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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DAVID EDWARD DRAKE, Appellant.	)	2 CA-CR 2010-0254 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20100177001

Honorable Edgar B. Acuña, Judge

AFFIRMED IN PART; VACATED IN PART

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H O W A R D, Chief Judge.

¶1 Appellant David Drake was convicted after a jury trial of aggravated assault with a deadly weapon or dangerous instrument, a dangerous-nature offense. The trial

court sentenced him to a mitigated, five-year prison term. On appeal, he contends the court erred when it refused to give his requested jury instruction on the lesser-included offense of attempted aggravated assault; fundamental error occurred when a law enforcement officer testified about Drake's silence after he had been informed of his right to remain silent; and the court erred when it ordered him to pay a time-payment fee and attorney fees as part of his sentence. We affirm in all respects except as to the time-payment fee, which we vacate.

¶2 We view the evidence and all permissible inferences arising from the evidence in the light that is most favorable to sustaining the verdict. *See State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 914 (2005). So viewed, the evidence established the following. The victim was inside a convenience store, visiting the clerk who was a friend of his. Drake walked into the store and demanded that the victim walk outside with him, telling the victim he owed money to a woman the victim knew named Jocelyn. The victim refused to go with Drake, who then pulled him outside the store, produced a switchblade knife with an approximate eight inch blade, and tried to stab the victim with it. Drake then left the scene and walked into a nearby apartment complex.

¶3 Two Tucson police officers responded to a call about the assault and were directed by witnesses to the apartment complex. They saw a ground-floor apartment door open and a woman later identified as Jocelyn came out, asking the officers why they were there. Drake then came out, identified himself, and volunteered, "I didn't touch him." He then told the officers he knew why they were there, knew where he was going, and asked to be handcuffed. He admitted to the officers he had two knives, a switchblade and a steak knife. He subsequently was charged with and convicted of aggravated assault.

¶4 On appeal, Drake contends the court erred in refusing to instruct the jury on attempted aggravated assault, a lesser-included offense of aggravated assault. In rejecting Drake's proffered instruction, the trial court stated it had reviewed the evidence and found "no evidence that the [victim] was not placed in immediate or threatened of immediate physical harm or imminent danger." Drake argues that if the jury had believed even portions of his testimony and disbelieved portions of the victim's testimony, it might have found him guilty only of the lesser offense.

¶5 "We review [a] trial court's decision to give or refuse a jury instruction for an abuse of discretion." *State v. Hurley*, 197 Ariz. 400, ¶ 9, 4 P.3d 455, 457 (App. 2000). "[A]n offense is 'necessarily included,' and so requires that a jury instruction be given, only when it is lesser included *and* the evidence is sufficient to support giving the instruction." *State v. Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d 148, 150 (2006), *quoting* Ariz. R. Crim. P. 23.3. As our supreme court stated in *Wall*, the evidence is sufficient if the jury would "be able to find (a) that the State failed to prove an element of the greater offense and (b) that the evidence is sufficient to support a conviction on the lesser offense." *Id.* ¶ 18. But, the court added, the evidence in not sufficient if,

> as a theoretical matter, "the jury might simply disbelieve the state's evidence on one element of the crime" because this "would require instructions on all offenses theoretically included" in every charged offense. Instead, the evidence must be such that a rational juror could conclude that the defendant committed only the lesser offense.

Id., *quoting State v. Caldera*, 141 Ariz. 634, 637, 688 P.2d 642, 645 (1984) (internal citations omitted).

¶6 Drake was charged with aggravated assault, which is defined by A.R.S. §§ 13-1203(A)(2), and 13-1204(A)(2), as "[i]ntentionally plac[ing] another person in

reasonable apprehension of imminent physical injury" while using "a deadly weapon or dangerous instrument." Attempted aggravated assault is a lesser-included offense of aggravated assault, and is committed "if, acting with the necessary culpability otherwise required for the commission" of aggravated assault, a person "[i]ntentionally does or omits to do anything which, under the circumstances as such person believes them to be, is any step in a course of conduct planned to culminate in the commission" of aggravated assault. A.R.S. § 13–1001(A)(2). *See also State v. Angle*, 149 Ariz. 499, 505, 720 P.2d 100, 106 (App. 1985) (affirming instruction on attempted aggravated assault as lesser-included offense of aggravated assault), *vacated in part on other grounds*, 149 Ariz. 478, 479, 720 P.2d 79, 80 (1986).[1]

¶7 Drake contends the jury could have found "the element of reasonable apprehension [of imminent physical injury] not proved beyond a reasonable doubt" if the jurors "believed certain parts of [the victim's] testimony, discount[ed] other parts, and by believing parts of Jocelyn's testimony and disbelieving other parts." First, he does not cite to the portions of the record that purportedly support his arguments. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (argument shall contain "citations to . . . parts of the record relied on"). Second, the record belies Drake's arguments and supports the trial court's decision to reject the proffered instruction.

¶8 The victim testified Drake had opened the switchblade and tried to stab him with it, and that he was afraid and jumped back about two feet when he first saw the knife. Two off-duty officers from the Arizona Department of Corrections were at the convenience store when Drake assaulted the victim; they testified they had heard the

[1]Drake requested and the trial court gave the jury an instruction on the lesser-included offense of simple assault; the court refused instructions on disorderly conduct by recklessly handling or displaying a deadly weapon or dangerous instrument and attempted aggravated assault.

switchblade "click" as Drake opened it and saw Drake pointing it at the victim and holding it between one and five inches from the victim's sternum. One of the officers testified the victim had not done anything to defend himself, but simply stood there, "trying not to aggravate [Drake] anymore." She explained that she and the other officer had tried to calm down the victim, describing him as "kind of frantic" and "worried." The other officer described the victim as "nervous."

¶9 Drake concedes the evidence established he had displayed a switchblade during a confrontation with the victim but suggests the victim arguably had not been afraid because there were "problems with his credibility, in that he had both a prior felony conviction and a prior misdemeanor that reflected poorly on his honesty." The victim denied he had been carrying any weapons at the time. Drake asserts that, although no weapon was ever found on the victim because he was never searched, testimony suggested the victim "may have been armed with a gun." Presumably, Drake is referring to Jocelyn's testimony that, on another occasion, she had seen the victim with a gun, and had seen him in the convenience store earlier on the day of this incident with a "gun bulge" in his pants.

¶10 Drake's arguments amount to precisely the kind of "theoretical" speculation the supreme court stated in *Wall* was insufficient to warrant an instruction on a lesser-included-offense instruction. 212 Ariz. 1, ¶ 18, 126 P.3d at 151. We agree with the state that, based on the record before us, "the evidence showed that either Appellant was guilty of a completed offense of aggravated assault with a deadly weapon or dangerous instrument or not guilty at all . . . ." Under such circumstances, an instruction on the lesser-included offense likely would have been improper, and could not be justified, as Drake asserts, on the ground that the jury should have been given an opportunity to reach

a compromise verdict by finding him guilty of a lesser offense. *See Angle*, 149 Ariz. at 505, 720 P.2d at 106 (instruction on lesser-included offense improper if evidence established defendant had committed greater offense or no offense at all; trial court "should not invite the jury to speculate or compromise" by giving instruction "not rationally supported by the evidence").

¶11 Additionally, here, unlike in *State v. Dugan*, 125 Ariz. 194, 196, 608 P.2d 771, 773 (1980), on which Drake relies, there was no evidence the victim had not been in reasonable apprehension of immediate physical harm. Based on the victim's own testimony, the testimony of the witnesses, and the inferences that could be drawn from the evidence presented, rather than speculation about whether the victim had a gun, the only reasonable conclusion the jury could have reached here is that the victim had been placed in reasonable apprehension of physical harm. The trial court did not abuse its discretion when it rejected Drake's proffered instruction on attempted aggravated assault.

¶12 Conceding trial counsel did not object or move for a mistrial, Drake next argues that fundamental error occurred when the arresting police officer testified that Drake had been given the *Miranda*[2] warnings and had said nothing after that. Drake contends that, notwithstanding the lack of an objection or motion for mistrial, he is entitled to relief because the testimony was a comment on his invocation of his right to remain silent, error he insists was both fundamental and prejudicial. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

¶13 "Due process demands that the state refrain from introducing testimony reflecting that a defendant had invoked his or her right to remain silent." *State v. Siddle*, 202 Ariz. 512, ¶ 5, 47 P.3d 1150, 1153 (App. 2002). "This rule 'rests on the fundamental

[2]*Miranda v. Arizona*, 384 U.S. 436 (1966).

unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial.'" *State v. Gilfillan*, 196 Ariz. 396, ¶ 36, 998 P.2d 1069, 1079 (App. 2000), *quoting Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993). However, "testimony that falls short of disclosing a defendant's invocation of the right to remain silent does not run afoul of the Due Process Clause." *Siddle*, 202 Ariz. 512, ¶ 5, 47 P.3d at 1153. In order to be "constitutionally proscribed," a comment on a defendant's invocation of the right to remain silent "must be adverse; that is, it must support an unfavorable inference against the defendant and, therefore, operate as a penalty imposed for exercising a constitutional privilege." *State v. Mata*, 125 Ariz. 233, 238, 609 P.2d 48, 53 (1980); *cf. State v. Palenkas*, 188 Ariz. 201, 212, 933 P.2d 1269, 1280 (App. 1996) (finding prosecutor violated defendant's rights by using refusal to consent to search without warrant "to induce the jury to infer guilt").

¶14 Considering the context of the officer's comment, it does not appear to have been a direct comment on Drake's invocation of his constitutional right to remain silent. Hayes had testified about the spontaneous comments Drake made when Hayes and his partner first had approached Drake. The prosecutor then asked Hayes to describe Drake's demeanor as they interacted. Hayes responded, "After the initial statements were made and he was read *Miranda* he didn't say anything after that to me." Thus, Hayes was not commenting directly or purposefully on Drake's silence after having been advised of his right to remain silent; rather, he was apparently trying to explain in response to the prosecutor's question that he could not describe Drake's demeanor because Drake stopped talking after he made the initial statements. We see no error here, much less error that could be characterized as fundamental in nature.

¶15 Furthermore, even assuming arguendo it was error for Hayes to have commented on Drake's post-*Miranda* silence, the error, whatever its nature, was not prejudicial. In his spontaneous comments to Hayes, Drake admitted culpability of some sort. And the evidence that he had demanded that the victim leave the convenience store and threatened him with a knife was overwhelming. Indeed, Drake conceded on appeal that the evidence established he had pulled out a knife and displayed it to the victim. A passing remark by Hayes, particularly in the context within which the comment was made, was not prejudicial. Therefore Drake is not entitled to relief for this claim, raised for the first time on appeal. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607.

¶16 Drake next contends, for the first time on appeal, that the trial court erred when it ordered him to pay a time-payment fee. The state concedes the court erred and agrees Drake is entitled to relief because the fee is an illegal sentence, which is fundamental, prejudicial error that is not forfeited by the lack of an objection in the trial court. *See id.*; *see also State v. Soria*, 217 Ariz. 101, ¶ 7, 170 P.3d 710, 712 (App. 2007) (imposition of unauthorized warrant fee amounted to illegal sentence, which is fundamental error). We agree with Drake, as does the state, that because the attorney fee assessment is not punitive in nature, no time-payment fee was authorized. *See State v. Connolly*, 216 Ariz. 132, ¶¶ 3, 5, 163 P.3d 1082, 1082-83 (App. 2007) ("court-ordered attorney and indigent assessment fees are not a 'penalty, fine, or sanction' under [A.R.S.] § 12–116" because "[s]uch fees are not punitive in nature or related to other court-imposed penalties").

¶17 Drake also challenges for the first time the trial court's imposition of $400 in attorney fees, which was imposed initially at the arraignment and reaffirmed at sentencing, because the court failed to make the findings required by A.R.S. § 11–584

and Rule 6.7(d), Ariz. R. Crim. P. Again, Drake has forfeited the right to seek relief for all but fundamental, prejudicial error. *Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607; *see also State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 7, 185 P.3d 135, 138 (App. 2008).

¶18 Drake is correct that a trial court is required to make specific findings of fact relating to the defendant's ability to pay attorney fees before imposing such fees and must find, too, that the defendant will not suffer substantial hardship by paying fees, which must reflect the actual cost of such services. *See State v. Taylor*, 216 Ariz. 327, ¶ 25, 166 P.3d 118, 125 (App. 2007). But, as this court stated in *Moreno-Medrano*, 218 Ariz. 349, ¶¶ 12–13, 185 P.3d at 139, a court's failure to make these findings is not error that can be characterized as fundamental. Additionally, at sentencing the trial court stated to Drake, the "Court does find that you are employable. Therefore, the prior order of $400 attorney's fees is affirmed . . . ." From this comment we can infer the court did, in fact, consider whether Drake was in a position to pay this amount and other assessments without suffering substantial hardship. Drake did not object or correct the court and claim he was not, in fact, employable. Moreover, the court stated it had considered the presentence report, which contains information under a section entitled "vocational/financial" that supports the court's conclusion that Drake is employable, that he most recently had been employed as a caregiver for neighbors and their property, that he was being "provided room, board, and most utilities," and that the Arizona Department of Corrections records showed he had "worked as a food service worker on a labor pool." On this record, we cannot say any error that occurred was fundamental or prejudicial.

¶19 We affirm Drake's conviction. We vacate the portion of his sentence imposing a time-payment fee but affirm his sentence in all other respects.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge