IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JOSHUA EDWARD SYMONETTE,
Appellant.

No. 2 CA-CR 2014-0111
Filed July 31, 2015

Appeal from the Superior Court in Pima County
No. CR20131066001
The Honorable Richard D. Nichols, Judge

CONVICTON AFFIRMED; SENTENCE VACATED; REMANDED

COUNSEL

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Miller and Chief Judge Eckerstrom concurred.

E S P I N O S A, Judge:

¶1 After a jury trial, Joshua Symonette was convicted of possession of a deadly weapon by a prohibited possessor. The trial court sentenced him to eight years' imprisonment and ordered him to pay certain fees and assessments. On appeal, he challenges his sentence and raises a number of other issues. For the following reasons, we affirm Symonette's conviction but vacate his sentence and remand for resentencing.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the verdict, resolving all reasonable inferences from the evidence against the defendant. *State v. Inzunza*, 234 Ariz. 78, ¶ 2, 316 P.3d 1266, 1268-69 (App. 2014). On February 26, 2013, Tucson Police Department (TPD) officers stopped a vehicle with three occupants, the driver, a front passenger, and Symonette, seated in the "rear passenger side." TPD Officer Scott Cushing asked Symonette "if he had any weapons or narcotics on him," and he replied "no." Cushing then asked if he could search Symonette "for those items" and he consented. The officer found marijuana in his pocket and an empty leather gun holster on his hip tucked in the waistband of his pants. When asked if there was a firearm in the car, Symonette replied, "no." Cushing then asked if he owned a firearm, and Symonette responded "yes, he had one, [but] this holster belonged to a firearm that was at his residence that he left at home." Symonette also told Cushing that he had a prior felony conviction, which was later confirmed.

¶3 During a search of the vehicle, TPD Officer Nicholas Droban found a handgun "under the front passenger seat toward the rear" in a space only accessible from the rear seat due to

components under the seat. Officer Cushing then compared the gun to the holster Symonette had been wearing and "noticed that not only did th[e] firearm fit the holster, . . . it[was] obviously an old worn holster. And the wear marks and the grooves on the holster are an exact match to that particular firearm we located in the vehicle." Because "the holster matched every detail of the gun, and . . . none of [the] other passengers would have been able to put the handgun where it was," Cushing concluded Symonette was in possession of the firearm.

¶4 In March 2013, a grand jury indicted Symonette for possession of a deadly weapon by a prohibited possessor, and the state alleged multiple prior felony convictions. The state subsequently offered Symonette a plea agreement pursuant to which he would plead guilty to a class four felony with one prior historical felony and receive a sentence ranging from 2.25 to 7.5 years' imprisonment. On May 17, 2013, Symonette rejected the offer and a record was made pursuant to *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000).

¶5 In July 2013, the trial court permitted Symonette to proceed pro se, assisted by appointed advisory counsel. At the conclusion of the February 2014 jury trial, the parties stipulated Symonette had three previous felony convictions and his right to possess a firearm had not been restored. The jury found Symonette guilty, after which the trial court found his three convictions to be historical priors and sentenced him as described above. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Motion for Disclosure Sanctions

¶6 Symonette first contends the trial court abused its discretion by declining to impose sanctions on the state pursuant to Rule 15.8, Ariz. R. Crim. P., when it disclosed the day before trial a foundational witness for a video recording of a jail visit between Symonette and his cousin. The jail visit had occurred on February 27, 2013, and the video was disclosed to Symonette on January 10, 2014. On the first day of trial, February 11, 2014, the state filed a motion in limine requesting that the court revisit a

January 6, 2014 ruling [1] barring evidence that Symonette had possessed marijuana at the time of the traffic stop, based on a "newly discovered statement . . . in one of . . . Symonette's video visits at the jail." In its motion, the state reported that the day before, February 10, it had "discovered that [Symonette] admitted to his cousin in one of the video visits that he had marijuana and the pistol." It asked the court to permit introduction of Symonette's statement and "allow Officer Cushing to testify accordingly." Symonette objected, and his advisory counsel stated that although the video had been previously disclosed, he had been unable to watch it because he did not have necessary software to play the video; Symonette stated he was shown the video "[j]ust right now."

¶7 The trial court ultimately ruled the video admissible, noting it was "not too concerned about the lack of disclosure because that's you in the video clip talking, so you had to know it exists and what it says . . . because you said it" and finding it had "some probative value." On the second day of trial, Symonette requested that the video evidence be suppressed or alternatively, that the state reoffer the plea, asserting a lack of disclosure pursuant to Rule 15.8, Ariz. R. Crim. P. The state countered that the video "was not evidence that was in the State's possession at the time the plea was offered," it was not aware of the conversation at issue until "well after . . . Symonette had rejected the plea," and, in any event, "[t]here was no plea deadline in th[e] case." The trial court denied Symonette's request.

¶8 We review a trial court's decision not to impose a sanction for an abuse of discretion, *see State v. Towery*, 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996), but review its interpretation of statutes and court rules de novo, *see Fragoso v. Fell*, 210 Ariz. 427, ¶ 7, 111 P.3d 1027, 1030 (App. 2005). We will uphold the court's ruling if legally correct for any reason. *State v. Cañez*, 202 Ariz. 133, ¶ 51, 42 P.3d 564, 582 (2002).

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[1]The court's ruling followed a hearing on a motion in limine filed by Symonette and will be discussed in detail in the following section.

¶9 The parties concur that amended Rule 15.8, effective January 2014,[2] applies in this matter. That rule "sets forth the state's disclosure obligations in specified circumstances involving plea agreements." *Rivera-Longoria v. Slayton*, 228 Ariz. 156, ¶ 9, 264 P.3d 866, 868 (2011). It provides that if "[material] disclosure is made less than 30 days before [an] offer expires or is withdrawn," and the lack of disclosure materially impacted the defendant's decision to accept or reject the offer, the court will preclude the evidence from trial, at minimum, unless the state reinstates the offer. Rule 15.8(a), (b). The rule "was adopted to ensure that, once charges have been filed in superior court, basic discovery will be provided to the defense sufficiently in advance of a plea deadline to allow an informed decision on the offer with effective assistance of counsel." *Rivera-Longoria*, 228 Ariz. 156, ¶ 13, 264 P.3d at 869. It "reflects the view that defendants should receive certain basic disclosures before having to decide on plea offers made early in the case." *Id.* ¶ 21.

¶10 Here, Symonette was offered a plea with no deadline. He rejected the offer, two months after his indictment while represented by counsel. Rule 15.8 permits sanctions against the state for untimely disclosure where a plea offer "expires or is withdrawn," reflecting a decision by the state to end a defendant's ability to accept an offer. The rule ensures, by way of sanctions, that the state provide a defendant with sufficient time to review all material discovery prior to terminating a plea offer. Given that Rule 15.8(a) is specific as to when sanctions may be imposed, that is, in situations where a plea offer "expires or is withdrawn,"and in this case the action terminating the pending offer was made by the defendant, we cannot say the trial court abused its discretion by declining to impose sanctions against the state.

Admission of Evidence

¶11 We review evidentiary decisions for an abuse of discretion, deferring to the trial court's determinations on relevance and unfair prejudice. *State v. Smith*, 215 Ariz. 221, ¶ 48, 159 P.3d 531,

[2]Rule 15.8 was amended again effective January 1, 2015, and is the current version of the rule, which is not at issue here.

542 (2007). Under this standard, we will "'uphold a decision if there is any reasonable evidence in the record to sustain it.'" *State v. Salamanca*, 233 Ariz. 292, ¶ 8, 311 P.3d 1105, 1108 (App. 2013), *quoting State v. Butler*, 230 Ariz. 465, ¶ 28, 286 P.3d 1074, 1081 (App. 2012).

Videorecorded Statement

¶12 At the January 6, 2014 hearing, Symonette sought suppression of evidence that he had possessed marijuana at the time of the traffic stop. The state responded that the evidence should be "an issue for the jury when they're weighing his credibility as to can they believe his statements when he says: I didn't have a gun nor any narcotics on my person." The hearing judge[3] observed that, in answering the officer's question, Symonette might have distinguished between narcotics and marijuana, which are statutorily "mutually exclusive." The judge then ruled inadmissible "the fact that . . . Symonette admittedly had marijuana in his pocket," finding "the probative value does not outweigh the danger of undue prejudice."

¶13 As noted above, the state sought reconsideration of that ruling in light of the jail visitation video. In that video, Symonette "talk[s] about what happened during the stop," and is "asked the question did anyone else get hemmed up." Symonette responded, "Mondo[, the driver,] 'cause me and him we had weed . . . and then I had that pistol . . . ." Addressing Symonette's objection to the evidence, the court observed "it would substantiate the accuracy of your statement that, A, you admitted to having a gun and, B, you admitted to having the marijuana, actually did have the marijuana" and noted it "could see there would be some probative value." After hearing argument from both sides, the court found "the evidence of [Symonette's] possession of marijuana is relevant, that the probative value does outweigh the prejudicial [e]ffect in light of the statement made by [him] on the videotape."

[3]Judge Howard Fell was the hearing judge, but Judge Nichols presided at trial.

Rules 401 and 403, Ariz. R. Evid.

¶14 Symonette maintains that "the evidence that he had marijuana when he said he did had little probative value" and was outweighed by unfair prejudice. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Ariz. R. Evid. 401. But relevant evidence may be excluded if "its probative value is substantially outweighed by a danger of . . . unfair prejudice." Ariz. R. Evid. 403. That may be the case "if the evidence has an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror," but "[n]ot all harmful evidence . . . is unfairly prejudicial." *State v. Mott*, 187 Ariz. 536, 545–46, 931 P.2d 1046, 1055–56 (1997). "Because the trial court is best situated to conduct the Rule 403 balance, we will reverse its ruling only for abuse of discretion." *Cañez*, 202 Ariz. 133, ¶ 61, 42 P.3d at 564.

¶15 Our supreme court has noted "it would require a rare case for the defendant's own statement to be seen as prejudicial to the extent it should be excluded under Rule 403." *Id.* ¶ 61. This is not that rare case; Symonette's statements that he had "weed" and "that pistol," and the fact he had a small amount of marijuana on his person cannot be viewed as so compelling or pejorative as to influence a jury to make a decision on an improper basis such as emotion or horror. *See Mott*, 187 Ariz. at 545–46, 931 P.2d at 1055–56. Further, the danger suggested by Symonette—that the jury would think "because he violated one law he was likely to violate another"—was minimal, particularly since he was not charged with a marijuana-related offense and in light of the fact that possession of a small amount of marijuana is not necessarily unlawful in Arizona. *See* A.R.S. §§ 36-2801 through 36-2819. Finally, as the trial court stated, the evidence had "some probative value" in that it would substantiate Symonette's statement that he had the "pistol" because he "admitted to having the marijuana, actually did have the marijuana."[4] Accordingly, we cannot say the trial court abused its

[4]Symonette also asserts "the evidence that he had marijuana when he said he did had little probative value for any contested

discretion in striking the Rule 403 balance.[5] *Cañez*, 202 Ariz. 133, ¶ 61, 42 P.3d at 584.

Reconsideration of Ruling

¶16 Symonette next contends the trial court erred by reconsidering the decision of the hearing judge who had ruled the marijuana evidence inadmissible. "We review a trial court's reconsideration of a prior judge's ruling for abuse of discretion." *State v. Garcia*, 224 Ariz. 1, ¶ 42, 226 P.3d 370, 382 (2010). Rule 16.1(d), Ariz. R. Crim. P., provides that "[e]xcept for good cause . . . an issue previously determined by the court shall not be reconsidered." As our supreme court has observed "[t]his rule and the law of the case doctrine are rules of procedure, not substance; thus, they do not limit a court's 'power to change a ruling simply because it ruled on the question at an earlier stage.'" *Garcia*, 224 Ariz. 1, ¶ 43, 226 P.3d at 382, *quoting State v. King*, 180 Ariz. 268, 279, 883 P.2d 1024, 1035 (1994). The rules do not "prevent a different judge, sitting on the same case, from reconsidering the first judge's prior, nonfinal rulings." *King*, 180 Ariz. at 279, 883 P.2d at 1035.

¶17 We agree with the state that the trial court had cause to reconsider the hearing judge's ruling excluding evidence of

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issue" because he had a different meaning for the word "pistol." This explanation, however, would go to the weight of the evidence, rather than its admissibility. *See State v. Hardy*, 230 Ariz. 281, ¶ 44, 283 P.3d 12, 21-22 (2012) (defendant's explanations why prior statements unreliable went to weight rather than admissibility); *State v. Williams*, 183 Ariz. 368, 376, 904 P.2d 437, 445 (1995) (possible alternative explanations why defendant might shoot someone rather than conceal crime would go to weight of evidence not admissibility).

[5] Having found the video statement properly admitted pursuant to Rules 401 and 403, we need not address Symonette's further argument, not specifically made to the trial court, that it was inadmissible for purposes of impeachment under Rule 608, Ariz. R. Evid.

Symonette's possession of marijuana after the video evidence came to light. As the court observed, the fact Symonette acknowledged having marijuana on his person in the video, and did have marijuana in his possession at the time of the traffic stop, made his further acknowledgment of also having "that pistol" more probable. Thus, the court did not abuse its discretion by reconsidering the hearing judge's ruling.

Photographs of Gun, Holster, and Identification Card

¶18 Symonette next maintains the trial court abused its discretion by "admitting photographic exhibits showing the gun, the holster, and . . . Symonette's [identification card] together even though they had been found separated and in different places." The disputed exhibits are two photographs, Exhibits 8 and 9 at trial, each showing a gun, a holster, a magazine, and Symonette's identification card. In Exhibit 8, the items are shown separately, while in Exhibit 9, the gun is shown inside the holster.

¶19 Officer Cushing testified the exhibits were "field photographs of the holster and gun that [he] took that night." He stated: "We don't always [take] . . . photographs . . . as the items are found[;] [s]ometimes the picture we take is just to document the item itself . . . [as] in this case." He explained that when he took the pictures, his intention was "[t]o photograph items collected." He also stated "a lot of times we use our cars kind of as workspaces like a table," placing items on the hood. "[Symonette's] [identification card] was close by because we were using it to . . . run the computer check. The holster and gun were nearby because obviously we're looking at those." He photographed the three items together, he testified, because they "just happened to be right there." Cushing acknowledged he did not find the gun in the vehicle, but stated he saw that it had been recovered and he had checked it into evidence. Although somewhat intertwined, Symonette appears to advance three arguments relating to the two exhibits.

Chain of Custody

¶20 Symonette asserts that the "pictures in question have no . . . direct line of proof." He states Officer Cushing "did not find the

gun but only photographed the gun that others had found[and n]o one with knowledge of the gun identified the photograph." In establishing a chain of custody, "the state must show continuity of possession, but it need not disprove 'every remote possibility of tampering.'" *State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996), *quoting State v. Hardy*, 112 Ariz. 205, 207, 540 P.2d 677, 679 (1975). And, any flaws in the chain of custody normally go to the weight of the evidence rather than its admissibility. *State v. Morales*, 170 Ariz. 360, 365, 824 P.2d 756, 761 (App. 1991); *see also State v. McCray*, 218 Ariz. 252, ¶ 15, 183 P.3d 503, 508 (2008) (gaps or conflicts in officer's testimony regarding chain of custody affect weight rather than admissibility).

¶21 Officer Droban testified he found the gun in the vehicle on the night of Symonette's arrest and Officer Cushing testified he was present and had received the gun found in the vehicle by other officers. Assuming the absence of evidence as to exactly how the gun passed from Droban to Cushing constitutes a gap in the chain of custody, the omission goes to the weight of the evidence, not its admissibility. *See McCray*, 218 Ariz. 252, ¶ 15, 183 P.3d at 508.

Authentication of Photographs

¶22 Symonette next contends the photographs "lacked even the most basic authentication required by Rule 901(a), Ariz. R. Evid." That rule provides that the proponent must produce evidence "sufficient to support a finding that the item is what the proponent claims it is." "'The [court] does not determine whether the evidence is authentic, but only whether evidence exists from which the jury could reasonably conclude that it is authentic.'" *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 8, 186 P.3d 33, 35 (App. 2008), *quoting State v. Lavers*, 168 Ariz. 376, 386, 814 P.2d 333, 343 (1991). We apply "a flexible approach" in deciding whether evidence has been properly authenticated, "allowing a trial court to consider the unique facts and circumstances in each case—and the purpose for which the evidence is being offered." *Id.* ¶ 14.

¶23 Officer Cushing testified the photographs were not taken to show the items as they were found, but rather to show the "items collected." He stated they "just happened" to be together at

the time of the photographs and confirmed the photos were a "fair and accurate representation of [the holster and gun he] saw that night." We cannot say there was insufficient evidence to allow the jury to conclude the photographs depicted, with reasonable accuracy, the gun and holster recovered by officers at the time of Symonette's arrest.

Admission of Photographs

¶24 Symonette also maintains the photographs were "misleading" because "the items portrayed . . . strongly suggested that the gun and holster were associated and that . . . Symonette's [identification card] went with them." He asserts "[w]hen presented with Exhibits 8 and 9, the jury was likely to automatically believe that . . . the gun and holster were linked." In his reply brief, Symonette also appears to argue the exhibits were cumulative and not relevant.[6] He asserts the jury had "no need of a correct representation of the gun or holster" because they had been admitted into evidence. Although acknowledging that Exhibit 9 "showing the pistol in the holster, does illustrate Officer Cushing's testimony that the gun was an exact fit," he argues that Exhibit 8 was improperly admitted.

¶25 We review a trial court's decision to admit photographs for abuse of discretion. *State v. Anderson*, 210 Ariz. 327, ¶ 39, 111 P.3d 369, 381 (2005). In determining admissibility, the court should consider the photograph's relevance, its "'tendency to incite passion or inflame the jury,'" and its "'probative value versus potential to cause unfair prejudice.'" *Id.*, *quoting State v. Murray*, 184 Ariz. 9, 28, 906 P.2d 542, 561 (1995). Symonette concedes the relevance of Exhibit 9, but asserts that Exhibit 8 "demonstrate[s] nothing." In Officer Cushing's testimony, however, he referenced Exhibit 8 to point out how the imprint from wear on the holster matched various features of the gun, which was positioned just below the holster in

[6] We note that this court generally does not consider arguments made for the first time in a reply brief, *Dawson v. Withycombe*, 216 Ariz. 84, ¶ 91, 163 P.3d 1034, 1061 (App. 2007), but in our discretion, we briefly address this argument here.

the photograph. The exhibit was therefore relevant. Further, to the extent the photographs were cumulative,[7] any error was harmless, *see State v. Williams*, 133 Ariz. 220, 226, 650 P.2d 1202, 1208 (1982) ("[E]rroneous admission of evidence which was entirely cumulative constitute[s] harmless error.").

¶26 Symonette further contends the photographs were misleading because they gave the "jury a visual impression that the evidence was found in the same location." Any misimpression, however, would have been dispelled by Officer Cushing's detailed explanations of how the photographs were taken and why—to document the items collected—and not where they had been found. *See Haight-Gyuro*, 218 Ariz. 356, ¶ 17, 186 P.3d at 38 ("'[A] photograph will be admissible so long as the discrepancies between it and its subject are not materially misleading either because they are minor or because the witness explains them in such a way that the jury would not be misled.'"), *quoting Consol. Rail Corp. v. Thomas*, 463 N.E.2d 315, 319 (Ind. Ct. App. 1984); *see also Lohmeier v. Hammer*, 214 Ariz. 57, ¶ 9, 148 P.3d 101, 105 (App. 2006) (photographs of vehicle taken by auto body shop admissible to show "condition of the vehicle immediately after the accident"). The trial court did not abuse its discretion in admitting the photographs into evidence.

Sentencing

¶27 Finally, Symonette contends the trial court erred in pronouncing his term of incarceration and in imposing certain fees and assessments. Citing *State v. Vermuele*, 226 Ariz. 399, 249 P.3d 1099 (App. 2011), Symonette initially argues he has not waived any sentencing error by failing to object below because he lacked "meaningful opportunity to raise the issue[s]." We agree. A party does not forfeit or waive a challenge to a sentence by failing to object

[7]Symonette did not object on this basis below nor does he assert any error was fundamental. His argument is thereby waived, *see State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005); *State v. Moreno–Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008), but in our discretion we address it briefly.

at the sentencing hearing absent a clear procedural opportunity to do so. *See id.* ¶ 9.

Term of Incarceration

¶28 The parties agree the trial court's pronouncement of Symonette's sentence of imprisonment was ambiguous and that the case should be remanded for the court to clarify its intention. At the sentencing hearing, the prosecutor "submit[ted] to the Court's discretion," stating: "It's not often that I say that the mitigated seems appropriate, but six years may seem appropriate." After hearing from Symonette, the court said, "I will take the facts of the case into account and the comments of the prosecution and impose a mitigated term of eight years in the Department of Corrections . . . ."

¶29 Symonette was convicted of possession of a firearm by a prohibited possessor, a class four felony, and the trial court found three prior felony convictions. As both parties point out, A.R.S. § 13-703(J) provides that in such a situation, the mitigated term is six years while the minimum term is eight. The court stated it was imposing a "mitigated term," identified two mitigating circumstances, and "t[ook] . . . into account . . . the comments of the prosecution," which had recommended a mitigated, six-year term of incarceration. The court then, however, imposed an eight-year term. As the court may have misspoken in pronouncing sentence, we remand the case for resentencing. *Cf. State v. Masengill*, 110 Ariz. 310, 312, 518 P.2d 560, 562 (1974) (where court sentenced defendant under erroneous impression, "proper for the trial court to review the sentence in order to dispel any ambiguities and resentence the defendant"); *State v. Bowles*, 173 Ariz. 214, 216, 841 P.2d 209, 211 (App. 1992) ("[W]hen there is a discrepancy between the oral pronouncement of sentence and the minute entry . . . a remand for clarification of sentence is appropriate.").

Fees and Assessments

¶30 Symonette asserts the trial court further erred by imposing fees and assessments in its minute entry, and not orally pronouncing them at sentencing, by failing to make factual findings in imposing attorney fees, and, apparently, by failing to consider

waiving the probation assessment. The sentencing minute entry provided that Symonette "shall pay the following:" (1) "Attorney's fees in the amount of $400.00"; (2) "Probation assessment in the amount of $20.00"; (3) "Indigent Administrative Fee in the amount of $25.00"; and (4) "Surcharge Assessment in the amount of $13.00."

¶31 Assessments may be part of a defendant's sentence.[8] *See State v. McDonagh*, 232 Ariz. 247, ¶¶ 9-10, 304 P.3d 212, 214 (App. 2013). Where a court inadvertently fails to properly impose an assessment that qualifies as a sentence, but instead includes it in a minute entry, the court should correct the sentence "in open court with the defendant present." *State v. Powers*, 154 Ariz. 291, 295, 742 P.2d 792, 796 (1987).[9] Fees that are not part of the sentence, however, like those here, need not be orally imposed. *See State v. Connolly*, 216 Ariz. 132, ¶ 3, 163 P.3d 1082, 1082-83 (App. 2007) (court-ordered attorney and indigent assessment fees not fines under A.R.S. § 12-116); *State v. Anderson*, 169 Ariz. 381, 382, 819 P.2d 967, 968 (App. 1991) ("Rules 26.9 and 26.10 do not require the court to orally impose the time payment fee as it is an administrative fee rather than part of the sentence itself."), *vacated in part on other grounds*, 171 Ariz. 34, 827 P.2d 1129 (1992). In view of our remand of this case for resentencing, we need not further address Symonette's arguments regarding the court's imposition of fees and assessments.

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[8]"[A]n assessment may qualify as a 'sentence' if (1) it is 'a pecuniary punishment imposed by a lawful tribunal upon a person convicted of a crime;' (2) the money recovered goes to the people of Arizona and (3) the money is not a civil penalty or restitution to a crime victim." *State v. McDonagh*, 232 Ariz. 247, ¶ 10, 304 P.3d 212, 214 (App. 2013), *quoting State v. Sheaves*, 155 Ariz. 538, 541-42, 747 P.2d 1237, 1240-41 (App. 1987).

[9] Although Symonette asserts the trial court "lacked jurisdiction to add the fees and assessments in the minute entry," he does not provide support for this proposition. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (briefs shall contain argument with citation to authority); *State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004) (arguments unsupported by authority are waived).

Instead, we direct the court to properly impose fees and assessments at resentencing.[10]

Disposition

¶32 For the foregoing reasons, Symonette's conviction is affirmed, but we vacate his sentence and remand the case for further proceedings consistent with this decision.

[10]In his reply brief, Symonette asserts that this court "cannot remand this case for the trial court to take action it did not take previously," citing *State v. Serrano*, 234 Ariz. 491, ¶ 6, 323 P.3d 774, 776 (App. 2014) (where trial court did not address discretionary matter of sex offender registration at sentencing, and parties had made no such request, state could not utilize Rule 24.4, Ariz. R. Crim. P. (applying to clerical mistakes), "'to supply judicial action'" and "'cause an order . . . that was never previously made . . . to be placed upon the record'"), *quoting State v. Pyeatt*, 135 Ariz. 141, 143, 659 P.2d 1286, 1288 (App. 1982) (alterations in *Serrano*). But Symonette was notified of the fees and assessments in the presentence report, and the court included the fees and assessments in its sentencing minute entry, only neglecting to pronounce them orally.