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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THE STATE OF ARIZONA, Appellee, v. DANNIE RAY KENNEDY, Appellant.	2 CA-CR 2008-0129 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20072250

Honorable Edgar B. Acuña, Judge

AFFIRMED AS MODIFIED IN PART; VACATED IN PART

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E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, appellant Dannie Kennedy was convicted of possessing methamphetamine and drug paraphernalia. The trial court imposed concurrent, enhanced, mitigated prison terms, the longer of which was eight years. On appeal, Kennedy contends insufficient evidence supported his convictions; the reasonable doubt instruction given to the jury constituted structural error; the trial court violated due process when it, rather than the jury, determined whether Kennedy had prior convictions for sentence-enhancement purposes; and the court abused its discretion in ordering him to pay surcharges and attorney fees. For the reasons set forth below, we affirm his convictions and sentences as modified in part, but we vacate the court's criminal restitution order.

Sufficiency of the Evidence

¶2 We view the evidence in the light most favorable to sustaining the convictions. *See State v. Manzanedo*, 210 Ariz. 292, ¶ 3, 110 P.3d 1026, 1027 (App. 2005). On June 6, 2007, Officer Conniff of the Marana Police Department walked toward a truck that was parked in a motel parking lot. Kennedy was standing next to the truck on the driver's side. After giving Officer Conniff his identification card, as she had requested, Kennedy put his hands in his pockets, backed away from the officer, and ignored her request to remove his hands from his pockets. He then walked behind an adjacent vehicle and bent over, out of Conniff's sight, for fifteen to twenty seconds. Officer Cann, who had arrived to provide assistance, saw Kennedy bending over behind a vehicle, "manipulating some object on the bumper[,] and then go[ing] all the way to the ground." Both officers yelled at Kennedy to

stop what he was doing and show his hands. When Officer Conniff examined the area near the bumper where Kennedy had bent over, she found three plastic bags containing methamphetamine. Kennedy was charged with possession of a dangerous drug and drug paraphernalia. After he was convicted and sentenced, he filed this appeal.

¶3 Kennedy argues that insufficient evidence supported his convictions because "the drugs plausibly could have belonged to someone else." He notes he was arrested in an area known for drug trafficking; "neither officer directly observed [him] engage in any unlawful conduct"; the two officers gave conflicting testimony about the vehicle behind which the drugs were found; and, due to the lack of fingerprint evidence from the plastic bags, the drugs were not "directly tied to [Kennedy]."

¶4 We review the sufficiency of evidence de novo. *See State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). In considering a claim of insufficient evidence, "[w]e construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, ¶ 12, 967 P.2d 106, 111 (1998). We will affirm a conviction supported by substantial evidence, *State v. Salman*, 182 Ariz. 359, 361, 897 P.2d 661, 663 (App. 1994), and "[w]e will find reversible error based on insufficient evidence only where there is a complete absence of probative facts to support a conviction." *State v. Fernane*, 185 Ariz. 222, 224, 914 P.2d 1314, 1316 (App. 1995). "'If reasonable [persons] may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.'" *State v. Davolt*, 207

Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004), *quoting State v. Rodriguez*, 186 Ariz. 240, 245, 921 P.2d 643, 648 (1996) (alteration in *Rodriguez*). It is the jury's role to weigh the credibility of witnesses and resolve any inconsistencies in the evidence. *State v. Lee*, 151 Ariz. 428, 429, 728 P.2d 298, 299 (App. 1986).

¶5 Kennedy's arguments on appeal, which are nearly identical to those he made to the jury, highlight that the state's evidence against him was entirely circumstantial. But circumstantial evidence may constitute the substantial evidence necessary to sustain a conviction. *State v. Blevins*, 128 Ariz. 64, 67, 623 P.2d 853, 856 (App. 1981). And the jury could have reasonably concluded that Kennedy's behavior in avoiding Officer Conniff, manipulating objects in his pocket, and the officers' subsequent discovery of the plastic bags of methamphetamine in the same area where Kennedy had been standing, demonstrated that the drugs and paraphernalia belonged to him. Though the two officers' testimony conflicted regarding the specific vehicle behind which they found the contraband, it was the jury's role to resolve any such conflicts in the evidence. Because the verdicts were supported by substantial evidence, we affirm Kennedy's convictions.

Jury Instruction

¶6 Kennedy also argues the trial court lowered the state's burden of proof and violated his constitutional rights by instructing the jury on "reasonable doubt" in accordance with the language approved in *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995). Our supreme court recently reaffirmed both its approval of the *Portillo* instruction

and its disinclination to revisit *Portillo*. *See State v. Garza*, 216 Ariz. 56, ¶ 45, 163 P.3d 1006, 1016-17 (2007). The courts of this state are bound by the decisions of our supreme court and have no authority to overrule its decisions. *State v. Foster*, 199 Ariz. 39, n.1, 13 P.3d 781, 783 n.1 (App. 2000). Accordingly, we find the trial court did not err in using the *Portillo* instruction over Kennedy's objection.

Prior Convictions

¶7 Kennedy further argues the trial court violated his rights to due process and a jury trial when the court, rather than the jury, determined he had prior felony convictions for purposes of enhancing his sentences. By failing to object below, Kennedy has forfeited the right to appellate relief on this issue absent fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). "To obtain relief under the fundamental error standard of review, [an appellant] must first prove error." *Id.* ¶ 23.

¶8 Although sentencing allegations generally must be tried to a jury, Rule 19.1(b)(2), Ariz. R. Crim. P., provides that "[t]he trial court shall determine the allegation of [a] prior conviction." Both the United States Supreme Court and the Arizona Supreme Court have recognized the constitutionality of such a procedure. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *see also State v. Anderson*, 211 Ariz. 59, n.2, 116 P.3d 1219, 1221 n.2 (2005) (citing *Apprendi* and noting "fact of a prior conviction may constitutionally be found by the trial judge, rather than the jury"). We are bound to follow their decisions. *See State v. Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d 1006, 1009 (App. 2003); *State v. Swoopes*, 216

Ariz. 390, ¶ 38, 166 P.3d 945, 957 (App. 2007) (state courts bound by United States Supreme Court's interpretation of federal constitution). Thus, no error occurred, fundamental or otherwise, when the trial court found Kennedy's prior convictions for sentencing purposes.

Reimbursement and Assessments

¶9 Kennedy further argues the trial court abused its discretion in ordering him to pay attorney fees and surcharges on his fine "in light of his indigency and substantial hardship to him and his immediate family." In 2007, Kennedy filed a financial affidavit with his request for court-appointed counsel in which he asserted he had been unemployed for the last two years and lacked any income or assets. At his arraignment, the court appointed counsel and ordered Kennedy to offset the costs of his legal representation by paying $400 in attorney fees. Kennedy made no objection to this initial order, nor did he object when the trial court renewed the assessment for legal fees at sentencing.

¶10 The presentence report indicated Kennedy had maintained full-time employment in the past but, before his arrest, had been "work[ing] side jobs demolishing trailers or cleaning yards." The report further stated that Kennedy had been ordered to pay child support of $179 per month, was in arrears for an unknown amount, and had no home or assets. The author of the report nonetheless concluded that, pursuant to A.R.S. § 12-253(4), Kennedy "does have the ability to contribute to the cost of his legal defense" and recommended he be ordered to pay $400 in attorney fees as well as an eighty percent

"surcharge" on his mandatory $1,000 fine. Kennedy did not object to the information, conclusions, or recommendations in the presentence report.

¶11 At the sentencing hearing, the trial court ordered Kennedy "to pay . . . attorney fees previously ordered at $400 [and a] $1,000 fine plus surcharge."[1] The sentencing minute entry suggested the court had adopted the presentence report's recommendation as to the amount of the surcharge and ordered Kennedy to pay an additional eighty percent of the $1,000 fine.[2] The court further ordered all fines, fees, and assessments be "reduced to a criminal restitution order this date pursuant to A.R.S. § 13-805."

Reimbursement for Legal Services

¶12 Kennedy argues the trial court abused its discretion in ordering him to pay $400 toward his attorney fees because the court "failed to conduct any inquiry . . . [or] make any finding . . . concerning [Kennedy]'s financial resources or his ability to pay without incurring substantial hardship." He is correct that the court erred in failing to make these required findings. *See State v. Taylor*, 216 Ariz. 327, ¶ 25, 166 P.3d 118, 125-26 (App. 2007). However, because he failed to object below, Kennedy must show that the court's error was fundamental in order to be entitled to relief. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20,

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[1]The court also imposed a $25 "indigent administrative assessment," which Kennedy does not challenge on appeal. *See* A.R.S. § 11-584(B)(1).

[2]Although the court did not specify its precise amount in the oral pronouncement of sentence, Kennedy does not challenge the "surcharge" on that basis. *See State v. Bowles*, 173 Ariz. 214, 216, 841 P.2d 209, 211 (App. 1992) (suggesting appellate court may examine record to clarify sentence).

115 P.3d 601, 607-08 (2005) (absent objection, defendant must show fundamental, prejudicial error). An error is fundamental only if it affects a substantial right or the fairness of the proceeding. *See id.*; *State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991) (error fundamental when an "issue[] . . . [is] so important that overriding considerations concerning the integrity of the system will excuse a party's failure to raise the issue in the trial court").

¶13 Section 11-584(B)(3), A.R.S., allows a trial court to order a defendant to reimburse the county for the costs of his legal representation. Rule 6.7(d), Ariz. R. Crim. P., further provides:

> If . . . the court finds that [an indigent defendant] has financial resources which enable him or her to offset in part the costs of the legal services to be provided, the court shall order him or her to pay . . . such amount as it finds he or she is able to pay without incurring substantial hardship to himself or herself or to his or her family.

¶14 In *State v. Moreno-Medrano*, 218 Ariz. 349, ¶¶ 12-13, 185 P.3d 135, 139 (App. 2008), this court held that the failure to make findings on the record regarding an indigent defendant's ability to pay attorney fees without hardship is not fundamental error. In so holding, we expressly disagreed with the contrary conclusion reached by Division One of this court in *State v. Lopez*, 175 Ariz. 79, 82, 853 P.2d 1126, 1129 (App. 1993), a case decided before our supreme court clarified the fundamental error standard of review. *Moreno-Medrano*, 218 Ariz. 349, ¶ 13, 185 P.3d at 139. We specifically departed from *Lopez* on the grounds that a fee order is not a penalty, it is enforceable only as a civil

judgment, and it has no effect on an indigent defendant's legal representation. *Moreno-Medrano*, 218 Ariz. 349, ¶¶ 9, 12, 18, 185 P.3d at 139, 140; *see also State v. Torres-Soto*, 187 Ariz. 144, 145, 927 P.2d 804, 805 (App. 1996) (suggesting that, notwithstanding *Lopez*, failure to make findings not always fundamental error warranting relief). Although Kennedy urges us to renounce *Moreno-Medrano* and follow the analysis of *Lopez*, he has provided no compelling reason for doing so. His observation that Division One recently cited *Lopez* with approval in *State v. Taylor*, 216 Ariz. 327, 166 P.3d 118 (App. 2007), is inapposite because *Taylor* granted relief to a defendant who had properly objected to the imposition of attorney fees at sentencing. *Id.* ¶¶ 3, 25.

¶15 Furthermore, as we noted in *Moreno-Medrano*, trial courts are generally presumed to know and correctly apply the law. 218 Ariz. 349, ¶ 14, 185 P.3d at 139. And a court's failure to make express findings is easily remedied by a timely objection or request. *See Trantor v. Fredrikson*, 179 Ariz. 299, 301, 878 P.2d 657, 659 (1994) ("If the court has failed to make findings and a party wants them, all one has to do is to make that issue known in the trial court."). We therefore reaffirm *Moreno-Medrano*'s holding that a court's failure to make express findings regarding a defendant's financial status and potential hardship for purposes of § 11-584(C) and Rule 6.7(d), Ariz. R. Crim. P., is not one of those "rare" errors fundamentally affecting the fairness of the judicial process or a defendant's substantial rights. 218 Ariz. 349, ¶ 13, 185 P.3d at 139; *see also Trantor*, 179 Ariz. at 300-01, 878 P.2d at

658-59 ("Although findings of fact and conclusions of law are certainly helpful on appellate review, they do not go to the foundation of the case or deprive a party of a fair hearing.").

¶16 Kennedy's additional arguments are unavailing for the same reason. On appeal, he contends the trial court erred in basing its reimbursement order on his potential income rather than his "present financial resources" as required by *Taylor*. *See* 216 Ariz. 327, ¶ 23, 166 P.3d at 125. He also suggests that, even if the trial court had found he actually had sufficient financial resources to pay the attorney fees without hardship, such a finding would lack support in the record. Although we agree with both points, Kennedy did not raise them below, and we will not disturb the trial court's unchallenged imposition of $400 in legal fees because we cannot characterize those errors as fundamental. *See Torres-Soto*, 187 Ariz. at 145, 927 P.2d at 805 (noting that, but for extraordinary surcharges, court "would not vacate th[e] unobjected-to imposition of [$375 in] attorneys' fees").

¶17 Moreover, a reimbursement order entered pursuant to Rule 6.7(d) and § 11-584 is neither a penalty nor a criminal sanction. *State v. Connolly*, 216 Ariz. 132, ¶ 3, 163 P.3d 1082, 1082-83 (App. 2007). As we noted in *Moreno-Medrano*, such an order is enforceable only as a civil judgment and does not affect a defendant's fundamental right to counsel. 218 Ariz. 349, ¶¶ 9, 12, 185 P.3d at 139. Although the order is often renewed at sentencing, it is not dependent upon a determination of guilt. *See* § 11-584(B)(3); Ariz. R. Crim. P. 6.7(d). Hence, a reimbursement order is not part of a criminal "sentence" as that term is defined in Rule 26.1(b), Ariz. R. Crim. P. Fundamental error review is rarely undertaken for civil

judgments and is typically "limited to situations where the [error] deprives a party of a constitutional right." *Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 420, 758 P.2d 1313, 1322 (1988). Because requiring Kennedy to pay $400 in attorney fees here was not fundamental error under either criminal or civil standards, we affirm the court's reimbursement order.

Penalty Assessments

¶18 Kennedy similarly contends the trial court abused its discretion and committed fundamental error in imposing the eighty percent surcharge on his fine, because he is "indigent and destitute" and the court failed to conduct an inquiry or make findings concerning his financial resources or ability to pay the assessment without hardship. Because he failed to object below, we review only for fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. It is Kennedy's burden to establish that an error occurred, that it was fundamental, and that it resulted in prejudice. *See id.* ¶¶ 19-20.

¶19 Section 13-3407(H), A.R.S., requires a trial court to impose a minimum fine of $1,000 on anyone convicted of possessing a dangerous drug. The court is also required to impose various penalty assessments as a percentage of the criminal fine unless it determines payment would work a hardship on the offender or his immediate family. *See* A.R.S. §§ 12-116.01(A)–(C), (F), 12-116.02(A), (D).[3] As Kennedy notes in his opening

[3]Although the statutes designate these additional charges "penalty assessments," courts often refer to them as "surcharges." *E.g.*, *State v. Beltran*, 189 Ariz. 321, 322, 942 P.2d 480, 481 (App. 1997); *Torres-Soto*, 187 Ariz. at 145, 927 P.2d at 805.

brief, neither the author of the presentence report nor the trial court indicated how the eighty percent surcharge was calculated. The state has not accounted for this figure on appeal, and we can find no currently applicable statutes justifying an eighty percent penalty assessment.[4]

¶20 In any event, the version of the applicable statutes in effect when Kennedy committed his offense authorized penalty assessments totaling, at most, seventy percent of a fine. *See* 2002 Ariz. Sess. Laws, ch. 226, § 1 (former § 12-116.01(A) through (C)); § 12-116.02(A). Regardless of the trial court's interpretation of the present statutes, insofar as the court did not sentence Kennedy in accordance with the laws in effect at the time of his offenses, the court committed fundamental, prejudicial error. *See State v. Beltran*, 170 Ariz. 406, 408, 825 P.2d 27, 29 (App. 1992) (holding that "surcharge on a fine is a criminal penalty" and that increasing surcharge based on statutes not in effect on offense date violates prohibition against ex post facto laws). We therefore order Kennedy's penalty assessments be reduced to seventy percent. *See State v. Gourdin*, 156 Ariz. 337, 339, 751 P.2d 997, 999 (App. 1988) (recognizing statutory authority of appellate court to correct illegal sentence).

¶21 We modify the penalty assessments, rather than vacating them, because we are not persuaded by Kennedy's arguments that the court's imposition of presumptive penalty

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[4]Subsections (A) through (C) of A.R.S. § 12-116.01 provide penalty assessments totaling sixty-one percent of a criminal fine, and § 12-116.02(A) provides for an additional thirteen percent assessment. The maximum penalty assessment authorized by these statutes is thus seventy-four percent of a criminal fine. The eighty percent figure appears to result from misconstruing § 12-116.01(C) and adding the six percent assessment that will replace the current seven percent assessment in the year 2012.

assessments constituted fundamental error. Unlike reimbursement orders issued pursuant to Rule 6.7(d) and § 11-584(B)(3), penalty assessments pursuant to §§ 12-116.01 and 12-116.02 do not require prior findings by the court. These statutes provide that "penalty assessment[s] shall be levied . . . on every fine." § 12-116.01(A)–(C); *accord* § 12-116.02(A). Both statutes further provide that "[t]he judge may waive all or part of the . . . penalty assessment, except for mandatory civil penalties and fines, the payment of which would work a hardship on the persons convicted . . . or on their immediate families." § 12-116.01(F); *accord* § 12-116.02(D). Thus, a defendant is responsible for seeking a waiver of the otherwise mandatory penalty assessments under these statutes.

¶22 Kennedy is correct that this court vacated penalty assessments in both *Beltran* and *Torres-Soto* despite the defendants' failure to have sought a waiver of the assessments in the trial court. However, in *Torres-Soto*, we granted relief in part because neither the court nor the parties knew the penalty assessments were discretionary. 187 Ariz. at 145-46, 927 P.2d at 805-06. The same was true in *Beltran*. 189 Ariz. at 322, 942 P.2d at 481. There, we again "instruct[ed] counsel that it is imperative to address whether surcharges should be waived in the sentencing of their clients." *Id.* at 323, 942 P.2d at 482. In contrast to *Torres-Soto* and *Beltran*, however, here the record does not clearly indicate Kennedy was unaware he could seek a waiver of penalty assessments on hardship grounds. In fact, Kennedy's attorney emphasized at sentencing that, "when [Kennedy] is out, he is self-employed, self-motivated, and he does things in the construction field such as demolition work[]."

¶23 When a defendant seeks on appeal the waiver of penalty assessments he should have sought below, we will grant relief only in extraordinary circumstances. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607 (noting relief warranted under fundamental error review only in "rare cases"). In both *Beltran* and *Torres-Soto*, the trial court had imposed on an indigent defendant fines and penalty assessments that totaled more than $150,000, which is the statutory limit for a felony fine. *See* A.R.S. § 13-801(A); *Beltran*, 189 Ariz. at 322, 942 P.2d at 481 (fine and assessments totaling $174,900); *Torres-Soto*, 187 Ariz. at 145, 927 P.2d at 805 (fine and assessments totaling $235,887). By contrast, the court here ordered Kennedy to pay fines, fees, and assessments totaling less than $2,500. This is not such an extraordinary amount as to warrant relief absent a request for a waiver below.

¶24 We therefore affirm the trial court's imposition of penalty assessments as modified.

Criminal Restitution Order

¶25 Kennedy did not object to the court's entry of the restitution order at sentencing, and he does not challenge this aspect of the court's ruling on appeal. However, "we will not ignore [fundamental error] when we find it." *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007).

¶26 Section 13-805(A)(1), A.R.S., allows a court to reduce fines, fees, and assessments to a restitution order "[a]t the time the defendant completes the defendant's period of probation or . . . sentence." After Kennedy's appeal came at issue, we held in *State*

v. Lewandowski, No. 2 CA-CR 2008-0057, ¶ 15, 2009 WL 838581 (Ariz. Ct. App. Mar. 31, 2009), that a court commits fundamental, prejudicial error by entering a criminal restitution order before expiration of the defendant's prison sentence or probationary term. We reasoned in *Lewandowski* that, because a restitution order causes interest to accrue on a criminal fine under § 13-805(C) and a court's authority to impose interest-bearing penalties is strictly statutory, the premature entry of a criminal restitution order results in an illegal sentence. *Id.* ¶¶ 11, 15. Accordingly, we vacate the trial court's premature criminal restitution order.

Disposition

¶27 We vacate the trial court's criminal restitution order and reduce Kennedy's penalty assessments to $700. Otherwise, we affirm Kennedy's convictions and sentences, including the $1,000 fine and $400 attorney fees imposed.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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GARYE L. VÁSQUEZ, Judge