

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

**See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24**

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**



DIVISION ONE
FILED: 6/11/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

STATE OF ARIZONA,) 1 CA-CR 11-0833
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
JOHN GORDON CRAIN,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-163235-001

The Honorable Dawn M. Bergin, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Joseph Maziarz, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Alice Jones, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Tennie B. Martin, Deputy Public Defender
Attorneys for Appellant

G O U L D, Judge

¶1 John Gordon Crain appeals his conviction and sentence for one count of resisting arrest, a class six felony. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 On December 2, 2010, Officer Akre was patrolling an apartment complex looking for a suspect who had an outstanding felony warrant. When Officer Akre spotted the suspect, he called for backup units, and Officer Jacobs was one of the units that responded. While searching for the suspect, Officer Jacobs observed Crain. Crain, who was not the suspect, was yelling and advancing on the officers in an agitated state, and calling the officers "motherfuckers." Officer Jacobs told Crain to leave the area several times, but Crain refused.

¶3 The disturbance created by Crain attracted the attention of the residents of the apartment complex, causing several people to come out of their apartments to observe the commotion. Based on the negative reaction of the crowd to the officers' confrontation with Crain, Officer Jacobs became concerned that Crain was causing an officer safety issue. As a result, Officer Jacobs told Crain that he would be arrested if he did not leave. Crain again refused to leave, stating "[y]ou can't arrest me for shit, motherfucker. I'll go where the fuck I want. Make me leave." Officer Jacobs then told Crain he was under arrest, to which Crain responded that he was not, and

Officer Jacobs grabbed Crain's left arm to place it in handcuffs. Crain "immediately began to resist and fight" and pull away from Officer Jacobs. Because Crain was starting to "get out of control," Officer Jacobs tried to place him against a wall so that he would be unable to fight.

¶4 Noticing the struggle, Officer Hughes came over to provide assistance and grabbed Crain's other arm. To restrict Crain's movement, Officer Jacobs used his foot to sweep Crain's feet out from under him and put him on the ground. Crain refused to cooperate and was fighting violently, trying to push himself up off the ground. After a lengthy struggle the officers were finally able to handcuff Crain.

¶5 Both officers attempted to have Crain stand up to walk to their police vehicle, but Crain would not comply. The officers had to lift Crain under his arms and walk him to their car. Crain continued to resist as the officers were "carrying" and "dragging" him to the car. Once they got to the car, Crain told the officers he had recently been in a car accident and that his fingers were hurting. Crain then refused to get in the police car, forcing the officers to physically place him in the vehicle.

¶6 Once inside the vehicle, Officer Jacobs observed Crain kicking the door of the police vehicle with both feet while yelling obscenities. Crain was kicking the inside of the door so

hard that Officer Jacobs "actually saw the door bend back." Officer Jacobs and Officer Hughes finally succeeded in restraining Crain by applying a "rip restraint," which tied Crain's ankles together and was attached to his handcuffs.

¶7 Crain was charged with one count of resisting arrest, a class six felony. Before trial, Crain filed a motion in limine to preclude evidence of his kicking the door of the police vehicle. The trial court denied the motion, finding that the evidence was intrinsic to the charge of resisting arrest, and Crain was subsequently found guilty by a jury. Crain timely appealed his conviction and sentence. We have jurisdiction pursuant to Article VI, section 9 of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, and 13-4033(A) (2013).

DISCUSSION

¶8 Crain argues the trial court erred when it denied his motion in limine and allowed the State to introduce evidence that he kicked the door of the police vehicle after he was placed in handcuffs. Crain argues the evidence was not intrinsic to the charge and constituted inadmissible evidence of "other acts." Crain further argues that even if the other act evidence was relevant, its probative value was outweighed by the danger of unfair prejudice. In contrast, the State contends the evidence was intrinsic to the charged offense of resisting arrest, and

that even if it was other act evidence, it was admissible pursuant to Arizona Rule of Evidence 404(b).

¶9 We review a superior court's ruling on the admissibility of evidence for an abuse of discretion. *State v. Robinson*, 165 Ariz. 51, 56, 796 P.2d 853, 858 (1990).

¶10 Evidence is intrinsic "if it (1) directly proves the charged act, or (2) is performed contemporaneously with and directly facilitates commission of the charged act." *State v. Ferrero*, 229 Ariz. 239, 243, ¶ 20, 274 P.3d 509, 513 (2012). Intrinsic evidence may be admitted without any analysis pursuant to Rule 404. *Id.* at 244, ¶ 21, 274 P.3d at 514.

¶11 A person commits the offense of resisting arrest by:
intentionally preventing or attempting to prevent a person reasonably known to him to be a peace officer . . . from effecting an arrest by: 1. Using or threatening to use physical force against the peace officer or another; or 2. Using any other means creating a substantial risk of causing physical injury to the peace officer or another.

A.R.S. § 13-2508(A) (2010). This court has construed the phrase "effecting an arrest" in A.R.S. § 13-2508 to mean "an on-going process toward achieving, producing, making, or bringing about, an arrest." *State v. Mitchell*, 204 Ariz. 216, 218, ¶ 12, 62 P.3d 616, 618 (App. 2003). Accordingly, we have declined to hold that an arrest is always "effected" once a person has been handcuffed.

Id. at 220, ¶ 21, 62 P.3d at 620.¹ Rather, “[t]he completion of the arrest process for purposes of the resisting arrest statute requires the successful, effective restraint or submission of the person being arrested.” *Id.*

¶12 Here, the evidence that Crain kicked the door of the police vehicle was intrinsic evidence because it directly proved that Crain resisted arrest. Crain’s arrest was not complete when he was placed in the police vehicle. Although his hands were restrained in handcuffs, there was no successful, effective restraint or submission because Crain was still resisting arrest by violently kicking the door of the police vehicle. Furthermore, the officers testified that they could not transport Crain to the jail while he was violently kicking and bending the door of the vehicle. Thus, the arrest was not complete until the officers successfully and effectively restrained Crain by placing the rip restraint on his ankles to restrict his kicking movements.²

¹ See *State v. Lee*, 217 Ariz. 514, 517, ¶ 11, n. 3, 176 P.3d 712, 715, n. 3 (App. 2008) (Evidence defendant kicked officer after she was handcuffed supported defendant’s conviction for resisting arrest because “[c]onduct after handcuffs are placed may be considered in determining whether a person is resisting arrest under A.R.S. § 13-2508.”).

² Crain also argues that the evidence he kicked the police vehicle is inadmissible under Rules 403 and 404(b) because: (1) the State failed to prove by clear and convincing evidence that the acts were committed and that Crain committed the acts; (2) the evidence was not logically nor legally

CONCLUSION

¶13 Crain's conviction and sentence for resisting arrest are affirmed.

/S/

ANDREW W. GOULD, Presiding Judge

CONCURRING:

/S/

MARGARET H. DOWNIE, Judge

/S/

PATRICIA A. OROZCO, Judge

relevant; and (3) the probative value of the evidence was substantially outweighed by unfair prejudice. He further argues the court erred because it did not make express findings concerning those issues pursuant to Rule 404(b). Because we conclude the trial court did not abuse its discretion in finding that Rule 404(b) did not apply to the subject evidence, we do not address these issues.