DIVISION ONE
FILED: 07/10/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 11-0462
	)	DEPARTMENT A
v.	)	
	)	**MEMORANDUM DECISION**
JOSHUA LAMAR WALTON, Appellant.	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-140021-001

The Honorable Daniel G. Martin, Judge
The Honorable Michael W. Kemp, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Division
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Kathryn L. Petroff, Deputy Public Defender
Attorneys for Appellant

T I M M E R, Presiding Judge

¶1 Joshua Lamar Walton appeals his convictions and sentences after a jury convicted him of one count of attempt to commit armed robbery, a class three dangerous felony, and two counts of armed robbery, class two dangerous felonies. Walton's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), advising this court that after a search of the entire record on appeal, she found no arguable question of law that is not frivolous. This court granted Walton an opportunity to file a supplemental brief in propria persona, and he did not. Through counsel, however, Walton raises three issues without accompanying argument: (1) insufficient evidence to support the alleged presence of a weapon, (2) the absence of African-Americans on the jury, and (3) the commission of perjury by witnesses. For the following reasons, we affirm Walton's convictions and sentences.

BACKGROUND

¶2 On August 10, 2010, a grand jury indicted Walton on a series of armed robberies and attempted armed robberies that occurred on July 31, 2010. The evidence adduced at trial established the following events: the first of three incidents took place at approximately 9:15 p.m. at a Filiberto's Mexican Restaurant in Avondale, Arizona. According to testimony, Walton's accomplice walked into the restaurant while wearing a

mask and ordered a side order of rice. After the cashier delivered the rice, the accomplice demanded money and clutched what appeared to be a gun in his waistband. At some point, Walton entered the restaurant and the accomplice asked why Walton was not wearing a mask. When the cashier left the register, the two men fled in what was identified as Walton's older model Buick sedan.

¶3 Shortly thereafter, a second robbery occurred at an Avondale grocery store. Walton was seen in the store while his accomplice robbed a father and his daughter walking to their vehicle in the parking lot.[1] Once again, the accomplice displayed what appeared to be a firearm in his waistband.

¶4 Finally, just minutes later, two juveniles were robbed at gunpoint by Walton and his accomplice while walking down Crystal Gardens Parkway. Both Walton and his vehicle were identified by the victims in each of the three incidents.

¶5 A unanimous jury convicted Walton of all three counts of armed robbery and attempted armed robbery and found all three to be dangerous felonies. The court sentenced Walton to 7.5 years' imprisonment for the attempted armed robbery conviction and 10.5 years' imprisonment for each of the armed robbery

[1] Walton was not indicted with any charges in connection with this robbery. Nonetheless, the trial court allowed introduction of evidence in connection with the event to rebut Walton's mere-presence defense.

convictions, all concurrent, with 320 days' presentence incarceration credit. This timely appeal followed.

DISCUSSION

I. Sufficiency of the evidence

¶6 Walton first contends insufficient evidence to supports the jury's factual finding that a weapon was used in commission of the robberies. "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypotheses whatsoever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987); *see also State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (citation omitted) ("Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction."). Evidence sufficient to support a conviction "is such proof that reasonable persons could accept as adequate and sufficient to support a conclusion of [a] defendant's guilt beyond a reasonable doubt." *State v. Fulminante*, 193 Ariz. 485, 493, ¶ 24, 975 P.2d 75, 83 (1999) (internal quotation marks and citations omitted).

¶7 Walton was convicted of armed robbery and attempted armed robbery pursuant to Arizona Revised Statutes ("A.R.S.")

section 13-1904 (West 2012).[2] A person commits armed robbery if "in the course of committing [a] robbery[,] . . . such person or an accomplice . . . [i]s armed with a deadly weapon or a simulated deadly weapon; or . . . [u]ses or threatens to use a deadly weapon or dangerous instrument or a simulated deadly weapon." A.R.S. § 13-1904(A); *State v. Anderson*, 210 Ariz. 327, 342, ¶ 54, 111 P.3d 369, 384 (2005) ("A defendant need not personally use or threaten to use the deadly weapon if an accomplice does so."). Because evidence of a "simulated deadly weapon" is sufficient to sustain a conviction under § 13-1904, it is not necessary for the State to prove that Walton or his accomplice displayed a loaded or even functional firearm. *See State v. Bousley*, 171 Ariz. 166, 167, 829 P.2d 1212, 1213 (1992) (holding that unarmed defendants who, in course of robbery, held hands under their clothing in such a way that it appeared that defendants had handguns under their shirts or in their pockets, could be convicted of armed robbery).

¶8 In reviewing the sufficiency of the evidence, we review the facts in the light most favorable to upholding the verdict and resolve all conflicts in the evidence against the defendant. *State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). Numerous witnesses testified that both Walton and

[2] Absent material revisions after the date of an alleged offense, we cite a statute's current version.

his accomplice possessed what appeared to be a firearm. The cashier at Filiberto's testified Walton's accomplice clutched a black item in his waistband that appeared to be a firearm. Another Filiberto's employee corroborated this testimony stating she saw what appeared to be the handle of a gun in the accomplice's waistband. Furthermore, the victim of the uncharged grocery store robbery also testified that Walton's accomplice was carrying a "metallic-black grayish" weapon, which he threatened to use on the victim. Finally, the two juvenile victims of the last robbery testified to the presence of a weapon. One stated he saw the handle of a "firearm or an actual weapon." The second said both Walton and his accomplice displayed and even pointed firearms at them. He further testified there was "no question" to him that he saw a "black pistol."

¶9 The determination of the credibility of witnesses and the weight to be given any item of evidence is a matter for the jury. *See State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995). While reasonable persons could differ, the above-cited evidence was sufficient to permit a jury to find beyond a reasonable doubt that Walton or his accomplice were in possession of a firearm or a simulated firearm. Accordingly, evidence was sufficient to sustain the conviction.

II. Lack of African-Americans on the jury

¶10 Walton next argues he was prejudiced by the lack of African-Americans on the jury. Because Walton did not raise this argument to the trial court, he has waived it absent fundamental error. *State v. Schaaf*, 169 Ariz. 323, 327, 819 P.2d 909, 913 (1991). To gain relief, he must prove error occurred, the error was fundamental, and he was prejudiced by the error. *State v. Henderson*, 210 Ariz. 561, 568, ¶¶ 23-24, 26, 115 P.3d 601, 608 (2005). Error is considered fundamental if it reaches the foundation of the defendant's case or removes an essential right to the defense. *State v. McGann*, 132 Ariz. 296, 298, 645 P.2d 811, 813 (1982). To determine whether error is fundamental, "we look to the entire record and to the totality of the circumstances." *State v. Hughes*, 193 Ariz. 72, 86, ¶ 62, 969 P.2d 1184, 1198 (1998).

¶11 We do not detect error. Although Walton was entitled to be tried by a fair and impartial jury, he was not entitled to be tried by any particular jury. *State v. Morris*, 215 Ariz. 324, 334, ¶ 40, 160 P.3d 203, 213 (2007). The record does not reveal that African-Americans were systemically excluded during the jury-selection process. *See id.* Moreover, the record does not reflect the racial composition of the jury panel. Regardless, because the State did not exercise any preemptive

strikes, we know the State did not exclude any African-Americans from the jury.

III. Perjury

¶12 Walton finally argues the trial court erred by entering a judgment of conviction because witnesses committed perjury. But Walton fails to specify which witnesses committed perjury, which statements were considered perjury, and how he suffered prejudice. Because he fails to develop this argument sufficiently for us to conduct a review, he has waived them. *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (holding that failure to develop legal argument waives argument on appeal); *see also* Ariz. R. Crim. P. 31.13(c)(1)(vi) (requiring appellant's brief to include a concise argument containing the party's contentions and references to supporting authorities). Consequently, we reject this argument.

CONCLUSION

¶13 After the filing of this decision, counsel's obligations pertaining to Walton's representation in this appeal have ended. Counsel need do no more than inform Walton of the status of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Walton shall have thirty days from the date of this decision to

proceed, if he desires, with an in propria persona motion for reconsideration or petition for review.

/s/
Ann A. Scott Timmer, Presiding Judge

CONCURRING:

/s/
Patricia K. Norris, Judge

/s/
Donn Kessler, Judge