FILED BY CLERK
MAR 13 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2007-0186
Appellee,	)	DEPARTMENT A
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
JOHN RICHARD PIPER,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20061577

Honorable Hector Campoy, Judge

AFFIRMED IN PART
VACATED IN PART

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Sarah E. Heckathorne — Phoenix
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
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H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant John Richard Piper was convicted of aggravated assault of a minor under the age of fifteen. The trial court suspended the imposition of sentence and placed Piper on probation. Piper appeals, arguing that the evidence was insufficient to show he had the requisite intent to commit assault, that the trial court erred in denying his request for a certain jury instruction, and that the court erred in ordering him to pay a sex offender monitoring fund assessment and a related time payment fee. For the reasons discussed below, we conclude that imposition of the assessment and fee constituted fundamental, prejudicial error and therefore vacate the imposition of the assessment and related fee. With regard to Piper's other claims, we find no error and otherwise affirm Piper's conviction and order of probation.

Facts

¶2 "'We view the facts in the light most favorable to sustaining the conviction[].'" *State v. Simpson*, 217 Ariz. 326, ¶ 2, 173 P.3d 1027, 1028 (App. 2007), *quoting State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). The victim, twelve-year-old Sarah B., and her mother, Connie B., spoke with Piper inside a convenience store where Piper worked. Connie was a former employee of the store and had been Piper's co-worker. Connie wanted to say goodbye to Piper because she and Sarah were moving to a different state. Piper asked Connie if he could give her or Sarah a hug. Connie apparently consented to Piper giving Sarah a hug. While Piper was hugging Sarah, he groped her buttocks. He also asked Sarah if he could have a kiss but she refused. He then asked Connie if he could

"take a peek or cop a feel." He later explained to an investigating officer that he was hoping to see Sarah's underwear. Connie said "no" and she and Sarah left the store.

¶3 Piper was charged with and convicted of aggravated assault of a minor under the age of fifteen. The jury also found that Piper had committed the offense for the purpose of his own sexual gratification. Upon conviction, the court placed Piper on probation. The court did not order Piper to register as a sex offender but did order that he pay a $250 sex offender monitoring fund assessment and a $20 time payment fee. Piper now appeals his conviction and the imposition of the assessment and fee.

Sufficiency of the Evidence

¶4 Piper first argues the court erred in denying his motion for judgment of acquittal, pursuant to Rule 20, Ariz. R. Crim. P., on the ground that the evidence was insufficient to show he had possessed the requisite intent to commit assault, that is, to injure, insult or provoke Sarah. When considering claims of insufficient evidence, "we view the evidence in the light most favorable to sustaining the verdict and reverse only if no substantial evidence supports the conviction." *State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005). "Evidence may be direct or circumstantial, but if reasonable minds can differ on inferences to be drawn therefrom, the case must be submitted to the jury." *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993) (citation omitted). We do not reassess the evidence to determine whether we would find the defendant guilty; rather, we assess whether enough evidence exists for a rational jury to have found the defendant guilty

beyond a reasonable doubt. *See State v. Garfield*, 208 Ariz. 275, ¶ 6, 92 P.3d 905, 907 (App. 2004).

¶5 Criminal intent is a state of mind and may be "shown by circumstantial evidence." *State v. Routhier*, 137 Ariz. 90, 99, 669 P.2d 68, 77 (1983). A defendant's words and conduct may be considered when determining intent. *See State v. Vann*, 11 Ariz. App. 180, 182, 463 P.2d 75, 77 (1970). In the absence of an "outright admission," a defendant's mental state may be inferred "from all relevant surrounding circumstances." *In re William G.*, 192 Ariz. 208, 213, 963 P.2d 287, 292 (App. 1997).

¶6 Pursuant to A.R.S. § 13-1203(A)(3), the state was required to show that Piper "[k]nowingly touch[ed] [Sarah] with the intent to injure, insult or provoke [her]." Section 13-105(9)(a), A.R.S., provides that "'with the intent to' means, with respect to a result . . . described by a statute defining an offense, that a person's objective is to cause that result."

¶7 The evidence showed that Piper, who was over thirty years old, purposely groped the buttocks of a twelve-year-old child. He then asked the child's mother if he could "take a peek or cop a feel" of the child and later admitted to an investigating officer that he was hoping to see the child's underwear. When he described the incident to the officer he stated that his hand was in an "inappropriate" area and that he knew it was not okay to touch a twelve-year-old child on the buttocks. He further admitted knowing Sarah was only "eleven or twelve" and that he had made a "big mistake." Piper's conduct was unquestionably offensive, supporting an inference that it was done to insult or provoke. The

foregoing constitutes substantial evidence from which a reasonable jury could conclude that Piper's objective was to insult or provoke Sarah. *See Vann*, 11 Ariz. App. at 182, 463 P.2d at 77 (defendant's words and actions may constitute substantial evidence).

¶8 Piper argues his sole objective in touching Sarah was sexual gratification and that this somehow negates an intent to insult or provoke because such a reaction from Sarah might have hampered his success in achieving sexual gratification. But Piper could have had more than one objective. And to the extent the argument suggests a conflicting inference could reasonably be drawn from the evidence, such conflict was for the jury to resolve. *See Landrigan*, 176 Ariz. at 4, 859 P.2d at 114. Because substantial evidence supports the jury's finding that Piper had the requisite intent to commit assault, the trial court did not err in denying his Rule 20 motion.

Jury Instruction

¶9 Piper next argues the court erred in refusing his request that the jury be instructed that intent to "provoke" means intent "to provoke a violent response." Although we review a trial court's refusal of a jury instruction for an abuse of discretion, we review de novo whether a jury instruction correctly states the law. *See State v. Johnson*, 212 Ariz. 425, ¶ 15, 133 P.3d 735, 741 (2006). "In the absence of statutory definitions, we give words their ordinary meaning." *State v. Cox*, 217 Ariz. 353, ¶ 20, 174 P.3d 265, 268 (2007); *see also* A.R.S. § 1-213 (undefined words must "be construed according to the common and approved use of the language"). A trial court does not abuse its discretion when it refuses

to define a word in an instruction that has a commonly understood meaning. *See Cox*, 217 Ariz. 353, ¶ 20, 174 P.3d at 268. And the court is not required to give a requested instruction that is an incorrect statement of the law. *See id.* ¶ 21.

¶10 With respect to the instruction on the elements of assault, Piper asked the court to define the word "provoke" as "to provoke a[n] ordinary person to a violent response." The court denied this request and overruled Piper's subsequent objection, finding "the plain and ordinary meaning of provoke is apparent to a jury and they, through their common sense can adequately determine what the meaning is without any definition."

¶11 Section 13-1203 does not define the word "provoke" with respect to assault, nor does A.R.S. § 13-105 provide a general definition of the term. *The American Heritage Dictionary* 998 (2d college ed. 1985) defines "provoke" as follows: "1. To cause anger, resentment, or deep feeling in. 2. To cause to take action. 3. To bring on by inciting . . . ." This general definition is not limited to a violent response. Thus, Piper's argument that "provoke" must mean "to provoke a violent response" is not supported by the statute or by the general meaning of the word, and is a misstatement of the law.

¶12 We further note that A.R.S. § 13-2904(A)(3), which regulates disorderly conduct, proscribes behavior that is "likely to provoke immediate physical retaliation." Use of this language demonstrates the legislature knows how to modify or restrict the meaning of "provoke" when it intends to. But as used in the statute relevant in this case, § 13-1203, the word "provoke" is not a technical term and the legislature has not assigned it an unusual

meaning. *See Cox*, 217 Ariz. 353, ¶ 20, 174 P.3d at 268. Because the word has a plain and ordinary meaning, it does not require "explanation to the average juror." *Id.* The court did not abuse its discretion in refusing to provide a separate and incorrect definition to the jury. *See id.*

Imposition of Fees

¶13 Piper last argues the court erred in ordering him to pay a $250 sex offender monitoring fund assessment as well as a related $20 time payment fee. Piper did not object to the imposition of these fees at sentencing, but the state concedes that it was fundamental error for the court to have imposed them.

¶14 When a defendant fails to object to an error in the trial court, we review solely for fundamental error. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). To prevail, the "defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20. Generally, imposition of an unauthorized fee constitutes fundamental error. *See State v. Soria*, 217 Ariz. 101, ¶ 7, 170 P.3d 710, 712 (App. 2007) (imposition of improper $45 warrant fee fundamental error); *cf. State v. Bouchier*, 159 Ariz. 346, 347, 767 P.2d 233, 234 (App. 1989) (like illegal sentences, illegal term of probation is fundamental error). Prejudice is shown by "the fact that [the d]efendant has or will have to pay an amount not sanctioned by the law." *Soria*, 217 Ariz. 101, ¶ 7, 170 P.3d at 712.

¶15 Section 13-3828, A.R.S., established the "sex offender monitoring fund . . . consisting of monies collected from assessments pursuant to [A.R.S.] §§ 13-119 and 13-3824." Section 13-119 mandates imposition of a $250 assessment "[o]n conviction of any offense for which a person is required to register" as a sex offender pursuant to A.R.S. § 13-3821. Subsection C of § 13-3821 provides the court with discretion to require sex offender registration when sentencing a defendant "for an offense for which there was a finding of sexual motivation." Section 13-3824 provides punishment for violations of the sex offender registration requirements.

¶16 Here, the jury found that Piper's aggravated assault of Sarah had been sexually motivated. Exercising its discretion pursuant to § 13-3821(C), the trial court expressly stated it would not require sex offender registration at the time it placed Piper on probation, but it ordered him to undergo sex offender treatment. The court stated it wished to observe how Piper responded to treatment and supervision before making a final decision on whether to require him to register as a sex offender. The court then ordered Piper to pay a $250 sex offender monitoring fund assessment and a $20 time payment fee in the event Piper did not pay the $250 all at once.

¶17 According to the plain language of §§ 13-119 and 13-3828, imposition of the sex offender monitoring fund assessment is authorized only when a person is required to register as a sex offender. Nothing in the statute gives the court the discretion to impose this fee under other circumstances. Because Piper was not ordered to register as a sex offender,

neither the assessment nor the related time payment fee was authorized by law. This was fundamental, prejudicial error. *See Soria*, 217 Ariz. 101, ¶ 7, 170 P.3d at 712.

Conclusion

¶18 Based on the foregoing, we vacate the trial court's order imposing a sex offender monitoring fund assessment and related time payment fee. We otherwise affirm Piper's conviction and probation order.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

_____
JOHN PELANDER, Chief Judge

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J. WILLIAM BRAMMER, JR., Judge