DIVISION ONE
FILED: 02/28/2012
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 11-0322
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
ALEJANDRO MARTIN VALDEZ,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Coconino County

Cause No. S0300CR2010-00441

The Honorable Jacqueline Hatch, Judge

CONVICTION AFFIRMED; SENTENCE AFFIRMED AS MODIFIED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
And Barbara A. Bailey, Assistant Attorney General
Attorneys for Appellee

Coconino County Public Defender — Flagstaff
By H. Allen Gerhardt, Jr.
Attorney for Appellant

B R O W N, Judge

¶1 Alejandro Martin Valdez appeals from his conviction and sentence for resisting arrest. He challenges the

sufficiency of the evidence and requests that the sentencing order be corrected to properly reflect his presentence incarceration credit. For the following reasons, we affirm Valdez's conviction and sentence, but modify the court's sentencing order.

BACKGROUND[1]

¶2 On the evening of May 21, 2010, Officer Candelaria, an off-duty Flagstaff Police Officer, was shopping at a Walmart store when he recognized Valdez. Candelaria knew a warrant had been issued for Valdez's arrest and he was thought to be armed. Candelaria called the patrol supervisor, and approximately twelve officers from multiple agencies were dispatched to the store. Because they thought Valdez was armed, the officers decided to arrest him after he exited the store.

¶3 Valdez walked out of the store pushing a shopping cart. As he walked on the sidewalk, three officers pulled up behind him in an unmarked vehicle. Officers Taylor and Condon, who were in full uniform, exited the vehicle. Taylor stated loudly, "Hey, police. We need to talk to you." Valdez turned and made eye contact with the officers. Taylor stated, "You're under arrest," but Valdez took off running. Taylor and Condon

[1] We view the evidence in the light most favorable to sustaining the conviction and resolve all conflicts against Valdez. *See State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998).

chased Valdez as he ran through the parking lot and weaved between cars. Valdez ran into the path of a car backing up in the parking lot. The car nearly hit Condon. Taylor kept yelling at Valdez to stop, but he did not comply. Another car came within a foot of hitting Taylor. Valdez turned and ran back towards the front of the store and Condon tackled him as he neared the sidewalk. Condon ordered Valdez to stop resisting and to put his hands behind his back.

¶4 Valdez was charged with resisting arrest, a class 6 felony, pursuant to Arizona Revised Statutes ("A.R.S.") section 13-2508(A)(2) (2010).[2] At the close of the State's case, Valdez moved for a judgment of acquittal, which the trial court denied. A jury found Valdez guilty as charged, and the trial court

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[2] The statute provides in pertinent part as follows:

> 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).

sentenced him to 3.75 years' imprisonment, with credit for time served.[3] Valdez timely appealed.

DISCUSSION

¶5 Valdez argues that the trial court erred in denying his motion for judgment of acquittal. A judgment of acquittal is appropriate only "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990) (citation omitted). In reviewing the sufficiency of the evidence, we view the facts in the light most favorable to upholding the jury's verdict, and resolve all conflicts in the evidence against the defendant. *State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

[3] The sentencing minute entry granted Valdez credit for "three hundred forty-seven (247) days of pre-sentence incarceration." The transcript, however, reflects the trial court's intent to give Valdez credit for 347 days. The State agrees the reference in the minute entry to 247 days was a typographical error. In this decision, we order the minute entry amended to correct the discrepancy. *See State v. Stevens*, 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992) (correcting sentencing error without a remand to the trial court).

reasonable doubt." *State v. West*, 226 Ariz. 559, 562, ¶ 16, 250 P.3d 1188, 1191 (2011) (internal quotations and citation omitted). We review de novo the trial court's denial of a Rule 20 motion. *Id.* at ¶ 15.

¶6 To convict Valdez of the charge against him, the State was required to prove he intentionally prevented or attempted to prevent a police officer from arresting him by using any means other than physical force to "creat[e] a substantial risk of causing physical injury to the peace officer or another." A.R.S. § 13-2508(A).

¶7 At trial, Valdez did not dispute that he knew Taylor and Condon were peace officers acting under official authority in attempting to arrest him. Instead, he argued that he merely avoided arrest and that he did not create a substantial risk of causing physical injury to anyone in doing so.

¶8 On appeal, Valdez asserts that *State v. Barker*, 227 Ariz. 89, 253 P.3d 286 (App. 2011), is "dispositive of the issue presented." He challenges the notion that the conduct necessary to satisfy the "effecting an arrest" element of resisting arrest started when the officers told him he was under arrest.

¶9 In *Barker*, which involved an appeal of a conviction under A.R.S. § 13-2508(A)(1), the defendant argued he could not have resisted arrest because the officer failed to state he was under arrest and initially intended only to detain him. *Id.* at

___, ¶ 9, 253 P.3d at 287. Relying on *State v. Mitchell*, 204 Ariz. 216, 62 P.3d 616 (App. 2003), we noted that "[e]ffecting an arrest has been construed to mean an ongoing process toward achieving, producing, making, or bringing about, an arrest." *Barker*, 227 Ariz. at ___, ¶ 8, 253 P.3d at 287 (internal quotations and citation omitted). We also recognized that "[a]lthough an arrest may not be complete until a defendant is actually restrained, the resisting arrest statute is violated if a person prevents or attempts to prevent an officer from 'effecting an arrest.'" *Id.* at ¶ 7 (citing *Mitchell*, 204 Ariz. at 218, ¶ 12, 62 P.3d at 618).

¶10 Valdez does not dispute that an officer specifically told him he was under arrest before he fled from the officers. Instead, he asserts that unlike the physical contact we found sufficient in *Barker*, an oral communication from fifteen feet away that he was under arrest does not satisfy the "effecting an arrest" prong. However, the resisting arrest statute does not specify any particular conduct required on the part of an officer for effecting an arrest. Moreover, Valdez cites no authority, nor are we aware of any, stating that the process of effecting an arrest does not start when the police announce to a person, "you're under arrest."

¶11 Valdez also relies on *State v. Womack*, 174 Ariz. 108, 847 P.2d 609 (App. 1992), contending that fleeing before an

arrest has been effectuated does not constitute resisting arrest. However, *Womack* is not controlling here. In *Womack*, the defendant was driving a motorcycle without a taillight. *Id.* at 110, 847 P.2d at 611. When an officer attempted to stop the motorcycle, the defendant looked back at the officer and increased his speed. *Id.* The officer activated his emergency lights and siren, and the defendant fled at high speed through a residential district. *Id.* Several miles later, the officer arrested the defendant "without further incident." *Id.* In concluding that mere flight does not constitute resisting arrest, we stated, "[w]e find it difficult to see how defendant's initial flight could be characterized as resisting arrest, since *no arrest was being attempted*." *Id.* at 114, 847 P.2d at 615 (emphasis added).

¶12 In contrast to *Womack*, the officers here were attempting to arrest Valdez, and they clearly communicated their intent to arrest Valdez before he fled. Taylor and Condon were both in full uniform, and Taylor stated, "Hey, police. Stop." Valdez looked directly at Taylor, who then stated, "You're under arrest." At that point, Valdez took off running. But unlike in *Womack*, the process of effecting his arrest had already begun when Valdez fled. *See Barker*, 227 Ariz. at ___, ¶ 8, 253 P.3d at 287 ("[E]ffecting an arrest has been construed to mean an ongoing process toward achieving, producing, making, or bringing

about, an arrest." (internal quotations and citation omitted)). Viewed in a light most favorable to sustaining the verdict, a reasonable juror could have concluded Valdez's conduct constituted resisting arrest under A.R.S. § 13-2508(A).

¶13 Finally, Valdez argues that he did not create a substantial risk of causing physical injury as required by A.R.S. § 13-2508(A)(2) when he ran through the parking lot. In *Womack*, we concluded that while the chase took place at high speed in a residential neighborhood, the record was "devoid of the required specific facts amounting to strong evidence that the officer or another experienced a substantial risk of physical injury as required by the statute." 174 Ariz. at 114, 847 P.2d at 615. Unlike the situation in *Womack*, however, the State here presented specific facts from which a reasonable juror could conclude Valdez's conduct created a substantial risk of causing physical injury to the officers seeking to arrest him. Condon and Taylor both testified that the parking lot was busy that night with vehicles and pedestrians and that Valdez ran across lanes of traffic and between parked cars as they chased him. Taylor testified that a car preparing to back up came within a foot of him. Condon also testified that he was nearly hit by a car while in pursuit. Surveillance video, which was played extensively for the jury and referenced by both sides in closing argument, is consistent with the officers' testimony,

showing Valdez running in the path of a minivan backing up, which required the officers to swerve around the vehicle. The video also shows Valdez running between moving cars shortly before Condon tackled him.

¶14 Accordingly, we conclude there was sufficient evidence from which a reasonable juror could have found Valdez created a substantial risk of injury to the officers or himself by running through the crowded parking lot. *Cf. State v. Cagle*, 228 Ariz. 374, ___, ¶¶ 1, 3, 226 P.3d, 1070, 1071 (App. 2011) (defendant's efforts to resist arrest required cars on highway to swerve to avoid hitting officers, creating a substantial risk of injury); *State v. Barr*, 183 Ariz. 434, 439, 904 P.2d 1258, 1263 (App. 1995) (finding that defendant created substantial risk of injury where he locked his arms in front of him and jerked back and forth when officers attempted to handcuff him, held a cell phone which one officer feared could be used as a weapon, and kicked one officer in the thigh after he and the officers fell to the floor).

CONCLUSION

¶15 Because sufficient evidence exists in the record supporting Valdez's conviction, we affirm. In addition, we affirm the resulting sentence but we correct the sentencing order to reflect that Valdez was awarded 347 days of presentence incarceration credit.

/s/
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MICHAEL J. BROWN, Judge

CONCURRING:

/s/
_____
DIANE M. JOHNSEN, Presiding Judge

/s/
_____
DONN KESSLER, Judge