NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

SAED DARRELL PENNINGTON, *Appellant*.

No. 1 CA-CR 18-0663
FILED: 11-19-2019

Appeal from the Superior Court in Maricopa County
No. CR2018-106140-001
The Honorable John Christian Rea, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Nicholas Chapman-Hushek
Counsel for Appellee

Maricopa Public Defender's Office, Phoenix
By Jesse Finn Turner
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Kenton D. Jones delivered the decision of the Court, in which Judge James B. Morse Jr. and Judge Diane M. Johnsen joined.

J O N E S, Judge:

¶1 Saed Pennington appeals his conviction and sentence for one count of resisting arrest. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Around 4:00 a.m. on February 2, 2018, Pennington called to a uniformed officer seated in a marked Phoenix Police Department patrol vehicle parked in a convenience store parking lot.[1] The officer exited the vehicle and, after observing Pennington behaving erratically, requested backup. A second officer arrived and, after discovering an outstanding warrant for Pennington's arrest, the two officers attempted to take him into custody. According to the officers, Pennington "violently pull[ed] away," ignored commands to "stop resisting," and moved approximately five feet away from the officers before they brought him to the ground and handcuffed him. The officers then found a white substance, later determined to be methamphetamine, in Pennington's pocket.

¶3 The State charged Pennington with one count each of aggravated assault upon a police officer, possession of a dangerous drug, and resisting arrest. At trial, Pennington, an African-American man, testified that he felt disoriented from a diabetic episode the morning of the incident, and the arrival of the second officer made him nervous in light of recent media reports of police brutality against African-Americans. Pennington admitted he was "trying to . . . do anything in [his] power to get away from the situation" because he was afraid for his life, but denied knowing about his outstanding warrant or that the officers were trying to arrest him.

[1] We view the facts in the light most favorable to upholding the verdict of guilt. *State v. Delahanty*, 226 Ariz. 502, 504, ¶ 1 n.2 (2011) (quoting *State v. Chappell*, 225 Ariz. 229, 233, ¶ 2 n.1 (2010)).

¶4 Regarding the charge of resisting arrest, the jury was instructed that:

> The crime of resisting arrest requires proof of: One, a peace officer acting under official authority sought to arrest either the defendant or some other person; and, two, the defendant knew or had reason to know that the person seeking to make the arrest was a police officer acting under color of such police officer's official authority; and, three, the defendant intentionally prevented or attempted to prevent the peace officer from making the arrest; and, the 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 police officer or another.
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> Whether the attempted arrest was legally justified is irrelevant.

Accord Ariz. Rev. Stat. (A.R.S.) § 13-2508(A).[2] In closing argument, Pennington's counsel argued the State had failed to prove the second element of resisting arrest — that "the defendant knew or had reason to know that the person seeking to make the arrest was a police officer acting under color of such police officer's official authority." Counsel emphasized:

> Now, [the officers] didn't say he had a warrant. They didn't say, you're under arrest. They didn't say, you committed a crime. They just grabbed him. Now, just because he has a blue uniform doesn't mean you have the ability just to grab people when you want to. He had no idea why this person was grabbing him. He was just grabbing him.

¶5 During deliberations, the jury asked the court to "better define 'acting under color' of such peace officer's authority." Over Pennington's objection, the trial court instructed the jury that "'acting under color' means that the police officer was acting with the authority of a police officer."

¶6 The jury convicted Pennington of resisting arrest, determined he had committed the offense while on community supervision, and acquitted him of the other charges. After finding Pennington had two prior

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[2] Absent material changes from the relevant date, we cite the current version of rules and statutes.

felony convictions, the trial court sentenced him as a non-dangerous, repetitive offender to the presumptive term of 3.75 years' imprisonment with credit for 222 days of presentence incarceration. Pennington timely appealed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A)(1).

DISCUSSION

¶7 Pennington argues the trial court abused its discretion and misstated the law in responding to the jury question regarding the definition of "acting under color." "Courts are [] given broad discretion in determining whether and how to respond to jury questions." *State v. Cheramie*, 217 Ariz. 212, 219, ¶ 21 (App. 2007), *vacated in part on other grounds*, 218 Ariz. 447 (2008); *see also* Ariz. R. Crim. P. 22.3(b)-(c) (authorizing the trial court to "further instruct the jury as appropriate" after providing notice to the parties). Whether jury instructions adequately reflect the law is a question of law reviewed *de novo*. *State v. Orendain*, 188 Ariz. 54, 56 (1997) (citing *United States v. Sterner*, 23 F.3d 250, 252 (9th Cir. 1994)). To warrant reversal, the defendant must prove both that the instruction was improper and that it caused him prejudice.[3] *See State v. Barr*, 183 Ariz. 434, 442 (App. 1995).

¶8 "[T]here is frequently more than one way to properly instruct a jury," and "[e]very correct statement of law . . . need not be included in an instruction." *State v. Rosas-Hernandez*, 202 Ariz. 212, 220, ¶ 35 (App. 2002). Thus, we need not consider the alternatives posed by Pennington; instead, we consider "whether the instructions[,] considered as a whole, sufficiently instructed the jury on the proper rule of law." *State v. Bridgeforth*, 156 Ariz. 60, 64-65 (1988) ("[A] particular instruction need not be given where others, actually given, adequately set forth the law.").

¶9 Relying upon *State v. Fontes*, 195 Ariz. 229 (App. 1998), Pennington argues the phrase "acting under color of such peace officer's

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[3] The State suggests Pennington waived all but fundamental error review because he only asked the trial court to forego further explanation rather than provide an alternative instruction. The record reflects that Pennington first objected to providing *any* further instruction, then separately objected to the court's proposed instruction. These objections gave the court ample opportunity to correct possible errors and were therefore sufficient to preserve the issues for appellate review. *See State v. Deschamps*, 105 Ariz. 530, 533 (1970) (citing *State v. Phillips*, 102 Ariz. 377, 382 (1967)).

official authority" has "generally been interpreted to mean acting in vindication of public right[s] and justice." In *Fontes*, the defendant argued he could not have been convicted of assaulting a police officer or resisting arrest because the officer attempting to arrest him was an off-duty sheriff's deputy, privately employed as a plainclothes security officer in a grocery store. *Id.* at 230-31, ¶¶ 2, 5. Ultimately, the *Fontes* court concluded that whether an off-duty officer is executing official duties, as opposed to serving a private employer, turned upon "whether the off-duty officer was 'acting in vindication of public right and justice or merely performing acts of service to a private employer.'" *Id.* at 231, ¶ 8 (quoting *State v. Kurtz*, 78 Ariz. 215, 218 (1954)). This holding does not purport to define the phrase "acting under color of authority," but rather, provides a standard for distinguishing between official acts and private acts. Accordingly, we do not find *Fontes* persuasive for the purpose offered.

¶10 As the trial court noted, "under color of" is an "archaic and not commonly known" phrase. This does not mean the phrase is complicated or requires an intricate parsing. "Color of authority" is defined simply as "[t]he appearance or presumption of authority sanctioning a public officer's actions," with that authority "deriv[ing] from the officer's apparent title to the office." *Black's Law Dictionary* (11th ed. 2019). Thus, "acting under the color of such peace officer's official authority" means that there is a connection between the conduct and the authority. *See Willingham v. Morgan*, 395 U.S. 402, 409 (1969) (explaining actions were made under "color of office" when they "derived solely from [the public officer's] official duties") (citing *Maryland v. Soper*, 270 U.S. 9, 33 (1926)). The court here accurately and adequately explained the necessary tie between the officer's conduct and the officer's duty by instructing the jury that a conviction required proof that "the police officer was acting with the authority of a police officer." We find no error.

¶11 Moreover, Pennington fails to prove prejudice from the trial court's response to the question. "Prejudice is a fact-intensive inquiry, the outcome of which will 'depend upon the type of error [alleged] and the facts of a particular case.'" *State v. Dickinson*, 233 Ariz. 527, 531, ¶ 13 (App. 2013) (quoting *State v. James*, 231 Ariz. 490, 494, ¶ 15 (App. 2013)). Error is harmless if we are convinced "beyond a reasonable doubt, that the error did not affect th[e] verdict." *State v. Rodriguez*, 192 Ariz. 58, 63, ¶ 27 (1998).

¶12 Pennington argues the trial court's response to the jury's question was prejudicial because it was inconsistent with the "prevalent theme" of his defense that "just because someone is wearing the blue uniform does not mean they are acting as a police officer." Indeed,

Pennington stressed both within his testimony and via counsel's argument that he did not know or have reason to know that the officers in question were acting within their official capacity — despite the fact that they were both in uniform and driving fully marked law enforcement vehicles — believing instead that he was going to become a victim of police brutality. But the offense of resisting arrest does not require proof that the defendant "reasonably know that the peace officer was acting under color of official authority." *In re Jessi W.*, 214 Ariz. 334, 337, ¶ 16 (App. 2007). The defendant need only know or have reason to know that the person effectuating the arrest is in fact a peace officer. *Id.* Thus, Pennington's evidence and argument regarding the officers' motives for detaining him are irrelevant.

¶13 Finally, the evidence of the officers' actual authority to arrest Pennington is overwhelming. *See State v. Leteve*, 237 Ariz. 516, 525, ¶ 26 (2015) (concluding trial error was harmless where there was overwhelming evidence to support the criminal element in question). Pennington does not dispute the existence of the outstanding warrant, the lawfulness of his arrest, or the officers' authority to act upon the warrant. Upon this record, we are convinced beyond a reasonable doubt that even an erroneous explanation of "acting under color" would not have affected the verdict. Thus, we find no prejudice.

CONCLUSION

¶14 Pennington's conviction and sentence are affirmed.

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