

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Appellee,*

*v.*

TIMOTHY ROBERT OLVERA,  
*Appellant.*

No. 2 CA-CR 2015-0281  
Filed April 7, 2016

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

*See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.*

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Appeal from the Superior Court in Pinal County  
No. S1100CR201401958  
The Honorable Steven J. Fuller, Judge

**AFFIRMED**

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COUNSEL

Mark Brnovich, Arizona Attorney General  
Joseph T. Maziarz, Section Chief Counsel, Phoenix  
By Jonathan Bass, Assistant Attorney General, Tucson  
*Counsel for Appellee*

The Stavris Law Firm, PLLC, Scottsdale  
By Christopher Stavris  
*Counsel for Appellant*

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**MEMORANDUM DECISION**

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

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STARING, Judge:

¶1 Following a jury trial, appellant Timothy Olvera was convicted of aggravated assault and two counts of unlawful imprisonment arising from an incident with his former girlfriend.<sup>1</sup> The trial court sentenced him to concurrent, maximum 1.5-year prison terms. On appeal, Olvera contends the court erroneously permitted him to testify about the punishment he received for a prior conviction and improperly ordered him to pay indigent defense attorney fees without expressly finding he could afford to pay them. For the reasons set forth below, we affirm.

¶2 Before Olvera testified at trial, the parties stipulated that the state could impeach him with questions about a prior conviction, and the trial court explained that although the nature of the offense and class of felony could not be mentioned, any reference to the fact “that it was a felony and all the dates, what county, and the CR number” were permissible. At trial, Olvera admitted the prior conviction during direct examination and, without objection by defense counsel, again admitted having the conviction during cross-examination and responded affirmatively when the prosecutor asked him if he had received probation for the prior offense and if he had “been through the court system before.” Olvera asserts his responses were “irrelevant and extremely prejudicial,” *see* Ariz. R. Evid. 401, 402, 403, 609; exceeded the scope of permissible testimony agreed to by the parties; and violated his rights to due process and against self-incrimination.

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<sup>1</sup>On the first day of trial, Olvera pled guilty to two counts of disorderly conduct arising from the same matter, for which he was sentenced to time served.

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¶3 Olvera correctly concedes that because he failed to object to the state's questions below, he has forfeited any right to appellate relief absent fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). An error is fundamental only if it affects a substantial right or the fairness of the proceeding. *See id.* Olvera argues that, because the trial court did not strike his responses, provide a curative instruction or declare a mistrial, the error was prejudicial and fundamental, rendering his trial unfair.

¶4 Rule 609(a)(1)(B), Ariz. R. Evid., provides that evidence of a prior conviction may be used to impeach a witness's credibility "if the probative value of the evidence outweighs its prejudicial effect" to the defendant. "It is the fact of conviction, not the extent or terms of the punishment, that is probative of the witness's veracity." *State v. Tucker*, 157 Ariz. 433, 448, 759 P.2d 579, 594 (1988). However, as the state correctly argues, even assuming the trial court erroneously permitted testimony about the imposition of probation in the prior matter, prejudice did not result. *Cf. id.* at 448, 759 P.2d at 594 ("suggestion that [defendant] might have violated the conditions of his parole is only minimally more detrimental to his credibility than the fact of his convictions"). If anything, the mention of probation may have benefitted Olvera, because the jury was not left to speculate that his felony conviction resulted in imprisonment.

¶5 Moreover, the jury was properly instructed that it could consider evidence of Olvera's prior conviction for the limited purpose of assessing his credibility. *See Ariz. R. Evid. 609(a); see also State v. Newell*, 212 Ariz. 389, ¶ 69, 132 P.3d 833, 847 (2006) (juries presumed to follow instructions). Also, the fact Olvera was acquitted of one of the charged offenses (threatening or intimidating) suggests he was not prejudiced by the challenged testimony. Because Olvera has not established that fundamental error occurred or that he suffered prejudice therefrom, we reject his argument. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607-08.

¶6 Olvera also challenges the trial court's order that he pay \$400 in indigent defense attorney fees, asserting the court failed to

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enter findings regarding his ability to pay that amount. He concedes that, because he did not object to the imposition of fees at sentencing or request express findings regarding his ability to pay them, he has forfeited all but fundamental, prejudicial error. *See id.*, ¶¶ 19-20. Further conceding that we previously have found the failure to make findings on the record regarding an indigent defendant's ability to pay attorney fees without hardship is not fundamental error, *State v. Moreno-Medrano*, 218 Ariz. 349, ¶¶12-13, 185 P.3d 135, 139 (App. 2008), Olvera nonetheless asks that we reverse the imposition of fees and remand "in order to correct an undue hardship as well as a legal injustice."

¶7 Before imposing fees pursuant to A.R.S. § 11-584 and Rule 6.7(d), Ariz. R. Crim. P., a trial court is required to make specific factual findings regarding a defendant's ability to pay the fees imposed and must find the fees will not cause a substantial hardship. *Moreno-Medrano*, 218 Ariz. 349, ¶ 9, 185 P.3d at 139; *see* A.R.S. § 11-584(C)(3) (defendant may be required to "repay . . . a reasonable amount . . . for the cost of the person's legal services"); § 11-584(D) (court "shall take into account the financial resources of the defendant and the nature of the burden that the payment will impose" before requiring defendant to repay costs of legal defense); Ariz. R. Crim. P. 6.7(d) (court permitted to impose costs of legal services on defendant in "such amount as it finds he or she is able to pay without incurring substantial hardship to himself or to herself or to his or her family"); *see also State v. Taylor*, 216 Ariz. 327, ¶ 25, 166 P.3d 118, 125-26 (App. 2007).

¶8 Notably, Olvera has not shown the trial court failed to consider his ability to pay or his financial resources. As we observed in *Moreno-Medrano*, trial courts are generally presumed to know and correctly apply the law. 218 Ariz. 349, ¶ 14, 185 P.3d at 139. The presentence report indicated that due to missed days of work related to "court and counseling," Olvera had been unemployed for the past year. However, Olvera testified he previously had been employed for two years at a steel company where he made \$16 per hour, and reported to the author of the presentence report that he would be able to resume working there "once he is released from confinement." The author of the report

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thus recommended Olvera “pay indigent defense attorney fees of \$400.00.” And at sentencing, when the trial court stated it had read and considered the presentence report, defense counsel did not object to the portion of the report that addressed Olvera’s financial status.

¶9 Additionally, in Olvera’s presentence memoranda, defense counsel stated that Olvera’s job at the steel company “allowed him to have health insurance, benefits, a 401k, and the option to work overtime,” and explained that he earned enough “to provide a decent living to [the victim] and their children.” Finally, as Olvera concedes on appeal, he did not object when the fees were imposed at sentencing. *See Trantor v. Fredrikson*, 179 Ariz. 299, 301, 878 P.2d 657, 659 (1994) (court’s failure to make express findings easily remedied by timely objection or request). Accordingly, because Olvera has not identified fundamental error, *see Moreno-Medrano*, 218 Ariz. 349, ¶¶12-13, 185 P.3d at 139, or established that the imposition of fees caused him undue hardship or legal injustice, we deny his claim.

¶10 We therefore affirm Olvera’s convictions and sentences, and the attorney fees assessment.