DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. JERRY LEE RICHARDSON, Appellant.	)	1 CA-CR 09-0578 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-109933-001 DT

The Honorable Lisa Ann VandenBerg, Judge Pro Tempore

AFFIRMED AS MODIFIED

Phoenix

Terry Goddard, Attorney General
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
And Sherri Tolar Rollison,
Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Karen M. Noble, Deputy Public Defender
Attorneys for Appellant

K E S S L E R, Presiding Judge

¶1 Jerry Lee Richardson ("Defendant") appeals from his conviction and sentence for resisting arrest. For the reasons

that follow, we affirm Defendant's conviction. We also affirm Defendant's sentence as modified.

FACTUAL AND PROCEDURAL HISTORY

¶2 The State filed a direct complaint against Defendant for resisting arrest in violation of Arizona Revised Statutes ("A.R.S.") section 13-2508(A)(1) (2010). Before trial, the State designated the crime as a misdemeanor. The superior court held a bench trial.

¶3 A Phoenix police officer ("Officer") initiated a traffic stop after Defendant made a right turn at a red light in violation of a posted sign prohibiting such maneuvers. *See* A.R.S. § 28-645(A)(3)(b) (2010) (prohibiting right-on-red turns when a prohibitory sign is erected at the intersection). Officer followed Defendant briefly, activated his lights, and pulled Defendant over. Officer dismounted his police motorcycle and approached Defendant's vehicle in full uniform.

¶4 When he reached the vehicle, Officer requested Defendant's driver's license, vehicle registration, and proof of insurance. Officer informed Defendant that he was being pulled over for turning right-on-red in violation of the prohibitory sign. Defendant stated that he did not make the turn on red and that Officer should not have stopped him. Officer continued to request Defendant's driver's license and Defendant continued to refuse.

¶5 Defendant then opened his vehicle door, striking Officer's knees in the process. Officer ordered Defendant to remain in his vehicle. Defendant exited the vehicle notwithstanding Officer's order. Officer then ordered Defendant to move to the rear of the vehicle, which he did. Defendant called 9-1-1 and paced between the vehicle and the curb.

¶6 While Defendant was pacing, he veered from his path and intentionally bumped into Officer. Officer pushed Defendant against Defendant's vehicle and informed him that he was under arrest. Defendant told Officer that he was not under arrest.

¶7 Officer began trying to handcuff Defendant. Defendant pulled his hands and arms away from Officer as Officer attempted to handcuff him. Defendant also began sliding his torso several feet back and forth along the edge of the vehicle. Officer continued trying to grab Defendant's arm but could not handcuff him because Defendant continued to pull his arm away.

¶8 Officer then moved Defendant onto the ground by placing his arms around Defendant's chest and causing them to fall to the ground together. Officer pulled one of Defendant's arms out from underneath him and placed a handcuff around one wrist. Officer was not able to place the second handcuff on Defendant's wrist until an additional officer arrived to assist.

¶9 The superior court convicted Defendant of resisting arrest and imposed a sentence of three months unsupervised

probation. Along with the probation, the superior court imposed a probation fee of sixty-five dollars per month. Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2003) and 13-4032(6) (2010).

ANALYSIS

¶10 On appeal, Defendant contends 1) the superior court erroneously convicted him of resisting arrest because the evidence was insufficient to show that he had satisfied the force requirement in A.R.S. § 13-2508(A)(1) and 2) the superior court erroneously imposed a sixty-five dollar per month probation fee.

I. Substantial Evidence Supports the Conviction

¶11 On appeal, "[w]e view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the convictions." *State v. Powers*, 200 Ariz. 123, 124, ¶ 2, 23 P.3d 668, 669 (App. 2001) (citation and internal quotations omitted). We review the superior court's interpretation of a statute *de novo*. *State v. Noceo*, 223 Ariz. 222, 224, ¶ 3, 221 P.3d 1036, 1038 (App. 2009). "A person commits resisting arrest by intentionally preventing or attempting to prevent a person reasonably known to him to be a peace officer, acting under color of such peace officer's official authority, from effecting an arrest by . . . [u]sing or threatening to use physical force

against the peace officer or another." A.R.S. § 13-2508(A)(1). "'Physical force' means force used upon or directed toward the body of another person." A.R.S. § 13-105(31) (2010). "Against" means "[i]n the opposite direction to the course of anything" or "counter to". 1 The Compact Edition of the Oxford English Dictionary 173 (1971); *see also* A.R.S. § 1-213 (2002) (mandating that undefined words "be construed according to the common and approved use of language").

¶12 The superior court had sufficient evidence to conclude that Defendant used force against Officer. When Officer attempted to handcuff Defendant, Defendant pulled his arm away from Officer. While Officer had Defendant pinned against a vehicle, Defendant shook his torso. Defendant and Officer were in bodily contact while this occurred. Once Officer brought Defendant to the ground, Defendant continued to pull his arm away from Officer, preventing Officer from handcuffing Defendant without backup.

¶13 Defendant's motion was a force. The force was upon Officer, as Defendant and Officer were consistently in physical contact during the struggle. The physical force was against Officer, as defendant pulled, squirmed away from Officer, and tried to extricate himself from Officer's controlling grip. Having used force upon Officer in opposition to Officer's effort

to effect an arrest, Defendant satisfied the condition in subsection A(1).

¶14 Our conclusion that Defendant violated A.R.S. § 13-2508(A)(1) is consistent with *State v. Lee*. 217 Ariz. 514, 517, ¶ 11, 176 P.3d 712, 715 (App. 2008). *Lee* determined that a defendant violated A.R.S. § 13-2508(A)(1) by, inter alia, pulling her arms away from officers and physically resisting the placement of handcuffs.[1] *Id*. Defendant here also pulled his arms away from Officer and physically resisted the placement of handcuffs.

¶15 Defendant contends that he did not use physical force against Officer because his behavior towards Officer was not assaultive. We disagree. The plain language of the relevant statutes shows that assault and resisting arrest are separate offenses proscribing distinct culpable acts. *Janson ex rel. Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991) (applying plain meaning rule). Assault criminalizes injuring another person, causing a person to fear injury, or touching another person. A.R.S. § 13-1203(A) (2010). Resisting arrest under A.R.S. § 13-2508(A)(1) criminalizes the act of preventing an arrest through the use or threat of force. The

[1] The *Lee* defendant additionally kicked, which Defendant did not do. *Id*. However, Defendant violently thrashed his torso from side to side.

statute does not depend on injury, apprehension of injury, or even voluntary touching. *Lee*, 217 Ariz. at 517, ¶¶ 12, 13, 176 P.3d at 715. Cases like this one demonstrate the distinction. Defendant never voluntarily touched or injured Officer. Officer grabbed Defendant and pinned him to a car. The Defendant's forceful movements away from Officer, efforts to *prevent* contact, are the culpable act under the plain statutory language. *See Clement v. State*, 248 S.W.3d 791, 797 (Tex. App. 2008) (upholding resisting arrest conviction under forceful resistance theory when defendant struggled physically and pulled away from officer but made no voluntary contact with officer because "[a] person can forcefully resist an arrest without successfully making physical contact with the officer"). Based on the plain meaning rule, we decline to judicially impose the elements of assault upon the crime of resisting arrest.

¶16 Additionally, requiring that behavior be assaultive to constitute resisting arrest would render A.R.S. § 13-2508(A)(1) superfluous, because A.R.S. §§ 13-1203 and -1204 already criminalize assaultive behavior towards police officers. Construing A.R.S. § 13-2508(A)(1) to only criminalize conduct that also constitutes an aggravated assault violates the requirement that we not render a statute superfluous. *Grand v. Nacchio*, 225 Ariz. 171, 175-76, ¶ 22, 236 P.3d 398, 402-03 (2010).

¶17 Defendant also contends that we should construe A.R.S. § 13-2805(A)(1) as being subject to an unwritten exception for "minor scuffling" which Defendant contends exists under a similarly worded Hawaii statute. We disagree. "Those who use physical force against police officers attempting to arrest them are not entitled to engage in 'minor scuffling' whether it is usual or unusual in the context of an arrest." *Lee*, 217 Ariz. at 517, ¶ 12, 176 P.2d at 715 (citation omitted). *Lee* considered the same comment to Hawaii's resisting arrest statute that Defendant relies on and rejected the contention that a person has a privilege to scuffle with an arresting officer. *Id.* at ¶ 13.

¶18 Additionally, Defendant contends that the evidence is insufficient to show that he resisted arrest because the conduct constituted merely avoiding arrest. We disagree. When a defendant uses physical force against an officer to prevent an arrest, it makes no difference that the force is minor and may be perceived as merely avoiding arrest. *Id.* at 518, ¶ 15, 176 P.3d at 716. The case Defendant relies on to support his claim, *State v. Womack*, involved no use of force. 174 Ariz. 108, 847 P.2d 609 (App. 1992). In *Womack*, the defendant merely fled from an officer and eventually surrendered. *Id*. at 109-10, 114, 847 P.2d at 610-11, 615. *Womack* involved no force and does not

control the result of a case where the defendant used some force, no matter how little force was involved.

¶19 Defendant also cites several cases upholding convictions for resisting arrest, apparently making an implied argument that his conviction should be overturned because his use of force was in some way different than the force present in those cases. We disagree. First, our application of the statute comes directly from the wording of the statute. Based on the words used and their meanings, we find that the superior court had adequate evidence to convict Defendant. The facts of prior cases upholding a conviction do not restrict this Court to upholding convictions in identical or similar scenarios.

¶20 Additionally, the citations proffered by Defendant support our decision to affirm Defendant's conviction. *Lee* was discussed *supra* ¶¶ 14, 15, 17, 18. *State v. Stroud* upheld a conviction for resisting arrest when the defendant continued to struggle with an officer after the officer grabbed him. 207 Ariz. 476, 480-81, ¶ 17, 88 P.3d 190, 194-95 (App. 2004) *vacated on other grounds* 209 Ariz. 410, 103 P.3d 912 (2005). The defendant kicked and pushed the officer's arm. *Id*. *Stroud* supports our decision for two reasons. First, like *Lee*, *Stroud* rejected a defendant's invocation of *Womack* for the proposition that minor scuffling is merely avoiding arrest and not resisting. *Id*. at 480-81, ¶¶ 15-17, 88 P.3d at 194-95. Second,

although the type of force was somewhat different, *Stroud* affirmed a conviction when the defendant refused to submit to an arrest and continued to physically struggle while in direct physical contact with an officer. *Id.* at ¶ 17. Here, Defendant refused to submit to an arrest and continued to physically struggle while in direct physical contact with Officer. *Stroud* supports our decision to uphold Defendant's conviction.

¶21 Similarly, *State v. Sorkhabi* supports our decision to affirm Defendant's conviction. 202 Ariz. 450, 46 P.3d 1071 (App. 2002). *Sorkhabi* considered whether or not a crime was "victimless" for the purpose of determining whether it was subject to state or tribal jurisdiction. *Id*. at 453, ¶ 11, 46 P.3d at 1074. *Sorkhabi* cites *Womack* for the proposition that "[i]f [a] defendant prevent[s] arrest without using or threatening to use physical force or other means creating substantial risk of physical injury, he 'avoids arrest.'" *Id*. at 452, ¶ 9, 46 P.3d at 1073. It does not control the result of this case, because the superior court in this case correctly concluded that Defendant used physical force against Officer. *Sorkhabi* additionally held that the defendant's conduct was "squarely" within the provisions of A.R.S. § 13-2508(A) simply because he "struggled" with two officers. 202 Ariz. at 452, ¶ 10, 46 P.3d at 1073. Defendant's altercation with Officer

clearly constitutes a struggle. *Sorkhabi* also supports our decision to affirm.

¶22 Defendant engaged in a physical struggle with Officer. He pulled his arms away from the Officer's handcuffs. He shook his torso while in contact with Officer. This conduct inhibited Officer's efforts to gain control of him during an arrest and is sufficient to sustain a conviction for resisting arrest.[2]

II. Defendant's Probation Fee is Valid as Modified

¶23 Defendant also contends that he received an illegal sentence[3] because 1) the superior court imposed a probation fee when he was sentenced to unsupervised probation, and 2) the superior court imposed a sixty-five dollar fee notwithstanding that the statute in effect at the time Defendant committed his crime prescribed a fifty dollar fee. We hold that Defendant is obligated to pay a probation fee but the superior court imposed a fee in excess of the statutory amount. Therefore, we affirm Defendant's sentence as modified.

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[2] Because we affirm Defendant's conviction based on A.R.S. § 13-2508(A)(1), we need not address the State's contention that the conviction for violating A.R.S. § 13-2508(A)(1) may be upheld because some evidence suggested that he may have committed an offense he was neither charged with nor convicted of.

[3] Although Defendant failed to raise this issue in the superior court, an illegal sentence is fundamental error. *State v. Mason*, 225 Ariz. 323, 328, ¶ 10, 238 P.3d 134, 139 (App. 2010) (citation omitted).

¶24 "When granting probation to an adult the court, as a condition of probation, shall assess a monthly fee." A.R.S. § 13-901(A) (2010). Defendant contends that this fee applies only to defendants sentenced to supervised probation. However, that limitation is relevant only if a defendant is sentenced in a justice or municipal court. *Id.* Defendant was sentenced in the superior court and was subject to a monthly fee for unsupervised probation.

¶25 Defendant contends that he is entitled to a fifty dollar monthly probation fee rather than a sixty-five dollar fee. We agree. The law amending A.R.S. § 13-901(A) to increase the probation fee contained no emergency clause. 2009 Ariz. Sess. Laws Ch. 5 (1st Sp. Sess.). Therefore, it took effect on May 2, 2009, ninety days after the first special session of the Legislature ended. Ariz. Const. art. 4, pt. 1 § 1(3). It was not in effect when Defendant committed his crime in February 2009. Defendant is entitled to pay the probation fee in effect on the date he committed his offense.

¶26 Probation is a form of criminal punishment. *State v. Mendivil*, 121 Ariz. 600, 602, 592 P.2d 1256, 1258 (1979). A probation fee is part of criminal punishment. *State v. Payne*, 223 Ariz. 555, 566, ¶ 35, 225 P.3d 1131, 1142 (App. 2009) (citing *State v. Castranova*, 221 Ariz. 549, 551, ¶¶ 8-10, 212 P.3d 887, 889 (App. 2009) *depublished* 224 Ariz. 121, 228 P.3d

113 (2010)). "When the penalty for an offense is prescribed by one law and altered by a subsequent law, the penalty of such second law shall not be inflicted for a breach of the law committed before the second took effect, but the offender shall be punished under the law in force when the offense was committed." [4] A.R.S. § 1-246 (2002). The law in force when Defendant committed his offense called for a fifty dollar monthly probation fee, therefore Defendant is entitled to the benefit of the lower fee.

¶27 The State contends that the probation fee is appropriate because the relevant statute mandates a fee "not less than" fifty dollars. We disagree. We do not view the language "not less than" as conferring unfettered discretion on the superior court to impose any probation fee over the statutory amount. The language the State relies on comes from the following sentence: "When granting probation to an adult the court, as a condition of probation, shall assess a monthly fee of not less than fifty dollars unless, after determining the

[4] Additionally, unless a statute expressly states that it is retroactive, we must apply it prospectively only. A.R.S. § 1-244 (2002); *Garcia v. Browning*, 214 Ariz. 250, 252, ¶ 7, 151 P.3d 533, 535 (2007). When a statute alters a criminal punishment, including the terms of probation, the operative date for retroactivity purposes is the date of the offense. *O'Brien v. Escher*, 204 Ariz. 459, 462, ¶ 10, 65 P.3d 107, 110 (App. 2003). The lack of an express retroactivity provision supports our decision to apply the prior statute.

inability of the probationer to pay the fee, the court assesses a lesser fee." A.R.S. § 13-901(A) (Supp. 2008). The language "not less than" precedes a phrase allowing the court to grant a lesser fee in limited circumstances. The language "not less than" does not confer any express power to charge a fee greater than that enumerated. It merely restricts the court's discretion to charge less. Therefore, we hold that the superior court erred by charging a probation fee greater than the one called for by the statute in effect at the time Defendant was sentenced.

¶28 This Court has the power to modify an illegal sentence to comply with the appropriate statutory limits. A.R.S. § 13-4037(A) (2010). Accordingly, we modify Defendant's probation fee to be fifty dollars per month.

CONCLUSION

¶29 For the foregoing reasons, we affirm Defendant's conviction and sentence as modified.

/s/

DONN KESSLER, Presiding Judge

CONCURRING:

/s/

DANIEL A. BARKER, Judge

/s/

JON W. THOMPSON, Judge