

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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STATE OF ARIZONA, *Appellee*,

*v.*

GORDON J. FRANCISCO, *Appellant*.

No. 1 CA-CR 19-0228  
FILED 5-5-2020

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Appeal from the Superior Court in Maricopa County  
No. CR2018-147772-001  
The Honorable William R. Wingard, Judge *Pro Tempore*

**AFFIRMED**

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COUNSEL

Arizona Attorney General's Office, Phoenix  
By Brian R. Coffman  
*Counsel for Appellee*

Maricopa County Public Defender's Office, Phoenix  
By Robert W. Doyle  
*Counsel for Appellant*

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**OPINION**

Judge Diane M. Johnsen delivered the opinion of the Court, in which Presiding Judge Samuel A. Thumma and Judge Randall M. Howe joined.<sup>1</sup>

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**J O H N S E N**, Judge:

¶1 A jury found Gordon Francisco guilty of aggravated assault under Arizona Revised Statutes ("A.R.S.") section 13-1204(A)(2) (2020), for hitting a man with a miniature souvenir baseball bat.<sup>2</sup> Francisco argues his conviction should be overturned because the statute defining "[d]angerous instrument," A.R.S. § 13-105(12) (2020), is unconstitutionally vague. We hold the statute is not impermissibly vague and therefore affirm Francisco's convictions.

**FACTS AND PROCEDURAL BACKGROUND**

¶2 Francisco and the victim were talking in a Tempe park when Francisco, unprovoked, suddenly rushed at the other man with an 18-inch wood baseball bat weighing just under half a pound.<sup>3</sup> He swung at the victim two or three times and made contact once, opening up a two-inch gash above the victim's left eye. After police officers apprehended Francisco, he spat on one of the officer's pants.

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<sup>1</sup> Judge Johnsen was a sitting member of this court when the matter was assigned to this panel of the court. She retired effective February 29, 2020. In accordance with the authority granted by Article 6, Section 3, of the Arizona Constitution and pursuant to A.R.S. § 12-145, the Chief Justice of the Arizona Supreme Court has designated Judge Johnsen as a judge pro tempore in the Court of Appeals, Division One, for the purpose of participating in the resolution of cases assigned to this panel during her term in office.

<sup>2</sup> Absent material revision after the date of an alleged offense, we cite the current version of a statute or rule.

<sup>3</sup> We recite the evidence in the light most favorable to sustaining the jury's verdicts. *State v. Nelson*, 214 Ariz. 196, 196, ¶ 2 (App. 2007).

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¶3 The State indicted Francisco on two counts of aggravated assault, the first for the assault with the bat, charged as a Class 3 felony under A.R.S. §§ 13-1203(A)(1) (2020) and -1204(A)(2) (causing physical injury through use of a deadly weapon or dangerous instrument); the second for spitting on the officer, charged as a Class 5 felony under §§ 13-1203(A)(3) and -1204(A)(8)(a) (touching a peace officer with the intent to injure, insult or provoke). At trial, the State argued the bat as Francisco wielded it was a dangerous instrument, and the jury convicted him of both charges. The superior court sentenced Francisco as a category-three repetitive offender to concurrent presumptive prison terms, the longer of which is 11.25 years.

¶4 We have jurisdiction to consider Francisco's timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2020), 13-4031 (2020) and -4033(A)(1) (2020).

### DISCUSSION

¶5 Francisco does not challenge his conviction for spitting on the police officer but argues his conviction for assaulting the other victim with the souvenir bat should be reversed because the definition of "dangerous instrument" in § 13-105(12) is unconstitutionally vague. Although Francisco did not raise vagueness in the superior court, we have discretion to consider a vagueness challenge first raised on appeal. *See State v. Denson*, 241 Ariz. 6, 8, ¶ 7 (App. 2016).

#### A. Standing.

¶6 The State argues Francisco may not challenge § 13-105(12) as unconstitutionally vague because his use of the bat to commit the assault clearly fell within the statute. *See Parker v. Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."); *State v. Tocco*, 156 Ariz. 116, 119 (1988); *State v. Anderson*, 199 Ariz. 187, 191, ¶ 15 (App. 2000).

¶7 Francisco contends he has standing because his conduct fell "within the . . . ambiguous area" of the statute's reach. *See Tocco*, 156 Ariz. at 119. Moreover, some of his arguments imply a facial attack on § 13-105(12). A defendant who argues the statute of conviction is unconstitutionally vague on its face has standing to raise the issue on appeal. *State v. Burke*, 238 Ariz. 322, 326, ¶ 5 (App. 2015).

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**B. Vagueness.**

¶8 We review a statute's constitutionality *de novo*. *State v. George*, 233 Ariz. 400, 402, ¶ 6 (App. 2013). We likewise review questions of statutory interpretation *de novo*, looking first to the text of the statute. *State v. Burbey*, 243 Ariz. 145, 146-47, ¶¶ 5, 7 (2017). To determine the meaning of a particular provision, we consider "the context and related statutes on the same subject." *Nicaise v. Sundaram*, 245 Ariz. 566, 568, ¶ 11 (2019). If the meaning is clear, our analysis stops there; we resort to secondary interpretation methods only if the text is ambiguous. *Burbey*, 243 Ariz. at 147, ¶ 7. It is Francisco's burden to show the challenged law is unconstitutional. *State v. Kaiser*, 204 Ariz. 514, 517, ¶ 8 (App. 2003). Insofar as he challenges the facial validity of the statutory definition of "dangerous instrument," he "must establish that no set of circumstances exists under which the statute would be valid." *Denson*, 241 Ariz. at 9, ¶ 8 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)); *but see Johnson v. United States*, 135 S. Ct. 2551, 2561 (2015) (criticizing standard of "vague in all its applications" as tautological).

¶9 A criminal law violates one's right to due process if it is "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Id.* at 2556; *see also State v. Cota*, 99 Ariz. 233, 236 (1965) ("A statute denies due process of law if it forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.").

¶10 Contrary to Francisco's contention, the statute's text is clear and satisfies constitutional requirements for purposes of notice and enforcement. "'Dangerous instrument' means anything that under the circumstances in which it is used, attempted to be used or threatened to be used is readily capable of causing death or serious physical injury." A.R.S. § 13-105(12). "'Serious physical injury' includes physical injury that creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb." A.R.S. § 13-105(39).

¶11 Read in context, § 13-105(12) fairly lets a person of ordinary intelligence know what conduct it covers – namely, use or threatened use of an item that, as wielded by the defendant on that particular occasion, readily could cause permanent or prolonged serious physical harm. "Due process requires neither perfect notice, absolute precision nor impossible

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standards. It requires only that the language of a statute convey a definite warning of the proscribed conduct." *Fuenning v. Superior Court*, 139 Ariz. 590, 598 (1983); *see also id.* (law is not vague "simply because it may be difficult for the public to determine how far they can go before they are in actual violation").

¶12 Francisco complains that the definition of "dangerous instrument" has the potential to sweep in "most household items." He contends the breadth of the definition, combined with the jury's role in deciding how to apply it, makes the statute susceptible to discriminatory and arbitrary enforcement. But the mere fact that a statute reaches broadly, or that it can be applied flexibly, does not render it impermissibly vague. *See State v. Coulter*, 236 Ariz. 270, 274-75, ¶ 9 (App. 2014) ("A statute is not vague simply because it is broad or that there may be difficulty in deciding whether certain marginal conduct falls within the scope of the statute.").

¶13 Here, the potential universe of "dangerous instruments" is made sufficiently definite by the requirement that dangerousness be determined in light of the particular circumstances on which the charge is based. *See Johnson*, 135 S. Ct. at 2561 (standard may survive vagueness challenge if it is defined in relation to the "conduct in which an individual defendant engages *on a particular occasion*"). "That there will be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense." *Cota*, 99 Ariz. at 236. Moreover, in considering the particular circumstances underlying the charge against Francisco, the jurors not only were required to consider how he used the bat, they also were required to determine whether he acted "[i]ntentionally, knowingly or recklessly" in causing "physical injury" to the victim. *See A.R.S. § 13-1203(A)(1)*; *see also Gonzales v. Carhart*, 550 U.S. 124, 149 (2007) ("[S]cienter requirements alleviate vagueness concerns.").

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**CONCLUSION**

¶14 Francisco fails to establish that the definition of "dangerous instrument" in A.R.S. § 13-105(12) is unconstitutionally vague, whether considered on its face or as applied to his particular conduct. His convictions and sentences therefore are affirmed.



AMY M. WOOD • Clerk of the Court  
FILED: AA