DIVISION ONE
FILED: 9/3/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 12-0439
	)	
Appellee,	)	DEPARTMENT S
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
MICHAEL EUGENE MCMANUS,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Mohave County

Cause No. S8015CR98000260

The Honorable Steven F. Conn, Judge

REVERSED IN PART; SENTENCE VACATED; REMANDED WITH DIRECTIONS

Thomas C. Horne, Arizona Attorney General — Phoenix
By Joseph T. Maziarz, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Robert A. Walsh, Assistant Attorney General
Attorneys for Appellee

Jill L. Evans, Mohave County Public Defender — Kingman
Attorney for Appellant

W I N T H R O P, Presiding Judge

¶1 Michael Eugene McManus ("Appellant") appeals the trial court's determination that he violated his probation and the resulting sentence. Appellant contends the State never offered

any evidence to prove that his treatment staff deemed adult pornography inappropriate for him to possess and that the probation department had warned him he was not allowed to possess visual depictions of such pornography. The State confesses error, and we agree that the State failed to offer the aforementioned evidence at Appellant's probation violation hearing. Consequently, we reverse the court's finding that Appellant committed Violation #2 of special condition 12 of his probation as discussed below, and we vacate Appellant's sentence. Because the record is unclear, however, whether the State's failure to offer the aforementioned evidence also requires us to reverse the court's finding that Appellant committed alleged Violation #2 of special condition 14 of his probation as discussed below, we remand with directions for the trial court to clarify its previous ruling as to that violation, hold a new disposition hearing if necessary, and conduct any other proceedings consistent with this decision.

¶2 In February 2003, Appellant pled guilty pursuant to *Alford*[1] to the offense of attempted sexual exploitation of a minor, a class three felony. The trial court suspended sentencing and ordered Appellant placed on ten years' probation, which included both uniform and special sex offender conditions of probation, including the following terms:

[1] *See North Carolina v. Alford*, 400 U.S. 25, 31 (1970).

> 12. Do not possess, or in any way attempt to obtain by telephone or any other instrument, any sexually stimulating or sexually oriented material in any form as deemed inappropriate by treatment staff, or patronize any adults-only establishment where such material is available.
>
> . . . .
>
> 14. Do not possess, use, or have personal access to any computer or similar equipment that has Internet capability without prior written permission of your probation officer.

¶3 With the exception of a probation violation admitted by Appellant in 2007, Appellant appeared to do well on probation.[2] On July 26, 2011, however, the State through the probation department filed a petition ("the July petition") to revoke Appellant's probation, alleging that Appellant had committed three violations of special condition 14 of his probation.[3] Upon the State's motion, the trial court later

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[2] Appellant admitted violating uniform condition 2, which prohibited him from "knowingly associat[ing] with any person engaged in criminal activity or having a criminal record without the prior written approval of the [Adult Probation Department]." The trial court reinstated Appellant on probation, with additional special conditions of probation.

[3] The State alleged the following violations:

> Violation #1: Whereby on or about on July 26, 2011, [Appellant] was in possession of two (2) computers, a router, and three (3) external hard drives without permission of the [Adult Probation Department].
>
> Violation #2: Whereby on or about on July 26, 2011, [Appellant] was accessing the internet to view sexually oriented material.

dismissed with prejudice alleged Violation #3 of special condition 14.

¶4 On August 15, 2011, the State filed a supplemental petition ("the August petition") to revoke Appellant's probation, alleging that Appellant had committed two violations of special condition 12 of his probation.[4] On December 14, 2011, the State filed a third petition ("the December petition") to revoke Appellant's probation, alleging that Appellant had committed another violation of special condition 14 of his probation.[5]

¶5 At the June 8, 2012 contested probation violation hearing, the court granted the State's motion to dismiss with

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> Violation #3: Whereby on or about on July 26, 2011, [Appellant] was in possession of two (2) photographs of one of the victims in this case.

[4] The allegations mirrored Violations #1 and #2 alleged in the July petition, with the addition of one sentence (italicized below):

> Violation #1: Whereby on or about on July 26, 2011, [Appellant] was in possession of two (2) computers, a router, and three (3) external hard drives without permission of the [Adult Probation Department]. *[Appellant] used these instruments to view sexually stimulating images.*
>
> Violation #2: Whereby on or about on July 26, 2011, [Appellant] was accessing the internet to view sexually oriented material.

[5] The State alleged as follows: "Whereby, on or about December 7, 2011, . . . [Appellant] admitted to purchasing a new computer and using said computer to search the Internet for plane fares."

prejudice Violation #1 of special condition 12 as alleged in the August petition. The court also found that the State had not proved that Appellant had committed Violation #1 of special condition 14 as alleged in the July petition or violated special condition 14 as alleged in the December petition.

¶6 The court did find, however, that Appellant had committed Violation #2 of special condition 14 as alleged in the July petition and Violation #2 of special condition 12 as alleged in the August petition. The court also noted that it considered Violation #2 of special condition 14 and Violation #2 of special condition 12 to be "both the identical single violation based upon what happened on July 26, 2011."

¶7 On June 28, 2012, the trial court sentenced Appellant to a mitigated term of six years' imprisonment in the Arizona Department of Corrections. We have jurisdiction over Appellant's timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (West 2013),[6] 13-4031, and 13-4033(A).

¶8 Appellant maintains that the State failed to prove he committed alleged Violation #2 (that he "access[ed] the internet to view sexually oriented material") of special condition 12 (prohibiting him from "possess[ing], or in any way attempt[ing]

[6] We cite the current version of the statutes as they appear in Westlaw if no changes material to our decision have since occurred.

to obtain by telephone or any other instrument any sexually stimulating or sexually oriented material in any form as deemed inappropriate by treatment staff") because the State never offered any evidence to prove that his treatment staff deemed adult pornography inappropriate for him to possess and that the probation department had warned him he was not allowed to possess visual depictions of such pornography.

¶9 Because Appellant did not raise this objection in the trial court, we review for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, 567-68, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005); *State v. Payne*, 223 Ariz. 555, 560, ¶ 13, 225 P.3d 1131, 1136 (App. 2009). The State's failure to prove every element of an offense constitutes such error. *See State v. Stroud*, 209 Ariz. 410, 412 n.2, ¶ 6, 103 P.3d 912, 914 n.2 (2005).

¶10 We will uphold the trial court's finding of a probation violation unless the finding is arbitrary or unsupported by any theory of the evidence. *State v. Vaughn*, 217 Ariz. 518, 521, ¶ 14, 176 P.3d 716, 719 (App. 2008) (citation omitted). If a probationer has not been advised of the specific terms or conditions of his probation, however, his probation cannot be revoked for violation of those unspecified terms or conditions. *See State v. Alves*, 174 Ariz. 504, 505-06, 851 P.2d 129, 130-31 (App. 1992); *see also* Ariz. R. Crim. P. 27.1

(requiring that conditions of probation and regulations implementing those conditions be in writing).

¶11 In this case, the record provided this court, including the transcript of the June 8, 2012 probation violation hearing, makes clear that although the State provided evidence that Appellant possessed adult pornography accessed through the internet, the State failed to offer any evidence that Appellant's treatment staff deemed such pornography inappropriate for him to possess or that the probation department had notified Appellant (either through written notice or verbally) that he was not allowed to possess visual depictions of adult pornography. Consequently, we reverse the trial court's finding that Appellant committed Violation #2 of special condition 12. Moreover, because we set aside this probation violation finding, and the record does not clearly show the trial court would have made the same disposition without this finding, we also set aside the revocation and sentence. *See State v. Jones*, 163 Ariz. 498, 499, 788 P.2d 1249, 1250 (App. 1990).

¶12 We are unable to determine from the record, however, whether our reversal of the trial court's finding that Appellant committed Violation #2 of special condition 12 requires us to also reverse the court's finding that Appellant committed Violation #2 (that he "access[ed] the internet to view sexually

oriented material") of special condition 14 (prohibiting him from "possess[ing], us[ing], or hav[ing] personal access to any computer or similar equipment that has Internet capability without prior written permission of [his] probation officer"). Although Appellant and the State appear to assume that reversal of this second violation flows from or is inextricably connected to reversal of the first violation, and statements made by the court at the probation violation and disposition hearings might be construed to support such an assumption, the record and the meaning of the trial court's statements are unclear. Consequently, we remand this matter to the trial court with directions for the court to clarify whether its finding that Appellant committed Violation #2 of special condition 14 still stands in light of our decision, hold a new disposition hearing if necessary, *see id.*, and conduct any other proceedings consistent with this decision.

_____/S/_____
LAWRENCE F. WINTHROP, Presiding Judge

CONCURRING:

_____/S/_____
DIANE M. JOHNSEN, Chief Judge

_____/S/_____
SAMUEL A. THUMMA, Judge