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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ISRAEL YSEA, Appellant.	2 CA-CR 2011-0112 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR201000676

Honorable James L. Conlogue, Judge

AFFIRMED

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H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Israel Ysea was convicted of resisting arrest and sentenced to a presumptive prison term of one year. On appeal, Ysea argues that his

conviction was not supported by sufficient evidence and that he was convicted of a duplicitous charge. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the verdicts. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). A police officer attempted to pull over a car driven by Ysea on suspicion that he was driving without a license. Although the officer had activated his vehicle's lights and siren, Ysea did not pull over and instead increased his speed and the officer lost sight of the vehicle. Another officer discovered the car parked and saw Ysea walk from the car toward a house. The officer, with his weapon drawn, identified himself as a police officer and commanded Ysea to stop. Ysea did not stop and the officer continued to order Ysea to stop and show his hands. Other officers arrived, tried to handcuff Ysea, but "had to take him to the ground." The officers began to put Ysea in handcuffs but he "wouldn't give [them] his right hand" and "tr[ied] to get away" by pulling away and stiffening up. After the officers had handcuffed him, Ysea began to struggle again and "went down to the ground a second time." The officers then put leg irons on him.

¶3 Ysea was indicted for unlawful flight from a pursuing law enforcement vehicle, resisting arrest, and aggravated assault. The trial court dismissed the aggravated assault charge on the prosecution's motion before trial. The jury found Ysea guilty of resisting arrest but could not reach a verdict on the unlawful flight charge and declared a mistrial on that count. Ysea was sentenced as described, and this appeal followed.

Sufficiency of the Evidence

¶4 Ysea first contends insufficient evidence supported his conviction, because there was not sufficient evidence that the officers intended to arrest him.[1] We examine the sufficiency of the evidence to determine whether substantial evidence supports the jury's verdict. *State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 913 (2005).

¶5 "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). Substantial evidence "may be either circumstantial or direct." *State v. Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d 455, 458 (App. 2003). We will reverse a conviction "only if 'there is a complete absence of probative facts to support [the jury's] conclusion.'" *State v. Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d 391, 394 (App. 2000), *quoting State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988).

¶6 Section 13-2508, A.R.S., defines resisting arrest as "intentionally preventing or attempting to prevent a person reasonably known to him to be a peace officer . . . from effecting an arrest by . . . [u]sing or threatening to use physical force against the police officer or another." An officer makes an arrest by "an actual restraint of the person to be arrested, or by [the arrestee's] submission to the custody of the person

[1]In his opening brief, Ysea appears to assert that the resisting arrest statute requires he have known the officer intended to arrest him and there was insufficient evidence of this element. However, in his reply brief Ysea clarifies that he only contests the sufficiency of the evidence showing that "the arresting officer must have the intent to *effect an arrest* [and t]hat is the element missing in Mr. Ysea's case."

making the arrest." A.R.S. § 13-3881(A); *see also State v. Barker*, 227 Ariz. 89, ¶¶ 12-13, 253 P.3d 286, 288 (App. 2011) (sufficient evidence officers effecting arrest when defendant "grabbed, pushed over, wrestled with, and shot with a Taser by uniformed officers trying to handcuff him"). An arrest may occur over a period of time or may occur during handcuffing or another brief event. *State v. Mitchell*, 204 Ariz. 216, ¶ 13, 62 P.3d 616, 618 (App. 2003). And the jury may infer a person's intent "from the circumstances of the doing of the act itself." *State v. Ontiveros*, 206 Ariz. 539, n.2, 81 P.3d 330, 334 n.2 (App. 2003).

¶7 Here, the indictment charged Ysea with resisting the arrest effectuated by Officer Paul Barco. Barco did not testify at trial. The first officer to encounter Ysea outside of his car testified that, when he arrived, "an arrest was imminent." The officer drew his weapon, yelled that he was a police officer, and ordered Ysea to stop. Ysea continued walking and ignored the officer's commands. The officer continued yelling for Ysea to stop, show his hands, and put his hands on a wall.

¶8 At that point, Barco and another officer arrived. They "immediately went to help [the first officer] restrain" Ysea by trying to "grab a hold of him to handcuff him." The two officers "had to take him to the ground" to get handcuffs on him and then had to "place[] him on the trunk of the vehicle, because he was still thrashing about." While the officers were struggling with Ysea, Barco suggested they "just tase him, tase him," at which point Ysea began to comply. The officer with Barco testified that the two had used force on Ysea because they were trying to arrest him. A reasonable jury could have

concluded that Barco intended to make an arrest, i.e. actually restrain Ysea, based on the evidence that he tried to handcuff Ysea, helped take him to the ground in order to do so, put him against the police car and discussed tasing him in order to subdue him. *See* § 13-3881; *Spears*, 184 Ariz. at 290, 908 P.2d at 1075; *Barker*, 227 Ariz. 89, ¶¶ 12-13, 253 P.3d at 288.

¶9 Ysea appears to rely on *State v. Blackmore*, 186 Ariz. 630, 925 P.2d 1347 (1996), and *State v. Saez*, 173 Ariz. 624, 845 P.2d 1119 (App. 1992), for the proposition that he had been stopped rather than arrested. However, the charge of resisting arrest requires substantial evidence that the officers intended to arrest Ysea by actually restraining him, rather than analyzing when a "detention exceed[s] the permissible scope of a *Terry* stop and bec[omes] an illegal defacto arrest." *Blackmore*, 186 Ariz. at 633, 925 P.2d at 1350; *see Saez*, 173 Ariz. at 627, 845 P.2d at 1122. Therefore, neither *Blackmore* nor *Saez* are applicable here.

¶10 Ysea also argues that "Barco's intent is unknown because he did not testify." However, the jury had substantial evidence of Barco's intent based on his actions and reasonably could conclude he had intended to arrest Ysea. *See Ontiveros*, 206 Ariz. 539, n.2, 81 P.3d at 334 n.2.

Duplicitous Charge

¶11 Ysea next contends the trial court erred by "permitting [him] to be convicted on a duplicitous charge." He suggests the charge was duplicitous because

Barco was the named victim of the offense, yet the state introduced evidence of Ysea's using or threatening to use force against other officers.

¶12 Ysea concedes he did not object on this basis in the trial court. Ysea therefore has forfeited the right to seek relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object to alleged error in trial court results in forfeiture of review for all but fundamental error). Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Id.* ¶ 19, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). The defendant has the burden to show both that the error was fundamental and that it caused him prejudice. *Id.* ¶¶ 19-20.

¶13 A duplicitous charge occurs when an indictment charges only one criminal act, but evidence of multiple acts is introduced. *State v. Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d 844, 847 (App. 2008). However, the trial court is not required to engage in "curative measures" if "all the separate acts . . . are part of a single criminal transaction." *Id.* ¶ 15. The acts are part of a single transaction if "there is no reasonable basis for distinguishing between the acts" and the defendant does not offer different defenses to the acts. *Id.* ¶¶ 25, 32-33.

¶14 Section 13-2508, A.R.S., provides that a person commits resisting arrest by attempting to prevent an 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." The indictment charged Ysea with resisting arrest by attempting to prevent Barco "from effecting an arrest by using or threatening to use physical force against a peace officer or another" and cited § 13-2508 generally.[2] The verdict form used the same language but did not cite the statute.

¶15 Here, Ysea contends that the state introduced "no less than five instances (acts) of use or threatened use of physical force on [his] part against different officers." However, Ysea does not identify the instances or acts but merely states they were "set forth above." We presume he is relying generally on his statement of facts, but we cannot identify what evidence constitutes the five instances or acts to which he refers. But all the evidence of force or threat of force occurred between the time Barco arrived at the scene and the time the officers subdued Ysea as part of a continuous interaction between Ysea and the officers. And at trial Ysea argued generally that the officers were lying or inaccurate in their testimony and that he simply was defending himself from injury. Because Ysea asserted the same defense to any use or threat of physical force

[2]Ysea notes that the statute requires force against "the peace officer or another" while the indictment charged him with force against "a peace officer or another." But Ysea argues that when the trial court ruled Barco was a victim, it amended the indictment such that Barco "was the individual against whom physical force was threatened or used." Ysea does not contend he had insufficient notice of the charge against him. *See State v. Freeney*, 223 Ariz. 110, ¶ 11, 219 P.3d 1039, 1041 (2009) (technical defects in indictment may be amended when no change to nature of offense charged or prejudice to defendant). Because we find the court was not required to engage in curative measures even if the indictment limited the force to be against Barco, we need not decide whether the court "necessarily ruled" to amend the indictment.

against the officers and there is no other reasonable basis for distinguishing between the acts, the trial court did not err. *See Klokic*, 219 Ariz. 241, ¶¶ 25, 32-33, 196 P.3d at 849-51.

¶16 Ysea further contends the trial court erred by instructing the jury under subsection (A)(1) and (A)(2) when the indictment only included language from (A)(1). He asserts this led to "the possibility of [a] non-unanimous jury verdict[]." The jury instructions included as an element of resisting arrest that "[t]he means used by the defendant to prevent the arrest involved either the use or threat to use physical force or any other substantial risk of physical injury to either the peace officer or another." But, the verdict form did not include the improper element. And incorrect jury instructions do not improperly amend the indictment, such that Ysea could have been found guilty under either (A)(1) or (A)(2), when the verdict form conforms to the indictment.[3] *See State v. Rivera*, 226 Ariz. 325, ¶ 7, 247 P.3d 560, 563 (App. 2011); *State v. Rybolt*, 133 Ariz. 276, 279-80, 650 P.2d 1258, 1261-62 (App. 1982), *overruled on other grounds by State v. Diaz*, 142 Ariz. 119, 688 P.2d 1011 (1984). Therefore, the jury found Ysea guilty only under (A)(1) and there existed no possibility of a non-unanimous jury verdict. *See Klokic*, 219 Ariz. 241, ¶¶ 32-33, 196 P.3d at 851.

[3]Although Ysea argues based on *State v. Freeney*, 223 Ariz. 110, 219 P.3d 1039 (2009), that the two subsections of § 13-2508(A) create separate crimes, we need not reach that issue here, because incorrect jury instructions do not amend a correct indictment. *See State v. Rivera*, 226 Ariz. 325, ¶ 7, 247 P.3d 560, 563 (App. 2011).

Conclusion

¶17 For the foregoing reasons, we affirm Ysea's conviction and sentence.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge