DIVISION ONE
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**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

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| STATE OF ARIZONA, | ) | 1 CA-CR 08-0411 |
| | ) | |
| Appellee, | ) | DEPARTMENT D |
| | ) | |
| v. | ) | **MEMORANDUM DECISION** |
| | ) | |
| JOSHUA MICHAEL FERRANTE, | ) | (Not for Publication – |
| | ) | Rule 111, Rules of the |
| Appellant. | ) | Arizona Supreme Court) |
| | ) | |
| | ) | |
| | ) | |

Appeal from the Superior Court in Mohave County

Cause No. CR-2007-1203

The Honorable Steven F. Conn, Judge

**AFFIRMED**

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Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and William Scott Simon, Assistant Attorney General
Attorneys for Appellee

David Goldberg — Ft Collins, CO
Attorney for Appellant

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G E M M I L L, Judge

**¶1** Defendant Joshua Michael Ferrante appeals from his

conviction on one count of aggravated assault, a Class 3 dangerous felony. Ferrante makes the following six claims on appeal: (1) the trial court committed fundamental error by failing to accurately instruct the jury in its preliminary instructions regarding the presumption of innocence and the State's burden of proof; (2) the trial court abused its discretion by admitting the deposition of Ferrante's mother at trial; (3) the trial court abused its discretion by admitting substantial hearsay about the victim's drug debts and threats he received from drug dealers; (4) the State failed to present sufficient evidence of the aggravated assault; (5) the trial court erred by failing to instruct the jury on "lesser included types of aggravated assault;" and (6) at sentencing, the trial court erred by admitting an untimely disclosed pen pack that established Ferrante's prior convictions. For reasons set forth more fully below, we affirm.

**FACTS[1] AND PROCEDURAL HISTORY**

**¶2** In August 2007, the victim,[2] his wife Cindy, and Cindy's daughter Shay, lived in a house on Park Street in Kingman. Cindy also has three sons who did not live with the

[1] We view the facts in the light most favorable to sustaining the jury's verdict and resolve all reasonable inferences against the defendant. *State v. Vandever*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 n.2 (App. 2005).

[2] To protect the victim's privacy, we will refer to him as "Victim" in this decision.

couple, one of whom is Ferrante.

**¶3** Prior to August 2007, Victim had been a daily methamphetamine user. By August, he had been off drugs for approximately two or three months but still owed $200.00 to his drug dealers, who lived in town. Victim was visited at his home by one of his dealers, Jane, "several times," trying to collect; but he had no money because he was out of work. Jane had been "pretty adamant" about wanting the money and told Victim that she would send someone to collect his car as payment.

**¶4** Jane's husband came by on August 3, the day before the offenses in the present case occurred, and demanded payment. He informed Victim that "they had sent somebody" to pick up Victim's car the day before, but no one had been home. Victim felt scared and threatened and informed Jane's husband that he "had a gun" in order to "ward [him] off." Jane's husband told Victim that he "needed the money" and left.

**¶5** At 4:30 a.m. on August 4, Victim was seated on a couch in the living room while his wife worked on a computer in the same room. They had received several calls from Ferrante asking if he could come to their house to speak with his mother. The couple had put Ferrante off, saying that it was too late and that they were going to bed; but Victim ultimately relented and told Ferrante he could "come on over."

**¶6** Ferrante arrived with a male friend whom Victim did

not know and whose name Victim did not remember. The friend sat with Victim on the couch and fell asleep while Ferrante went into the bedroom to speak with his mother. Ferrante and his mother were in the bedroom for "quite some time." When Ferrante finally emerged from the bedroom, he "came out and laid a blanket down" on the floor in front of Victim. He roused his friend and asked him to "[c]ome here" and try on some shoes.

**¶7** In his peripheral vision, Victim then saw Ferrante take a pole with a metal spike on its end that the couple kept by the back door for protection and swing it towards him. The pole hit Victim in the back of the head with such force that it split into two pieces.

**¶8** Victim jumped up "in shock." He was caught completely off-guard by Ferrante's actions and started screaming, "Why did you do that? Why are you doing this?" Ferrante started yelling at Victim and pointed to the blanket several times, telling Victim to "Lay down on the blanket. . . Lay down on the f-ing blanket."

**¶9** Suddenly Victim felt the back of his head "all warm and everything" and noticed he had blood on his hands. Victim screamed and then heard his wife and her daughter scream. When Ferrante turned to see if his mother and sister had come out of the bedroom, Victim seized the opportunity provided by the distraction to run through several rooms in the house in order

to reach the back door. He was "screaming for [his] life," and managed to run out of the house and across the railroad tracks to the main street. There he jumped in front of the only truck that was driving by at that hour of the morning and asked for help. As Victim stood by the truck, he saw Ferrante and his friend "come around the corner" and drive away.

**¶10** The driver of the truck would not permit Victim to get in his truck because he did not want him to bleed all over it. However, he "drove down the street a half block and pulled over" and called the police. Victim ran across the street to a telephone booth and called 911.

**¶11** Police and paramedics arrived, and Victim was transported to the Kingman Regional Medical Center. Victim suffered a 1 to 1-1/2 inch laceration to the back of the head. The wound was treated and closed with five staples and Victim was released that same day.

**¶12** On August 6, police located Ferrante at a residence in Kingman where he was staying with his wife and children. When one of the officers went to the backyard of the house to establish a perimeter, he spotted Ferrante kneeling between a large evergreen bush and the house, crouching on the ground. It appeared to the officer that Ferrante was hiding. Ferrante was arrested without a struggle.

**¶13** The State charged Ferrante with attempted first degree

murder, a Class 2 dangerous felony, and aggravated assault,[3] a Class 3 dangerous felony. At trial, the State's theory of premeditation for the attempted murder charge was based in part on the fact that, before attacking Victim, Ferrante had asked his mother about the gun that was in the house and the fact that Ferrante had laid a blanket down on the floor in front of Victim. It was also based on evidence that, immediately before the attack, Ferrante told his mother that she should stay in her bedroom "no matter what happened" and that, if she did not, he would have "no problem digging two more holes in the desert." The State argued that the motive behind the attack was Victim's drug debt.

**¶14** The jury acquitted Ferrante of the attempted murder charge, but it found him guilty of aggravated assault and also found that the offense was dangerous. The jury also found that the offense was committed while Ferrante was on release on a separate felony offense. The trial court found that Ferrante had two prior historical felony convictions and sentenced Ferrante to an aggravated sentence of 13 years in prison plus two years because the offense was committed while Ferrante was released on a felony.

**¶15** Ferrante timely appealed. This court has jurisdiction

[3] Before trial, the State dismissed the allegation that the offense was a domestic violence offense.

pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1)(2003), 13-4031 (2001) and 13-4033 (Supp. 2009).

**ANALYSIS**

***Improper Preliminary Instructions***

**¶16** During preliminary intructions, the trial court instructed the jury as follows:

> This plea of not guilty means that the State must prove every part of the charge beyond a reasonable doubt. The law does not require a defendant to prove his innocence. He is presumed by law to be innocent. This means that the State must prove all of its case against the defendant.
>
> The State must prove the defendant guilty beyond a reasonable doubt, which means that you have to be firmly convinced of the defendant's guilt before you can return a guilty verdict in this case. No guilty verdict may be based on mere suspicion, probability or supposition.

On appeal, Ferrante claims that the trial court committed reversible error by not giving the full *Portillo*[4] instructions in its preliminary as well as final instructions. Ferrante acknowledges that, prior to closing arguments, the trial court gave the jury a complete *Portillo* instruction.

**¶17** Ferrante also acknowledges that he failed to object to these preliminary instructions and to raise this issue before the trial court. He has therefore forfeited his right to obtain

[4] *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995).

appellate relief on this claim unless he can establish both that fundamental error occurred and that the error in this case caused him prejudice. *See State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Fundamental error is error that "goes to the foundation of the case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *Id.* at 568, ¶ 24, 115 P.3d at 608.

**¶18** In our review, we read the jury instructions as a whole to ensure that the jury received the information it needs to arrive at a legally correct decision. *State ex rel. Thomas v. Granville*, 211 Ariz. 468, 471, ¶ 8, 123 P.3d 662, 665 (2005) (citation omitted). Error in a jury instruction is reversible only if the instruction, taken as a whole, supports a reasonable conclusion that the jurors were misled. *State v. Bass*, 198 Ariz. 571, 576-577, ¶ 17, 12 P.3d 796, 801-802 (2000). Contrary to Ferrante's arguments, therefore, a trial court's failure to provide a verbatim recitation of *Portillo* in its preliminary instructions will not necessarily lead to the conclusion that the jury was misled or did not reach its verdict based on the appropriate law.

**¶19** First, Ferrante maintains that the trial court failed to advise the jury that it must "start with the presumption that the defendant is innocent." While not using those precise words

in its preliminary instructions, the concept was more than adequately communicated to the jury by the trial court's instructions that the defendant "is presumed by law to be innocent," and that the burden of proving defendant guilty beyond a reasonable doubt rested with the State to "prove all of its case against the defendant." It was further communicated by the trial court's immediately preceding instructions that advised the jury that the charges against Ferrante were not evidence against him and that it "should not think that defendant is guilty just because he has been charged with a crime." We therefore do not agree with Ferrante's contention that the jurors were not aware until final instructions that they were to start with the presumption that he was innocent.[5]

[5] Furthermore, during *voir dire*, the court also advised all the *venire* persons:

> The defendant in any criminal case is presumed by law to be innocent. This means that the State has to prove beyond a reasonable doubt that the defendant is guilty. The defendant is not required to prove his innocence. He is not required to produce any evidence at all in his own behalf.
>
> Again, the State has to prove the defendant guilty beyond a reasonable doubt, which means that you have to be firmly convinced of the defendant's guilt before you can return a guilty verdict.

**¶20** Second, Ferrante claims prejudice because the jury would not have known what proof beyond a reasonable doubt meant "and that it must acquit [Ferrante] absent such proof or 'a real possibility' that [Ferrante] was not guilty." While it may have been more prudent for the trial court to have given the full *Portillo* definition in its preliminary instruction to the jury as well, we find its failure to do so in this case is not fatal.

**¶21** Here, the preliminary instruction properly informed the jury, consistent with *Portillo*, that "beyond a reasonable doubt" meant that they had to be "firmly convinced" of Ferrante's guilt before they could return any guilty verdict. Prior to hearing final arguments and retiring to deliberate, the jury received their final instructions, which contained the full *Portillo* definition of reasonable doubt, as Ferrante acknowledges. The trial court provided the jury with written copies of those instructions for their deliberations as well.

**¶22** Other than Ferrante's speculation, there is simply no evidence in this record that supports the supposition that the jury was misled about the proper legal definition of either of these terms. *See Bass*, 198 Ariz. at 577, ¶ 17, 12 P.3d at 802

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> The burden or the responsibility of proving the defendant guilty beyond a reasonable doubt, rests upon the State, that is the prosecutor, . . . and that burden or responsibility does not shift at any time during this trial over to [defendant] or to his attorney [].

("[m]ere speculation that the jury was confused is insufficient to establish actual jury confusion") (citations omitted). That determination is further supported by the fact that the jury acquitted Ferrante of the attempted murder charge while still finding him guilty of the aggravated assault.

**¶23** We conclude that, read as a whole, the jury instructions in this case adequately provided the jury with the information it needed to arrive at a legally correct decision. *See Granville*, 211 Ariz. at 471, ¶ 8, 123 P.3d at 665. We find no error, fundamental or otherwise, nor do we find the prejudice that would be required for reversal even if we found fundamental error. Reversal on this basis is unwarranted.[6]

***Admission of Deposition Testimony***

**¶24** Prior to trial, the State moved to depose Cindy, Victim's wife and Ferrante's mother, because it had reason to believe that there was "a substantial likelihood that [she] will refuse to testify at trial." On February 14, 2008, the State deposed Cindy under oath, and defense counsel was present and had a full and fair opportunity to cross-examine her. On March

[6] Ferrante also asserts for the first time on appeal that the trial court violated his Fifth, Sixth and Fourteenth Amendment Rights. By not raising these issues before the trial court, he has similarly forfeited relief on his constitutional arguments and we choose not to address them here. *See State v. Spreitz*, 190 Ariz. 129, 145, 945 P.2d 1260, 1276 (1997) (court may properly decline to consider constitutional issues where defendant fails to raise them at trial).

19, 2008, the State filed a motion *in limine* requesting permission to have Cindy declared "unavailable" and to use the video/and or transcript of her deposition testimony at trial, if she indeed failed to appear.

**¶25** The trial court heard argument on the State's motion on April 1, the first day of trial. At that time, the State informed the court that it had received information that the Maricopa County Sheriff's Officer had personally served Cindy on March 20, 2008. Furthermore, according to the prosecutor, he had personally spoken with Cindy and offered her transportation to court, which she had declined. Because the subpoena had been issued for April 2 and because, arguably, there was still a possibility that the witness would appear, the trial court refrained from ruling Cindy "unavailable" at that time. However, the trial judge informed the parties that, should Cindy not appear at the appointed time on the following day, he would admit the deposition evidence. The judge also instructed counsel that they should agree before then precisely how the evidence would be presented to the jury.

**¶26** When Cindy failed to appear for trial on April 2, Ferrante requested that the trial court issue a bench warrant for her arrest. The State joined in the motion, and the trial court issued the bench warrant. Ferrante continued to argue against the admission of her deposition testimony, stating that

the State had failed to use "any reasonable efforts" to secure her appearance. Ferrante maintained that the State should have arrested Cindy prior to trial and required her to post a secured appearance bond to ensure her appearance or that it should have Cindy arrested and brought to court on the bench warrant that had just been issued.

**¶27** The prosecutor informed the court that his office had tried to no avail several times that same day to call the witness to offer transportation. They discovered that Cindy had changed her place of employment and they were only able to access voice mail on her home telephone and leave unanswered messages. Offers to assist with transportation relayed through Victim were also ineffective.

**¶28** The trial court ultimately ruled that Cindy was "unavailable," and a videotape of her deposition was played for the jury. On appeal, Ferrante argues that the trial court abused its discretion by declaring Cindy "unavailable" and admitting her deposition testimony. According to Ferrante, the State presented insufficient evidence that supported the trial court's finding that the State had made "reasonable efforts" to

secure her presence.[7] We disagree.

**¶29** We review for an abuse of discretion a trial court's ruling on the admission or exclusion of evidence under exceptions to the rule against hearsay. *State v. Tucker*, 205 Ariz. 157, 165, ¶ 41, 68 P.3d 110, 118 (2003). Review of a trial court's determination based on a Confrontation Clause violation is reviewed de novo. *Lilly v. Virginia*, 527 U.S. 116, 137 (1999)(plurality opinion). Confrontation Clause and hearsay rule violations are subject to harmless error analysis. *Bass*, 198 Ariz. at 580-581, ¶ 39, 12 P.3d at 805-806.

**¶30** Rule 804(b)(1) of the Arizona Rules of Evidence provides that former testimony is admissible in criminal proceedings in accordance with Ariz. R. Crim. P. 19.3(c). Criminal Rule 19.3(c) permits the admission of prior testimony if: (1) the party against whom the former testimony was offered was a party to the previous proceeding and had an opportunity to cross-examine the declarant with an interest and motive similar to that involved in the current proceeding, and (2) if the declarant is currently "unavailable" as a witness.

**¶31** A declarant is "unavailable," and his or her prior

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[7] Ferrante's Confrontation Clause arguments do not implicate *Crawford v. Washington*, 541 U.S. 36 (2004), issues because Ferrante had the opportunity to cross-examine the witness at her deposition. The parties agreed to present the videotape of the deposition, which would also have permitted the jury to observe the witness's demeanor and tone during questioning.

testimony is not "hearsay," if the witness is absent from the hearing and the proponent of a statement has been unable to procure the witness's attendance or testimony "*by process or other reasonable means*." Ariz. R. Evid. 804(a)(5) (emphasis added). "To establish the element of unavailability, the State must have made a good-faith effort to obtain the witness' presence at trial." *State v. Edwards*, 136 Ariz. 177, 181, 665 P.2d 59, 63 (1983).

**¶32** In *State v. Gonzales*, 181 Ariz. 502, 508-509, 892 P.2d 838, 844-845 (1995), our supreme court noted that, most "good faith efforts" challenges to hearsay evidence involved "unserved witnesses who cannot be located." However, "nothing in Rule 804 suggests that service of a subpoena is a *per se* showing of good-faith efforts." *Id*. at 509, 892 P.2d at 845. Instead, "the true issue" is whether the State made a good-faith effort to *locate* the witness so that he or she could be subpoenaed. *Id*. Furthermore, because the phrase "good faith effort" is not susceptible to a precise definition, whether such efforts have been made must be determined on a case by case basis by the trial court. *State v. Marshall*, 121 Ariz. 170, 171, 589 P.2d 44, 45 (App. 1978).

**¶33** Here, there is no doubt[8] that the State made every

[8] Ferrante accepted the State's avowals, but merely argued the State's action were not enough.

effort it could, short of actually arresting Cindy prior to trial and exacting a bond from her, to try and secure her presence at the trial. Although the State had reason to believe that Cindy would not appear to testify at trial, the fact that she had appeared for her deposition indicates that the State could not simply assume that she might not also ultimately honor her subpoena and appear at trial. Indeed, even the trial court was required to wait until the date and time of her subpoena before it could consider her "unavailable." Under these circumstances, the trial court did not deem it unreasonable that the State would be reluctant to arrest the wife of its victim in order to ensure that it could try its case. We concur. Furthermore we find the evidence presented by the State sufficient to support the trial court's finding that the State had made reasonable efforts to procure her attendance and that Cindy was unavailable. The trial court did not abuse its discretion in admitting Cindy's deposition testimony at trial.

***Hearsay Challenge Concerning***
***Victim's Drug Debts and Threats***

**¶34** Prior to trial, Ferrante filed a motion *in limine* precluding the State from presenting "all speculative and hearsay evidence regarding the motive for the attacks." The State desired to elicit testimony that Victim owed Jane and her husband money for drugs and that Ferrante's assault was

connected with their efforts to collect on that debt. Specifically, the State anticipated eliciting testimony that, during one of the encounters with Jane's husband, Victim had mentioned owning a gun, which Ferrante would never have known about, but that, when Ferrante came to the house, he was "asking for the gun." The State sought to introduce the evidence, not for the "truth" of the statements asserted, but because it believed it was important to establish a motive for the attack in the case.[9]

**¶35** The trial court permitted the State to elicit the testimony at trial in order to allow the State to later argue that Ferrante had acted "in cahoots" with the drug dealers. However, it precluded "anyone from expressing the opinion" that the attack occurred because Ferrante was extracting punishment or payment related to the drug debt.

**¶36** During the trial, the State elicited testimony from Victim that Jane and her husband had visited him repeatedly before the attack seeking the $200 dollars he owed. According to Victim, when Jane's husband threatened him the day before the attack, Victim claimed he owned a gun to "ward them off." According to Victim, he did not actually own a weapon; he had never mentioned owning a gun to anyone except Jane's husband

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[9] The evidence was also relevant to the State's arguments regarding premeditation.

that day; and Ferrante would never have seen him with a gun or suspected he owned one.

**¶37** During her deposition, defense counsel elicited testimony from Cindy that confirmed that Victim had had a drug habit; that he had been confronted by local drug dealers, one of whom was named "Joan;" and that Joan's husband came to Victim's house and "wanted [Victim] to find him a gun . . . to get a gun." Defense counsel also elicited the statement that Victim had told her, either while he was in the hospital or a day later, that Ferrante "was there to collect the debt."

**¶38** On appeal, Ferrante argues that the trial court abused its discretion in admitting Victim and Cindy's statements about Victim's interactions with the drug dealers because those statements were hearsay. He maintains that Jane and her husband's statements were offered for their truth and claims that he was prejudiced by not being able to cross-examine either of them.

**¶39** This court applies an abuse of discretion standard when reviewing a trial court's rulings on the admissibility of hearsay evidence. *State v. King*, 212 Ariz. 372, 375, ¶ 16, 132 P.3d 311, 314 (App. 2006). Absent a clear abuse of discretion, this court will not second guess a trial court's ruling on the admissibility or relevance of evidence. *State v. Spreitz*, 190 Ariz. 129, 146, 945 P.2d 1260, 1277 (1997). The trial court did

not abuse its discretion in admitting the evidence of Victim's interactions with the drug dealers in this case.

**¶40** Hearsay evidence is a statement, other than one made by the declarant while testifying at a trial or hearing, that is offered into evidence "*to prove the truth of the matter asserted*." Ariz. R. Evid. 801(c) (emphasis added). A statement admitted for a purpose other than the truth of its substantive comment is not hearsay. *See, e.g., State v. Miller*, 186 Ariz. 314, 322, 921 P.2d 1151, 1159 (1996) (statement admitted to show effect on defendant not hearsay).

**¶41** None of the out of court statements here were admitted to prove that Victim was actually threatened by the drug dealers or actually owned a gun. Victim testified that he had never owned a gun; Ferrante would never have seen him with a gun or been told by him that he "had a gun"; and he had never even mentioned to anyone else except Jane's husband that he owned a gun. Yet the evidence established that, when Ferrante arrived at the house the next day, he told his mother "he knew there was a gun in the house" and wanted to know where it was. The testimony in this case was clearly offered to support the State's theory that Ferrante was associated in some fashion with Jane and her husband and that his attack on Victim was motivated by Victim's failure to pay his debts. As such it was not offered for the truth of the matter asserted and not "hearsay"

as such, but relevant to explain the motive for the seemingly unexpected and unprovoked nature of the attack.

**¶42** Furthermore, we are mindful that a substantial portion of the evidence to which Ferrante now objects was elicited during Ferrante's cross-examination of Cindy at her deposition. Even if Ferrante did not then anticipate the admission of the deposition testimony at trial, he surely would have known that Cindy could have been impeached with her deposition statements had she appeared and testified differently. Under the circumstances, the trial court did not abuse its discretion in admitting this evidence.[10]

***Evidence of Aggravated Assault***

**¶43** Ferrante maintains that the State presented insufficient evidence supporting the conviction for aggravated assault as a dangerous felony. Specifically, Ferrante challenges the fact that Victim suffered a serious physical injury or that the weapon involved was a dangerous instrument.

**¶44** Ferrante raised his arguments below in his Rule 20 motion, which the trial court denied. On appeal, we review a

[10] We also note that Ferrante was able to use the drug dealer testimony to his advantage. Kingman Officer K. testified before the deposition videotape was played. Officer K. interviewed Victim the morning of the attack while he was still in the emergency room. On cross-examination, defense counsel elicited the testimony that Victim failed to mention that a drug dealer had come to his house or that he had used the presence of a gun to scare him off, as he testified at trial.

denial of a motion for directed verdict for an abuse of discretion and will only reverse if there is not substantial evidence to support a conviction. *State v. Henry*, 205 Ariz. 229, 232, ¶ 11, 68 P.3d 455, 458 (App. 2003). Substantial evidence may be either circumstantial or direct and is evidence that a reasonable jury may accept as sufficient to find guilt beyond a reasonable doubt. *Id*. A trial court must submit a case to the jury if reasonable minds can differ on the inferences to be drawn from the evidence. *Id*.

**¶45** On appeal, we view the evidence in the light most favorable to sustaining the trial court's decision. *State v. Sullivan*, 205 Ariz. 285, 287, ¶ 6, 69 P.3d 1006, 1008 (App. 2003). If conflicts in the evidence exist, we resolve them in favor of sustaining the verdict. *State v. Salman*, 182 Ariz. 359, 361, 897 P.2d 661, 663 (App. 1994).

**¶46** The State's theory of the case was that Ferrante had committed aggravated assault on Victim by either causing a "serious physical injury" or by using "a dangerous instrument." We find the evidence sufficient to sustain convictions on either of these theories.

*Dangerous Instrument*

**¶47** A dangerous instrument is defined as "anything that under the circumstances in which it is used, attempted to be used or threatened to be used is readily capable of causing

death or serious physical injury." A.R.S. § 13-105(12) (Supp. 2009). Even if an instrument is not inherently dangerous as a matter of law, such as a gun or a knife, a jury may still determine whether a defendant used the object in such a manner that it became a "deadly weapon." *State v. Gordon*, 161 Ariz. 308, 310, 778 P.2d 1204, 1206 (1989).

**¶48** Here, the jury saw the actual stick in the courtroom and it also appears that the jury was permitted to have it in the jury room during deliberations. From photographs in evidence, it appears that the weapon was a thick wooden stick, at least 2-3 feet long. It was described by a Kingman Police evidence technician as a "long stick with a rubber-type reddish-color handle," which had a broken end when police recovered it at the Victim's home. The broken end was described as "about eight inches long, [with] like a nail or spike sticking out of the center." Victim described it as the type of pole implement that "people pick up cans with at the park." The evidence at trial established that Ferrante had struck Victim with such force that the wooden pole had snapped in two.

**¶49** Furthermore, Dr. Carmen, who treated Victim at the emergency room testified that depending on how such a weapon was used to strike someone in the head, it could potentially cause paralysis; loss or impairment of a bodily organ, such as the brain; or even death. Kingman Police Detective O. also

testified that the weapon was roughly equivalent to the metal or wooden PR-24 clubs that officers are trained to use, and the authorized use of those clubs to strike the head required a "lethal force situation." The preceding evidence was more than sufficient to satisfy the State's burden of establishing that the wooden pole constituted a "dangerous instrument" under the circumstances in which it was used in this case.

*Serious Physical Injury*

**¶50** The State also maintained that Ferrante committed aggravated assault by inflicting a serious physical injury. The definition of a "serious physical injury" includes a physical injury that causes "serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb." A.R.S. § 13-105(38) (Supp. 2009). Here there was sufficient evidence from which the jury could have found that Victim had sustained such an injury.

**¶51** Victim testified that after being struck in the head, he developed migraine headaches, which he had never experienced prior to the attack. He experienced the migraine headaches "daily." He also developed numbness and weakness in his left arm and hand and had difficulty gripping. Furthermore, Victim testified that he continued to experience headaches and weakness to his arm and hand at the time of trial, although his symptoms had improved since he had received medications.

**¶52** Defense witness, Dr. Justin Mussomelli, a neurologist in Scottsdale who treated Victim on December 6, 2007 and January 2008, corroborated Victim's testimony. Mussomelli testified that when he treated Victim seven months after the attack, Victim suffered from significant migraine headaches and had significant difficulty utilizing his arm. According to Mussomelli, although Victim's symptoms had improved by the time of his second visit, he continued to suffer from "post-traumatic migraine" and there was no way of knowing for any given person whether that would ever change.

**¶53** This evidence supports the finding by a rational trier of fact that Victim suffered protracted impairment of his brain and arm as a direct result of Ferrante's attack. Therefore, the trial court did not abuse its discretion in denying Ferrante's Rule 20 motion.

***Failure to Instruct on Other Lesser Included Types of Aggravated Assault***

**¶54** Ferrante requested an instruction on attempted aggravated assault. According to Ferrante:

> [The] evidence that was presented by the State could also suggested that whoever assaulted [Victim] might not necessarily -- was attempting to commit the homicide of [Victim], but may have just been attempting to commit an assault on [Victim], and attempted to inflict serious physical injury on to [Victim]. And not only that, they might have been even attempting to inflict a less serious aggravated assault, such as maybe just a fracture or broken bone or maybe intended to inflict maybe a temporary injury

on [Victim].

Although the trial court appreciated the fact that "there would be a certain symmetry" involved, given that Ferrante was charged with attempted murder, it denied Ferrante's request for an instruction on attempted aggravated assault.

**¶55** On appeal, Ferrante argues that, although he was "less than clear in his request for a lesser included instruction," it was "clear that he was arguing that his view of the evidence was that a reasonable jury could conclude that the victim suffered only temporary but substantial disfigurement or impairment making the offense a class 4 felony under ARS § 13-1204(A)(3)." In the alternative, he maintains that the trial court should have *sua sponte* instructed the jury on the lesser included temporary but substantial form of aggravated assault. We find no error in the court's failure to instruct on attempted aggravated assault or on the Class 4 version of temporary but substantial.

**¶56** A trial court's denial of a defendant's request for a lesser included instruction is reviewed for an abuse of discretion. *State v. Wall*, 212 Ariz. 1, 3, ¶ 12, 126 P.3d 148, 150 (2006). An offense is lesser included when the greater offense cannot be committed without necessarily committing the lesser offense. *Id.* at ¶ 14, 126 P.3d at 150 (quotation and citation omitted). An offense is necessarily included and

requires that a jury instruction be given only when it is a lesser included and the evidence is sufficient to support giving the instruction. *Id.* at 4, ¶ 18, 126 P.3d at 151. The mere possibility, however, that a jury might choose to disbelieve some portion of the State's case does not require the court to instruct on a lesser offense. *State v. King*, 166 Ariz. 342, 343, 802 P.2d 1041, 1042 (App. 1990).

**¶57** A person commits an "attempt" if, with the requisite culpability, the person either (1) intentionally engages in conduct which would constitute an offense if the attendant circumstances were as such person believes them to be; or (2) intentionally does or omits to do anything that, under the circumstances as such person believes them to be, is any step in the course of conduct planned to culminate in commission of the offense. A.R.S. § 13-1001(A)(1)-(2) (2001). The evidence at trial did not support an "attempt" on either basis.

**¶58** As the State notes, Ferrante's argument at trial was that there was insufficient evidence that he was the actual assailant and/or that the injuries sustained and the weapon employed were not sufficient to establish an aggravated assault either with a dangerous instrument or through the infliction of serious physical injury. Ferrante challenged Victim's credibility and his version of the events and persistently maintained that the injury he suffered was minor at best – a

mere cut that required no more than a few staples and no hospitalization. Ferrante also persistently maintained that a "stick" could not be a dangerous instrument. Based on the evidence, Ferrante either did not commit any offense at all or was guilty of the completed offense of aggravated assault. The trial court did not abuse its discretion in denying the request for an instruction on attempt.

**¶59** Nor did it commit fundamental error[11] in failing to *sua sponte* instruct the jury on other types of aggravated assault that would constitute a Class 4 offense. Ferrante argues that, without conceding that there was evidence of substantial impairment of any organ or body part, it was obvious from Victim's own testimony and that of Dr. Mussomelli that he suffered some "temporary" impairment. Therefore the jury could have reasonably concluded that he suffered either a less severe injury or that he intended to inflict a less severe one.

**¶60** In order to prevail on a fundamental error basis, a defendant must show not only that fundamental error occurred but that it caused him prejudice in his case. *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607.

**¶61** Arizona Revised Statutes § 13-1204(A)(3) (Supp. 2009)

[11] We do not find that Ferrante's concededly "less than clear" statements sufficiently presented the trial court with a request for such instruction.

provides that an aggravated assault is a Class 4 felony if the assault results in a "temporary but substantial disfigurement, temporary but substantial loss or impairment of any body organ or part or a fracture of any body part." By making the separate finding that the offense was a "dangerous offense," the jury in this case specifically found beyond a reasonable doubt that offense involved a serious physical injury or the use of a dangerous instrument. A.R.S. § 13-1204(A)(1)-(2). Therefore, there is no possibility, other than Ferrante's speculation, that even had the trial court given the instruction, the verdict would have been different. Ferrante has therefore failed to prove prejudice. *See Henderson*, 210 Ariz. 567, ¶ 20, 115 at 607. We conclude, therefore, that Ferrante's claim that the trial court erred in failing to *sua sponte* instruct the jury on aggravated assault as a Class 4 felony is without merit.

***Discovery Violation/Sentencing***

**¶62** The State proved Ferrante's priors to the trial court at sentencing on May 9 by using a certified Arizona Department of Corrections "pen pack." Ferrante objected to the admission of the pen pack because he did not receive a copy of it until April 25,[12] which was after the conclusion of the trial. In

[12] The State avowed to the trial court that it had only received the document from DOC on April 16 and that it had immediately forwarded the information to Ferrante. Ferrante does not challenge the State's avowal.

arguing against its admission, defense counsel maintained only that Ferrante was prejudiced by the late disclosure because he "was not able to evaluate the evidence that would be ultimately presented in this case for him to determine whether to accept the previous plea offer." The trial court admitted the pen pack over Ferrante's objection, deeming it highly unlikely that Ferrante had been prejudiced "in any real way" as the priors were "local priors" and the State had alleged them "a long time ago."

**¶63** Ferrante renews his argument on appeal, maintaining that, "most importantly," the late disclosure prejudiced him in reaching a decision about the State's plea offer prior to trial "at which time this document had not yet been disclosed." That is because, according to Ferrante, without the actual document establishing the length of time that he had been incarcerated, the trial court could not have found that he had more than one historical prior felony because two of the three priors alleged by the State were for Class 6 felonies committed more than five years prior to the instant offense.

**¶64** According to Ferrante, the trial court erred by not precluding the document as a "minimum sanction." He asks that we remand with directions to the trial court to allow him to accept the plea offer, or, should the State not wish to reinstate the offer, to resentence him considering only one

historical prior felony conviction. Ferrante's arguments are without merit, and he has shown no prejudice.

**¶65** The decision whether to impose sanctions for discovery violations, and the choice of sanctions to impose, are matters that are well within the sound discretion of the trial court. *State v. Dumaine*, 162 Ariz. 392, 406, 783 P.2d 1184, 1198 (1989); *See State v. Meza*, 203 Ariz. 50, 55, ¶ 19, 50 P.3d 407, 412 (App. 2002) (trial court has great discretion whether to impose sanctions and how severe a sanction to impose). "We review such a decision for an abuse of discretion and grant considerable deference to the trial court's perspective and judgment." *Meza*, 203 Ariz. at 55, ¶ 19, 50 P.3d at 412.

**¶66** The State alleged the priors on November 28, 2007,[13] a good four months before the beginning of the trial. *See* A.R.S. § 13-604(P) (2001) (permitting filing of allegation of priors at any time prior to the date case actually tried provided it is not filed fewer than twenty days before trial). Therefore, there is no question that Ferrante had notice, well before trial, that the State intended to use the priors against him and would have been able to consider that factor in contemplating whether to accept the State's plea offer or proceed to trial.

[13] The fact that Ferrante could be impeached with two historical prior felony convictions was subsequently discussed at a Rule 609 Hearing conducted by the trial court at the end of the State's case in chief on April 2.

Ferrante here does not argue that the disclosure of the information in the pen pack surprised him or that it was inaccurate in any way. As the trial court in this case noted, it is difficult to imagine that the first inkling Ferrante would have had about his criminal history was when he received the pen pack on April 25. Furthermore, had there been any question about whether or not the priors were allegeable, as he argues on appeal, there was more than sufficient time for Ferrante to have challenged their use or to have asked the State to produce additional information prior to trial and certainly prior to sentencing.

**¶67** We find that the trial court did not abuse its discretion in denying Ferrante's request to exclude the pen pack. *See Meza*, 203 Ariz. at 55, ¶ 19, 50 P.3d at 412. We therefore decline to remand this matter to the trial court on this basis.

**CONCLUSION**

**¶68** For the foregoing reasons, we affirm Ferrante's conviction and sentence.

_____/s/_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

___/s/_____
PATRICK IRVINE, Judge

____/s/_____
ANN A. SCOTT TIMMER, Judge