NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
***See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24**

DIVISION ONE
FILED: 07/24/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	1 CA-CR 11-0408
v.	DEPARTMENT C
JOHNNY ANGEL MAURO, Appellant.	**MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-116040-001DT

The Honorable Roger E. Brodman, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Joseph T. Maziarz, Division Chief Counsel
Criminal Appeals/Capital Litigation Section
and Matthew H. Binford, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Louise Stark, Deputy Public Defender
Attorneys for Appellant

N O R R I S, Judge

¶1 Johnny Angel Mauro timely appeals his conviction and sentence for resisting arrest. As we understand his briefing, Mauro argues the superior court should have declared a mistrial when it admitted statements he made to fire department personnel after police handcuffed him -- statements he characterizes as "irrelevant and overly prejudicial testimony." For the reasons set forth below, we disagree and affirm his conviction and sentence.

¶2 Mauro's resisting arrest charge arose out of an altercation in downtown Scottsdale. At trial, Mauro testified he did not ask for medical attention after the altercation, despite being tazed and bitten by a police dog, because he felt the police "were just going to hurt [him]." On the State's cross-examination, the following exchange occurred, which is the basis for this appeal:

> Q The fire department asked if you needed any medical treatment?
>
> A Yes.
>
> Q And your response was "fuck no"?
>
> A Yes.
>
> Q They asked if you wanted to go to the hospital; is that right?
>
> A Yes.

Q And your response was, “No, I want to sue you and your fucking family”?

A Yes.

Q The fire department hadn’t done anything to you that night, did they?

A No.

Q You don’t have a whole lot of respect for the police, do you?

A Of course I do.

Q You do? That night as the fire department was offering to treat you, didn’t you tell one of the officers, “You ain’t nobody, you’re just the doughnut-eating, coffee-drinking”?

Although Mauro did not object to the questions or testimony before the last question (collectively, the “treatment testimony”), immediately after the last question -- the “doughnut question” -- Mauro’s counsel objected and moved for a mistrial.

¶3 In moving for mistrial, Mauro’s counsel relied on the court’s resolution of a motion in limine he filed before trial which addressed the admissibility of the treatment testimony and doughnut question.[1] As reflected in the record, the superior court denied the motion in limine as moot based on the

[1]At trial, both the parties’ and the court’s recollection of the discussion regarding the motion in limine varied from what was actually discussed, undoubtedly because they did not have access to a transcript of the hearing.

prosecutor's assurances he would not use the statements in his case-in-chief.[2]

¶4 On appeal, Mauro argues the superior court should have granted a mistrial because admission of his statements to the fire department personnel was unduly prejudicial. We disagree and hold the superior court did not abuse its discretion in refusing to grant a mistrial. *See State v. Gallardo*, 225 Ariz. 560, 564, ¶ 6, 242 P.3d 159, 163 (2010) (appellate court reviews denial of mistrial motion for abuse of discretion).

¶5 First, the superior court properly admitted the treatment testimony. *See State v. Ellison*, 213 Ariz. 116, 126, ¶ 25, 140 P.3d 889, 909 (2006) (citations omitted) (appellate court reviews decision to admit defendant's testimony for abuse of discretion). Mauro opened the door to this line of questioning when, on direct examination, he testified he did not request medical treatment. Ariz. R. Evid. 404(a)(1) (while generally not admissible, character evidence may be allowed for rebuttal purposes). The testimony was also relevant to show motive and intent for the criminal charges he was facing -- resisting arrest and assault. Ariz. R. Evid. 404(b) (evidence

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[2]At the hearing on the motion in limine, the prosecutor said: "I don't even plan on asking the police officers about any statements that the defendant made. The only time I plan to get into any statements by the defendant, if it arises at trial, is to either to cross-examine the defense witnesses or impeach defense witnesses."

of other acts may be admissible to show motive or intent). Both the charges required the State to prove Mauro acted intentionally. *See* Arizona Revised Statutes §§ 13-1203(A)(2) (2010) (assault), -2508(A) (2010) (resisting arrest). Thus, the anger and hostility expressed in his answers was relevant to the charges.

¶6 Second, the superior court found the doughnut question inadmissible under Arizona Rule of Evidence 403 because it was "more prejudicial than probative." Although the court did not find the doughnut question mandated a mistrial, it took appropriate corrective action. It advised the jury it had sustained Mauro's counsel's objection to the doughnut question and struck the question from the record. It also emphasized to the jury:

> a question is not evidence. A question can be used only to give meaning to a witness's answer. And if a lawyer objects to a question and I do not allow the witness to answer, you must not try to guess what the answer might have been. You must also not treat the objection as evidence or guess the reason why the lawyer objected in the first place.

Given the superior court's detailed instructions to the jury, and in light of our supreme court's directive that, absent some evidence to the contrary, we are to presume jurors will follow instructions, *State v. Ramirez*, 178 Ariz. 116, 127, 871 P.2d 237, 248 (1994), the court did not abuse its discretion in

refusing to grant a mistrial. We therefore affirm Mauro’s conviction and sentence.

/s/
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/
DONN KESSLER, Judge

/s/
MICHAEL J. BROWN, Judge