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,	)	1 CA-CR 09-0945
Appellee,	)	DEPARTMENT A
v.	)	**MEMORANDUM DECISION**
GREGORY WILLIAM SCHMITT,	)	(Not for Publication – Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)

Appeal from the Superior Court in Yavapai County

Cause No. P1300 CR 2009-0240

The Honorable Ralph M. Hess, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
And Liza-Jane Capatos, Assistant Attorney General
Attorneys for Appellee

David Goldberg, Esq. — Fort Collins
Attorney for Appellant

K E S S L E R, Presiding Judge

¶1 Gregory William Schmitt ("Defendant") appeals from his conviction and sentence for resisting arrest. For the reasons that follow, we affirm Defendant's conviction and sentence.

FACTUAL AND PROCEDURAL HISTORY

¶2 The State charged Defendant with Count 1, unlawful flight from a pursuing law enforcement vehicle, a class five felony; Count 2, resisting arrest, a class six felony; and Count 3, driving with a suspended license, a class one misdemeanor. Defendant waived his right to counsel, pled not guilty, and proceeded to a jury trial with advisory counsel. The jury convicted Defendant of all three charges and the superior court suspended a sentence and imposed two years of supervised probation.

¶3 The State's evidence at trial indicated that on October 29, 2008, a Yavapai County Sheriff's Office Deputy ("Deputy") was conducting an unrelated traffic stop when he saw Defendant driving a three-wheel all terrain vehicle ("ATV") on Stevens Trail in Wilhoit, Arizona. Deputy, who was wearing his uniform and standing outside of his fully marked patrol vehicle, motioned and yelled for Defendant to come to his location because he believed an ATV could not be registered with the Department of Motor Vehicles, and therefore could not legally be driven on a public street. Deputy testified that Defendant saw him and accelerated rather than pulling over, so Deputy ended the original traffic stop and pursued Defendant in his patrol car.

¶4 Deputy tried to initiate a traffic stop by turning on his overhead lights and his siren but Defendant did not pull over. Deputy followed Defendant for approximately one mile before deciding to terminate the pursuit due to policy and safety concerns. Shortly after, Defendant appeared to lose control of the vehicle and became trapped in a bush. Deputy then attempted to regain contact with Defendant. Deputy testified that Defendant was on the ATV, attempting to free the vehicle and flee, so Deputy knocked Defendant off of the ATV and tried to handcuff him while Defendant was lying on the ground face down. Deputy testified that when he knocked Defendant off of the ATV, Deputy "went on to the ground with him, and was struggling with him . . . ."

¶5 Defendant failed to comply with verbal commands to put his hands behind his back. Deputy had Defendant's left arm behind his back but Defendant was using "his physical force of not allowing [Deputy] to bring his [right] arm back behind his back." Deputy was able to handcuff Defendant only after striking Defendant in the back of the head to get him to stop moving. Defendant told Deputy he did not pull over because his license was suspended.[1]

[1] Defendant's driver's license was suspended, canceled, and revoked on October 29, 2008.

¶6 The jury found Defendant guilty of all three counts. The superior court suspended a sentence and imposed a collective term of two years of supervised probation. The court ordered that the class six felony for resisting arrest remain undesignated to provide Defendant with the opportunity to have that charge designated a misdemeanor upon successful completion of probation. Defendant has filed a timely notice of appeal. This Court has jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003) and 13-4032(6) (2010).

ANALYSIS

¶7 Defendant raises two issues on appeal: (1) that the State presented insufficient evidence that Defendant resisted arrest in violation of A.R.S. § 13-2508 (2010); and (2) that the trial court committed reversible error when it did not define for the jury the phrase "substantial risk" as it is used in the jury instructions setting forth the elements of A.R.S. § 13-2508.

¶8 The State argues: (1) sufficient evidence supports Defendant's resisting arrest conviction under each subsection of A.R.S. § 13-2508, and sufficient evidence as to either subsection warrants affirming the conviction; and (2) Defendant cannot meet his burden of proving that the trial court committed fundamental error by not supplementing jury instructions with a

definition of "substantial risk" because the court's initial jury instructions were adequate and because the phrase is used in its ordinary sense in the resisting arrest statute.

Substantial Evidence Supports the Conviction

¶9 A sufficiency of the evidence challenge requires that we examine "the facts and all reasonable inferences therefrom in the light most favorable to sustaining the conviction[]." *State v. Powers*, 200 Ariz. 123, 124, ¶ 2, 23 P.3d 668, 669 (App.), approved on other grounds, 200 Ariz. 363, 26 P.3d 1134 (2001) (citation omitted).

> 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:
>
> 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). "'Physical force' means force used upon or directed toward the body of another person . . . ." A.R.S. § 13-105(31) (2010). "Against" means "in the opposite direction to the course of anything" or "counter to." 1 The Compact Edition of the Oxford English Dictionary 173 (1971); *see* A.R.S. § 1-213 (2002) (Unless otherwise specified in the law, "[w]ords

and phrases shall be construed according to the common and approved use of the language.").

¶10 Once the predicate requirements of A.R.S. § 13-2508(A) are met, instances of physical force involving physical contact by the arrestee against the officer generally satisfy A.R.S. § 13-2508(A)(1). *See State v. Lee*, 217 Ariz. 514, 516-17, ¶¶ 9, 11, 176 P.3d 712, 714-15 (App. 2008). Deputy and Defendant were in continuous physical contact while Deputy was attempting to place him in handcuffs. Defendant struggled with Deputy and used his physical force to resist bringing his arms behind his back. It is reasonable to infer that Deputy was initially unable to place Defendant in handcuffs because Defendant was using physical force to prevent Deputy from doing so.

¶11 Furthermore, Deputy testified that he delivered two strikes to the back of Defendant's head in order to "stop his movement" and "try to cease . . . his resistance." The evidence supports the inference that Defendant's conduct amounted to a minor scuffle, and "[t]hose who use physical force against police officers attempting to arrest them are not entitled to engage in 'minor scuffling.'" *Lee*, 217 Ariz. at 517, ¶ 12, 176 P.3d at 715. Thus, there is sufficient evidence in the record from which a jury could conclude that Defendant used physical force against Deputy, in violation of A.R.S. § 13-2508(A)(1).

¶12 While we do not need to address sufficiency of the evidence under subsection (A)(2) because sufficient evidence supports the jury's finding of guilt under subsection (A)(1), we conclude there is also sufficient evidence to support a conviction pursuant to subsection (A)(2). Deputy testified that Defendant did not obey verbal commands to place his hands behind his back and struggled with Deputy when Deputy attempted to effect an arrest. Deputy testified that Defendant "placed [him] in risk by . . . not complying with verbal commands" because, in Deputy's experience, physical injuries were more likely to occur when an arrestee refused to follow verbal orders. Deputy never incurred physical injuries while arresting someone who was completely compliant. Therefore, sufficient evidence exists in the record from which a jury could conclude that Defendant resisted arrest by creating a substantial risk of causing physical injury to Deputy, in violation of A.R.S. § 13-2508(A)(2).[2]

[2] Our conclusion is consistent with *State v. Womack*, which held that a law enforcement officer's pursuit of a fleeing defendant does not alone satisfy the requirement in A.R.S. § 13-2508(A)(2). 174 Ariz. 108, 113, 847 P.2d 609, 614 (App. 1992). Here, a jury could find that Defendant created a substantial risk of physical injury to Deputy by refusing to comply with Deputy's orders and struggling while Deputy was attempting to place him in handcuffs, not by fleeing from Deputy and prompting a pursuit.

Declining to Define "Substantial Risk" for the Jury

¶13 During its deliberations, the jury submitted a question to the court requesting an explanation of "substantial risk" as it is used in the resisting arrest statute.[3] The State's attorney proposed that the court direct the jury to use the instructions that had already been given. The court recognized that "substantial risk" was not defined in the instructions or the statute and suggested replying that the definition was for the jury to decide based on the given instructions. Defendant objected that a juror could not determine whether Defendant's conduct created a substantial risk without a definition of the phrase.[4] Defendant, however, was unable to provide the court with a viable alternative and subsequently agreed to the court's proposed response, which charged the jury with deciding the meaning "from the evidence and the jury instructions provided to you."

¶14 Defendant waived any objection to the court's response to the jury's question by indicating that the proposed response was "acceptable." Therefore, we review the court's

[3] The court read the jury's question in the presence of Defendant and the State's attorney: "Please explain meaning of, quote, substantial risk, end quote to officer as related resisting arrest."

[4] Defendant stated: "I just don't see how one of the jury members can, you know, determine in his own mind what exactly substantial risk -- how is –- to determine whether or not my actions rose to the level of resisting arrest when there is no definition for substantial risk."

decision not to provide a definition of "substantial risk" for fundamental error. Ariz. R. Crim. P. 21.3(c); *e.g.*, *State v. Barnett*, 142 Ariz. 592, 594, 691 P.2d 683, 685 (1984). Error is fundamental if it affects the foundation of the case, deprives a defendant of a right essential to his defense, or is an error of such magnitude that the defendant could not possibly have had a fair trial. *See State v. Gendron,* 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991).

¶15 We find that the court's response to the jury's request for an additional instruction defining "substantial risk" did not constitute fundamental error. The court acted within its discretion in declining to provide further instructions. Ariz. R. Crim. P. 22.3; *State v. Morales*, 139 Ariz. 572, 574, 679 P.2d 1059, 1061 (App. 1983) ("The provision that the judge may give additional instruction . . . indicates clearly that it is the trial judge who must decide what instruction is necessary."). The court invited input from the Defendant and the State's attorney before deciding not to supplement the given instructions.

¶16 The court properly directed the jurors to interpret the words according to their ordinary meanings because the phrase "substantial risk" is not defined within the resisting arrest statute and does not have a technical meaning. *See* A.R.S. § 1-213; *see, e.g.*, *Barnett*, 142 Ariz. at 594, 691 P.2d

at 685 (“Where terms used in an instruction have no technical meaning peculiar to the law in the case but are used in their ordinary sense and commonly understood by those familiar with the English language, the court need not define these terms.”) (citations omitted). Moreover, any possible error was harmless because the evidence supports a conviction under A.R.S. § 13-2508(A)(1). Thus, we find no fundamental error as to this point.

CONCLUSION

¶17 The evidence supports Defendant’s conviction and sentence and we find no error in instructing the jury. Accordingly, we affirm the conviction and sentence of Defendant.

/s/
DONN KESSLER, Presiding Judge

CONCURRING:

/s/
DANIEL A. BARKER, Judge

/s/
JON W. THOMPSON, Judge