IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

RICHARD ALLEN REED, *Appellant*.

No. 1 CA-CR 16-0269
FILED 4-11-2017

Appeal from the Superior Court in Maricopa County
No. CR2014-117844-001
The Honorable Danielle J. Viola, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Michael T. O'Toole
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Nicholaus Podsiadlik
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Peter B. Swann delivered the decision of the court, in which Judge Kent E. Cattani and Judge Donn Kessler joined.

S W A N N, Judge:

¶1 Richard Reed appeals his conviction for one count of voyeurism, Arizona Revised Statues ("A.R.S.") § 13–1424. He contends the court erred by failing to *sua sponte* instruct the jury on surreptitious viewing, A.R.S. § 13-3019, as a lesser-included offense of voyeurism. For the following reasons, we conclude the superior court did not err, and we affirm Reed's conviction for voyeurism.

FACTS AND PROCEDURAL HISTORY

¶2 Reed used a mirror to look under a closed bathroom door while his subordinate, C.C., was inside the bathroom urinating. C.C. saw the mirror as well as Reed's shoe in the gap between the floor and the bottom of the door, confronted Reed, and filed complaints with their employer and with the Wickenburg Police Department. A grand jury indicted Reed on one count of voyeurism, which requires that the misconduct be "for the purpose of sexual stimulation."

¶3 Whether Reed was sexually motivated was the main issue at trial. He claimed he was investigating whether C.C. was using drugs as a possible explanation for what he perceived to be her behavioral changes. The prosecution presented testimony from C.C. and the employer's human-resources manager disputing Reed's investigation claim, and Reed described C.C. as "a very attractive woman" and said that his relationship to her was "obsessive."

¶4 Reed asked for a jury instruction on disorderly conduct as a lesser-included offense of voyeurism. The prosecutor objected, and the trial court declined the request. Reed did not ask that the jury be instructed on surreptitious viewing as a lesser-included offense of voyeurism.

¶5 After a three-day trial, the jury returned a guilty verdict. The court suspended sentence and placed Reed on three years of probation with sex-offender terms and two months of deferred jail time.

¶6 Reed filed a timely notice of appeal.

DISCUSSION

¶7 On appeal, Reed for the first time contends that the superior court erred by failing *sua sponte* to instruct the jury on surreptitious viewing as a lesser-included offense of voyeurism.[1]

¶8 Because Reed did not ask for such an instruction, he must show fundamental error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19–20 (2005). To establish fundamental error, he must show error and that the error was both fundamental and prejudicial. *Henderson*, 210 Ariz. at 568, ¶ 23; *State v. James*, 231 Ariz. 490, 493 ¶ 11 (App. 2013) (stating that defendant "bears the burden to establish that (1) error exists, (2) the error is fundamental, and (3) the error caused him prejudice"). Fundamental error is error that goes to "the foundation of the case . . . [and] takes from the defendant a right essential to his defense." *Henderson*, 210 Ariz. at 567, ¶ 19.

¶9 The parties dispute whether the trial court erred by failing *sua sponte* to instruct on a lesser-included offense in a non-capital case. Reed relies in part on *State v. Fish*, in which we noted that we "would normally hold that it is fundamental error for the trial court to fail to give such an instruction if it is supported by the evidence and not waived by the defendant." 222 Ariz. 109, 131, ¶ 79 (App. 2009); *see also State v. Fiihr*, 221 Ariz. 135, 137, ¶ 9 (2008) (citing *State v. Valenzuela*, 194 Ariz. 404, 408, ¶ 16 (1999)) ("Under some circumstances, a trial court's failure to *sua sponte* instruct the jury on a lesser-included offense may constitute fundamental, prejudicial error."). The State contends a post-*Fish* case, *State v. Gipson*, 229 Ariz. 484 (2012), conclusively resolved that the trial court does not have a duty to instruct *sua sponte* on lesser-included offenses in non-capital cases.

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[1] Both crimes are class 5 felonies. A.R.S. § 13-3019(E) (surreptitious viewing); A.R.S. § 13-1424(D) (voyeurism). But a defendant convicted of voyeurism also may be required to register as a sex offender. A.R.S. § 13-3821(C) ("[T]he judge who sentences a defendant for any violation of chapter 14 [A.R.S. §§ 13-1401 to -1472] or 35.1 [A.R.S. §§ 13-3551 to -3562] of this title or for an offense for which there was a finding of sexual motivation pursuant to § 13-118 may require the person who committed the offense to register pursuant to this section.") (footnote omitted).

¶10 We need not decide, however, whether the alleged error was fundamental or caused Reed prejudice, because we conclude that surreptitious viewing, A.R.S. § 13-3019, is not a lesser-included offense of voyeurism, A.R.S. § 13-1424. *See cf. Fiirh*, 221 Ariz. at 138, ¶ 12 (holding that misdemeanor failure to stop is not a lesser-included offense of felony flight from a law-enforcement vehicle and affirming conviction, finding "no error, fundamental or otherwise").

¶11 Whether one offense is a lesser-included offense of another crime is a question of statutory interpretation, which we review de novo. *State v. Cheramie*, 218 Ariz. 447, 448, ¶¶ 7–8 (2008); *In re James P.*, 214 Ariz. 420, 423, ¶ 12 (App. 2007). Two tests determine whether an offense is a lesser-included offense: the "elements" test and the "charging documents" test. *State v. Hine*s, 232 Ariz. 607, 610, ¶ 10 (App. 2013); *State v. Larson*, 222 Ariz. 341, 343, ¶ 7 (App. 2009).

¶12 Under the elements test, a lesser-included offense is an offense that is composed solely of some but not all the elements of the greater offense, so that it is "impossible to have committed the greater offense without having committed the lesser offense." *Hine*s, 232 Ariz. at 610, ¶ 10 (citing *State v. Celaya*, 135 Ariz. 248, 251 (1983)). Under the charging documents test, a lesser-included offense is an offense that would not always form part of the greater offense but is nonetheless described by the charging document. *Larson*, 222 Ariz. at 344, ¶ 13.[2] "Stated differently, can the offense, as described by statute, or as charged, 'be committed without necessarily committing the lesser.'" *State v. Gooch*, 139 Ariz. 365, 366–67 (1984) (internal citation omitted).

¶13 In applying the elements test, "the first step is to comparatively analyze the elements of the respective statutes." *In re Victoria K.*, 198 Ariz. 527, 530, ¶ 9 (2000). When analyzing lesser-included offenses, courts examine the statutory elements of the crimes, not the facts underlying the particular case. *State v. Laffoon*, 125 Ariz. 484, 487 (1980).

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[2] Reed does not contend that the charging documents test supports his argument. It is in any event of no avail to him, because the charging document could not be construed to describe any offense other than voyeurism. The indictment charged that Reed "on or about January 29, 2015, for the purpose of sexual stimulation, knowingly did invade the privacy of VICTIM A, without his or her knowledge, in violation of A.R.S. §§ 13-1424, 13-701, 13-702, and 13-801."

An element is any constituent part of an offense that the prosecution must prove to obtain a conviction. *State v. Lara*, 240 Ariz. 327, 328, ¶ 7 (2016). "The legislature defines crimes and their elements, and courts may not add elements to crimes defined by statute. . . . Our analysis is therefore limited to the elements of the two relevant offenses as set forth in Arizona's criminal code." *Cheramie*, 218 Ariz. at 449, ¶ 9 (internal quotation and citation omitted).

¶14 The plain language of these two statutes shows they require different conduct. A.R.S. § 13-1424(A) provides that a person commits voyeurism if the person "knowingly invade[s] the privacy of another person without the knowledge of the other person for the purpose of sexual stimulation." A.R.S. § 13-1424(C) provides that:

> [A] person's privacy is invaded if both of the following apply:
>
> 1. The person has a reasonable expectation that the person will not be photographed, videotaped, filmed, digitally recorded or otherwise viewed or recorded.
> 2. The person is photographed, videotaped, filmed, digitally recorded or otherwise viewed, with or without a device, either:
> (a) While the person is in a state of undress or partial dress.
> (b) While the person is engaged in sexual intercourse or sexual contact.
> (c) While the person is urinating or defecating.
> (d) In a manner that directly or indirectly captures or allows the viewing of the person's genitalia, buttock or female breast, whether clothed or unclothed, that is not otherwise visible to the public.

¶15 In comparison, the surreptitious-viewing statute, A.R.S. § 13-3019(A), provides:

> It is unlawful for any person to knowingly photograph, videotape, film, digitally record or by any other means secretly view, with or without a device, another person without that person's consent under either of the following circumstances:

> 1. In a restroom, bathroom, locker room, bedroom or other location where the person has a reasonable expectation of privacy and the person is urinating, defecating, dressing, undressing, nude or involved in sexual intercourse or sexual contact.
> 2. In a manner that directly or indirectly captures or allows the viewing of the person's genitalia, buttock or female breast, whether clothed or unclothed, that is not otherwise visible to the public.

¶16 Reed contends that the only "material difference between these two statutes is that voyeurism requires the defendant [to have] acted for the purpose of sexual stimulation." There is, however, another material difference.

¶17 While both statutes protect a person's right to privacy in circumstances in which a person is deemed to reasonably expect privacy, surreptitious viewing requires that the perpetrator "secretly view" another person while voyeurism does not. Thus voyeurism, unlike surreptitious viewing, can be committed in other than secrecy, because it does not require that the State prove the perpetrator "secretly view[ed]" the other person.

¶18 In interpreting a statute, we must give meaning to each word and phrase "so that no part is rendered void, superfluous, contradictory or insignificant." *Pinal Vista Props., L.L.C. v. Turnbull*, 208 Ariz. 188, 190, ¶ 10 (App. 2004); *see also Mejak v. Granville*, 212 Ariz. 555, 557, ¶ 9 (2006) ("We must interpret the statute so that no provision is rendered meaningless, insignificant, or void."). "When the plain text of a statute is clear and unambiguous there is no need to resort to other methods of statutory interpretation to determine the legislature's intent because its intent is readily discernable from the face of the statute." *State v. Christian*, 205 Ariz. 64, 66, ¶ 6 (2003).

¶19 We recently interpreted the voyeurism statute in *State v. Gongora*, 235 Ariz. 178 (2014). In that case, the victim was shopping in "a retail store open to the public" when the defendant "walked up behind her, crouched down, and looked up her dress." 235 Ariz. at 179, ¶¶ 2, 4. He violated A.R.S. § 13-1424 by overtly arranging himself, while in public, in such a way that he could see up her dress. *See* A.R.S. § 13-424(C)(2)(d); 235 Ariz. at 180, ¶ 9. We concluded that "[a] fully-clothed person in a public place has a reasonable expectation that the public will not be able to view parts of her body as if she were not clothed." *Id.*

¶20 *Gongora* shows that it is not "impossible" — the word *Celaya* used in the lesser-included-offense rule — to commit voyeurism without having committed surreptitious viewing. The defendant in *Gongora* was not secretly viewing the victim.

¶21 *Gongora* also observed that the Legislature in 2006 amended the surreptitious-viewing statute to be "consistent with" the then-proposed voyeurism statute and that "[t]he more serious offense of voyeurism be 'for the purpose of sexual stimulation,' which is not found in the surreptitious photographing statute." 235 Ariz. at 181 ¶¶ 11–12 (quoting A.R.S. § 13-1424(A)). We do not interpret this observation as attempting to analyze all material differences between the two statutes, nor do we interpret this observation as meaning — as Reed argues — that voyeurism is simply surreptitious viewing with a sexual-motivation overlay.

¶22 Even if the surreptitious-viewing statute was amended to be "consistent with" the voyeurism statute, that does not mandate that it be considered a lesser-included offense of voyeurism. Statutes clearly can be related in that they address similar conduct, and whether violations are charged is a matter of prosecutorial discretion. *See, e.g.*, *State v. West*, 176 Ariz. 432, 443–44 (1993) (rejecting defendant's argument that jury should have been instructed on lesser-related offenses, i.e., those offenses "supported by the facts of the case although not included in the charging document") *overruled in part on other grounds*, *State v. Rodriguez*, 192 Ariz. 58, 65 n.7, ¶ 30 (1998).

¶23 While the two statutes are clearly related, a person can commit voyeurism without committing surreptitious viewing because voyeurism does not require that the perpetrator "secretly view" the victim. As a result, we conclude that surreptitious viewing statute is not a lesser-included offense of voyeurism.

CONCLUSION

¶24 Because we conclude as a matter of law that A.R.S. § 13-3901 is not a lesser-included offense of A.R.S. § 13-1424, we affirm Reed's conviction and sentence.