IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2008-0372
Appellee,	)	DEPARTMENT A
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
DUSTIN ANTHONY ORTIZ,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20070985

Honorable Frank Dawley, Judge Pro Tempore

VACATED IN PART; AFFIRMED IN PART

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H O W A R D, Presiding Judge.

¶1 After a jury trial, Dustin Ortiz was convicted of theft of a means of transportation and burglary in the third degree. Both offenses arose from Ortiz's possession of a stolen motorcycle. The court suspended imposition of sentence and ordered him to serve a three-year term of probation including 180 days in jail. On appeal, Ortiz claims that the state presented insufficient evidence he had committed third-degree burglary or, in the alternative, that the third-degree burglary statute is unconstitutionally vague. He also claims the trial court erred in imposing a $20 time payment fee. The state concedes the trial court erred in imposing the fee. We agree and therefore vacate the imposition of the time payment fee. We otherwise affirm Ortiz's convictions and the terms of his probation.

Sufficiency of the Evidence

¶2 Ortiz first claims the state presented insufficient evidence to support the charge of burglary in the third degree. His sole argument on this claim is that the third-degree burglary statute does not apply to motorcycles. Although Ortiz moved for a judgment of acquittal at trial, pursuant to Rule 20, Ariz. R. Crim. P., he did not make the argument he now raises on appeal in support of that motion, and he did not otherwise challenge the applicability of the third-degree burglary statute at trial. Therefore, he has forfeited this argument absent fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Id.*, *quoting State v. Hunter*, 142

Ariz. 88, 90, 688 P.2d 980, 982 (1984). The defendant has the burden to show both fundamental error and prejudice. *Id.* ¶ 20. A conviction based on insufficient evidence constitutes fundamental error. *State v. Stroud*, 209 Ariz. 410, n.2, 103 P.3d 912, 914 n.2 (2005). Likewise, a conviction based on a nonexistent theory of liability is fundamental error. *See State v. Ontiveros*, 206 Ariz. 539, ¶ 17, 81 P.3d 330, 333 (App. 2003).

¶3 When interpreting a statute, "our goal . . . is to discern and implement the intent of the legislature." *Id.* ¶ 8. We first look to the plain language of the statute as the best indicator of legislative intent. *See State v. Christian*, 205 Ariz. 64, ¶ 6, 66 P.3d 1241, 1243 (2003). Words are given their "'ordinary meaning unless it appears from the context or otherwise that a different meaning'" controls. *State v. Hoggatt*, 199 Ariz. 440, ¶ 8, 18 P.3d 1239, 1242 (App. 2001), *quoting Sierra Tucson, Inc. v. Pima County*, 178 Ariz. 215, 219, 817 P.2d 762, 766 (App. 1994). We will not adopt an interpretation of a statute that is "patently unreasonable" or one that is "unduly restrictive" when such interpretation is unsupported by legislative history or public policy. *State v. Hamblin*, 217 Ariz. 481, ¶ 11, 176 P.3d 49, 52 (App. 2008).

¶4 Section 13-1506(A)(1), A.R.S., provides that a person commits third-degree burglary by "[e]ntering or remaining unlawfully in or on a nonresidential structure . . . with the intent to commit any theft or any felony therein." Section 13-1501(12), A.R.S., defines the term "Structure" as "any vending machine or any building, object, vehicle, railroad car or place with sides and a floor that is separately securable from any other structure attached

to it and that is used for lodging, business, transportation, recreation or storage." This court recently confirmed that § 13-1506 includes burglary of a motor vehicle. *See Hamblin*, 217 Ariz. 481, ¶¶ 11-12, 176 P.3d at 52. And a motorcycle is a vehicle. *See* A.R.S. § 13-105(40) ("[v]ehicle" means a device upon which any person "is, may be or could have been transported"). Thus, the legislature must have intended third-degree burglary to include burglary of a motorcycle. *See Christian*, 205 Ariz. 64, ¶ 6, 66 P.3d at 1243 (plain language best indicator of legislative intent).

¶5 Ortiz attempts to inject ambiguity into the statutes by emphasizing the definition of the phrase "Enter or remain unlawfully." As provided in § 13-1501(2), the phrase is defined as,

> an act of a person who enters or remains on *premises* when the person's intent for so entering or remaining is not licensed, authorized or otherwise privileged except when the entry is to commit theft of merchandise displayed for sale during normal business hours, when the premises are open to the public and when the person does not enter any unauthorized areas of the premises.

(Emphasis added.) Ortiz observes the term "premises" is not defined in the statute and offers a dictionary definition of the term that restricts it to a "house or building, along with its grounds." *See Black's Law Dictionary* 1219 (8th ed. 2004). Thus, Ortiz argues, the use of the term "[e]ntering or remaining unlawfully" in § 13-1506(A)(1) means third-degree burglary is only accomplished by an act of a person who enters or remains in a house or building or its grounds. He posits that, because a motorcycle is not a house, building, or

grounds, motorcycles—and all vehicles that cannot be inhabited—must necessarily fall outside of the scope of the third-degree burglary statute.

¶6 If we were to accept Ortiz's argument, we would have to define "vehicle," as used in the definition of "[s]tructure," § 13-1501(12), as "a vehicle that can be inhabited." But if the legislature had intended the term "vehicle" to have such a restrictive interpretation, it would have used language to say so. *See Hamblin*, 217 Ariz. 481, ¶ 11, 176 P.3d at 52 (court will not adopt unduly restrictive and unsupported interpretation). And the definition of "[e]nter or remain unlawfully" in § 13-1501(2) is clearly intended to address the difference between when a person is or is not lawfully authorized to enter and remain in a particular place, whereas the various statutory definitions of "structure"—including residential and nonresidential, §§ 13-1501(10), (11), and (12)—provide guidance for determining what type of place is at issue in order to determine what degree of burglary has been committed. *See* A.R.S. §§ 13-1506, 13-1507.

¶7 We conclude it would be patently unreasonable to construe the word "premises" in § 13-1501(2) as an unexpressed limitation on the word "vehicle" in § 13-1501(12). *See Hamblin*, 217 Ariz. 481, ¶ 11, 176 P.3d at 52 (court will not adopt unreasonable construction). The overall context of the statutes makes clear that third-degree burglary includes an act of entering or remaining unlawfully on a motorcycle. *See Hoggatt*, 199 Ariz. 440, ¶ 8, 18 P.3d at 1242 (court considers context of statute in determining meaning of terms).

¶8 Thus, the jury properly could find Ortiz guilty of third-degree burglary if it found he had remained unlawfully on a motorcycle with the intent to commit theft of that motorcycle. § 13-1506(A)(1). Substantial evidence supports the jury's finding that he did so. As Ortiz otherwise does not challenge the sufficiency of the evidence to support this conviction, he has failed to show error, fundamental or otherwise. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607.

Vagueness Claim

¶9 In the alternative, Ortiz argues the third-degree burglary statute is unconstitutionally vague. He acknowledges that he did not raise this argument below, but this court may consider a claim that a statute is unconstitutionally vague even when raised for the first time on appeal. *See State v. Anderson*, 199 Ariz. 187, ¶ 14, 16 P.3d 214, 218 (App. 2000).

¶10 A statute is "unconstitutionally vague if it does not give persons of ordinary intelligence a reasonable opportunity to learn what it prohibits and does not provide explicit standards for those who will apply it." *State v. Takacs*, 169 Ariz. 392, 394, 819 P.2d 978, 980 (App. 1991). The party challenging a statute's validity has the burden of overcoming a strong presumption of constitutionality. *See State v. McMahon*, 201 Ariz. 548, ¶ 5, 38 P.3d 1213, 1215 (App. 2002). "[D]ue process does not require that a statute be drafted with absolute precision." *Takacs*, 169 Ariz. at 395, 819 P.2d at 981. Additionally, the omission of an explicit definition for a statutory term or the fact that a statute may be susceptible to

different interpretations does not render the statute unconstitutionally vague. *State v. Lefevre*, 193 Ariz. 385, ¶ 18, 972 P.2d 1021, 1026 (App. 1998).

¶11 Ortiz argues A.R.S. § 13-1506(A)(1) is unconstitutionally vague because of the purported contradiction between the definition of "structure" in § 13-1501(12) to include vehicles and the proffered dictionary definition of "premises," as used in § 13-1501(2), which excludes vehicles. Ortiz claims that, because of this contradiction, a person of ordinary intelligence would not know whether the third-degree burglary statute applies to vehicles. But, in keeping with our analysis of Ortiz's sufficiency-of-the-evidence claim, we conclude the inclusion of the statutorily undefined term "premises" in § 13-1501(2) cannot reasonably be interpreted to exclude "vehicles" from the express definition of "[s]tructure" in § 13-1501(12). The use of the word "premises" in § 13-1501(2) is at worst imprecise, but we will not declare a statute invalid simply because it might have been "written with greater precision." *See Takacs*, 169 Ariz. at 395, 819 P.2d at 981. We see no likelihood that a person of reasonable intelligence would not understand that § 13-1506(A)(1) applies to vehicles, which are specifically included in the definition of structure in § 13-1501(12). Therefore, Ortiz has not sustained his burden to overcome the presumption of constitutionality. *See McMahon*, 201 Ariz. 548, ¶ 5, 38 P.3d at 1215.

Time Payment Fee

¶12 Finally, Ortiz argues the trial court erred in imposing a $20 time payment fee. He did not object to the fee below, and we therefore review for fundamental error. *See*

Henderson, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. Imposition of an illegal sentence, including a fee not authorized by law, constitutes fundamental error. *See State v. Soria*, 217 Ariz. 101, ¶ 7, 170 P.3d 710, 712 (App. 2007).

¶13 At sentencing, the trial court ordered Ortiz to pay $400 in attorney fees, a $25 Indigent Administrative Assessment fee, and a $20 time payment fee pursuant to A.R.S. § 12-116(A). The court also ordered that he pay a monthly probation services fee of $50. Ortiz argues that, under *State v. Connolly*, 216 Ariz. 132, ¶ 3, 163 P.3d 1082, 1082-83 (App. 2007), the trial court erred in imposing the time payment fee with respect to the indigent assessment and the attorney fees. Ortiz further argues the monthly probation fee does not trigger a time payment fee under § 12-116. The state concedes error and requests that we vacate the time payment fee.

¶14 We agree that, under *Connolly*, the imposition of the attorney fees and the indigent assessment did not justify imposing the time payment fee in this case. 216 Ariz. 132, ¶ 4, 163 P.3d at 1083. We further agree that the monthly probation fee is not contemplated by § 12-116. As the state points out, a purpose of § 12-116 is "to offset increased court costs incurred by reason of deferred payment plans granted to defendants who are unable to pay court-ordered penalties, sanctions or fines when imposed." *State v. Pennington*, 178 Ariz. 301, 302, 873 P.2d 639, 640 (1994). Because the probation fee is intended to be a monthly assessment, *see* A.R.S. § 13-901(A), it is not a "deferred payment

plan" that generates any increased administrative costs. We therefore conclude the trial court erred in imposing the time payment fee.

Conclusion

¶15 For the foregoing reasons, we vacate the imposition of the $20 time payment fee. We otherwise affirm Ortiz's convictions and the terms of his probation.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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PHILIP G. ESPINOSA, Judge