

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

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THE STATE OF ARIZONA,  
*Appellee,*

*v.*

CARLOS CALZIDILLAS MADRID,  
*Appellant.*

No. 2 CA-CR 2014-0182  
Filed May 4, 2015

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

*See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.*

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Appeal from the Superior Court in Pima County  
No. CR20132881001  
The Honorable Howard Fell, Judge Pro Tempore

**AFFIRMED**

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COUNSEL

Mark Brnovich, Arizona Attorney General  
Joseph T. Maziarz, Section Chief Counsel, Phoenix  
By Amy Pignatella Cain, Assistant Attorney General, Tucson  
*Counsel for Appellee*

Isabel G. Garcia, Pima County Legal Defender  
By Scott A. Martin, Assistant Legal Defender, Tucson  
*Counsel for Appellant*

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**MEMORANDUM DECISION**

Judge Espinosa authored the decision of the Court, in which Presiding Judge Miller and Chief Judge Eckerstrom concurred.

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ESPINOSA, Judge:

¶1 After a jury trial, Carlos Madrid was convicted of four counts of aggravated driving under the influence of an intoxicant (DUI), one count of criminal damage, seven counts of endangerment, and one count of resisting arrest. The trial court found two historical prior convictions and imposed a combination of concurrent, presumptive or partially mitigated terms of imprisonment, the longest of which is eight years. In the sole issue raised on appeal, Madrid contends the trial court abused its discretion by refusing to instruct the jury on resisting arrest through passive resistance. For the following reasons, we affirm.

**Relevant Factual and Procedural Background**

¶2 In reviewing the denial of a requested jury instruction, we view the evidence in the light most favorable to the requesting party. *See State v. King*, 225 Ariz. 87, ¶ 13, 235 P.3d 240, 243 (2010). The evening of July 4, 2013, Sergeant Christopher Dennison of the Tucson Police Department was on patrol near downtown Tucson when he witnessed a truck “doing a burnout or break stand,” where the “back tires . . . spin heavily[,] . . . the vehicle is not moving[, but is] kicking up a lot of smoke [and] making a lot of noise.” It happened a second time, and Dennison initiated a traffic stop. The truck’s driver, however, “accelerate[d] very rapidly” in an apparent attempt to flee, leading Dennison to “shut down [his] emergency equipment hoping the vehicle would slow down to a safe rate of travel.” While following at a slower pace, Dennison notified other officers of the “vehicle travelling at a high rate of speed northbound.” He then learned there was a nearby collision and “a subject running.”

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¶3 Sergeant Dennison turned on his overhead lights and drove down a side street to “attempt to cut the subject off.” He saw Madrid run out of an alleyway and pulled up beside him, got out of his vehicle, identified himself as “Tucson Police,” and “ordered [Madrid] to stop and get on the ground.” Madrid had been attempting to jump a nearby fence and “took off running again,” with Dennison giving chase on foot. During his pursuit of Madrid, the officer brought him to the ground twice and attempted to hold him there. Both times Madrid wrestled himself to his feet, broke free, and ran. Madrid managed to break free of the officer’s holds, including “pull[ing] out of” a “wrist lock” as Dennison attempted to handcuff him. At trial, the officer testified that, during the incident, he “was having a lot of trouble controlling [Madrid],” noting that “[a]s I would grab onto him, he would start pushing and pulling away from me trying to break free of any holds I was putting on him.” Dennison eventually put Madrid on the ground once again and held his legs, “trying to keep him pinned to the ground,” until other officers arrived.

¶4 Madrid was subsequently indicted on four counts of aggravated DUI, one count of criminal damage, seven counts of endangerment, and one count of resisting arrest.<sup>1</sup> At the conclusion of the state’s case, defense counsel moved for a Rule 20, Ariz. R. Crim. P., judgment of acquittal, arguing:

[W]ith resisting arrest, what it requires – at least at the felony level, it requires that somebody either used or threatened to use physical force, and here’s the keyword, against a peace officer. In this case, what the testimony was, as I recall, is there was pulling or maybe pushing away from the officer but no actual force directed at him. Essentially the testimony was the suspect

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<sup>1</sup>As to resisting arrest, the indictment alleged Madrid had “resisted or attempted to resist arrest by using or threatening to use physical force against a peace officer or another, in violation of A.R.S. §§ 13-2508(A)(1) and (B) . . . .”

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was trying to get away but never actively trying to fight the officer or using any force towards the officer.

There was also, of course, the lesser-included offense of essentially passive resistance. That's a misdemeanor resisting arrest. That's not what was charged here though. So for that reason . . . the using or threatening to use physical force against a peace officer has not been met.

The trial court denied the Rule 20 motion.

¶5 Defense counsel then stated, that he “ha[d] a proposed lesser included” jury instruction and asked the trial court to “provide the jury with the instruction for the misdemeanor, which is essentially resisting by passive resistance.” The state countered that passive resistance is “not . . . a lesser included. . . . It’s different elements.” Defense counsel responded, “I think it is a lesser included because essentially passive resistance is still resisting but not quite to the same degree as the use of force against an officer would be.” The court declined to give the instruction, deeming it “not appropriate.”

¶6 The jury ultimately convicted Madrid on all counts. The trial court found two historical felonies and sentenced Madrid as described above. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

### **Jury Instruction**

¶7 Madrid contends the trial court abused its discretion in refusing to instruct the jury on the misdemeanor of resisting arrest through passive resistance, which he asserts is a lesser-included offense of the felony of resisting arrest through physical force. We review a trial court’s refusal to give a particular jury instruction for an abuse of discretion, *State v. Brown*, 233 Ariz. 153, ¶ 24, 310 P.3d 29, 37 (App. 2013), which may include an error of law, *see State v. Wall*, 212 Ariz. 1, ¶ 12, 126 P.3d 148, 150 (2006).

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¶8 To constitute a lesser-included offense, “the offense must be composed solely of some but not all of the elements of the greater crime so that it is impossible to have committed the crime charged without having committed the lesser one.” *State v. Celaya*, 135 Ariz. 248, 251, 660 P.2d 849, 852 (1983). “The test for whether an offense is lesser-included is whether it is, by its very nature, always a constituent part of the greater offense, or whether the charging document describes the lesser offense even though it does not always make up a constituent part of the greater offense.”<sup>2</sup> *State v. Robles*, 213 Ariz. 268, ¶ 5, 141 P.3d 748, 750-51 (App. 2006), quoting *State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 12, 965 P.2d 94, 97 (App. 1998). A person commits resisting arrest, a class six felony, by preventing or attempting to prevent a peace officer from effecting arrest by “[u]sing or threatening to use physical force against the peace officer or another.”<sup>3</sup> A.R.S. § 13-2508(A)(1), (B). A person commits resisting arrest, a class one misdemeanor, by “[e]ngaging in passive resistance,”<sup>4</sup> § 13-2508(A)(3), (B), where “passive resistance” “means a nonviolent physical act or failure to act that is intended to impede, hinder or delay the effecting of an arrest,” § 13-2508(C).

¶9 The state argues that the misdemeanor offense of resisting arrest through passive resistance is not a lesser-included offense of the felony of resisting arrest because “passive resistance is

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<sup>2</sup>Madrid contends that misdemeanor resisting arrest, passive resistance, qualifies as a lesser-included offense of felony resisting arrest under the elements test, but further asserts that, if it does not, “it nevertheless may be so under the charging-document test.”

<sup>3</sup>“Physical force’ means force used upon or directed toward the body of another person.” A.R.S. § 13-105(32). “Against” is defined as “from an opposite direction and into contact with.” *Webster’s Third New Int’l Dictionary* 39 (1971); see also A.R.S. § 1-213 (undefined words are construed according to common and approved use of language).

<sup>4</sup>“Passive” is defined as “not acting but acted upon,” “subject to . . . an external agency.” *Webster’s Third New Int’l Dictionary* 1651 (1971); see also § 1-213.

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not ‘composed solely of some but not all of the elements of’ resisting arrest ‘so that it is impossible to have committed’ resisting arrest ‘without having committed’ passive resistance.” Instead, it asserts, “passive resistance is simply another manner in which to commit resisting arrest.” While we might be inclined to agree, we need not decide that issue because a trial judge is required to instruct only on “necessarily included offenses,” Ariz. R. Crim. P. 23.3; *see also State v. Valenzuela*, 194 Ariz. 404, ¶ 10, 984 P.2d 12, 14 (1999), and we find that principle dispositive here.

¶10 “An offense is necessarily included ‘when it is lesser included’ and ‘the facts of the case as presented at trial are such that a jury could reasonably find that only the elements of a lesser offense have been proved.’” *State v. Gipson*, 229 Ariz. 484, n.2, 277 P.3d 189, 191 n.2 (2012), *quoting Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d at 150. In determining whether sufficient evidence existed to require a lesser-included offense instruction, the court must examine “‘whether the jury could rationally fail to find the distinguishing element of the greater offense.’” *State v. Bearup*, 221 Ariz. 163, ¶ 23, 211 P.3d 684, 689 (2009), *quoting State v. Detrich*, 178 Ariz. 380, 383, 873 P.2d 1302, 1305 (1994). Thus, even if misdemeanor resisting arrest, passive resistance, were considered a lesser-included offense of felony resisting arrest, the court need not instruct on passive resistance unless it is a “necessarily included offense” under the facts presented. *See* Ariz. R. Crim. P. 23.3; *Gipson*, 229 Ariz. 484, n.2, 277 P.3d at 191 n.2.

¶11 In Arizona, a defendant’s use of minimal force is sufficient to constitute “resisting arrest” under A.R.S. § 13-2508(A)(1). In *State v. Lee*, the defendant resisted arrest by jerking her arm away from an officer, struggling to keep officers from placing her arms behind her back and, once handcuffed, “kick[ing] her legs, trying to prevent the officers from gaining control of her.” 217 Ariz. 514, ¶ 3, 176 P.3d 712, 713 (App. 2008). On appeal she argued that her physical contact with the police officers was “minor scuffling” and more in the nature of avoiding arrest rather than resisting arrest. *Id.* ¶ 5. We observed, however, that the language of § 13-2508(A)(1) “does not require any particular type of physical conduct so long as that conduct qualifies as ‘physical force

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against the peace officer,” and held that because some physical force was used, the conduct was within the scope of the resisting arrest statute. *Id.* ¶¶ 11, 12; *see also State v. Stroud*, 207 Ariz. 476, 480–81, ¶¶ 15–17, 88 P.3d 190, 194–95 (App. 2004) (defendant resisting arrest by “kicking his feet” and “pushing on [the officer’s] arm”), *vacated on other grounds*, 209 Ariz. 410, 103 P.3d 912 (2005) (alteration in *Stroud*); *State v. Sorkhabi*, 202 Ariz. 450, ¶¶ 2, 9–10, 46 P.3d 1071, 1072–73 (App. 2002) (where evidence showed “defendant struggled with” arresting officers, defendant’s conduct squarely under § 13-2508(A)(1)); *State v. Henry*, 191 Ariz. 283, 284–85, 955 P.2d 39, 40–41 (App. 1997) (defendant resisted arrest pursuant to § 13-2508(A)(1), (2) by “refus[ing] to be handcuffed, squirming and tucking his arms underneath his body” and calling out to bystanders for help); *cf. State v. Womack*, 174 Ariz. 108, 114, 847 P.2d 609, 615 (App. 1992) (flight alone does not constitute resisting arrest).

¶12 We defer to the trial court’s assessment of the evidence. *Wall*, 212 Ariz. 1, ¶ 23, 126 P.3d at 152. The uncontradicted facts show that Madrid actively struggled with and broke away from Sergeant Dennison on at least four occasions, including as the officer tried to handcuff him. Further, Madrid refused to remain on the ground and stood up several times, despite the officer’s efforts to hold him down. By forcibly pulling away from Dennison and pushing against him to stand up, Madrid used physical force against the officer. § 13-2508(A)(1). Equally important, there was no evidence that Madrid engaged in nonviolent physical acts such as only running away or going limp. *See Womack*, 174 Ariz. at 114, 847 P.2d at 615.; *see also Lee*, 217 Ariz. 514, ¶ 9, 176 P.3d at 716 (distinguishing situation where suspect fled from arrest and no physical contact); *Forrester v. City of San Diego*, 25 F.3d 804, 810 (9th Cir. 1994) (noting demonstrators “resisted arrest passively, not actively, by going limp”) (Kleinfeld, J., dissenting). The trial court thus could properly determine that no reasonable jury could fail to find the distinguishing element of § 13-2508(A)(1), that is, the use of physical force against an officer. *See Gipson*, 229 Ariz. 484, n.2, 277 P.3d at 191 n.2. Accordingly, because passive resistance was not a necessarily included offense of felony resisting arrest under these facts, we cannot say the court abused its discretion by denying Madrid’s request for such an instruction.

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**Disposition**

¶13 For the foregoing reasons, Madrid's convictions and sentences are affirmed.