DIVISION ONE
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PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 08-0806
	)	DEPARTMENT C
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
JOEY HAHN,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-005774-001 DT

The Honorable Karen L. O'Connor, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Adriana M. Rosenblum, Assistant Attorney General
Attorneys for Appellee

Sharmila Roy — Laveen
Attorney for Appellant

I R V I N E, Presiding Judge

¶1 Joey Hahn ("Hahn") appeals from his convictions and sentences for two counts of aggravated assault. Hahn argues that

the court erred in declining to instruct the jury on the lesser included offense of simple assault and in failing to give the lesser included instruction of disorderly conduct. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On August 4, 2007, S.G. and T.G. (collectively "the brothers") visited the location where their brother died in a rollover car accident. Shortly after they arrived, Hahn drove by and allegedly taunted them. In response, the brothers yelled and made aggressive gestures at Hahn. Hahn continued driving and the brothers returned to their car to drive home. While driving home, they noticed Hahn quickly approaching from behind. The brothers pulled off the road, allowing Hahn to pass. Hahn passed but stopped his truck approximately three car lengths in front of the brothers. Hahn then reversed his truck into the brother's car, causing significant damage.[1]

¶3 After Hahn's vehicle idled away from the car, T.G. threw a sledgehammer at Hahn's truck and ran towards the driver-side door. Hahn exited his truck and the two began to wrestle. S.G. then grabbed a pipe wrench from the car and approached Hahn. As S.G. approached, Hahn's father arrived with a gun, causing the brothers to run away and eventually call the police.

[1] The brothers and a witness testified that Hahn's truck backed over the car and onto the car's hood.

¶4 On February 21, 2008, the grand jury issued an indictment, charging Hahn with two counts of aggravated assault, class three dangerous felonies. At trial, the State's witnesses' testimony substantially corroborated each other; however, Hahn's testimony disputed much of it. Hahn testified that the brothers initially threw rocks at his truck as he drove by. As he passed the brothers a second time, they threw a sledge hammer at the truck. Further, Hahn testified that the brothers were outside of their car when the collision occurred. At the conclusion of trial, the jury found Hahn guilty as charged. The court sentenced Hahn to mitigated sentences of five years for each count and ordered the sentences run concurrently.

¶5 Hahn timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A) (2010).[2]

DISCUSSION

¶6 Hahn first argues that the trial court erred when it declined to instruct the jury on the lesser included offense of simple assault. The State charged Hahn with intentionally placing another person in reasonable apprehension of imminent physical injury by using a dangerous instrument under A.R.S. § 13-1204(A)(2) (2010). At trial, Hahn argued that "the jury could

[2] We cite the current version of the applicable statute because no revisions material to this decision have since occurred.

find that a vehicle was not a dangerous instrument." The court disagreed and stated that "given the charges in the indictment and the evidence presented at this trial, I don't find that the lesser included instruction is warranted."

¶7 An offense is lesser included when the greater offense cannot be committed without necessarily committing the lesser offense. *State v.* Wall, 212 Ariz. 1, 3, ¶ 14, 126 P.3d 148, 150 (2006) (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).

¶8 "A person commits aggravated assault if the person commits assault as prescribed by § 13-1203" using "a deadly weapon or dangerous instrument." A.R.S. § 13-1204(A)(2). Under A.R.S. § 13-1203(A)(2) (2010), a person commits assault by intentionally placing another person in reasonable apprehension of imminent physical injury. A "dangerous instrument" is "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) (2010). 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). Therefore, as Hahn and the State note, the difference between assault and aggravated assault is the use of a dangerous instrument.

¶9 Hahn does not dispute that a motor vehicle may be a dangerous instrument, but argues that the State failed to present evidence showing that he used his truck as a dangerous instrument. Under the terms of A.R.S. §§ 13-1204(A)(2) and 13-105(12), a vehicle may be a dangerous instrument simply by virtue of the circumstances under which it is used. *See State v. Williams,* 168 Ariz. 367, 371, 813 P.2d 1376, 1380 (App. 1991) (noting the state is not required to show the defendant had a specific intent to use the vehicle as a dangerous instrument), *vacated in part on other grounds,* 175 Ariz. 98, 854 P.2d 131 (1993). Here, the record reflects that the State offered substantial evidence that Hahn used his truck under circumstances in which it could be considered a "dangerous instrument." As mentioned above, the brothers and a witness each testified that Hahn violently reversed his truck into the car while the brothers were sitting inside. They also testified that Hahn's truck crashed into the car's bumper and came to rest on

top of the hood due to the force of the collision. Hahn's only argument was that the brothers were not in the vehicle when he drove his truck into their car. This would not show the truck was not used as a dangerous instrument. As a result, we agree with the trial court that the evidence did not support a simple assault instruction.

¶10 Hahn also argues that the court erred when it did not sua sponte instruct the jury on disorderly conduct as a lesser included offense of aggravated assault. Hahn contends that a jury could reasonably have believed that Hahn was only reckless in his handling of the truck. "[D]isorderly conduct instructions are appropriate in aggravated assault cases if the facts support both instructions." *State v. Miranda*, 200 Ariz. 67, 68, ¶ 3, 22 P.3d 506, 507 (2001). A person commits disorderly conduct if, with intent to disturb the peace or quiet of a person, or with knowledge of doing so, he recklessly handles, displays or discharges a deadly weapon. A.R.S. § 13-2904(A)(6) (2010).

¶11 At trial, Hahn did not request a lesser-included offense instruction. When a defendant does not request a lesser included offense instruction, he waives his right to challenge the instructions on appeal absent fundamental error. *State v. Nordstrom*, 200 Ariz. 229, 253, ¶ 81, 25 P.3d 717, 741 (2001). 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. *State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (stating the defendant bears burden of proving error, that the error was fundamental, and that he suffered prejudice thereby). Fundamental error is "error going to the foundation of a case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Id.* at 567, ¶ 19, 115 P.3d at 607 (quoting *State v. Hunter,* 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)).

¶12 We agree with the State that the evidence did not support a disorderly conduct instruction. Hahn testified that he wanted to immobilize the brothers' car and acknowledged that the brothers were frightened. Further, even assuming the trial court erred, Hahn has not provided any evidence of and we perceive no prejudice. By making the separate finding that the offense was a "dangerous offense," the jury in this case specifically found beyond a reasonable doubt that the offense involved the use of a deadly weapon or dangerous instrument. A.R.S. § 13-1204(A)(2). Therefore, there is no possibility, other than Hahn's speculation, that even had the trial court given the instruction, the verdict would have been different. Hahn has therefore failed to prove prejudice. *See Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607.

CONCLUSION

¶13 For the foregoing reasons, we affirm Hahn's convictions and sentences.

/s/
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PATRICK IRVINE, Presiding Judge

CONCURRING:

/s/
_____
MICHAEL J. BROWN, Judge

/s/
_____
DONN KESSLER, Judge