STATE OF MINNESOTA

IN SUPREME COURT

A21-0477
A21-0480

Court of Appeals

Thissen, J.
Concurring, McKeig, Chutich, Moore, III, JJ.

State of Minnesota,

Respondent,

vs.

Filed: June 14, 2023
Office of Appellate Courts

Irfan Beganovic,

Appellant.

Keith Ellison, Attorney General, Ed Stockmeyer, Assistant Attorney General, Saint Paul, Minnesota; and

Michelle Eldien, Otter Tail County Attorney, Fergus Falls, Minnesota, for respondent.

Cathryn Middlebrook, Chief Appellate Public Defender, Anders J. Erickson, Assistant State Public Defender, Saint Paul, Minnesota, for appellant.

S Y L L A B U S

1. The term "unlawfully" in the first-degree arson statute, Minn. Stat. § 609.561, subd. 1 (2022), creates an element requiring the State to prove a fire was started without authorization.

2. The evidence in this case was sufficient to prove beyond a reasonable doubt that the fire was started unlawfully.

3. Unobjected-to failure to instruct the jury on the element of unlawfulness was not reversible error.

Affirmed.

O P I N I O N

THISSEN, Justice.

This case asks the court to clarify whether the State must prove that a person charged with first-degree arson acted "unlawfully" when setting fire to a dwelling. Minn. Stat. § 609.561, subd. 1 (2022). Contrary to the court of appeals, we conclude that the use of "unlawfully" in section 609.561, subdivision 1, creates an element of the crime of first-degree arson that the State must prove. But we nonetheless affirm the conviction because we conclude that the State met its burden to prove beyond a reasonable doubt that Beganovic acted unlawfully in setting fire to his house and that the unobjected-to failure to instruct the jury on the element was not reversible error. Therefore, we affirm the decision of the court of appeals but on different grounds.

FACTS

In the early morning of June 1, 2018, appellant Irfan Beganovic's house burned down. Beganovic called 911 at approximately 1:30 a.m. to report the fire. Following the fire he filed an insurance claim, prompting an investigation by his insurance company. Beganovic did not claim that he started the fire, either on the day of the fire or when he filed his insurance claim.

At the same time, a fire marshal conducted a separate investigation. Both investigators independently reached the conclusion that the fire was started intentionally. They based their conclusion on the fire's multiple points of origin, as well as ruling out any other causes (such as faulty appliances or wiring).

The State charged Beganovic with first-degree arson under section 609.561, subdivision 1. Under this statute, a person is criminally liable if he "unlawfully by means of fire or explosives, intentionally destroys or damages any building that is used as a dwelling at the time the act is committed . . . ." Minn. Stat. § 609.561, subd. 1. Beganovic pleaded not guilty and the case proceeded to a jury trial in November 2020.

At trial, investigators testified to their conclusions that the fire was intentionally started. The investigators told the jury that, based on their training and experience, the appliances in the house could not have started the fire. Beganovic's wife and daughter both testified that they were sleeping on the couches in the living room on the night of the fire. Although Beganovic's daughter unexpectedly testified during trial that she started the fire by smoking a cigarette, the deputy fire marshal and fire investigators explained that the daughter's claim would not explain the other two origin points of the fire. Beganovic continued to contend that the fire was started by faulty appliances or wiring. He also stated that his family was inside the house at the time the fire started. On the day of the fire and when he later filed his insurance claim, Beganovic never claimed that he started the fire or that the burning of his house was lawful because he was authorized to do so. The jury found Beganovic guilty.

Beganovic appealed, arguing that the word "unlawfully" in the first-degree arson statute creates an element of the offense that the State must prove beyond a reasonable doubt. According to Beganovic, because the State presented no evidence to show that the burning of his house was "unlawful," the State failed to establish all elements of the crime of first-degree arson. *State v. Beganovic*, 974 N.W.2d 278, 283–84 (Minn. App. 2022).

The court of appeals rejected Beganovic's argument. The court of appeals read Minn. Stat. § 609.561 (2022) (the arson statute) and Minn. Stat. § 609.564 (2022) (the permit statute)[1] together such that "unlawful" means that a defendant did not have a permit, license, or other written authorization to start the fire from a public authority as specifically provided in section 609.564. *Beganovic*, 974 N.W.2d at 284–85. The court of appeals held that Beganovic had the burden of proving that he had a permit, license, or other written authorization to start the fire. *Id.* at 285. The court of appeals reasoned that the burden of proof rested with Beganovic because the act of destroying a house by fire or explosives is "ordinarily dangerous to society." *Id.* at 284–85 (citation omitted) (internal quotation marks omitted). Because Beganovic did not show that he was permitted to burn down his house, the court of appeals held that sufficient evidence supported his conviction. *Id.* at 286.

[1] Section 609.564 states: "A person does not violate section 609.561, 609.562, 609.563, or 609.5641 if the person sets a fire pursuant to a validly issued license or permit or with written permission from the fire department of the jurisdiction where the fire occurs." The language of the provision has not changed since 2018 when the fire at issue in this case occurred.

ANALYSIS

We are asked to decide whether the State met its burden under the first-degree arson statute, Minn. Stat. § 609.561. The statute provides that "[w]hoever unlawfully by means of fire or explosives, intentionally destroys or damages any building that is used as a dwelling at the time the act is committed . . . commits arson in the first degree . . . ." Minn. Stat. § 609.561, subd. 1.

To resolve this dispute, we first assess the meaning of the word "unlawfully" as used in section 609.561, subdivision 1, to determine whether "unlawfully" is an element of first-degree arson or a defense. Second, because we conclude that "unlawfully" is an element of first-degree arson, we analyze whether the prosecution met its burden to prove beyond a reasonable doubt that Beganovic acted unlawfully. Finally, we address whether failing to instruct the jury that the State was required to prove Beganovic acted unlawfully was reversible error.

Beganovic's argument is essentially that the evidence provided at trial is insufficient to support his conviction because the State failed to prove that he "unlawfully" burned down his house. When a sufficiency-of-the-evidence claim turns on the interpretation of a statute, we review that interpretation de novo. *State v. Bowen*, 921 N.W.2d 763, 765 (Minn. 2019).

I.

A.

Before we reach the question of whether "unlawfully" is an element of first-degree arson, we must determine what the term "unlawfully" means in section 609.561. This is a

question of statutory interpretation, which requires us "to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2022). To do so, we first examine the plain meaning of the text—the word's plain and ordinary meaning—and we may consult dictionary definitions as part of that inquiry. *Buzzell v. Walz*, 974 N.W.2d 256, 262 (Minn. 2022).

Unlawful is defined as "[n]ot authorized by law . . . [c]riminally punishable . . . [i]nvolving moral turpitude." *Unlawful, Black's Law Dictionary* (11th ed. 2019). Of these various formulations, "not authorized by law" is the most apt. *See* Bryan A. Garner, *A Dictionary of Modern Legal Usage* 902 (2d ed. 1995) (noting that the sense of unlawful as "unauthorized by law" is most common and the senses of unlawful as criminally punishable and involving moral turpitude "so complicate matters in using this term that they lessen its utility"). Criminally punishable is redundant as the statute itself creates a criminal punishment. Moral turpitude seems inappropriate: partly because it is awkward for section 609.561 to read "whoever [*with moral turpitude*] by means of fire or explosives, intentionally destroys or damages any building that is used as a dwelling" and partly because we have not decided if arson is an act of moral turpitude. *Cf. In re Conley*, 248 N.W. 41, 42 (Minn. 1933) (concluding that a violation of Minnesota law is not a de facto act of moral turpitude). Therefore, "unlawfully" in section 609.561 could reasonably be read broadly to mean a fire not authorized by law.

Furthermore, the term "unlawfully" is not modified or limited in any way, which suggests that the term is to be read broadly. We will not read into the statute any modifying or limiting language. *Gen. Mills, Inc. v. Comm'r of Revenue*, 931 N.W.2d 791, 800

(Minn. 2019) (noting that we cannot add words or meaning to a statute that were intentionally or inadvertently omitted).

The approach taken by the court of appeals and urged upon us by the parties does just that; it adds language to section 609.561 that modifies or limits the term "unlawfully" used by the Legislature. Following the court of appeals, the parties in their briefing before us advance the argument that we should limit the term "unlawfully" in the first-degree arson statute to mean fires set without the authorization contemplated by section 609.564. In other words, the *only* way to prove a fire was or was not set "unlawfully" (regardless of who has the burden of proof) is to show that the defendant had one of the specific types of authorization set forth in section 609.564.[2] To be clear, we agree that possession of a validly issued license or permit or written permission as described in section 609.564 is one way to show that a defendant's act was not unlawful; we do not agree that it is the exclusive way.

To reach the conclusion that the term "unlawfully" exclusively means that a defendant did not have a license, permit, or written permission to start the fire under section 609.564, the court of appeals relied on our decision in *Cilek v. Off. of Minn. Sec'y of State*, 941 N.W.2d 411, 415 (Minn. 2020), for the proposition that we may read multiple statutory sections together to determine its plain meaning. *Beganovic*, 974 N.W.2d at

[2] We are not bound by the arguments made by the parties. *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) ("[I]t is the responsibility of appellate courts to decide cases in accordance with law, and that responsibility is not to be diluted by counsel's oversights, lack of research, failure to specify issues or to cite relevant authorities." (citation omitted) (internal quotation marks omitted)).

283–84. In *Cilek*, we examined whether a Minnesota voter must be given access to certain information contained in statewide registered voter lists. 941 N.W.2d at 414–15. The question required us to consider the Minnesota Data Practices Act, which generally makes all government data public unless classified as not public, Minn. Stat. § 13.03, subds. 1, 3 (2022), and Minnesota election law, particularly Minn. Stat. § 201.091 (2022), which allows public access to some, but not all, information in the registered voter lists. *Cilek*, 941 N.W.2d at 415–16. The information the voter sought was not classified as not public anywhere in the Data Practices Act. *Id.* at 414–16. Consequently, the Data Practices Act suggested that the information the voter sought was public. *Id.* On the other hand, section 201.091 suggested that the information was not public. *Id.*

We resolved the apparent conundrum by looking to two provisions of the Data Practices Act. *Id.* at 415. We first considered Minn. Stat. § 13.01, subd. 5(a) (2022), which provides that "sections referenced in [the Data Practices Act] that are codified outside this chapter classify government data as other than public, place restrictions on access to government data, or involve data sharing." We also considered Minn. Stat. § 13.607, subd. 6 (2022), which expressly directs that "[a]ccess to registered voter lists is governed by section 201.091." *Cilek*, 941 N.W.2d at 415. Accordingly, in light of the express language in the Data Practices Act that said that section 201.091 of the election law, and not the Data Practices Act itself, governed public access to voter registration records, we held that the voter could not access the information that was not made public under section 201.091. *Id.* at 416. Stated otherwise, *Cilek* does not create a general rule that multiple sections of a statute may be read together to determine its plain meaning. Instead,

Cilek stands for the unremarkable proposition that when a statute expressly says, "look at statute A to resolve this question and not statute B," we should use statute A to resolve the question.

That is not the same question posed in this case. Nothing in section 609.561 directs us to look to another statute to resolve the question of the meaning of "unlawfully."

The Legislature has provided us with guidance for understanding its intent. Minn. Stat. § 645.17 (2022). Among other things, we may presume that the Legislature generally "intends the entire statute to be effective and certain." Minn. Stat. § 645.17(2).

We have made clear, however, that the breadth of this general guidance depends upon how connected the statute we are interpreting is to other statutes. We recognize that when two statutes were enacted at the same time and for the same purpose, we may properly consider both in our effort to understand the plain language of the statute—whether more than one reasonable interpretation of the language exists. We refer to this as the whole statute canon. *State v. Fugalli*, 967 N.W.2d 74, 80 (Minn. 2021) (describing the whole statute canon and noting that it applies when determining whether text is ambiguous). And that principle makes sense as a method for understanding what the Legislature intended when it enacted a statute. When two parts of a statute are enacted at the same time and for the same purpose, the Legislature has all of those provisions before it as it considers the legislative solution to the particular problem, including the language used to set forth that solution. Accordingly, it is reasonable to assume that all of the provisions inform the legislators' understanding of the text of the statute it enacts. *See generally State v. Prigge*, 907 N.W.2d 635, 640 (Minn. 2018).

For that same reason, when trying to understand the plain meaning of a statute, we cannot consider other statutes that were not enacted in the same legislative act as the provision we are interpreting. The so-called related statutes canon, which allows us to construe together two statutes that were enacted separately but which share a common purpose and subject matter, only applies after we have determined that the statute we are interpreting has more than one reasonable meaning. *Fugalli*, 967 N.W.2d at 80 (describing the related statutes canon and stating that it applies after we have determined that statutory text is susceptible to more than one reasonable interpretation). Because we have determined that the plain meaning of the word "unlawfully" in section 609.561 broadly means "not authorized by law" without any modifiers or limitations, we conclude that the related statutes canon does not apply and that we cannot rewrite section 609.561 to read "unlawfully [due to lack of authorization under section 609.564] . . . ."

This conclusion is also supported by three other text-based clues that tell us that an interpretation that limits "unlawfully" to lack of authorization under section 609.564 is not the proper one. First, the decision to include "unlawfully"—the term that remains in the current law and which we are interpreting today—in the first-degree arson statute was made in 1976. *See* Act of Apr. 2, 1976, ch. 124, § 4, 1976 Minn. Laws 281, 282 (codified as amended at Minn. Stat. § 609.561 (2022)). In 1976, the Legislature amended the arson statute to split arson offenses into degrees and jettisoned the previous distinction between "simple" versus "aggravated" arson. *Compare* Minn. Stat. §§ 609.56, 609.565 (1974), *with* Act of Apr. 2, 1976, ch. 124, § 4, 1976 Minn. Laws 281, 282 (codified as amended at Minn. Stat. § 609.561 (2022)). In doing so, the Legislature used the same language as the prior

statute—"[w]hoever, by means of fire or explosives, intentionally destroys or damages [a dwelling]"—but expressly added the word "unlawfully." *See* Minn. Stat. §§ 609.56, 609.565 (1974); Act of Apr. 2, 1976, ch. 124, § 4, 1976 Minn. Laws 281, 282 (codified as amended at Minn. Stat. § 609.561 (2022)).[3] The Legislature plainly intended to add a new requirement—that the defendant must have acted in a way unauthorized by law—to the definition of the crime. We therefore must give meaning to "unlawfully" as a distinct requirement under the statute as it existed in 1976. *See State v. Galvan-Contreras*, 980 N.W.2d 578, 585 (Minn. 2022) (stating that we will not read a statute so that a word is superfluous). And the Legislature could not have intended the term "unlawfully" to have been limited to the circumstances defined in section 609.564 because section 609.564 was not adopted until 1985—9 years after the word "unlawfully" was written into the arson

[3] By way of background, the term "unlawfully" is currently used in the first-degree, second-degree, and third-degree arson statutes, but not the fourth-degree, fifth-degree, or wildfire arson statutes. *Compare* Minn. Stat §§ 609.561–.563 (2022), *with* Minn. Stat. §§ 609.5631–.5632, 609.5641 (2022). The term was added to the definition of first-, second-, and third-degree arson in 1976. *See* Act of Apr. 2, 1976, ch. 124, §§ 4–6, 1976 Minn. Laws 281, 282–83 (codified as amended at Minn. Stat. §§ 609.561–.563 (2022)). As just noted above, the previous version of the arson statute did not include the word "unlawfully." Further, the 1976 legislation created only three degrees of arson—the three that include the word "unlawfully." *Id.* The wildfire arson statute was enacted in 1990 and does not include the word "unlawfully." Act of Apr. 20, 1990, ch. 478, § 2, 1990 Minn. Laws 1031, 1032 (codified as amended at Minn. Stat. § 609.5641). At the same time, the statute excluding certain fires set under authority, permit, or other written permission from criminal liability was amended to include wildfires. Act of Apr. 20, 1990, ch. 478, § 1, 1990 Minn. Laws 1031, 1032 (codified as amended at Minn. Stat. § 609.564 (2022)). The fourth- and fifth-degree arson statutes were enacted in 1998 and did not include the word "unlawfully." Act of Apr. 6, 1998, ch. 367, §§ 19, 20, 1998 Minn. Laws 666, 694 (codified as amended at Minn. Stat. §§ 609.5631–.5632 (2022)). The Legislature did not amend section 609.564 at the time to exclude fires set under authority of a permit, license, or written permission from prosecution for fourth- and fifth-degree arson.

statute. *See* Act of May 17, 1985, ch. 141, § 4, 1985 Minn. Laws 396, 398 (codified as amended at Minn. Stat. § 609.564 (2022)). In short, "unlawfully" must have meant something in the period before section 609.564 was enacted, suggesting that the meaning of "unlawfully" cannot be entirely or exclusively linked to, and limited by, section 609.564. When the Legislature added section 609.564 in 1985, it did not also amend section 609.561 to refer to section 609.564 or limit the word "unlawfully" by saying that a person acts "unlawfully" unless he complies with section 609.564.

Second, the text of section 609.564, the authorization statute, also applies on its face to wildfire arson, Minn. Stat. § 609.5641 (2022), a statute which does not contain the word "unlawfully" in its definition of the crime. It would be odd to read section 609.564 as an expression of legislative intent to modify or limit the word "unlawfully" in section 609.561 when section 609.564 applies equally to a criminal statute that does not contain the word "unlawfully."

And finally, unlike Minn. Stat. § 624.714, subd. 1a (2022), which criminalizes carrying a firearm in public "without first having obtained a permit to carry," it is not clear under Minnesota law that section 609.564 is the sole means to claim a fire was started lawfully. Although the authorization statute is one way to avoid criminal liability for setting fire to a dwelling, the statute does not foreclose the possibility of other lawful excuses.

In summary, a person acts "unlawfully" when he sets a fire in a manner not authorized by law. Accordingly, we read the word "unlawfully" broadly to mean

unauthorized by law and do not limit the word's meaning to fires set without a permit, license, or written authorization as set forth in section 609.564.

B.

Having determined that "unlawfully" as used in section 609.561 means not authorized by law, we turn to the central dispute in this case: is "unlawfully" an element of first-degree arson under section 609.561? If "unlawfully" is an element of the offense, rather than an exception to criminal liability, then it is something that the State was required to prove beyond a reasonable doubt. *See State v. Hall*, 931 N.W.2d 737, 740 (Minn. 2019). This is a question of statutory interpretation which we review de novo. *Id.* Accordingly, we ask whether the Legislature intended the statutory language that a person must act "unlawfully" to be convicted of first-degree arson to be an element of the offense or an exception to criminal liability. *See State v Khalil*, 956 N.W.2d 627, 641 (Minn. 2021) ("Within the limitations imposed by the federal and state constitutions, the Legislature has the power to define crimes and the punishment for crimes (including the terms for confinement and parole), and the judiciary interprets and carries out those legislative commands."). For the reasons addressed below, tenets of statutory interpretation reflect that the Legislature intended "unlawfully" to be an element of first-degree arson. Furthermore, this result is consistent with the court's precedents analyzing the distinction between an element of a crime and an exception to criminal liability in other statutes.

1.

The text and structure of the language are strong clues to the Legislature's intent. *See* Minn. Stat. §§ 645.08, 645.16 (2022). The first clause in section 609.561,

subdivision 1, defining the crime of first-degree arson reads, "Whoever unlawfully by means of fire or explosives . . . ." As a textual matter, the word "unlawfully" in section 609.561 is not set apart from the language in the statute as an independent clause—the word is not even offset by punctuation. Rather, the word "unlawfully" is integrated into and among the other elements in the statute defining the crime. This supports "unlawfully" being an element of the crime that the State must prove beyond a reasonable doubt.

Further, as earlier noted, the Legislature in 1976 deliberately added "unlawfully" to, and in the middle of, the preexisting statutory description of the crime which stated that "[w]hoever, by means of fire or explosives, intentionally destroys or damages [a dwelling] . . . ." *Compare* Minn. Stat. §§609.56, 609.565 *with* Act of Apr. 2, 1976, ch. 124, § 4, 1976 Minn. Laws 281, 282 (codified as amended at Minn. Stat. § 609.561 (2022)). That too suggests that "unlawfully" is an element of the crime and not an exception to criminal liability. If the Legislature intended that "unlawfully" be considered an exception to criminal liability rather than an element, one would have expected it to draft the statute differently by setting the exception off in a separate, non-integrated clause. *See Buzzell*, 974 N.W.2d at 265 (rejecting a statutory interpretation argument on the basis that, had the Legislature intended a particular meaning, it would have chosen a more direct textual path); *see, e.g.*, Minn. Stat. § 624.714, subd. 1a ("A person . . . who carries, holds, or possesses a pistol in a motor vehicle, snowmobile, or boat, or on or about [his] clothes

or the person, or otherwise in possession or control in a public place . . . *without first having obtained a permit* to carry the pistol is guilty of a gross misdemeanor." (emphasis added)).[4]

2.

This analysis of the statutory language of section 609.561 to glean legislative intent is consistent with how we have previously interpreted other statutes that require the absence of a fact. *See Hall*, 931 N.W.2d at 740 (explaining that a statutory clause requiring the absence of a fact may be either an element or defense).[5] The first-degree arson statute's

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[4] As discussed in the next section, the court in *State v. Paige*, held that the "without a permit" provision in Minn. Stat. § 624.714 operated as an exception rather than as an element. 256 N.W.2d 298, 303 (Minn. 1977). And in *State v. Timberlake*, "we reaffirm[ed] our interpretation of Minn. Stat. § 624.714 set forth in *Paige*." 744 N.W.2d 390, 397 (Minn. 2008).

[5] Our job is to determine the intent of the Legislature regarding section 609.561, the specific statute that we are interpreting. Prior cases interpreting other statutes that similarly require the absence of a fact are useful by analogy (highlighting the types of clues we may consider in conducting such an analysis), but our focus must be on the statute in front of us in a particular case and whether the Legislature intended a word or phrase in that particular statute to be an element or an exception. This approach is especially apt when interpreting language in a statute that was enacted before we decided the first case in the string of cases we discuss below.

In particular, we should be cautious before we impose general presumptions about legislative intent drawn from prior analogous cases dealing with different statutes, particularly where the presumption is not articulated in those cases. For instance, the concurrence argues that we should adopt a broad presumption that the Legislature always intends that statutory language that allows a person to avoid criminal liability for the act described in a criminal statute if he is authorized by the *government* to do the act creates an exception, but language that allows a person to avoid criminal liability for the act described in a criminal statute if he is authorized by someone *other than the government* to do the act creates an element of the crime. Such an approach has no basis in anything having to do with the intent of the Legislature when it enacted the language of the particular statute we are interpreting.

inclusion of the term "unlawfully" is such an absence-of-a-fact provision, by requiring that a person acted in a manner *not* authorized by law.[6]

We first addressed an absence of fact statutory requirement in *State v. Paige*, where we evaluated a statute that prohibited carrying a firearm "without a permit." 256 N.W.2d 298, 303 (Minn. 1977); *see also* Minn. Stat. § 624.714, subd. 1 (1976).[7] The defendant claimed that the language "without a permit" created an element of a crime that the State was required to prove. *Paige*, 256 N.W.2d at 303. We disagreed. We held that "[t]he better view is that 'without a permit' is an exception," because "[t]here] is nothing inherently unfair in requiring persons charged under the statute to present their permits." *Id.* We further reasoned that the statutory provision itself included a "general prohibition," and stated that "[t]he only exception to this rule is for persons who have demonstrated a need or purpose for carrying firearms and have shown their responsibility to the police in obtaining a permit." *Id.*

We limited the holding in *Paige* by clarifying that the ultimate burden of proving beyond a reasonable doubt that the defendant did not have a permit to carry a firearm remains with the State. *Id.* at 304. Under *Paige*, a person seeking to avoid criminal liability under Minn. Stat. § 624.714, subd. 1, had to establish a prima facie case showing that he

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[6] The principle announced in *State v. Stokely*, 16 Minn. 282 (Minn. 1871), and its progeny, is not implicated in this case because a person who sets an authorized fire does not commit an offense, much less a more serious offense. *See Hall*, 931 N.W.2d at 742 (distinguishing the *Stokely* and *Brechon* lines of cases).

[7] The statute provided: "A person . . . who carries, holds or possesses a pistol . . . in a public place or public area without first having obtained a permit to carry the pistol is guilty of a gross misdemeanor." Minn. Stat. § 624.714, subd. 1 (1976).

had a permit to possess the firearm. *Paige*, 256 N.W.2d at 304. Essentially, the defendant had to come forward with some evidence that he had a permit to carry. The burden then shifted "back onto the state to show the invalidity of the permit, or violation of the terms of the permit." *Id.* We reasoned that "[o]nce the defendant has come forward initially with evidence of the permit, the state's difficulty in 'proving a negative' is alleviated, making it reasonable for the state to disprove the defense." *Id.*

We next addressed an absence of fact statutory requirement in *State v. Brechon*, 352 N.W.2d 745 (Minn. 1984), where we considered a trespassing statute, Minn. Stat. § 609.605(5) (1982), which provided "[w]hoever intentionally does any of the following is guilty of a misdemeanor . . . (5) Trespasses upon the premises of another and, *without claim of right*, refuses to depart therefrom on demand of the lawful possessor thereof." (Emphasis added.) We were tasked with determining whether the words "without claim of right" created an element of the offense the State had to prove. *Brechon*, 352 N.W.2d at 748. We stated the case had three possible outcomes: (1) that "without claim of right" was an element of the offense the State had to prove beyond a reasonable doubt; (2) that the language created an ordinary defense, which would require the defendant to present evidence, but would keep the burden of persuasion on the State to disprove the defense beyond a reasonable doubt (essentially the result in *Paige*); or (3) that the language created an affirmative defense, in which the defendant would take on the burden of establishing the defense by a preponderance of the evidence. *Id.* at 749.

We further explained how we determine which of the three categories statutory language that requires proof of an absence of a fact falls into. First, we stated that the

analysis for determining whether such language creates an element or an exception is textual: whether the language requiring proof of absence of a certain fact "is so incorporated with the clause defining the offense that it becomes in fact a part of the description." *Id.* at 749 (citation omitted) (internal quotation marks omitted); *see generally* Minn. Stat. § 609.095(a) (2022) ("The legislature has the exclusive authority to define crimes and offenses . . . ."). If it is so incorporated with the clause defining the offense that it becomes in fact a part of the description, it is an element.

If the language is found to be an exception, the court must then determine if the exception is an ordinary defense (requiring the defendant to present evidence that the fact exists while leaving the burden of persuasion to disprove the existence of the fact on the State) or an affirmative defense (which shifts the burden of proof that the fact exists entirely to the defendant). *Brechon*, 352 N.W.2d at 749. To make that second determination—which has to do with process and the fairness of court proceedings—a court should consider if "the act in itself, without the exception, is 'ordinarily dangerous to society or involves moral turpitude' and that requiring the state to prove the acts would place an impossible burden on the prosecution." *Id.*

In *Brechon*, we reached our holding under the first part of the analysis, concluding that the language "without claim of right" was "integral to the definition of criminal trespass in Minnesota" and held that " 'without claim of right' is an element the state must prove beyond a reasonable doubt." *Id.* at 750. Accordingly, we did not need to reach the second part of the analysis. Consequently, we placed the burden of proof and persuasion

on the State to prove that the defendant did not have a claim of right to be on the property. *Id.*[8]

In other words, after *Brechon*, the question of whether the language requiring proof of absence of a fact is an element turns on whether the words are so incorporated with and integrated into the clause defining the offense that it becomes a part of the description of the offense. If a court determines that the language requiring proof of an absence of a fact is an exception to criminal liability, then the court assesses (1) whether the act that creates criminal liability is ordinarily dangerous to society or involves moral turpitude, and (2) whether requiring the State to prove the absence of a fact would place an impossible burden on the State. *Id.* at 749. If both of those factors are shown, then the language requiring proof of an absence of a fact may be treated as an affirmative defense rather than an ordinary defense. *Id.*

We reaffirmed our *Brechon* analysis in *In re L.Z.*, 396 N.W.2d 214 (Minn. 1986), and *State v. Burg*, 648 N.W.2d 673 (Minn. 2002). *In re L.Z.* was a case about the admissibility of certain school records under the juvenile offense of habitual truancy. We did not thoroughly discuss the distinction between element and defense. 396 N.W.2d at 220–21. But we did place the burden for showing that a child was absent "without a lawful

[8] In *Brechon*, we further stated that the State can prove its case by coming forward with evidence that would allow a reasonable factfinder to infer that there could be no claim of right by defendant. 352 N.W.2d at 750. We will discuss this aspect of the case in more detail below.

excuse" under the habitual truancy statute on the State and did not require the defendant to first bring forward any proof that she had a lawful excuse. *Id.* at 221.[9]

In *Burg*, we were asked to consider the phrase "without lawful excuse" in a statute criminalizing the failure to pay court-ordered child support.[10] *Burg*, 648 N.W.2d at 678. We held that "without lawful excuse" was embedded into the definition of the offense and that this embedded language "demonstrated [the Legislature's] intent to include the absence of a lawful excuse as one of the facts necessary for a conviction." *Id.* The court addressed the ruling in *Paige* directly, stating that:

> When the legislature in this manner includes the absence of a fact in the definition of an offense, the absence of that fact is generally treated as an element of the offense. Although we have not universally applied this rule, *see State v. Paige,* 256 N.W.2d 298, 302–04 (Minn. 1977) . . . our more recent cases have consistently treated such language as creating an element of an offense, *see In re Welfare of L.Z.*, 396 N.W.2d 214, 218 (Minn. 1986); *Brechon*, 352 N.W.2d at 750.

Id. at 678–79. *Burg* recognized that *Paige* had found the absence of a fact to be an exception, but did not address the rationale behind the "non-universal" application of the rule in *Paige* in comparison to cases like *Brechon*, *L.Z.*, and *Burg* where the absence-of-a-fact requirement was determined to be an element of the offense.

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[9] The statute defined a habitual truant as a child "absenting himself from attendance at school without lawful excuse" for the required number of days. *In re L.Z.*, 396 N.W.2d at 216 n.1 (quoting Minn. Stat. § 260.015, subd. 19 (1984)). We also held that the State had the burden to prove that the child volitionally absented himself and demanded more from the State to prove that element. *Id.* at 221.

[10] The statute provided: "Whoever is legally obligated to provide care and support to a . . . child . . . and knowingly omits and fails without lawful excuse to do so is guilty of a misdemeanor . . . ." *Burg*, 648 N.W.2d at 678 (quoting Minn. Stat. § 609.375 (1998)).

Although our *conclusion* that the absence-of-a-fact language in the statute addressed in *Paige* created an exception rather than an element of the offense is different than the conclusion reached about different statutes in the *Brechon* line of cases, our *analysis* in *Paige* is consistent with the rule articulated and applied in those other cases. In *Paige*, we examined the language and structure of section 624.714 and concluded that the statute created a general prohibition on carrying a firearm and separately identified *in the same statute* only one exception for those who have gone through the process of obtaining a permit to carry; a permitting process that itself was explicitly set forth in section 624.714. 256 N.W.2d at 303. The words "without first having obtained a permit to carry the pistol" were not part of the description of the offense. Minn. Stat. § 624.714 (1976). The phrase requiring the absence of a fact followed the description of the offense in the statutory text. Moreover, the language the Legislature used in section 624.714 directly referred to the exclusive process to obtain a permit that was set forth, immediately, in the same statute.[11] That is a textual analysis and it is consistent with the inquiry in our other cases focusing on whether the statutory language conveys the Legislature's intent to create an element of a crime.

While we did not distinguish between an "ordinary defense" and an "affirmative defense" in *Paige*, the outcome in *Paige* plainly demonstrated we considered the language

[11] We also observed in *Paige* that placing an initial burden of providing prima facie evidence of a permit to carry on the defendant would not be so unfair as to violate due process. *Paige*, 256 N.W.2d at 303 (citing *State v. Bott*, 246 N.W.2d 48 (Minn. 1976), for the principle that it does not always violate due process to place the burden of proving an affirmative defense on the defendant).

"without a permit" to be an ordinary defense rather than an affirmative defense. 256 N.W.2d at 304 (holding that defendant must come forth with prima facie evidence that he had a permit to carry a firearm, but State retains burden of proving defendant lacked a permit beyond a reasonable doubt); *see Brechon*, 352 N.W.2d at 749 (noting that in *Paige* we found that the language "without a permit" created the type of exception that required the defendant to come forward with prima facie evidence while leaving the State with the ultimate burden of persuasion beyond a reasonable doubt). We concluded in *Paige* that it was reasonable to leave the ultimate burden of proving beyond a reasonable doubt that the defendant did not have a permit to carry a firearm on the State. 256 N.W.2d at 304. The second requirement for transforming an ordinary defense into an affirmative defense—it would be impossible for the State to prove the absence of a fact—was not satisfied. *Id.* ("Once the defendant has come forward initially with evidence of the permit, the state's difficulty in 'proving a negative' is alleviated, making it reasonable for the state to disprove the defense.").

Finally, in *State v. Timberlake*, 744 N.W.2d 390, 396–97 (Minn. 2008), we firmly "reaffirmed out interpretation of Minn. Stat. § 624.714 set forth in *Paige*," and expressly concluded that "*Burg* and *Brechon* do not undermine our interpretation" in *Paige*. In *Timberlake*, we refused to change our previous holding in *Paige* that the words "without a permit" in section 624.714 was an exception and not an element, despite the Legislature's subsequent amendments to that statute. *Timberlake*, 744 N.W.2d at 394–96. The question in *Timberlake* was whether police had *reasonable suspicion* that a suspect was engaged in criminal activity by carrying a gun. *Id.* at 393. *Timberlake* was not about whether the State

had proved beyond a reasonable doubt that Timberlake violated section 624.714; indeed, Timberlake was not even charged with that offense but rather was convicted under Minn. Stat. § 624.713, subd. 1(b) (2006) (criminalizing possession of a firearm by a person previously convicted of a crime of violence). *Timberlake*, 744 N.W.2d at 392.

In reaching our conclusion, we once again started by examining the language of the statute. *Id.* at 394. We observed that the language of section 624.714 had been amended since the decision in *Paige*, but observed that "the operative language in the statute [is] the same as it was when we decided *Paige*," and concluded that the textual revisions only reinforced our construction of the language in *Paige*. *Timberlake*, 744 N.W.2d at 396. For instance, we noted that amendments requiring individuals to carry the permit on their persons and expressly state that they have authorization to carry created a *defense* to the crime of possession without a permit. *Id.* In other words, the language and structure of the statute supported the conclusion that the words "without a permit" were not part of the description of the offense and, accordingly, those words are properly treated as an exception.

In *Timberlake*, we also rejected the argument that *Brechon* and its progeny had "undermined" the specific holding in *Paige*. 744 N.W.2d at 396. We observed that possession of a firearm poses a greater danger to society than the crimes at issue in *Brechon* and *Burg*, *see Timberlake*, 744 N.W.2d at 396–97—a question relevant (as we have seen) to determining whether the absence of a fact was an "ordinary defense" or an affirmative defense after the threshold determination was made, based on the statutory language and structure, that the absence of a fact was an exception rather than an element.

Our review of these cases confirms our analysis in the prior subsection that looked to the text and structure of section 609.561 to determine whether the Legislature intended the word "unlawfully" to be an element of first-degree arson or an exception to criminal liability. In prior cases, we have determined whether a portion of a statute requiring proof that something did not happen (here, that a person acted in a manner *not* authorized by law) creates an element or exception by looking to the text and structure of the statute and asking whether the requirement "is so incorporated with the clause defining the offense that it becomes in fact a part of the description." *Brechon*, 352 N.W.2d at 749 (citation omitted) (internal quotation marks omitted).[12] Applying that same standard here, the word "unlawfully" is incorporated into section 609.561 in a manner similar to how "without lawful excuse" was integrated into the text of the statute in *Burg*, and arguably more

[12] The State argues that the real distinction between *Paige* and *Brechon* turns on whether the absence-of-a-fact language relates to mens rea. *Compare Paige*, 256 N.W.2d at 303 (characterizing the statute as a general prohibition on carrying firearms in public), *with Brechon*, 352 N.W.2d at 749 (explaining that if a defendant has a claim of right, "he lacks the criminal intent which is the gravamen of the offense"). The State reasons that while the provision in *Paige* had no intent requirement (it criminalized the mere possession of a gun in public), trespassing without claim of right includes an implied mens rea. This distinction may appear to have merit as a descriptive matter if comparing *Paige* and *Brechon* in isolation. But it is entirely inconsistent with *Burg*. The statutory language at issue in *Burg*, Minn. Stat. § 609.375 (1998), contains a mens rea requirement in addition to the phrase "without lawful excuse"—a set-up virtually identical to the statutory scheme at issue in this case. *See Burg*, 648 N.W.2d at 678. Even though one could possibly distinguish *Paige* and *Brechon* based on mens rea, that distinction collapses when broadened to our other cases involving whether statutory language creates an element or a defense. And, of course, the arson statute before us in this case requires mens rea as well. *See* Minn. Stat. § 609.561 (requiring proof that the defendant "intentionally destroys or damages any building" by fire or explosives). In any event, our primary focus is on analyzing the text of the arson statute and not on broad presumptions based on cases dealing with other statutes. *Supra* at 15, n.5.

integrated into the statute than the clause at issue in *Brechon*. In both *Burg* and *Brechon*, we held that the language was sufficiently incorporated to be considered an element of the crime instead of a defense.[13] The same standard applied here compels the same conclusion.

At the same time, the structure of the text of section 609.561 is different than the structure of the language in the carrying a firearm without a permit statute (section 624.714) addressed in *Paige* and *Timberlake*. Unlike the word "unlawfully" in section 609.561, the absence-of-a-fact language in section 624.714 is not textually embedded in the description of the crime—carrying, holding or possessing a pistol in public—but rather set forth following the definition of the crime. Further, the "without

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[13] Beganovic points to the court of appeals' ruling in *State v. Clarin*, 913 N.W.2d 717 (Minn. App. 2018), to support the argument that "unlawfully" is an element of the crime of first-degree arson. We are not bound by the court of appeals decision in *Clarin* and we express no opinion on whether the court of appeals' decision was correct.

Further, it is not clear that *Clarin* ultimately helps Beganovic. In *Clarin*, the court of appeals interpreted the possession of methamphetamine statute, which provided that a person is guilty of a controlled substance crime in the second degree if the person "unlawfully possesses" a certain amount of narcotics. Minn. Stat. § 152.022, subd. 2 (2022). The State argued that because possession of methamphetamine is always unlawful, it need only prove possession of the drug and need not separately prove the possession was unlawful. *Clarin*, 913 N.W.2d at 719. The court of appeals, noting that methamphetamine may be part of a legally prescribed drug, determined that the State was incorrect in its assertion that possession of methamphetamine is always unlawful. *Id.* Although the court of appeals used language that proof that the defendant unlawfully possessed methamphetamine was an element the State must prove, it did not directly confront the question presented in this case of whether unlawfulness was an element or defense under our decisions in *Paige*, *Brechon*, and their progeny. *Id.* at 720. Further, even though the court of appeals assumed that the State bore the burden of proving that the defendant's possession of methamphetamine was unlawful, the court of appeals nonetheless affirmed that the evidence supporting the conviction was sufficient because the evidence produced by the State—although not directly proving that the defendant's possession was not lawful—allowed the reasonable inference that the defendant's possession was not lawful. *Id.* at 720–21.

first having obtained a permit to carry the pistol" language of section 624.714, subd. 1a, expressly refers to a process that is immediately set forth in the same section. In contrast, as discussed above, section 609.561 itself does not include within its terms, or specifically point to, a particular standard for determining when conduct is unlawful or without authority. And under section 624.714, the firearm permit requirement is the *exclusive* way to avoid criminal liability for carrying a gun in public; that is not true of section 609.561.[14]

Accordingly, we hold that under section 609.561, the State must prove a person set a fire in a manner not authorized by law as an element of first-degree arson.

II.

We now turn to the question of whether the State met its burden to prove that Beganovic set the fire in a manner not authorized by law. The State must prove every element beyond a reasonable doubt to satisfy the requirements of due process. *State v. Pakhnyuk*, 926 N.W.2d 914, 919 (Minn. 2019).

In cases involving evidence of the absence of a fact, the State must "produce evidence from which it may be inferred beyond a reasonable doubt" that there is an absence

[14] The concurrence posits that the question of whether a term is sufficiently incorporated in the definition of the offense turns on whether the act in question is presumptively legal unless something is proven (in which case it is an element) or is presumptively illegal except when something is proven (in which case it is an exception). We are not persuaded. Those two statements say the same thing. A difference is only created by defining some acts as presumptively legal and some acts as presumptively illegal. But that begs the question: Why is being on land owned by someone else or failing to pay child support presumptively legal while carrying a weapon is presumptively illegal? Moreover, the "something" to be proven in all situations is permission or authorization to do the act. The test is not useful in distinguishing when a term is an element or an exception.

of that fact. *L.Z.*, 396 N.W.2d at 222. Both parties agree that the State introduced no direct evidence to prove this element, but the State argues the circumstantial evidence in this case allows for the inference that Beganovic acted without authorization. We agree.

We follow a two-step analysis in reviewing whether circumstantial evidence is sufficient to support a conviction. *State v. Hawes*, 801 N.W.2d 659, 668 (Minn. 2011). First, we identify circumstances proved. *State v. Irby*, 967 N.W.2d 389, 396–97 (Minn. 2021). "In identifying the circumstances proved, we defer, consistent with our standard of review, to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State." *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) (citation omitted) (internal quotation marks omitted). In the second step, we examine the reasonableness of the inferences that may be drawn from the circumstances proved to determine whether there are other rational inferences inconsistent with guilt. *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010). If there are other rational inferences that can be drawn from the evidence that are inconsistent with guilt, the conviction should be overturned. *Id.* But if the proposed hypothesis of innocence is not rational, the conviction should be affirmed. *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002).

First, based on the guilty verdict, we must assume that the jury concluded that Beganovic started the fire. Indeed, on appeal, Beganovic does not claim otherwise. The undisputed evidence also showed that Beganovic filed an insurance claim stating that he did not start the fire and that his family was inside the house when the fire started, that the fire was started at night, and that 911 was called to bring the fire department onto the scene.

The jury credited the fire investigator's testimony that the fire was set intentionally and not the result of a faulty appliance. The jury also necessarily rejected the daughter's testimony that she started the fire accidently with a cigarette.

Turning to the second step, these circumstances proved are consistent with the reasonable conclusion that Beganovic was not authorized by law to start the fire. Moreover, these circumstances are inconsistent with any alternative conclusion. It does not make sense for a person who is somehow authorized by law to burn his dwelling to do so at night, with his family inside, without safety officials on the scene, and then proceed to deny starting the fire in a 911 call and file an insurance claim asserting that he did not start the fire. It would not be reasonable for a jury to find that Beganovic had authorization to start a fire that he emphatically claimed he did not start. *See Andersen*, 784 N.W.2d at 329–30. From the evidence "it may be inferred beyond a reasonable doubt" that the fire was set in a manner not authorized by law. *See L.Z.*, 396 N.W.2d at 222. Because the circumstances proved are inconsistent with any other rational hypothesis besides guilt, the State met its burden to show that Beganovic acted unlawfully in burning his house.

III.

Beganovic also claims that the failure to instruct the jury on the "unlawfully" element of the first-degree arson statute is reversible error. Because Beganovic did not object to the jury instructions in the district court, the forfeiture doctrine generally prevents us from affording him appellate relief. *Pulczinski v. State*, 972 N.W.2d 347, 355 (Minn. 2022). But we make an exception when certain conditions exist:

> The forfeiture doctrine plays a vital role in the criminal justice system because it encourages defendants to object while before the district court so that any errors can be corrected before their full impact is realized. But because a rigid and undeviating application of the forfeiture doctrine would be out of harmony with the rules of fundamental justice, Rule 31.02 provides appellate courts a limited power to correct errors that were forfeited. This limited power is known as the plain-error doctrine.

Id. at 355–56 (citations omitted) (internal quotation marks omitted). To establish plain error warranting reversal of a conviction based on an unobjected-to error, an appellant must show (1) an error (2) that is plain (3) that affects a defendant's substantial rights. *Id.* at 356. We may only correct a plain error if we determine that failure to correct the error would cause the public to seriously question the fairness and integrity of our judicial system. *Id.*

We conclude that Beganovic cannot satisfy the third prong of the plain-error doctrine. Beganovic bears the burden of showing the error affected his substantial rights. *See State v. Gomez*, 721 N.W.2d 871, 880 (Minn. 2006). This means that Beganovic would have to demonstrate that there is a reasonable likelihood that the absence of the error would have had a significant effect on the jury's verdict. *State v. Reek*, 942 N.W.2d 148, 159 (Minn. 2020).

We have held that the failure to state an element of a crime in unobjected-to jury instructions does not necessarily affect the outcome of the case as a matter of law such that reversal is always required. *See State v. Watkins*, 840 N.W.2d 21, 28 (Minn. 2013). We conclude that, in this case, there is no reasonable likelihood that the jury would have reached a different conclusion had it been instructed that the State had to prove that Beganovic acted unlawfully—in a manner not authorized by law—when he set the fire.

The evidence that Beganovic did not have legal authorization to start the fire was overwhelming. *See State v. Mouelle*, 922 N.W.2d 706, 718 (Minn. 2019) (stating that whether the State presented overwhelming evidence to prove the element is one factor we consider when assessing if an unobjected-to jury instruction that fails to state an element of a crime affects a defendant's substantial rights). As discussed in Part II, the State presented evidence that the fire had multiple points of origin in the house. The evidence further showed that the fire was started in the middle of the night, that Beganovic claimed that his family was inside the house when the fire started, and that Beganovic told the 911 operator (and later the insurance company) that he did not start the fire. The significant quantum of evidence that Beganovic did not have legal authorization to start the fire supports a conclusion that there is no reasonable likelihood that the jury would have reached a different conclusion even if properly instructed on the "unlawfully" element.

Importantly, the strength of the State's evidence is reinforced by the fact that Beganovic did not contest the State's proof on the omitted "unlawfully" element. *Watkins*, 840 N.W.2d at 29 (stating that, in assessing whether there is a reasonable likelihood that the jury would not have convicted had the jury instructions not omitted an element of a crime, we consider whether "the defendant contested the omitted element and submitted evidence to support a contrary finding"). Beganovic's theory of the case was not that he was authorized by law to set the fire; rather his position at trial was that he did not set the fire at all. This is demonstrated by the fact that Beganovic testified at trial that he did not

set the fire and did not know how the fire started.[15] Further, Beganovic's counsel never argued to the jury that Beganovic could not be found guilty because the State failed to prove the fire was started unlawfully.

We do not agree with Beganovic that our decision in *Burg* compels a different result. In *Burg*, we decided that the failure to instruct the jury on the State's burden to show a defendant acted "without lawful excuse" did affect the defendant's substantial rights. 648 N.W.2d at 677–80. But *Burg* is different from this case in a significant way: In *Burg*, the district court expressly instructed the jury that the defendant had the burden of proving he did not have a lawful excuse. *Id.* at 676. Under those circumstances, it is difficult, if not impossible, for a reviewing court to say that the jury would have reached the same result in the absence of the erroneous jury instruction. Here, in contrast, the district court did not instruct the jury on the burden of proof one way or the other.

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[15] We emphasize that our consideration of Beganovic's trial testimony as part of our assessment of whether the failure to instruct the jury on the "unlawfully" element affected Beganovic's substantial rights does not place any burden on Beganovic to disprove that element. We already determined in Part II of the opinion that the State's evidence—without any consideration of the evidence presented by Beganovic at trial—was sufficient to prove the "unlawfully" element. The State's constitutional burden of proof was satisfied; the case could not get to the jury if that was not the case. Indeed, as just stated, the State's evidence on the "unlawfully" element, while circumstantial, was overwhelming in this case.

Our substantial rights inquiry under the plain error doctrine (which is about whether we can even provide appellate relief to a defendant asserting an unobjected-to error) focuses on what the jury likely would have done had it had been properly instructed. One clue about what the jury might have done in an alternative reality where the jury actually was properly instructed on the "unlawfully" element is whether Beganovic made the case to the jury that, in light of the evidence that it had before it, he was not guilty on the ground that the State failed to prove that he was acting without authorization when he set the fire. It is less likely a properly instructed jury would reach a different conclusion on an element when the defendant does not contest the element.

In summary, after reviewing the record, we conclude that there is no reasonable likelihood that the jury—which believed the State's case that Beganovic set the fire—would have reached a different result had it been properly instructed that the State had to prove that Beganovic started the fire unlawfully. Accordingly, Beganovic has not demonstrated that the failure to properly instruct the jury on the "unlawfully" element affected his substantial rights. We cannot afford Beganovic any appellate relief based on the unobjected-to erroneous jury instruction under the plain error exception.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals.

Affirmed.

C O N C U R R E N C E

McKEIG, Justice (concurring).

I agree with the decision of the court to affirm Beganovic's conviction. But I disagree that the term "unlawfully" in the first-degree arson statute, Minn. Stat. § 609.561 (2022), creates an element that the State must prove. For this reason, I respectfully concur.

The court of appeals concluded that "unlawfully" means "without authorization under the permit statute," found at Minn. Stat. § 609.564 (2022). *State v. Beganovic*, 974 N.W.2d 278, 284 (Minn. App. 2022). On appeal, neither party challenged that conclusion. But the majority concludes, contrary to the parties' and court of appeals' determination, that "unlawfully" does not exclusively refer to the permit statute. *Supra* at 10.[1] I disagree.

I begin my analysis at the same place as the court—with the plain language of the statute. *See Walsh v. State*, 975 N.W.2d 118, 122 (Minn. 2022) (explaining that in ascertaining the intent of the Legislature, we first examine the plain meaning of the statute at issue). When examining a statute's plain meaning, this court may use dictionary definitions to define terms. *State v. McReynolds*, 973 N.W.2d 314, 318 (Minn. 2022). As the majority states, unlawful is defined as "[n]ot authorized by law . . . [c]riminally punishable . . . [i]nvolving moral turpitude." *Supra* at 6 (citing *Unlawful*, *Black's Law Dictionary* (11th ed. 2019)). The majority then concludes that of these definitions, "not

[1] To be clear, I am not disputing that this court can review the meaning of a term in a statute despite the parties' agreement on the meaning. As the majority correctly points out, it is the responsibility of our court to decide cases in accordance with the law. *See State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990). Therefore, I take no issue with the majority's decision to analyze the word "unlawfully," but simply wish to highlight the consensus reached on this issue before this court's decision.

authorized by law" is the "most apt." *Supra* at 6, (citing Bryan A. Garner, *A Dictionary of Modern Legal Usage* 902 (2d ed. 1995)). I agree with the majority that this is the plain meaning of "unlawfully" in the first-degree arson statute.

But the question still remains of what "not authorized by law" means. To determine what this means, it makes sense that we would look to what the law authorizes. And the permit statute that follows the definitions of first through fifth degree arson clearly provides what it means to be "authorized by law." *See* Minn. Stat. § 609.564. Under the permit statute:

> A person does not violate section 609.561, 609.562, 609.563, or 609.5641 if the person sets a fire pursuant to a validly issued license or permit or with written permission from the fire department of the jurisdiction where the fire occurs.

Id. In other words, a fire is not set "unlawfully" if it is set pursuant to a valid license or permit. Conversely, a fire set without authorization through a valid license or permit is unlawful.

The majority claims that authorization cannot simply refer to the permit statute because the whole-statute canon only allows for two statutes to be considered together when the statutes were enacted at the same time and for the same purpose. *Supra* at 9–12 (citing *State v. Fugalli*, 967 N.W.2d 74, 80 (Minn. 2021)). But reading "unlawfully" in the first-degree arson statute as linked to the permit statute, does not rely on the use of the whole-statute canon. This is not a question of how to define a term in a statute; both the majority and concurrence agree that "unlawfully" plainly means "not authorized by law." Instead, this is a question of what the law authorizes, and that question is logically answered

by looking to any laws that provide authorization to set fires that, without proper permissions, would otherwise subject an individual to criminal liability. This inquiry leads directly to Minn. Stat. § 609.564.

The majority also claims a broad interpretation of "unlawfully" is the most appropriate because "it is not clear under Minnesota law that section 609.564 is the sole means to claim a fire was started lawfully." *Supra* at 12. But I fail to see any other circumstances under which an act that would be considered first-degree arson would be lawful other than an individual following the requirements of the permit statute. The statutory scheme as it currently exists involves a general prohibition on starting fires to a dwelling under Minn. Stat. § 609.561, and specific exceptions for individuals who follow the regulatory process referenced in Minn. Stat. § 609.564.

This distinction matters because—as the majority recognizes—the test for determining what is a basic element of a crime rather than an exception to a criminal statute is " 'whether the exception is so incorporated with the clause defining the offense that it becomes in fact a part of the description.' " *State v. Brechon*, 352 N.W.2d 745, 749 (Minn. 1984) (quoting *Williams v. United States*, 138 F.2d 81, 81–82 (D.C.Cir. 1943)). In this way, the statutory scheme of the crime of first-degree arson should be the dispositive point. It does not matter if "unlawfully" refers to Minn. Stat. § 609.564 exclusively or could potentially include other statutes; the point is that "unlawfully" refers to a lack of authorization that implicates a regulatory process set by separate statute(s). The exception

(authorization) is therefore not so incorporated with the clause defining the offense that it is merely part of the description of the offense.[2]

The majority claims that distinguishing between an element and an exception based on the way in which an individual is authorized to commit an otherwise illegal act "has no basis in anything having to do with the intent of the Legislature when it enacted the language of the particular statute we are interpreting." *Supra* at n.5. But the Legislature is the body that *creates* an administrative path—through permitting or some other process—to authorization of an otherwise illegal act. The Legislature's decision to create a regulatory framework to authorize individuals to set fires that would otherwise be first-degree arson, shows the Legislature's intent for the word "unlawfully" to be a defense instead of an element.

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[2] The majority claims that the Legislature "could not have intended the term 'unlawfully' to have been limited to the circumstances defined in section 609.564 because section 609.564 was not adopted until 1985." But it is possible that an authorization process existed outside of section 609.564 that was not codified in state statute until 1985. Ultimately, this inquiry is irrelevant; the question before our court is not what the Legislature intended in 1985. The question is what the Legislature intends by the plain language of the statute as it currently exists. The existence of a permit statute creates a structure that suggests first-degree arson is generally prohibited with exceptions only for individuals who follow the regulatory requirements of the permit statute.

Additionally, an argument we addressed in *State v. Timberlake* is whether statutory amendments transformed what was previously considered a defense into an element of a crime. *See* 744 N.W.2d 390 (Minn. 2008). Though we ultimately concluded that the amendments only reinforced that the language at issue was a defense, we implicitly accepted the possibility that the amendments could have changed the status of a statutory provision from a defense to an element. *Id.* at 395. Our implicit acceptance of this premise makes sense, because the Legislature can, and does, change statutory language to add or remove elements of crimes. *See State v. Pakhnyuk*, 926 N.W.2d 914, 926 (Minn. 2019) (describing the addition of elements in the interference of privacy statute). So even if at one point "unlawfully" was an element, the Legislature is not bound to keep it as such.

Furthermore, this conclusion is consistent with our caselaw. In *State v. Paige*, we held that the language in a statute that prohibited carrying a firearm "without a permit" created an exception to criminal liability instead of an element of the crime. 256 N.W.2d 298, 303 (Minn. 1977). We explained that the Legislature created a "general prohibition," and that "[t]he only exception to this rule is for persons who have demonstrated a need or purpose for carrying firearms and have shown their responsibility to the police in obtaining a permit." *Id.* We addressed the statute again in *State v. Timberlake*, noting that statutory amendments enacted that expressly referred to authorization to carry as a defense to criminal liability only further supported our conclusion in *Paige*. 744 N.W.2d 390, 396 (Minn. 2008).

In other cases, we have reached the opposite conclusion. For example, in *State v. Brechon*, we concluded that "without claim of right" created an element the State was required to prove beyond a reasonable doubt. 352 N.W.2d 745, 750 (Minn. 1984). But in reaching that conclusion, we reasoned that "without claim of right" was "integral to the definition of criminal trespass in Minnesota." *Id.* We explained that "[c]laim of right is a concept historically central to defining the crime of trespass" and that a defendant who has claim of right "lacks the criminal intent which is the gravamen of the offense." *Id.* at 749. Furthermore, we explained that the way the State can typically prove a defendant lacked claim of right to be on a property is through property law: showing ownership of the land by a third party and that the third party had not given permission for the defendant to be there. *Id.* at 750.

Similarly, in *State v. Burg*, we concluded that the phrase "without lawful excuse" was embedded in the definition of the offense of nonsupport of a child. 648 N.W.2d 673, 678 (Minn. 2002). We reasoned that, "[b]y embedding the phrase 'without lawful excuse' in the definition of the offense, the legislature demonstrated its intent to include the absence of a lawful excuse as one of the facts necessary for a conviction." *Id.* We therefore held that the State has the responsibility to prove beyond a reasonable doubt that a defendant has failed to pay child support "without lawful excuse," and not the defendant's burden to prove that they have a lawful excuse to not pay. *Id.*

Because I conclude that "unlawfully" refers to the permit process described under Minn. Stat. § 609.564, I find this case indistinguishable from *Paige* and *Timberlake*, but easily distinguishable from *Brechon* and *Burg*. Essentially, *Brechon* and *Burg* set up a statutory scheme under which an act is presumptively legal *unless* something is proven. Being on another's property is legal *unless* a defendant lacks claim of right to be there. Non-payment of child support is only illegal if a defendant fails to pay without a lawful excuse. *Paige* and *Timberlake*, in contrast, involve a statute that creates a general prohibition with a specific exception set by a regulatory process (possessing a permit). In the same way, setting fire to a dwelling is illegal *except* when an individual has gone through the proper regulatory channel to obtain authorization (or, in other words, has a lawful excuse).[3] A neighbor may give an individual permission to be on their property. A

[3] The existence of a permit process for only certain crimes makes sense given the difference between crimes in their inherent danger to society. As we articulated in *Paige*, the purpose of the statute criminalizing carrying a firearm in public is to "prevent the

psychologist could help establish that an individual lacks the ability to pay child support. But the only way under the current statutory scheme for a person to avoid criminal liability for setting a fire that would otherwise be first-degree arson is for that person to have obtained a permit in accordance with Minn. Stat. § 609.564. This authorization is therefore not embedded in the definition of the offense. *See Brechon*, 352 N.W.2d at 749. And because "unlawfully" is not embedded in the definition of the offense, I would conclude that the term creates not an element, but rather a defense to liability. Accordingly, I concur.

CHUTICH, Justice (concurring).

I join in the concurrence of Justice McKeig.

MOORE, III, Justice (concurring).

I join in the concurrence of Justice McKeig.

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possession of firearms in places where they are most likely to cause harm in the wrong hands, i.e., in public places where their discharge may injure or kill intended or unintended victims." *Paige*, 256 N.W.2d at 303. We then concluded that the statute created a "general prohibition" with an exception only for those persons "who have demonstrated a need or purpose for carrying firearms and have shown their responsibility to the police in obtaining a permit." *Id.*

Similarly, arson is a dangerous crime that can threaten the lives and property of others. The decision of the Legislature to articulate specifically when an individual may carry a firearm is essentially the same as the decision of the Legislature to articulate in section 609.564 when a fire is authorized; the statutes create limited circumstances when an individual is permitted to do an otherwise dangerous and illegal act.