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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. CESAR FERNANDO CAMPAS, Appellant.	2 CA-CR 2010-0214 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20094167001

Honorable Deborah Bernini, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 After a bench trial, Cesar Campas was convicted of third-degree burglary and unlawful use of means of transportation. The trial court sentenced him to concurrent

prison terms of six years for the burglary charge and 2.25 years for the unlawful use charge. On appeal, Campas argues the burglary conviction should be reversed because his unlawful use of a means of transportation cannot serve as the predicate felony for burglary. For the following reasons, we affirm.

Factual Background and Procedural History

¶2 We view the evidence in the light most favorable to sustaining the conviction. *State v. Hinden*, 224 Ariz. 508, ¶ 2, 233 P.3d 621, 622 (App. 2010). In July 2009, C.P.'s customized Mazda Protege was stolen. Soon thereafter the vehicle was involved in a police chase, during which its occupants jumped from the still-moving car and fled on foot shortly before it crashed into a residential yard. Officers pursued the occupants and found Campas in the back seat of a vehicle near the scene of the crash. Another man was apprehended and later identified as the driver of the vehicle.

¶3 The vehicle exhibited substantial damage unrelated to the crash. The "sleeving on the outside of the steering column was gone," the stereo system had been removed, and the ignition had been visibly damaged such that the key no longer worked in it. Police found tools, including a dent-puller, a screwdriver, and a pair of vice-grip pliers, in the back seat area. They also found a "jiggle key" for manipulating car ignitions on the front driver's side floorboard.

¶4 At trial, Campas moved for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., arguing the state had not presented substantial evidence on either the unlawful use charge or the burglary charge, and that the mental state required for

unlawful use of a means of transportation does not satisfy the mental state required for burglary. The trial court found Campas guilty of the charged offenses and sentenced him as outlined above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶5 Campas argues the burglary conviction should be reversed because burglary requires "that a person enter or remain unlawfully in or on a nonresidential structure with the intent to commit any theft or any felony therein," and "there was no evidence Campas intended to commit any other felony [beyond unlawful use] inside . . . the vehicle." The state contends Campas failed to make this argument in the trial court, thereby forfeiting the right to seek relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) (fundamental error review applies when defendant fails to object to alleged trial error). Relying in part on this court's decision in *State v. Moreno-Medrano*, 218 Ariz. 349, 185 P.3d 135 (App. 2008), the state further asserts Campas had the burden of establishing on appeal that the error was both fundamental and prejudicial but he did not make that argument, much less sustain his burden, thereby waiving the right to any review of this claim. Although the state is correct that the arguments Campas raised at trial related primarily to sufficiency of the evidence, the state overlooks his argument about the different mental states required to establish unlawful use and burglary. Specifically, Campas argued burglary and unlawful use require "two very different levels of intent."

¶6 Furthermore, the record indicates the trial court considered the specific issue Campas raises on appeal:

> I guess I'm just having some hesitation with this because unlawful presence in a means of transportation[—]you could literally enter without being up to no good and then it's just the having reason to know once you get inside that this is a stolen vehicle[—]i[t']s enough that if you don't immediately ask the driver to pull over and let you out you're guilty of this offense. And we take those factual bas[e]s in court all the time.

Although Campas's trial counsel could have argued the point more clearly and in greater detail, an imperfect argument does not necessarily forfeit the right to appellate review if the argument gave the trial court an opportunity to provide a remedy. *See, e.g.*, *State v. Petrak*, 198 Ariz. 260, ¶ 27, 8 P.3d 1174, 1182 (App. 2000) (failure to use word "duplicity" in trial objection did not forfeit duplicitous-indictment argument on appeal). Because the arguments Campas makes on appeal are sufficiently similar to those he made in the trial court, and because the court considered the issue he raises on appeal, we conclude it was preserved adequately for appellate review.

¶7 Campas maintains that unlawful use cannot be the "underlying felony" that establishes the requisite mental state for burglary because unlawful use punishes "mere unlawful presence inside . . . a vehicle." Section 13-1506(A), A.R.S., provides that "[a] person commits burglary in the third degree by . . . [e]ntering or remaining unlawfully in or on a nonresidential structure . . . with the intent to commit any theft or any felony

therein."[1] A person commits unlawful use of means of transportation as a passenger when the person, without intent to permanently deprive the owner of the vehicle, "[k]nowingly is transported or physically located in a vehicle that the person knows or has reason to know is in the unlawful possession of another person pursuant to [§ 13-1803(A)(1)] or § 13-1814." A.R.S. § 13-1803(A)(2).

¶8 "Our primary purpose in interpreting a statute is to give effect to the legislature's intent." *Hinden*, 224 Ariz. 508, ¶ 9, 233 P.3d at 623. In determining legislative intent, "'[w]e look first to the statute's language because we expect it to be the best and most reliable index of a statute's meaning.'" *Id.*, *quoting State v. Williams*, 175 Ariz. 98, 100, 854 P.2d 131, 133 (1993). "'[W]here the [statutory] language is plain and unambiguous, courts generally must follow the text as written.'" *Estate of Braden ex rel. Gabaldon v. State*, 225 Ariz. 391, ¶ 7, 238 P.3d 1265, 1267 (App. 2010), *quoting Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co., Inc.*, 177 Ariz. 526, 529, 869 P.2d 500, 503 (1994) (alterations in *Braden*).

¶9 Campas maintains that basing burglary on unlawful use "is contrary to . . . legislative intent." However, the plain language of § 13-1506 and § 13-1803 belies this assertion. The burglary statute requires intent to commit "any felony," § 13-1506(A)(1), and nothing in the statutory scheme restricts the scope of this provision.[2] *See generally*

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[1]A motor vehicle is a "nonresidential structure" for purposes of the burglary statute. A.R.S. § 13-1501(10), (12).

[2]In contrast, the legislature has limited the applicability of the burglary statute in shoplifting cases. *See* A.R.S. § 13-1501(2) (defining "[e]nter or remain unlawfully" to

§§ 13-1501, 13-1506. Thus, because unlawful use is a felony, § 13-1803(C), entering or remaining in a vehicle with intent to commit unlawful use of that vehicle is sufficient to establish burglary.

¶10 Moreover, Campas cites no authority, and we find none, supporting the proposition that committing unlawful use of a means of transportation cannot provide the requisite mental state for purposes of the burglary statute.[3] In an analogous case, *State v. Brown*, 188 Ariz. 358, 359-60, 936 P.2d 181, 182-83 (App. 1997), we held the intent element of the burglary statute is satisfied when a defendant enters a vehicle with the intent to steal the vehicle itself. *Accord State v. Aro*, 188 Ariz. 521, 524, 937 P.2d 711, 714 (App. 1997). In *Brown* we adopted the Florida Supreme Court's reasoning that burglary and car theft are "'two separate evils involving two distinct temporal events'" because a person could enter the vehicle with intent to steal it and then abandon the plan before taking it, in which case the burglary would be complete but not the theft. 188 Ariz. at 359-60, 936 P.2d at 182-83, *quoting State v. Stephens*, 601 So. 2d 1195, 1197 (Fla. 1992). Similarly, burglary is complete when a defendant enters or remains in a

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exclude situation where "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"). No such exception exists for unlawful use of a means of transportation.

[3]Campas's reliance on *State v. Hinden*, 224 Ariz. 508, 233 P.3d 621 (App. 2010), is misplaced. In *Hinden*, we reversed the defendant's burglary conviction because the yard he had entered was not a "fenced commercial yard," as required by the burglary statute. 224 Ariz. 508, ¶ 16, 233 P.3d at 625; *see also* § 13-1506(A)(1). It was due to the state's failure to prove this element—and not any failure to prove intent—that we vacated the defendant's burglary conviction. *Id.* ¶¶ 15-16.

vehicle with the intent to unlawfully use it, even if the unlawful use is not complete. This could occur when the vehicle is not unlawfully in the person's possession at the time the person has the intent to unlawfully use it.[4]

¶11 Finally, Campas argues that by designating unlawful presence in a vehicle as a means of committing the crime of unlawful use, "the legislature carved out a particular and separate crime and lesser punishment than third-degree burglary," and that he could not, therefore, be convicted of both unlawful use of a vehicle and burglary "based on the same set of facts." He asserts, "Arizona case law holds that a state cannot charge a defendant under a more general statute even where a specific statute applies." "[W]here a special statute deals with the same subject as the general statute, the special statute will control." *State v. Canez*, 118 Ariz. 187, 190-91, 575 P.2d 817, 820-21 (App. 1977). Consequently, "[w]hen the facts of an offense found in a general statute parallel the acts proscribed by a specific statute, there cannot be a prosecution for violation of the general statute." *Id.* at 191, 575 P.2d at 821. "However, the principle that the specific

[4]Campas cites a number of cases in support of his argument that intent to commit some additional felony beyond unlawful use is required for a burglary conviction. *See State v. Zinsmeyer*, 222 Ariz. 612, ¶ 33, 218 P.3d 1069, 1081 (App. 2009) (intent to steal truck); *State v. Hamblin*, 217 Ariz. 481, ¶¶ 3, 8, 176 P.3d 49, 51-52 (App. 2008) (intent to steal radar detector); *Aro*, 188 Ariz. at 524, 937 P.2d at 714 (intent to steal vehicle); *Brown*, 188 Ariz. at 360, 936 P.2d at 183 (same); *State v. Harris*, 134 Ariz. 287, 288, 655 P.2d 1339, 1340 (App. 1982) (intent to steal cassette and eight-track recorders); *see also State v. McElyea*, 130 Ariz. 185, 188, 635 P.2d 170, 173 (1981) (intent to steal apparently supported by evidence seized from defendant's vehicle upon his arrest); *State v. Hatch*, 225 Ariz. 409, ¶ 2, 239 P.3d 432, 433 (App. 2010) (intent to commit theft from store). But none of these cases suggests that unlawful use cannot be the predicate felony for burglary.

law controls over the general applies only where the specific conflicts with the general." *Id.* "This conflict arises only where the elements of proof essential to conviction under each statute are exactly the same." *State v. Weiner*, 126 Ariz. 454, 456, 616 P.2d 914, 916 (App. 1980).

¶12 We find no such conflict here because burglary and unlawful use are separate crimes, even though both may arise from one set of facts, *cf. State v. Mussiah*, 141 Ariz. 212, 214, 685 P.2d 1364, 1366 (App. 1984) (theft different crime than failure to return rental property, though same facts may implicate both), and the elements of proof are not identical, *see Weiner*, 126 Ariz. at 456, 616 P.2d at 916. Burglary requires intent to commit a theft or felony, § 13-1506(A)(1), whereas unlawful use requires knowledge or reason to know the vehicle is in the unlawful possession of another, § 13-1803(A)(2). Moreover, for the crime of unlawful use by a passenger to be complete, the vehicle must be in the "unlawful possession of another person,"[5] § 13-1803(A)(2), whereas burglary predicated on intent to commit unlawful use can be complete regardless of whether the vehicle is in another's unlawful possession. Since the proof for each crime is different, the two statutes do not conflict, and therefore, prosecution under both may occur when the facts satisfy the elements of each. *See State v. Hamblin*, 217 Ariz. 481, n.4, 176 P.3d 49, 53 n.4 (App. 2008) ("[T]here is nothing improper in the legislature's criminalizing the

[5]We note unlawful use also can be committed by a person who has unauthorized control over a means of transportation. § 13-1803(A)(1). Unlike unlawful use by a passenger, unlawful use by a person with control does not require the vehicle to be in the unlawful possession of another person. *Id.*

same conduct under different sections of the law as long as a defendant does not face double punishment.").

Disposition

¶13 For the foregoing reasons, Campas's convictions and sentences are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge