it becomes readily apparent that Appellant's conduct constituted sexual contact. Because he had prohibited sexual contact with J.M.'s buttocks, he committed sexual abuse in violation of 4 PYTC § 2-40(A). Accordingly, Appellant's conviction should be affirmed.[19]

---

[19] While Appellant seems to believe that the Tribe was required to prove that his unconsented-to touching of J.M. was done in some sort of loving, tender, or lingering fashion, Opening Brief at p.14, a plain reading of the statute shows that such a requirement is simply not required. If it was, as the Arizona Supreme Court noted in *Wise*, the original code drafters would not have needed to include the word "manipulating" within the statute. *Wise*, 137 Ariz. at 470, 671 P.2d at 911. The Pascua Yaqui Tribal Code, much like the Arizona Code, recognizes that many sexual offenses are committed for reasons relating to power and control, not love or tenderness.

II. The "To-Wit" Language Used in the Criminal Complaint Did Not Change the Statutory Elements of the Offense, and therefore, no Plain or Fundamental Error Occurred.

Appellant's conviction should be affirmed because his conduct — as testified to by J.M., whose testimony the Trial Court found credible — amounted to him having unconsented sexual contact with a minor aged victim. However, Appellant raises an additional argument for the first time on appeal: namely, that the original charging document changed the elements of the 4 PYTC § 4-2-40(A), thereby lessening the prosecution's burden of proof at trial. There is no Pascua Yaqui Appellate Court precedent regarding this issue. Because Appellant raises this argument for the first time on appeal, it must be reviewed for plain or fundamental error. *Escalante*, 245 Ariz. at 140, 425 P.3d at 1083; *Hood*, 251 Ariz. at 64, 484 P.3d at 640; *Tydingco* 909 F.3d at 304., Looking to Arizona law, it is clear that Appellant's argument is unpersuasive.

Appellant's chief contention centers on the "to wit" language used as part of his sexual abuse charge. That charge, as listed in the original complaint, read as follows:[20]

> "On or about February 14, 2021.... Defendant did intentionally or knowingly engage in sexual contact with any person 14 or more years of age without consent of that person or with any person who is under 14 years of age if the sexual contact involves only the female breast, to wit: touched the buttocks of a minor, J.M....." Amended Criminal Complaint, PYT v. *Cruz*, CR-21-077, p.1.

Appellant argues that use of the word "touched" in the "to wit" section somehow overrode the statutory elements requisite for a conviction under 4 PYTC § 2-40(A) and forced the trial judge to find Appellant guilty of conduct that did not rise to the level of sexual contact.

Appellant's argument fails. Pascua Yaquis sexual offense statutes are remarkably similar to the sexual offense statutes used in Arizona. Arizona courts have dealt with versions of the argument raised by Appellant and found them to be unpersuasive. *See Miranda*, CA-08-015 at

---

[20] In his Opening Brief, p. 10-11. Appellant refers to an earlier version of the criminal complaint filed against him and which involved a different time range for the alleged offenses. The complaint was amended on January 6, 2022. The discrepancy bears no weight on the issues presented in this proceeding.

p.22. For instance, in *State v. Marshall*, 197 Ariz. 496, 506, 4 P.3d 1039, 1049 (App. 2000), division one was asked to determine whether the prosecution had created a higher standard of proof by, essentially, adding additional elements in its "to wit" language that did not exist in Arizona's sexual conduct with a minor statute. The Court of Appeals stated that the "[m]ere mention in the indictment of facts that the State intends to elicit in proving the crime does not transform those facts into elements of the offense." *Id.* [21] Federal law appears to follow a similar track. *See United States v. Lopez*, 4 F.4th 706, 726 (9th Cir. 2021), cert. denied, 143 S. Ct. 121, 214 L. Ed. 2d 33 (2022) ("We looked to the requirements of the statute to determine the elements the Government was required to prove, not the language in the indictment.").

A "to wit" section must be read in conjunction with the statutory language it accompanies. Any conduct described as part of a "to wit" section, even if proven, does not constitute a criminal offense on its own if that its language does not meet the standards and elements required by the overarching statute. Appellant cites to no authority supporting his argument to the contrary. The Tribe has, indeed, found no such authority through its own research. Here, the "touched" language included as part of the "to wit" must be interpreted within the framework of 4 PYTC §§ 2-40(A) and 2-10(N). Section 2-40(A) requires a showing that any contact meet the statutory definition of sexual contact. Sexual contact is further defined by § 2-10(N), and has been discussed at length *supra*. Any touching must, therefore, have amounted to manipulation or fondling. As argued extensively above, J.M.'s testimony describing Appellant's repeated acts of touching and rubbing her buttocks over and under her clothing met the statutory requirements.[22] Additionally, it its

---

[21] While additional cases in Arizona discuss the argument raised by Appellant, the cases the Tribe has located are unpublished and carry no precedential effect in any jurisdiction. These cases include *State v. Mendoza*, No. 2 CA-CR 2015-0115, 2016 WL 1376594, at 2 (Ariz. Ct. App. Apr. 7, 2016), and *State v. Stark*, No. 1 CA-CR 11-0625, 2013 WL 2385161, at 5 (Ariz. Ct. App. May 30, 2013).

[22] It is unclear from Appellant's brief as to whether he also argues that the probable cause statement attached to the charging document failed to provide evidence showing that the conduct alleged in this case met the requirements of 4 PYTC § 2-10(N). While this argument would also need to be reviewed for plain or fundamental error, the probable cause statement included by Appellant as the fact section of his brief demonstrates that the argument lacks merit. Specifically, the probable cause statement indicated that J.M. told police Appellant "[m]oved from her back/side to

extensive written verdict, the Trial Court made specific findings that Appellant's hand "rub[ed J.M.'s] buttocks lower and lower. Order, Bench Trial, *PYT v. Cruz*, at p.2. Thus, Appellant's arguments that the trial court was forced to make a finding of guilt based on a mere touching is unpersuasive.

No fundamental error occurred in this case because no error occurred. And Appellant can show no prejudice. Accordingly, Appellant should be denied relief because he has failed to demonstrate that plain or fundamental error occurred. *Escalante*, 245 Ariz. at 140, 425 P.3d at 1083; *Hood*, 251 Ariz. at 61, 484 P.3d at 640. *Tydingco*, 909 F.3d at 304.

CONCLUSION AND REMEDY SOUGHT

The minor aged victim in this case, J.M., provided credible evidence at trial detailing how Appellant, without consent and under the cover of a blanket, touched and rubbed her buttocks. She described how he repeatedly pulled her back towards him so that he could continue to work his hand lower through successive layers of clothing and underwear, continuing to rub her buttocks and attempt other forms of sexual contact. The Trial Court, which was in the best position to be able to evaluate her credibility, found her credible and convicted Appellant of Sexual Abuse because Appellant's conduct amounted to impermissible sexual contact within the meaning of 4 PYTC § 2-10(N). In addition to there being more than sufficient evidence to convict Appellant at trial, there were no errors with regards to the charging document filed in this case as "to wit" language cannot override or alter the terms of a criminal statute. For these reasons, Appellant should be denied relief and his conviction should be affirmed.

---

her pants and worked his way into her pants from the back and under her underwear, sliding his hand down the center of her butt...." Opening Brief at p.7. It is difficult to imagine a scenario where this conduct would fail to meet a common sense, plain language definition of fondling or manipulating. Nevertheless, it is the Tribe's position that the testimony introduced at trial controls.

RESPECTFULLY submitted this 26th day of September, 2023.

Malena Acosta
Chief Prosecutor

Coleen Thoene
Deputy Prosecutor

Russell Boatwright
Deputy Prosecutor

CERTIFICATE OF SERVICE

I hereby certify that the Tribe's pleading was delivered this date to:

Benjamin Casey
Ben.Casey@pascuayaqui-nsn.gov
Clerk of the Court of Appeals
Pascua Yaqui Court of Appeals
7777 S. Camino Huivisim
Tucson, AZ 85757

And that one (1) copy of the Tribe's pleading was delivered, this date to:

Mark Willimann
Mark.Willimann@pascuayaqui-nsn.gov
Pascua Yaqui Office of the Public Defender
7474 S. Camino de Oeste
Tucson, AZ 85757

And that one (1) copy of the Tribe's pleading was delivered this date to:

Associate Judge Veronica Darnell
Pascua Yaqui Tribal Court
7777 S. Camino Huivisim
Tucson, AZ 85757

Dated this 26th day of September, 2023.

PASCUA YAQUI PROSECUTOR

Malena Acosta
Chief Prosecutor

Coleen Thoene
Deputy Prosecutor

Russell Boatwright
Deputy Prosecutor

Sworn before me this 26th day of September, 2023

Yvette L. Gradillas
Notary Signature

YVETTE L GRADILLAS
Notary Public - Arizona
Pima County
Commission # 585864
My Comm. Expires Jul 13, 2024

Pascua Yaqui Public Defender
4725 W Calle Tetakusim, Building B
Tucson, Arizona 85757
(520) 883-5013

Mark F. Willimann, Esq.
PYT Bar No: 10391 AZ Bar No: 017556

THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,

Plaintiff,

vs.

CRUZ, FELICIANO,

Defendant.

CR-21-077

MOTION TO SET APPEAL BOND

On April 27, 2022, this Court found Feliciano Cruz "guilty" of two counts out of the three counts charged: (1) Liquor Violation, and (3) Sexual Abuse, for which the Court set the Sentencing Hearing for August 17, 2022.

Unfortunately, on August 17, 2022, Cruz failed to appear, and the Court issued a bench warrant and a bond amount of $10,000.

Subsequently, Pascua Yaqui Police arrested Cruz, and the Court held an Initial/Detention Hearing on May 5, 2023, confirming the previously ordered release bond of $10,000, which he could not post.

On May 22, 2023, the Court sentenced Cruz to serve 9 months in jail, for which he is currently serving, and he is expected to be released at the end of December 2023.

The Court issued its final, written Sentencing Order on June 14, 2023,

On June 27, 2023, undersigned counsel filed a Notice of Appeal with the Court.

Pursuant to "OLD CODE" 3 PYTC § 2-2-490, Cruz may request the Court set an "Appeal Bond" to be posted during the pendency of his appeal. The two points the Court must decide is whether Cruz (1), will flee from justice, and (2), whether he is a danger to the community.

As to element one, whether Cruz will flee, the record is clear that he absconded after the Court found him guilty. Nevertheless, he was arrested here on the Pascua Yaqui Tribe reservation without incident just nine months after his originally scheduled Sentencing Hearing. (August 17, 2022.)

Adding to this, should the Court set a sufficiently substantial bond amount, it is unlikely Cruz will fail to appear when ordered given that he has, less than, six more months of his sentence to serve should he lose his appeal.

Regarding the second element, whether Cruz would be a danger to the community, he was found guilty of touching the buttocks of a 14-year-old girl in the presence of the young girl's older sister and his girlfriend. While this conduct is very troubling, still, certain release conditions can be ordered, such as, the Court ordering Cruz not to be in the presence of children pending appeal would be sufficient to protect our community pending his appeal.

Additionally, given that Cruz will be back in the community in 5 months after he has served his time, it is hard to believe that he would be any more of a danger to the

community today than he would be when he is released from custody.

Finally, undersigned counsel contacted Assistant Deputy Prosecutor Russel Boatwright who indicated that the Tribe OBJECTS to the Court setting an appeal bond amount in this matter.

For the foregoing reasons, Feliciano Cruz respectfully requests that the Court set an Appeal Bond as provided under 3 PYTC § 2-2-490 (Old Code.)

RESPECTFULLY SUBMITTED this 20 July 2023.

Rafael Gallego
Pascua Yaqui Chief Public Defender

/s/ Mark F. Willimann
Mark F. Willimann, Esq.
Attorney for Feliciano Cruz

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Appellee, vs. CRUZ, FELICIANO, Appellant.	APPELLATE CASE NO. CA-23-002 PASCUA YAQUI TRIBAL COURT NO.: CR-21-077

OPENING BRIEF

Mark F. Willimann, Esq.
Pascua Yaqui Bar No. 10391
PASCUA YAQUI PUBLIC DEFENDER
4725 W. Calle Tetakusim, Building B
Tucson, AZ 85757
(520) 883-5013

Attorney for Appellant

Table of Contents

Table of Authorities

CASES

CODE

RESEARCH MATERIAL

STATEMENT OF THE CASE/PROCEDURAL HISTORY/TRIAL COURT SENTENCING

On February 14, 2021, the Tribe charged Feliciano Cruz for allegedly committing four offenses: (1) Contributing to the Delinquency of a Minor; (2) Liquor Violation; (3) Public Sexual Indecency to a minor; and (4) Sexual Abuse of a Minor; and the trial Court found sufficient probable cause existed to move forward with the criminal matter. The trial Court set Cruz's release bond at $1,000.

On February 23, 2021, the trial Court held Cruz's arraignment. He pled not guilty to all counts.

On December 9, 2021, the Tribe submitted a Motion to Amend Complaint to change Count 4's language from "sexual conduct" to "sexual contact," as defined under 4 PYTC § 100-110. [1] The trial Court granted the Tribe's Motion on December 22, 2021.[2]

Thus, the remaining charges in the Amended Complaint proceeding to a bench trial were:

---

[1] Tribe's Motion to Amend Complaint, December 9, 2021.
[2] Trial Court's Order Granting Motion to Amend Complaint.

Count 2: 4 PYTC § 1-640(A)- Liquor Violation;

Count 3: 4 PYTC § 2-30(A)(1)(C)-Public Sexual Indecency;

Count 4: 4 PYTC § 2-40(A)-Sexual Abuse.[3]

On April 27, 2022, the trial Court officiated a bench trial to determine Cruz's culpability for three out of the four original charges. (The Tribe moved to have Count 1 of the Amended Criminal Complaint dismissed without prejudice.) [Note: the Complaint count numbers were modified at trial to reflect the remaining allegations.]

On April 28, 2022, issued a "ORDER BENCH TRIAL" where the trial Court found Cruz guilty of "Count #1: Liquor Violation," and "Count #3: Sexual Abuse." The trial Court, however, found that the Tribe had not met the burden of proving Cruz guilty of Count #2 because of a misinterpretation of statute, and given the trial Court's interpretation, this Count was "not guilty." [4]

---

[3] Amended Complaint the trial Court adopted on December 22, 2021.
[4] Trial Court's "Order Bench Trial."

The trial Court set a Sentencing Hearing for June 2022, but Cruz contacted the Court about his possible exposure to COVID-19, so his matter was continued to August 17, 2022.

For unknown reasons, Cruz failed to appear at his rescheduled sentencing hearing date, and the trial Court issued a bench warrant. A few months later, Tribe police arrested Cruz, and the trial Court ordered him to pay a $10,000 cash bond to be released, which he could not do. The Court also set a May 22, 2023, sentencing hearing date.

At the May 22, 2023, Sentencing Hearing, the trial Court sentenced Cruz to a "one-year of supervised probation" for the alcohol offense to run consecutive to a 9-months incarceration and a lifetime obligation to register as a "sex offender" for the sexual abuse offense. [5]

---

[5] Trial Court Sentencing Order, 22nd day of May 2023, with a written order issued on June 14, 2023.

STATEMENT OF FACTS

[DIRECTLY QUOTED FROM THE PROBABLE CAUSE STATEMENT]:

> On February 14, 2021, at approximately 0430 hours, I responded to 7544 S Camino De Oeste in reference to a juvenile age 14 (JM) stating that her uncle (Feliciano Modesto Cruz) sexually assaulted her at his residence (7614 Camino Rahum).
>
> Upon my arrival at the residence, I made contact with juvenile and her adult sister (Alicia Marie Montano, age 18) at 7544 Camino de Oeste. I separated both females and Officer Adame interviewed Alicia in his patrol vehicle, and I interviewed the juvenile inside my vehicle.
>
> The juvenile stated that they wore going to stay the night at her uncle's (Mr. Cruz) house (actually a cousin) which their mother (Monica Montano) stated was okay. At the residence they were sitting on the couch in the living room. Alicia nearest the front door, then the juvenile, then Mr. Cruz and then Diane Ruiz Arias. The juvenile stated that Mr. Cruz poured some alcohol (unknown type of alcohol) into her can of Pepsi (found can of Pepsi on floor where she was sitting.) Later he gave her a cup with more alcohol in it (short orange plastic cup with liquid next to Pepsi can on floor). The juvenile continued by stating that then Mr. Cruz started touching her by pulling on her belt and rubbing her leg. When she moved away, he would pull her back closer to him. She stated that he then slides his hand under her shirt and started rubbing her side and back. Soon he moves from her back/side to her pants and worked his way into her pants from the back and under her underwear, sliding his hand down the center of her butt, but she was uncomfortable to say more but she did say that he did not penetrate her with anything.

Alicia stated that she noticed her sister crying and asked her what was wrong. Her sister told her that Mr. Cruz gave her alcohol and then put his hand down her sister's pants.

ISSUE PRESENTED FOR REVIEW

If a statute's plain text is unambiguous, the Court is bound by that text. "Sexual abuse," 4 PYTC § 2-40, requires the Tribe prove that Cruz "engag[ed] in *sexual contact*" with the victim. Tribal Code defines "sexual contact" as "fondling or manipulating...any part-of the...buttocks." The trial Court found Cruz guilty because he "touch[ed] the buttocks of a minor." Did the trial Court err finding Cruz guilty?

ARGUMENT

The United States Supreme Court held in deciding *United States v. Ron Pair Enters,* "[w]here 'the statute's language is plain, the sole function of the courts is to enforce it according to its terms.'" [6]

The Supreme Court continued, "courts must presume that a legislature says in a statute what it means and means in the statute what it says there." [7]

Lastly, "[w]hen a statute does not define a term, a court should construe that term in accordance with its 'ordinary, contemporary, common meaning.'" [8] In fact, it is entirely permissible "[t]o determine the 'plain meaning' of a term undefined by a statute," for the courts to rely on the dictionary definition of the term. [9]

In this case, the Tribe's Amended Complaint alleges the following:

> COUNT 4: 4 PYTC § 2-40(A)(B), 4 PYTC § 2-10- Sexual Abuse / 4 PYTC § 4-100-110 Sexual Offenses and Sexual Crimes
>
> On, or about, February 14, 2021, at approximately 4:30 a.m., at or near 7544 S. Camino de Oeste, Defendant did intentionally or knowingly engage in **sexual contact** with any person 14 or more years of age

---

[6] *United States v. Ron Pair Enters, Inc.,* 489 U.S. 235, 241 (1989).
[7] *Id.* citing *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253-54.
[8] *San Jose Christian Coll. V. City of Morgan Hill,* 360 F.3d 1024, 1034 (9th Cir.2004).
[9] *Id.* at 1034.

> without consent of that person...to wit: ***Touched*** the buttocks of a minor, J.M. D.O.B. 6-30-2006.

4 PYTC § 2-10(N) defines "**sexual contact**" as:

> ...any direct or indirect ***fondling or manipulating*** any part-of the genitals, anus, groin, inner thigh, buttocks or female breast.

Further, 4 PYTC § 2-10(L)(4) defines "sexual act" as:

> The intentional ***touching***, not through the clothing, of the genitalia of another person who has not attained the age of 18 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

Therefore, the Tribe was obligated to prove to the trial Court that Cruz "fondl[ed] or minipulat[ed] J.M.'s buttocks without her consent. This legal standard is contrary to what is alleged in the Complaint where the Tribe suggested that Cruz committed this offense when he "touched" J.M.'s buttocks without consent.

It is clear, however, that the Tribe conflated the actus reus of "sexual act," which requires "touching" with that of "sexual contact," where the PYTC Code unambiguously states proof of directly or indirectly *fondled or manipulated* a "buttocks without consent."

Additionally, when the Tribe drafted the flawed Complaint, the trial Court felt obligated to agree with the unwritten elements by finding that the Tribe had proven that Cruz "touched" J.M. without consent; thus, he was guilty of sexual abuse.

Undoubtedly, the Tribe's troubles started with misidentifying the actus reus elements written in Count 4 of the Amended Complaint, which clearly states that it believed that "sexual abuse" could be proved with evidence that Cruz ***touched*** J.M.'s buttocks without consent when, in fact, the definition of "sexual contact," requires the Tribe to prove much more than ***touching***, it required the Tribe to prove "***fondling or manipulation***" of the young woman's buttocks. [10] In this way, the Tribe "mixed and matched" the actus reus from two, separate, and uniquely different definitions the "General Provisions," 4 PYTC § 2-10, provide for when it formulated an offense that simply does not exist in the Pasqua Yaqui Tribal Code.

Put differently, the Code appreciated the dichotomy between "touching" and "fondling and manipulating." [11] A "sexual act" requires the Tribe to prove that a defendant "touched" "the genitalia" of another without consent. But, for "sexual

---

[10] *Cf. 4 PYTC §2-10(L)(4) with 4 PYTC § 2-40(A).*
[11] *Id.*

contact," the Tribe was obligated that he "fondled or manipulated" J.M.'s buttocks, which is clearly more than just touching her buttocks.

Because the Code distinguishes the act of "touching" from that of "fondling or manipulating," the Tribe conflated a "sexual act," 4 PYTC § 2-10(L)(4), "the touching of the genitalia of another person...." with 4 PYTC § 2-40, which refers specifically to "sexual contact." Hence, "fondling or manipulating" should have never been confused with "touching," which has a very different meaning.

Since the words "touching," "fondling," or "manipulating" are not defined in the PYTC, the Court may glean the common meaning of the word using a dictionary definition for assistance. [12]

WWW.merriam-webster.com/dictionary/fondling defined "fondled"; "fondling" as: "to handle tenderly, lovingly, or lingeringly." Likewise, merriam-websters.com defines "manipulating" as: 2(b), "to control or play upon by artful, unfair, or insidious means especially to one's own advantage."

---

[12] *City of Morgan Hill,* 360 F.3d at 1034.

To contrast "fondling" and "manipulating" with "touching," merriams-websters.com defines "touch" as: 4, "to cause to be briefly in contact or conjunction with something."

Thus, it is without question that "fondling and manipulating" requires contact that is far more pronounce than what a "touch" requires. These competing concepts are not synonymous, nor can they be consistent with each other. It is unmistakable that those drafting our Code understood the words "fondling" and "manipulating" in addition to the word "touch," and they conscientiously used these different words to signify a very different actus reus. As a result, the United States Supreme Court's instruction for all courts to follow the precise letter of the Code/statute supports Cruz's position that the trial Court erred in agreeing with the Tribe's rendition of "sexual abuse."

In sum, the Tribe erred in drafting a complaint that created an offense the Code drafters never contemplated when it replaced the word "touch" for the statutory requirement that it prove that Cruz "lovingly, tenderly, or lingeringly" placed his hand on J.M.'s buttocks without her consent.

More to the point, the trial Court erred as a matter of law when it found that Cruz was guilty of Sexual Abuse when he "touched" J.M.'s buttocks because "touching" does not signify the correct actus reus of "sexual abuse." The correct actus reus for "sexual abuse" is "fondling or manipulating."

CONCLUSION

Our Pascua Yaqui Code provides unambiguous instruction as to what constitutes "sexual contact," it requires evidence of proof that Cruz "fondl[ed] or maniplat[ed]" J.M.'s buttocks without her consent. The Tribe, however, attempted to modify the Code to substantively alter the elements to an offense that does not exist in the Code; there is no crime that prohibits "touching" the buttocks without consent. Essentially, the Tribe took it upon themselves to come up with a creative way to hold Cruz accountable without having to prove the necessary evidence that he "handled tenderly, lovingly, or lingeringly" J.M.'s buttocks. Instead, the Tribe truncated this action to a "touch," which the proscriptions in the Code do not exist.

For this reason, Feliciano M. Cruz respectfully requests that this Court reverse the trial Court's finding of guilt, and that it remands this matter back to the trial Court with instruction that the elements of an offense must be adhered to as written,

the Tribe does not have the legislative authority to circumvent the Code to its own purpose.

DATED this 28th day of August 2023.

/s/ Mark F. Willimann
Mark F. Willimann, Esq.
Deputy Public Defender
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that Feliciano Cruz's Opening Brief e-mailed to:

Clerk of the Court of Appeals
Pascua Yaqui Court of Appeals
7474 South Camino de Oeste
Tucson, AZ 85757

and that one (1) copy of Feliciano Cruz's Opening Brief was e-mailed to:

Deputy Tribal Prosecutor
Office of the Prosecutor of the Pascua Yaqui Tribe
7474 South Camino de Oeste
Tucson, AZ 85757

DATED this 28th day of August 2023.

PASCUA YAQUI PUBLIC DEFENDER

/s/ Mark F. Willimann
Mark F. Willimann, Esq
Deputy Public Defender

Pascua Yaqui Public Defender
4725 W Calle Tetakusim, Building B
Tucson, Arizona 85757
(520) 883-5013

Mark F. Willimann, Esq.
PYT Bar No: 10391 AZ Bar No: 017556

THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,

Plaintiff,

vs.

CRUZ, FELICIANO, JR.,

Defendant.

CR-21-077

NOTICE OF APPEAL

Feliciano Cruz, Jr., Defendant, by and through the Pascua Yaqui Public Defender's Office, Rafael Gallego, Esq., Chief Defender, and his Deputy Public Defender, Mark F. Willimann, Esq., respectfully submits this Notice of Appeal of all of the Tribal Court's pre-trial and trial rulings, the finding of sufficiency of the evidence to support guilty verdicts, and the sentence imposed.

//

//

This Notice is timely as it was filed within 30-days of the Tribal Court's June 14, 2023, "ORDER: Sentencing Hearing.

RESPECTFULLY SUBMITTED this 27 June 2023.

Rafael Gallego
Pascua Yaqui Chief Public Defender

/s/ Mark F. Willimann
Mark F. Willimann, Esq.
Attorney for Feliciano Cruz, Jr.

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE Plaintiff, **vs.** **CRUZ, FELICIANO, JR.** Defendant.	**CASE NO. CR-21-077** **ORDER** **SENTENCING HEARING**

On May 22, 2023, the above matter came before the Court for a Sentencing Hearing. Coleen Thoene and Russell Boatwright appeared for the Tribe. Yvette Alvarez appeared from Pretrial Services/Probation. Also appearing were Sonia Laventure with Victim Services, and the victim and her family. The Defendant appeared in custody with his Legal Counsel, Alonzo Corral. The Court heard recommendations from the Tribe, the Defense, and Probation. The parties presented aggravating and mitigating factors to support their recommendations.

IT IS ORDERED that the Defendant, Feliciano Cruz, Jr., having been found guilty of Count One (1), Liquor Violation and Count Three (3), Sexual Abuse, shall be sentenced as follows:

CR-21-077, Count One, (1), Liquor Violation:

1) One year of detention suspended for one year of supervised probation;
2) Detention days shall run CONSECUTIVELY to the detention days imposed in Count Three (3) in the above captioned case number.
3) Defendant shall report to the Probation Department within 48 hours of his release from Detention days imposed in Count Three (3);
4) Defendant shall abide by all standard and special conditions of probation;
5) Defendant shall pay probation fees to be determined by probation department and due the first of each month;

6) **DEFENDANT SHALL HAVE NO CONTACT WITH VICTIM/MINOR J.M. (DOB: 06/03/2006) AND HER RESIDENCE, EFFECTIVE IMMEDIATELY, TO LAST THROUGHOUT THE ENTIRE DURATION OF HIS PROBATION.**

CR-21-077, Count Three, (3), Sexual Abuse:

1) 8 Months of detention to serve;

2) Detention days shall run CONSECUTIVELY to the detention days imposed in Count One (1) in the above captioned case number.

3) Defendant shall register as a Tier 3 Sex Offender.

IT IS FURTHER ORDERED that the Defendant shall receive credit for time served in the amount of 24 days. As eight (8) months of detention equals 243 days, the total days to serve shall be 219, which includes the 24 days of credit for time served being applied. THEREFORE, THE DEFENDANT'S RELEASE DATE IS:

WEDNESDAY, DECEMBER 27, 2023, AT 8:00 A.M.

IT IS FURTHER ORDERED that if the parties wish to argue to the Court that the calculation is incorrect, they have leave to file the appropriate pleading.

IT IS FURTHER ORDERED that the $1,000.00 bond is exonerated.

IT IS FURTHER ORDERED that the issue of restitution shall be held in abeyance for 60 days. The Tribe shall file a request for restitution or a motion to waive restitution before the expiration of the 60 days or any requests for restitution will be denied.

SO ORDERED ON THE 22ND DAY OF MAY, WITH A WRITTEN ORDER ISSUED ON JUNE 14, 2023.

Veronica Darnell
Judge, Pascua Yaqui Tribal Court

Cc:
Date: 06/13/23
✓ Tribe ✓ Defendant/Counsel ✓ Pre-trial/Probation ✓ Detention ___ Victim Advocate
Clerk: VM