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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: 02/16/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: DLL

STATE OF ARIZONA, ) No. 1 CA-CR 11-0067  
)  
Appellee, ) DEPARTMENT B  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
RUMMIE SHERRILL, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-030549-001SE

The Honorable Daniel G. Martin, Judge

**AFFIRMED**

Thomas C. Horne, Arizona Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel  
Criminal Appeals/Capital Litigation Division  
Katia Mehu, Assistant Attorney General  
Attorneys for Appellee

Maricopa County Public Defender Phoenix  
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Attorneys for Appellant

W I N T H R O P, Chief Judge

¶1 Rummie Sherrill appeals his conviction for resisting arrest, a class 6 undesignated felony. Sherrill contends there

was insufficient evidence to support the jury's verdict and that the trial court erred in instructing the jury. For reasons that follow, we affirm.

¶2           Around 2:00 a.m. on January 1, 2010, two sheriff's deputies responded to a report of domestic violence at Sherrill's residence. The deputies encountered Sherrill's daughter outside. The daughter had redness and swelling on her face and scratches on her upper chest, forearm and wrists. After speaking with Sherrill and other family members, the deputies determined that they had probable cause to arrest Sherrill for assaulting the daughter.

¶3           When advised he was under arrest, Sherrill initially placed his arms behind his back as requested by the deputies. After a handcuff was placed on his left wrist, however, Sherrill pulled his right arm away. One deputy grabbed Sherrill's right arm while the other deputy held onto his left arm to avoid being hit with the attached handcuffs. As the deputies attempted to force his arms behind his back, Sherrill began moving toward the doorway and kitchen area, pulling the deputies with him as they held onto his arms. When Sherrill failed to comply with multiple commands to stop resisting, the deputy holding Sherrill's left arm warned Sherrill that he would use a taser unless he stopped.

¶14 Sherrill continued moving toward the kitchen while attempting to pull his arms away from the deputies. The deputy holding Sherrill's left arm placed his taser against Sherrill's back and "drive stunned" him.<sup>1</sup> Sherrill fell to his knees while the deputies were still holding onto his arms. The taser was used two more times against Sherrill's back before the deputies were able to subdue him.

¶15 The State charged Sherrill with resisting arrest, a class 6 felony, and assault on the daughter, a class 1 misdemeanor and domestic-violence offense. At time of trial, the daughter could not be located, and Sherrill was later acquitted of assault, but convicted of resisting arrest. The trial court suspended imposition of sentence and placed Sherrill on unsupervised probation for a period of one year, leaving the conviction undesignated.

¶16 Sherrill timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031 and -4033 (West 2012).<sup>2</sup>

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<sup>1</sup> "Drive stun" refers to the technique of applying the taser's electrodes directly to the body rather than by firing probes from a distance.

<sup>2</sup> We cite the current version of the applicable statutes when no material changes have occurred since the date of an alleged offense.

## DISCUSSION

¶17 Sherrill first argues that there was insufficient evidence to support his conviction. Specifically, he contends there was no evidence that he used physical force against the deputies or created a substantial risk of physical injury to them. We disagree.

¶18 A judgment of acquittal should be entered "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). "Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). We review a claim of insufficient evidence *de novo*, viewing the evidence in a light most favorable to upholding the verdict. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). If reasonable minds could differ as to whether the evidence proves the elements of the offense, a motion for acquittal should not be granted. *Id.*

¶19 The offense of resisting arrest is defined as follows:

A person commits resisting arrest by intentionally preventing or attempting to prevent . . . 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.

Ariz. Rev. Stat. § 13-2508(A).

¶10 Sherrill contends that his actions did not violate either subsection (1) or (2) of A.R.S. § 13-2508(A). He contends the evidence established that he merely avoided arrest by tensing his arms and moving forward a few steps while the deputies were attempting to handcuff him. The evidence is sufficient to support a finding of guilt based on "a substantial risk of causing physical injury" to the deputies under subsection (A)(2).

¶11 The deputy who started to handcuff Sherrill testified that after he placed the handcuffs on Sherrill's left wrist, Sherrill attempted to pull his left arm free from the deputy's grip. The deputy further testified that this situation created an extreme danger because if Sherrill had been successful in pulling his left arm free, the dangling handcuffs attached to his wrist could have flung around like a weapon and caused injury to the deputies or anyone else in the area. Indeed, the deputy explained how he had been struck before in a similar manner, resulting in an injury to the back of his neck that required surgery.

¶12 On this record, the jury could reasonably find that Sherrill's actions created a substantial risk of physical injury

to the deputies, in violation of A.R.S. § 13-2508(A)(2). See *State v. Mitchell*, 204 Ariz. 216, 219, ¶ 16, 62 P.3d 616, 619 (App. 2003) (noting the purpose of criminalizing physical resistance to an arrest is to protect from substantial risk of physical injury); see e.g., *State v. Cagle*, 228 Ariz. 374, 379, 266 P.3d 1070, 1075 (App. 2011) (concluding defendant violated A.R.S. § 13-2508(A)(2) because he pulled his arm back, stiffened his body and braced himself in the car to avoid arrest and continued to struggle with officers near oncoming traffic as they pulled him from the car and attempted to handcuff him); *State v. Barr*, 183 Ariz. 434, 439, 904 P.2d 1258, 1263 (App. 1995) (holding proof of "substantial risk of causing physical injury" element established in part by evidence that defendant was holding portable phone, which officer feared could be used as a weapon, while jerking his arms back and forth to resist being handcuffed). Because the trial court did not err in denying Sherrill's motion for judgment of acquittal under A.R.S. § 13-2508(A)(2), we need not determine whether there was sufficient evidence to sustain a conviction under A.R.S. § 13-2508(A)(1).

¶13 Sherrill next argues that the trial court committed fundamental error by failing to further instruct the jury on "physical force" when the jury specifically requested such an instruction during deliberations. The fatal flaw in Sherrill's

argument is that his counsel expressly requested the trial court to respond that the jury should refer to the instructions and definitions previously given. "It is well settled that a defendant who invited error at trial may not assign the same as error on appeal." *State v. Endreson*, 109 Ariz. 117, 122, 506 P.2d 248, 253 (1973). Claims of fundamental error are not excluded from this rule, "for doing so would run counter to the purposes of the invited error doctrine." *State v. Logan*, 200 Ariz. 564, 565, ¶ 9, 30 P.3d 631, 632 (2001); see also *State v. Diaz*, 168 Ariz. 363, 365, 813 P.2d 728, 730 (1991) (noting "equity favors the application of the usual rule of invited error rather than the exceptional rule of fundamental error").

¶14 Finally, Sherrill argues that the trial court erred by refusing his request for a *Willits* instruction. See *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964). A *Willits* instruction tells jurors that they may draw an inference from the State's loss or destruction of material evidence that the evidence would have been unfavorable to the State. *State v. Fulminante*, 193 Ariz. 485, 503, ¶ 62, 975 P.2d 75, 93 (1999). We review the refusal to give a *Willits* instruction for an abuse of discretion. *State v. Speer*, 221 Ariz. 449, 457, ¶ 39, 212 P.3d 787, 795 (2009).

¶15 Prior to trial, Sherrill requested a *Willits* instruction based on the alleged failure of the sheriff's

department to preserve a video recorded by a camera attached to the taser. Sherrill asserted that the taser video would have exonerated him by showing that he did not resist arrest. The State opposed the request arguing that there is no evidence the video ever existed, and even assuming it did, its materiality and the allegation that it would be exculpatory were entirely speculative. The trial court agreed and denied Sherrill's request.

¶16 "To be entitled to a *Willits* instruction, a defendant must prove that (1) the state failed to preserve material and reasonably accessible evidence that had a tendency to exonerate the accused, and (2) there was resulting prejudice." *State v. Reffitt*, 145 Ariz. 452, 461, 702 P.2d 681, 690 (1985). A *Willits* instruction is not required when the defendant fails to establish that the evidence at issue would have some tendency to exonerate him. *State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995).

¶17 Here, Sherrill failed to prove the video contained material evidence that had a tendency to exonerate him. As the deputy explained in his trial testimony, the taser was used to "drive stun" Sherrill by touching it against his back rather than by standing away from him and shooting electrical probes. In other words, it was deployed in close contact with Sherrill,



which would make it unlikely that any video recording would show the actions of either the deputies or Sherrill.

¶118 In addition, Sherrill asserts in his opening brief that the taser's camera is activated when the safety feature is taken off, but he presents no evidence of when this occurred. Absent evidence to the contrary, we presume the safety would not have been released until moments before the deputy "drive stunned" Sherrill, which the deputies testified occurred only after he had resisted their efforts to handcuff him.

¶119 On this record, it was speculative as to whether any such video recording would have shown exculpatory evidence. Accordingly, the trial court did not abuse its discretion in ruling that Sherrill was not entitled to a *Willits* instruction. See *State v. Dunlap*, 187 Ariz. 441, 464, 930 P.2d 518, 541 (App. 1996) (holding defendant not entitled to *Willits* instruction when claim that lost or destroyed evidence is exculpatory is "entirely speculative").

¶120 For the same reasons, we reject Sherrill's claim that the trial court erred in precluding testimony regarding the possible video component of the taser. The trial court has discretion to preclude evidence, even though relevant, "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Ariz. R. Evid. 403. The trial court is granted

discretion in deciding whether to preclude evidence under this rule because it is best situated to conduct the balancing test and determine the possible effects of the evidence on the jurors. *State v. Canez*, 202 Ariz. 133, 153, ¶ 61, 42 P.3d 564, 584 (2002). Given the lack of showing that a taser video would actually depict anything of consequence, the trial court could reasonably find that having evidence regarding it injected into the trial could cause undue confusion of the issues and mislead the jury. *State v. Dann*, 205 Ariz. 557, 569, ¶ 39, 74 P.3d 231, 243 (2003).

**CONCLUSION**

¶21 We hold that there was sufficient evidence to support Sherrill's conviction for resisting arrest. We further hold that the trial court did not abuse its discretion in instructing the jury or denying Sherrill's request for a *Willits* instruction. We affirm the conviction and disposition.

/S/  
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LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

/S/  
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DIANE M. JOHNSEN, Presiding Judge

/S/  
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DONN KESSLER, Judge