IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

FRANK ROBERT MONTOYA, *Appellant*.

No. 1 CA-CR 21-0414
FILED 7-19-2022

Appeal from the Superior Court in Yuma County
No. S1400CR202000664
The Honorable Roger A. Nelson, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Michael O'Toole
Counsel for Appellee

Yuma County Public Defender's Office, Yuma
By Robert J. Trebilcock
Counsel for Appellant

MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Cynthia J. Bailey and Judge D. Steven Williams joined.

S W A N N, Judge:

¶1 Frank Robert Montoya argues that his convictions and sentences should be vacated for two reasons: because the jury was not properly instructed, and because the prosecutor improperly asked him whether the state's witnesses were lying and then referenced his responses in closing argument. We perceive no reversible error in the jury instructions. And though we do not condone the prosecutor's questions and argument, on this record we cannot say that the conduct constituted reversible error. We therefore affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Montoya was indicted for multiple offenses related to an incident at a Walmart store in Yuma: two counts of aggravated assault causing physical injury to peace officers (class 4 felonies), one count of assault on Walmart employees (a class 2 misdemeanor), one count of resisting arrest (a class 6 felony), and one count of trespass (a class 2 misdemeanor). Montoya pled not guilty, and the matter proceeded to a combined trial with co-defendant Victoria Carranza.

¶3 At trial, the state notified the court that the aggravated assault counts should not have been charged as class 4 felonies because the officers did not suffer physical injury. Accordingly, at the close of the state's evidence, the court amended the indictment to conform to the evidence, reducing the aggravated assault counts to lesser-included class 5 felony aggravated assaults.

¶4 The state presented evidence of the following facts. In July 2020, this particular Walmart required all customers to wear face masks to mitigate transmission of COVID-19. On July 8, Montoya and Carranza entered the store maskless. According to a store manager, when she approached Montoya and asked why he was not wearing a mask, Montoya said that he was "above" the manager, made no claim of any medical issue, and kept walking. The manager and her supervisor followed Montoya and

Carranza through the store "like in a maze, everywhere" for approximately 10 to 15 minutes from six to seven feet away, repeatedly asking them to wear masks and asking them to leave more than a dozen times. Surveillance video confirmed that the workers followed Montoya and Carranza throughout the store, typically from a distance but coming at least close to the manager's estimated range at one point. Montoya and Carranza were "sometimes . . . just quiet," and sometimes Montoya "would say, like, little things" that the manager could not recall at the time of trial.

¶5 Eventually, Montoya turned toward the two workers, coughed in their direction, and said that he hoped they would get COVID. The manager then called 911. Though the manager testified that her intent was to get Montoya and Carranza removed and trespassed from the store, not to report an assault, she described the coughing to the 911 operator and testified that she was scared Montoya might have COVID. Montoya and Carranza went to the front of the store and made a purchase at a self-checkout station, ignoring the supervisor when she attempted to prevent them from completing the transaction.

¶6 Police officers A.L. and R.P. responded to the scene. A.L. was wearing civilian clothes under a ballistic vest with "POLICE" printed on the front and back, and his badge was clipped to his belt in a visible location. R.P. was in full patrol uniform. As the officers spoke with the manager at the front of the store, Montoya and Carranza began to exit. The officers approached the pair and asked to talk, but they kept walking and stated that they did not have to comply.

¶7 The officers followed Montoya and Carranza to a car in the parking lot. A.L. told Montoya that he was investigating a disturbance and asked for Montoya's name. Montoya refused, began yelling that he was being harassed because of his race, and opened the passenger-side door. A.L. pushed the door closed and told Montoya that he was not free to leave. Montoya "balled up his fist and he bowed his chest like he wanted to fight." A.L. instructed him to either calm down or be handcuffed, and Montoya responded that he would like to see the officer try. Montoya then again tried to open the car door, and A.L. tried to grab him. Montoya pushed A.L. with both hands, shoved R.P. when he came around the car, pulled away after the officers twisted his arm behind him and restrained him, and ran a short distance before turning toward the officers and assuming a fighting stance. A.L. and R.P., along with a newly arrived officer, again tried to grab Montoya but he again broke free, ran, and assumed a fighting stance before continuing to run. A fourth officer, A.M., caught up to Montoya, and Montoya again assumed a fighting stance. A.M. punched

Montoya in the face, and he was physically subdued and taken into custody.

¶8 For his case, Montoya testified that when he entered the store, he indicated to a greeter that he had a medical condition and reiterated that information when a different worker asked him where his mask was. He denied that he was ever told to put on a mask or to leave the store, and he denied that anyone followed him through the store. He also denied coughing on the manager and the supervisor. He stated that he felt "some tension" and "like uncomfortable" when the supervisor tried to prevent him from checking out, but he denied that she explained anything to him or asked him to leave the store. He stated that he never heard anyone tell him to stop or mention police as he was leaving the store. He stated that the first interaction he had with police was at his car door, when a man, whom he did not realize was a police officer, twisted his arm behind his back and asked him what he was doing. He stated that he "got slammed to the car," panicked, and ran because he was afraid of being harmed. He claimed that he kept asking the officers to explain their conduct but they did not answer.

¶9 On cross-examination, the prosecutor asked Montoya if the store manager "was . . . lying" when she testified that he did not inform her that he had a medical condition. When Montoya said yes, the prosecutor asked him "why" she was lying and "[w]hat reason would she have to lie," and he responded that he did not understand why. Then, after Montoya denied being followed through the store or told to wear a mask or leave the store, the prosecutor again asked him whether the manager "was lying," and he said yes. Later in the questioning, the prosecutor asked Montoya if two officers "lied" about having told him that he was being detained, and he said yes. The prosecutor then asked, "So my question was, yes or no, it's your testimony that the officers lied?" Montoya said yes. Finally, in sequence, the prosecutor asked whether it was Montoya's testimony that A.L., R.P., A.M., and "literally everybody" had "lied," and Montoya answered yes each time. The prosecutor then asked "Why? Why would they all lie? Do they know you?" Montoya stated that he did not think they knew him, and the prosecutor asked: "So at least five people randomly came together—your testimony is that at least five people who—so never knew you came together to lie about these—this incident?" Defendant responded that the situation was sad, that he did not understand why the witnesses were lying, and that it would be great if the reason for the lying could be pointed out. He queried whether it was because of his race or his disability.

¶10 In closing argument, the prosecutor told the jury that one of the things it had to decide was whether, "despite overwhelming video evidence, everyone—[the store manager] and three law enforcement officers—lied and the only people telling you the truth are the defendants." Describing the jury's duty to weigh witness credibility, the prosecutor asked, "What motive would have—would someone have to lie to you about what they heard or saw that day?" The prosecutor then stated that Montoya had testified that the state's witnesses "came together to harass him and his girlfriend and then lie about it to you," and said, "Ask yourselves, what benefit is there to [the store manager] and the officers to come together and harass two strangers at 10:44 a.m. at a busy Walmart? And what benefit do they receive from lying to you about it nearly a year later? The answer is there is none."

¶11 The court finalized the jury instructions with counsel. The court noted that an instruction on "physical injury" was not needed, and the state and Carranza's counsel agreed. Montoya's counsel said nothing. When the court asked whether it needed to give separate instructions for Montoya and Carranza, Montoya's counsel stated that he "would agree to one," and the state and Carranza's counsel agreed.

¶12 The court instructed the jury as follows regarding the two assault theories at issue:

> Aggravated assault. The crime of aggravated assault requires proof of the following: The defendant committed an assault and the assault was aggravated by at least one of the following factors: The defendant knew or had—had reason to know that the person assaulted was a peace officer.
>
> This is where your—that added instruction comes in that you have sitting there. It says, "Assault." Let's read the—the separate piece of paper first. The crime of assault requires proof that the defendant intentionally placed another person in reasonable apprehension of imminent physical injury.
>
> That instruction applies to a count in Mr. Montoya's indictment for misdemeanor assault regarding the store employees.
>
> Okay. Now we'll move on to the next one. The crime of assault requires proof that the defendant knowingly touched another person with the intent to injure, insult, or

> provoke such person. That deals with the aggravated assaults on the police officers by both defendants.

¶13 The jury found Montoya guilty on all counts, and the court sentenced him to prison terms. He now appeals.

DISCUSSION

I. THE ABSENCE OF A JURY INSTRUCTION DEFINING "PHYSICAL INJURY" DID NOT CONSTITUTE REVERSIBLE ERROR.

¶14 Montoya first contends that the court's failure to define "physical injury" and "injury" for the jury deprived him of due process and his right to present a complete defense.[1] Because Montoya did not object at trial, we review for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 19–20 (2005).

¶15 Montoya was charged with assaulting the Walmart employees under A.R.S. § 13-1203(A)(2), which defines assault as "[i]ntentionally placing another person in reasonable apprehension of imminent physical injury." With respect to the aggravated assaults on the police officers, Montoya was ultimately charged under §§ 13-1203(A)(3) and -1204(A)(8)(a), which define the offense as "[k]nowingly touching another person with the intent to injure, insult or provoke such person" while "knowing or having reason to know that the victim is . . . [a] peace officer."

¶16 The court must instruct the jury "on the law relating to the facts of the case when the matter is vital to a proper consideration of the evidence." *State v. Avila*, 147 Ariz. 330, 337 (1985). But the court need not define statutory terms that "have no technical meaning peculiar to the law in the case but are used in their ordinary sense and commonly understood by those familiar with the English language." *State v. Barnett*, 142 Ariz. 592, 594 (1984). That is the case even when a term has been legislatively defined—so long as the ordinary and statutory definitions are "essentially

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[1] Montoya also argues in passing that the jury instructions on assault and aggravated assault were potentially confusing because the court explained the elements of the misdemeanor assault in the middle of its explanation of the aggravated assaults. But the court specifically identified which parts of the instructions applied to which offense, and speculative jury confusion provides no ground for relief. *See State v. Riley*, 248 Ariz. 154, 180, ¶ 88 (2020).

the same," the failure to provide the jury the statutory definition is not fundamental error. *State v. Zaragoza*, 135 Ariz. 63, 66 (1983). Further, contrary to Montoya's contention, the RAJI for assault merely references, and does not mandate, the RAJI for "physical injury." *See* RAJI (Criminal) § 12.03, Use Note. And in any event, RAJIs are not authoritative. *Cnty. of La Paz v. Yakima Compost Co.*, 224 Ariz. 590, 606, ¶ 48 (App. 2010).

¶17 Though "injury" is not statutorily defined, § 13-105(33) provides that "physical injury" means "the impairment of physical condition." We perceive no meaningful distinction between that statutory definition and the ordinary meaning of "physical injury." A common definition of "physical" is "of or relating to the body," and a common definition of "injury" is "hurt, damage, or loss sustained." Merriam-Webster, https://www.merriamwebster.com (last visited June 30, 2022). We reject Montoya's suggestion that the shared statutory and ordinary-use definition excludes illness or disease. The definition is broad. Further, we have recognized in other contexts that injury or physical injury for purposes of assault may include harm resulting from disease or untreated illness. Specifically, we have recognized that transmitting a disease may support a conviction for "[k]nowingly touching another person with the intent to injure, insult or provoke" under § 13-1203(A)(3), and that withholding needed medication may support a conviction for "[i]ntentionally, knowingly or recklessly causing any physical injury to another person" under § 13-1203(A)(1). *In re Jeremiah T.*, 212 Ariz. 30, 33, ¶ 6 (App. 2006).

¶18 We hold that the court's failure to define "injury" or "physical injury" was not error, much less fundamental error requiring reversal. We reject Montoya's contention that definitions would have permitted the jury to find that he did not intend to injure the officers when he pushed them; further, we note that the jury could have convicted Montoya on those counts by finding that he merely intended to insult or provoke the officers. *See* A.R.S. § 13-1203(A)(3). We also reject Montoya's contention that definitions would have precluded the jury from finding that he intended to place the Walmart employees in reasonable apprehension of imminent physical injury when he coughed in their direction and said he hoped they got COVID.

II. THE PROSECUTOR'S QUESTIONS AND ARGUMENTS REGARDING "LYING" DID NOT CONSTITUTE REVERSIBLE ERROR.

¶19 Montoya next contends that he was denied a fair trial by the prosecutor's questions and argument about "lying." We review for

fundamental, prejudicial error because Montoya did not object at trial. *See Henderson*, 210 Ariz. at 567, ¶¶ 19–20. Prosecutorial misconduct constitutes reversible error only if its cumulative effect "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Hughes*, 193 Ariz. 72, 79, ¶¶ 26–27 (1998) (citation omitted).

¶20 Though most jurisdictions deem it categorically improper for the prosecutor to ask the defendant whether another witness is lying, Arizona does not subscribe to such a bright-line rule. *State v. Morales*, 198 Ariz. 372, 375, ¶¶ 10, 12 (App. 2000). We recognize that though such questions are risky and problematic, they "may be appropriate when the only possible explanation for the inconsistent testimony is deceit or lying." *Id.* at ¶ 13. Further, such questions, even if coupled with argument referencing them, "will rarely amount to fundamental error." *Id.* at 376, ¶ 15. For example, their effect may be mitigated by the strength of the state's evidence and by jury instructions regarding the determination of witness credibility. *See id.*

¶21 Here, the state's witnesses and Montoya presented diametrically opposed accounts of the underlying events. On this record, the only possible explanation for the inconsistency was that either the state's witnesses or Montoya were lying. Further, we note that the jury was properly instructed that it was to evaluate the truthfulness of testimony, that it was to consider the defendant's testimony the same as any other testimony, and that the testimony of a law enforcement officer is not entitled to any greater importance or believability. We also note that video evidence belied Montoya's version of events by showing that two workers followed him throughout the store, coming relatively close to him at one point, and that officers wearing police garb spoke to him before twisting his arm behind him at the car.

¶22 Accordingly, we find no reversible error in this case.

CONCLUSION

¶23 We affirm Montoya's convictions and sentences for the reasons set forth above.