

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: 08/09/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 12-0141
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
KAREN DENICE HERRIN,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)
)
_____)

Appeal from the Superior Court in La Paz County

Cause No. S1500CR201000213

The Honorable Michael J. Burke, Judge

AFFIRMED

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

David Goldberg Attorney at Law Fort Collins, CO
By David Goldberg
Attorneys for Appellant

O R O Z C O, Judge

¶1 Karen Denice Herrin (Defendant) appeals her conviction
and sentence for resisting arrest, a class 6 felony.

¶2 Defendant'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 appellate record, he found no arguable question of law that was not frivolous. Defendant was afforded the opportunity to file a supplemental brief in propria persona, but she did not do so.

¶3 Our obligation in this appeal is to review "the entire record for reversible error." *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 (2003), 13-4031 (2010), and -4033.A.1 (2010). Finding no reversible error, we affirm.

FACTS AND PROCEDURAL HISTORY¹

¶4 On August 17, 2010, Quartzite Police Officer V. was dispatched to investigate a report of criminal damage. The officer's investigation eventually led him to the residence of Defendant.

¶5 Upon making contact with Defendant, Officer V. questioned her about the criminal damage report. At one point

¹ We view the facts in the light most favorable to affirming the conviction. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

during the questioning, Defendant turned away from the officer, who responded by grabbing Defendant's arm and attempting to place her under arrest. An altercation ensued, during which Defendant kicked Officer V. and attempted to bite him. Eventually, the officer was able to subdue Defendant and place her in handcuffs.

¶6 After placing Defendant in handcuffs, Officer V. moved her in front of his patrol car and activated the dash camera. The dash camera subsequently captured Defendant turning toward Officer V., making a kicking motion at him, and repeatedly attempting to walk away after being told to face forward. Defendant was charged with resisting arrest, aggravated assault, and criminal damage. The criminal damage charge was dismissed before trial.

¶7 At trial, Defendant objected to the admission of the video taken by the dash camera, arguing that the video only began recording after the arrest had occurred and was therefore irrelevant to the resisting arrest charge. The court initially allowed the video to be shown to the jury only with respect to the aggravated assault charge, with the presumption that the jury would receive a limiting instruction to consider the evidence in the video only for that charge. After testimony was complete, however, the court determined the video could be used as evidence in relation to the resisting arrest charge as well.

Defendant objected, arguing she was prejudiced by the lack of notice that the video would be used as evidence for the resisting arrest charge because she would have otherwise prepared a different trial strategy. The court gave Defendant the opportunity to reopen her case to produce additional evidence about the video, but she declined to do so.

¶18 The jury subsequently found Defendant guilty of the resisting arrest charge but acquitted her of aggravated assault. After finding no mitigating or aggravating factors, the court sentenced Defendant to one year of supervised probation and two days in jail with credit for two days of presentence incarceration.

DISCUSSION

Due Process

¶19 Defendant notes a potential due process violation because defense counsel did not have notice that the evidence from the video would be used to support the resisting arrest charge. However, the relationship between the evidence and a charge is allowed to change over the course of litigation as long as the defendant is not unduly prejudiced by the change. See *State v. Phelps*, 125 Ariz. 114, 119, 608 P.2d 51, 56 (App. 1979) (holding that the State may amend the charges to conform to the evidence as long as the defendant is not prejudiced to such an extent that he is unable to defend himself).

¶10 Here, Defendant had notice of the State's intention to use the video and its contents prior to trial. Additionally, the court presented Defendant with an opportunity to reopen her case to illicit testimony about the video in relation to the resisting arrest charge. Defendant, however, declined to do so. Also, when Defendant objected to the use of the video for the resisting arrest charge, she did not elaborate how notice of its use would have changed her trial strategy. Instead, Defendant only claimed she "wasn't prepared" to defend against the video as evidence of resisting arrest. As a result, we cannot say that Defendant suffered any undue prejudice or was deprived of the ability to defend herself.

Sufficiency of the Evidence

¶11 When considering sufficiency of the evidence, we will reverse the trial court "only if no substantial evidence supports the conviction." *State v. Pena*, 209 Ariz. 503, 505, ¶ 7, 104 P.3d 873, 875 (App. 2005). "'Substantial evidence' is evidence that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980).

¶12 A person commits resisting arrest by intentionally preventing or attempting to prevent someone he or she has reason to know is a peace officer acting under official authority from

executing an arrest by using or threatening to use force or otherwise creating a substantial risk of injury. A.R.S. § 13-2508 (2010).

¶13 The evidence at trial established that in the course of an investigation for criminal damage, Officer V. questioned Defendant outside her home. Officer V. was dressed in full police uniform at all relevant times. At some point during the investigation, Defendant turned away from the officer. The officer then grabbed Defendant's arm and informed her that she was under arrest. An altercation ensued during which Defendant kicked and attempted to bite Officer V. Furthermore, evidence in the video showed that Defendant tried to walk away from Officer V. and made kicking motions at him while handcuffed. The evidence established at trial was therefore sufficient to support the conviction on the resisting arrest charge.

CONCLUSION

¶14 We have read and considered counsel's brief, carefully searched the entire record for reversible error and found none. See *Clark*, 196 Ariz. at 541, ¶ 49, 2 P.3d at 100. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure, and substantial evidence supported the jury's finding of guilt. Defendant was present and represented by counsel at all critical stages of the proceedings. At

sentencing, Defendant and her counsel were given an opportunity to speak and the court imposed a legal sentence.

¶15 For the foregoing reasons, Defendant's conviction and sentence are affirmed. Counsel's obligations pertaining to Defendant's representation in this appeal have ended. Counsel need do nothing more than inform Defendant of the status of the appeal and her 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). Defendant shall have thirty days from the date of this decision to proceed, if she so desires, with an in propria persona motion for reconsideration or petition for review.

/S/

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

JON W. THOMPSON, Judge

/S/

SAMUEL A. THUMMA, Judge