DIVISION ONE
FILED: 10/3/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 12-0554
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	
JAMES LEON LAWRENCE,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-030031-001

The Honorable Susanna C. Pineda, Judge

AFFIRMED

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

James J. Haas, Maricopa County Public Defender — Phoenix
By Jeffrey L. Force, Deputy Public Defender
Attorneys for Appellant

J O H N S E N, Judge

¶1 James Leon Lawrence was convicted of resisting arrest. On appeal, he argues the jury instructions misstated the law and the evidence was insufficient to support his conviction. For

the reasons that follow, we affirm Lawrence's conviction and the resulting sentence.

FACTS AND PROCEDURAL BACKGROUND

¶2 A Mesa police officer responded to a report of possible domestic violence at an apartment complex. The officer contacted a woman in the complex parking lot who explained that she had been in an altercation with Lawrence. The officer then contacted Lawrence and told him to put down a beer bottle he held in his hand. Lawrence refused. When the officer told Lawrence he would detain him for investigative purposes, Lawrence walked away. Concerned that Lawrence might attempt to flee or retrieve a weapon from an apartment, the officer followed Lawrence.

¶3 Lawrence eventually sat down in a chair in front of an apartment, set the beer bottle on the ground and lit a cigar. The officer approached Lawrence and again told him he would detain him for investigative purposes, this time adding that Lawrence was not free to go. When the officer told Lawrence to drop the cigar, Lawrence refused. When the officer grabbed Lawrence's left arm to handcuff and detain him, Lawrence jerked his arm away. The officer then used an "arm cast" to move Lawrence out of the chair and onto the ground, just as a second officer arrived to assist. Lawrence, however, struggled with the officers and resisted their attempts to handcuff him by

kicking his legs and flailing his arms while still holding the cigar. During the struggle, the first officer repeatedly told Lawrence to drop the cigar and stop resisting. Lawrence refused. Lawrence eventually used the cigar to burn the first officer's cheek just below his eye. Once Lawrence burned the officer, the officer told him he was under arrest. Even then, Lawrence continued to struggle with the officers, and stopped only after the first officer began to shout that he was preparing to use his Taser.

¶4 The jury found Lawrence guilty of resisting arrest and aggravated assault, and the superior court sentenced him to an aggregate term of three years' imprisonment. On appeal, Lawrence contests only the resisting-arrest conviction. We have jurisdiction over Lawrence's timely appeal pursuant to Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2013), 13-4031 (2013) and 13-4033 (2013).[1]

DISCUSSION

¶5 Lawrence argues the jury instructions regarding resisting arrest misstated the law. We review the decision to give a jury instruction for abuse of discretion. *See State v. Dann*, 220 Ariz. 351, 363-64, ¶ 51, 207 P.3d 604, 616-17 (2009).

[1] Absent material revision after the date of an alleged offense, we cite a statute's current version.

Whether jury instructions properly state the law is an issue we review *de novo*. *State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997).

¶6 It is undisputed that the superior court properly instructed the jury on the elements of the crime of resisting arrest as specified in A.R.S. § 13-2508(A) (2013) using Revised Arizona Jury Instruction ("RAJI") Standard Criminal 25.08 (resisting arrest). Without being asked to do so, however, the court added to the instruction that "[a]n arrest is made by an actual restraint of the person to be arrested, or detained or by his submission to the custody of the person making the arrest or detainment." Contrary to this *sua sponte* instruction, the statute from which the court apparently drew the instruction reads as follows: "An arrest is made by an actual restraint of the person to be arrested, or by his submission to the custody of the person making the arrest." A.R.S. § 13-3881(A) (2013).

¶7 Neither party had asked the court to deviate from the statute. In doing so, the court stated it believed the definition was appropriate based on "an anomaly in the statutes" and on "case law," but it did not cite any case law and did not explain further. The question is whether the superior court's deviation from the statute is reversible error.

¶8 Lawrence argues the reference to detention in the instruction permitted the jury to convict him of resisting

arrest if it found he was resisting not a formal arrest but mere "detention" for investigative purposes. He argues an arrest or attempted arrest is an essential element of resisting arrest and a detention is not an "arrest."

¶9 Although the court's addition to the standard instruction was improper, we conclude it did not constitute reversible error. First, a peace officer need not announce a person is under arrest to "effect an arrest" within the meaning of the Arizona resisting-arrest statute. *State v. Barker*, 227 Ariz. 89, 89, ¶ 1, 253 P.3d 286, 286 (App. 2011). Further, whether an arrest is taking place is determined by the objective evidence, not the subjective beliefs of those involved. *State v. Winegar*, 147 Ariz. 440, 448, 711 P.2d 579, 587 (1985). An arrest may occur even though the arresting officer does not intend to make an arrest and subjectively believes no arrest occurred. *Id.* at 444-48, 711 P.2d at 586-87. Therefore, the fact that the officers and/or Lawrence may not have believed the officers were "arresting" Lawrence when they first attempted to handcuff and detain him does not necessarily determine whether Lawrence resisted an "arrest."

¶10 Pursuant to A.R.S. § 13-3881(A), the jury instructions defined "arrest" in relevant part to require "actual restraint" of the person or the person's "submission" to custody. There is no evidence Lawrence submitted to custody. Therefore, to

convict Lawrence of resisting arrest based on these instructions, the jury had to find an officer sought to actually restrain Lawrence, Lawrence knew or had reason to know the person seeking to actually restrain him was a peace officer, Lawrence intentionally prevented or attempted to prevent the officer from actually restraining him, and Lawrence used physical force, the threat of physical force or any other means presenting a substantial risk of injury to the officer to prevent the actual restraint.

¶11 Lawrence does not dispute the jury's findings as to those elements. He argues only that the erroneous instruction may have allowed the jury to convict him of offering resistance to what was a mere detention. To the contrary, however, no reasonable jury could have concluded that the circumstances constituted a mere detention for purposes of investigation after Lawrence assaulted the officer with the cigar. As of that moment, the officer who was assaulted and the other officers who observed the assault no longer were investigating the circumstances of the initial call; they were trying to arrest Lawrence for the crime they saw him commit (and for which the jury convicted him).

¶12 Lawrence's contention that his conviction was not supported by substantial evidence therefore fails. "Reversible error based on insufficiency of the evidence occurs only where

there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (citation omitted). "We 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, 436, ¶ 12, 967 P.2d 106, 111 (1998) (citation omitted). We also resolve any conflict in the evidence in favor of sustaining the verdict. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

¶13 Regardless that the first officer intended at first only to detain Lawrence for investigative purposes, Lawrence continued to resist after he burned the officer's face and circumstances changed from a detention to an arrest. At trial, Lawrence's defense was that he offered no resistance at all to the officers; he did not contend that his acts after he burned the officer with the cigar were any less culpable than his acts before that point. Similarly, on appeal, he does not argue that while he may have resisted the officer's initial efforts to detain him, he stopped resisting after he assaulted the one officer. Accordingly, under the facts presented, the improper instruction did not permit the jury to convict Lawrence of resisting arrest when he was resisting a mere detention, and the evidence was sufficient to support Lawrence's conviction.

CONCLUSION

¶14 We affirm Lawrence's convictions and the resulting sentences.

_____/S/_____
DIANE M. JOHNSEN, Chief Judge

CONCURRING:

_____/S/_____
RANDALL M. HOWE, Presiding Judge

_____/S/_____
SAMUEL A. THUMMA, Judge