

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  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.*

ROBERT EARL SHEPHERD, *Appellant*.

No. 1 CA-CR 15-0498  
FILED 6-22-2017

---

Appeal from the Superior Court in Maricopa County  
No. CR2014-105298-001  
The Honorable Jo Lynn Gentry, Judge

**AFFIRMED**

---

COUNSEL

Arizona Attorney General's Office, Phoenix  
By Joseph T. Maziarz  
*Counsel for Appellee*

Maricopa County Public Defender's Office, Phoenix  
By Jeffrey L. Force  
*Counsel for Appellant*

STATE v. SHEPHERD  
Decision of the Court

---

**MEMORANDUM DECISION**

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Lawrence F. Winthrop joined.

---

**K E S S L E R**, Judge:

¶1 Appellant Robert Earl Shepherd was tried and convicted of possession or use of narcotic drugs, a class 4 felony; possession or use of marijuana, a class 6 felony; and two counts of possession of drug paraphernalia, class 6 felonies. Shepherd was sentenced to concurrent terms of three years' probation for all counts. Counsel for Shepherd filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530 (App. 1999). Finding no arguable issues to raise, counsel requests this Court search the record for fundamental error. Shepherd was given the opportunity to, but did not file a supplemental proper brief. He requested his counsel raise several issues, which we address below. For the reasons that follow, we affirm Shepherd's convictions and sentences.

**FACTUAL AND PROCEDURAL HISTORY**

¶2 On the evening of January 31, 2014, Phoenix police officer DM was on duty outside a Phoenix motel. DM and his partner, Officer MP, were conducting surveillance of the area after receiving reports of drug sales. MP was positioned in one of the upstairs motel rooms with a view of the surrounding area.

¶3 MP observed Shepherd cross a nearby street at a non-ninety-degree angle in violation of a city code and then jump a six-foot-tall fence. DM contacted Shepherd in the common area of the motel. Upon approach, DM noticed an odor of marijuana coming from Shepherd. DM asked Shepherd if he had stolen anything from the adjacent property, although DM had not observed him take anything. Shepherd responded he was simply taking a shortcut to the hotel.

¶4 DM testified Shepherd gave him permission to search his bag and person. Shepherd testified DM did not obtain permission for the search. The search resulted in the discovery of a glass pipe with black residue; crack cocaine; rolling papers; and a bag of marijuana.

STATE v. SHEPHERD  
Decision of the Court

¶5 After a jury trial, Shepherd was convicted of all four counts and sentenced to concurrent terms of three years' probation. Shepherd timely appealed. 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) (2017), 13-4031 (2017), and 13-4033(A)(1) (2008).<sup>1</sup>

**DISCUSSION**

¶6 In an *Anders* appeal, this Court must review the entire record for fundamental error. Error is fundamental when it affects the foundation of the case, deprives the defendant of a right essential to his defense, or is an error of such magnitude that the defendant could not possibly have had a fair trial. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19 (2005) (citation omitted). To obtain reversal for fundamental error, the defendant bears the burden to show the error was prejudicial. *Id.* at ¶ 20.

I. Sufficiency of the Evidence

¶7 In reviewing the sufficiency of evidence at trial, we construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant. *State v. Gallegos*, 178 Ariz. 1, 9 (1994). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200 (1996) (quoting *State v. Scott*, 113 Ariz. 423, 424-25 (1976)).

¶8 Shepherd was convicted of possession or use of narcotic drugs; possession or use of marijuana; and two counts of possession of drug paraphernalia. Sufficient evidence supports each of Shepherd's convictions.

¶9 A person is guilty of possession or use of narcotic drugs if they knowingly use or possess a narcotic drug. A.R.S. § 13-3408(A)(1) (2009). Crack cocaine is a "narcotic drug" under A.R.S. § 13-3401(20) (2014). Knowledge, like any other element of a crime, may be proved by circumstantial evidence. *See State v. Henry*, 205 Ariz. 229, 232, ¶ 11 (App. 2003) (citations omitted). DM testified that he discovered cocaine in Shepherd's pants pocket, and a forensic scientist testified that the substance was in fact a cocaine base. DM's testimony that he discovered the cocaine in Shepherd's pocket was a sufficient basis from which the jury could infer that Shepherd knowingly possessed it.

---

<sup>1</sup> We cite the current version of applicable statutes unless revisions material to this decision have occurred since the events in question.

STATE v. SHEPHERD  
Decision of the Court

¶10 Similarly, to establish guilt for possession of marijuana, the State must prove Shepherd knowingly possessed marijuana. A.R.S. § 13-3405(A)(1) (2010). DM testified he discovered the marijuana in Shepherd's backpack, and the forensic scientist tested the substance and confirmed it was marijuana. Shepherd did not argue at trial that the backpack was not his, rather he negated the element of knowledge, arguing that the police placed the drugs there. However, the jury reasonably credited DM's testimony instead of Shepherd's, and DM's testimony was a sufficient basis from which the jury could infer Shepherd knowingly possessed the marijuana.

¶11 To be found guilty of possession of drug paraphernalia, the State must prove that Shepherd possessed, with intent to use, drug paraphernalia to introduce an illegal drug into the human body. A.R.S. § 13-3415(A) (2017). Rolling papers and pipes are considered "drug paraphernalia." A.R.S. § 13-3415(F)(2)(l). DM discovered a pipe in Shepherd's shirt pocket with burned residue in it. A forensic scientist testified that crack cocaine is commonly smoked in a pipe. The testimony regarding the location of the pipe on Shepherd's person combined with its proximity to crack cocaine was a sufficient basis from which the jury could infer that Shepherd possessed the pipe with intent to use it to smoke the crack cocaine. Similarly, DM discovered the rolling papers in Shepherd's backpack next to a bag of marijuana, and the forensic scientist testified rolling papers are often used to smoke marijuana. *See* A.R.S. § 13-3415(E)(4) ("In determining whether an object is drug paraphernalia, a court or other authority shall consider, in addition to all other logically relevant factors, . . . [t]he proximity of the object to drugs."). We find sufficient evidence supports Shepherd's convictions.

II. Shepherd's Issues on Appeal

¶12 Shepherd requested his counsel raise four issues, which we have reformulated below:

- (1) His jury was all "white";
- (2) The court erred in precluding him from making a full statement about whether he jumped a fence onto motel property and then by allowing the State to admit evidence of a prior statement in piecemeal fashion to make it appear he was lying;
- (3) The court erred in denying his motion for mistrial based on the above alleged error; and

STATE v. SHEPHERD  
Decision of the Court

(4) The court erred in denying his motion to suppress evidence.

¶13 We construe the issues above as requesting review of three issues: (1) the legality of Shepherd's initial stop and the denial of the motion to suppress the evidence; (2) the *Batson* challenge Shepherd made during voir dire and the removal of Jurors 31 and 14; and (3) the denial of Shepherd's motion for a mistrial based on the State's use and admission of an alleged prior inconsistent statement by Shepherd.

A. Initial Stop

¶14 "In reviewing the denial of a motion to suppress evidence, we consider only the evidence that was presented at the suppression hearing, which we view in the light most favorable to sustaining the trial court's ruling." *State v. Kinney*, 225 Ariz. 550, 553, ¶ 2 (App. 2010) (citation omitted). We defer to the superior court's findings of fact when reviewing investigatory stops and look only for an abuse of discretion. *State v. Rogers*, 186 Ariz. 508, 510 (1996) (citation omitted). However, we review de novo whether the police had a reasonable suspicion of criminal activity that justified conducting an investigatory stop. *Id.* (citation omitted).

¶15 The superior court found that DM's contact with Shepherd was consensual because Shepherd was not told he could not leave and was not detained. The court stated that "[p]olice officers can go up to anyone at any time and ask them questions without detaining them." We disagree that the contact was consensual. An investigatory stop occurs when a person reasonably believes, under the surrounding circumstances, that he is not free to end the contact and leave. *Id.* at 510 (citation omitted).

¶16 Here, Officer DM immediately initiated the encounter with questions of an investigatory nature. The first contact DM made with Shepherd was asking him what he was doing and if he had stolen anything, automatically making Shepherd a target of investigation. A reasonable person would not feel free to leave if a uniformed officer began asking him questions which implied he was engaged in illegal activity. Contrary to the State's argument, DM did not need to draw his weapon or tell Shepherd that he was detaining him in order to make him feel like he could not leave. The investigatory nature of the questions by an officer in uniform would make a reasonable person feel like he had to stay and answer, thus, the contact was not consensual.

¶17 Since the encounter was not consensual, we review the three reasons given to justify the stop. The three bases upon which Officer DM

STATE v. SHEPHERD  
Decision of the Court

could have formed reasonable suspicion are: (1) the “jaywalking” in violation of a city code; (2) the testimony that Officer MP observed a person matching Shepherd’s description jump a fence onto the private motel property, raising a reasonable suspicion of trespass; or (3) the odor of marijuana DM smelled on Shepherd after approaching him. “An investigatory stop is permissible under the Fourth Amendment if supported by reasonable suspicion that criminal activity is afoot.” *Id.* (citation and quotations omitted). Reasonable suspicion is a “commonsense, nontechnical concept[],” *Ornelas v. United States*, 517 U.S. 690, 695 (1996) (citations omitted), and pertains to “the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act,” *Brinegar v. United States*, 338 U.S. 160, 175 (1949).

¶18 The superior court’s second basis was reasonable suspicion for the stop. DM testified that MP saw an individual, matching Shepherd’s description, jump a fence onto the motel property at night where there had been drug activity. This was sufficient to suspect trespass. Thus, the court did not err in holding the stop was permissible, and did not abuse its discretion in denying the motion to suppress evidence therefrom.

B. Removal of Jurors

¶19 “We review a trial court’s decision to strike a potential juror for cause for abuse of discretion.” *State v. Medina*, 232 Ariz. 391, 403, ¶ 36 (2013) (citation and quotation omitted). A juror is properly excused for cause if his opinions would “prevent or substantially impair the performance of his duties as a juror.” *Id.* at ¶ 38 (citation and quotation omitted).

¶20 The record indicates that Jurors 14 and 31 were persons of color. The State moved to strike both for cause because they stated that they could not be impartial. Juror 31 admitted she would have difficulty not considering the penalty in making her decision and stated she was unsure she could render a fair decision. Juror 14 stated that she did not believe marijuana should be illegal to possess, and that she might be unable to find Shepherd guilty without DNA or fingerprints. The court retained Juror 14, but struck Juror 31 over Shepherd’s objection. The State then used a peremptory strike against Juror 14. The evidence supports the court’s strike of Juror 31, and Shepherd did not object to the peremptory removal of Juror 14.

¶21 We will affirm the superior court’s rulings on *Batson* challenges unless they are clearly erroneous. *Id.* at 404, ¶ 43 (citation

STATE v. SHEPHERD  
Decision of the Court

omitted). A *Batson* challenge involves three steps: (1) the defendant must make a prima facie showing that the strike was discriminatory on a prohibited basis; (2) the prosecutor must offer a neutral reason for each strike; and (3) the court must determine whether the defendant proved purposeful prohibited discrimination. *State v. Hardy*, 230 Ariz. 281, 285, ¶ 12 (2012) (citation omitted).

¶22 Under the first step of the analysis, Shepherd raised a *Batson* challenge after the State used a peremptory strike against Juror 31, making a prima facie showing of discrimination because Juror 31 was also a person of color. The State provided a race-neutral reason that Juror 31 had indicated she would have difficulty following the law and disregarding the penalty. See *State v. Newell*, 212 Ariz. 389, 401, ¶ 54 (2006) (citation omitted) (“‘Unless a discriminatory intent is inherent in the prosecutor[’]s explanation,’ this burden is satisfied by a facially valid explanation for the peremptory strike.”). Defense counsel responded he thought her answers were equivocal. The court accepted the State’s reason under the third step. “[T]he trial court’s finding at this step is due much deference,” and we find the court did not abuse its discretion. *Id.* (citation omitted).<sup>2</sup>

C. Denial of Motion for Mistrial

¶23 We will reverse the failure to grant a motion for mistrial only if such failure was an abuse of discretion. *State v. Koch*, 138 Ariz. 99, 101 (1983) (citations omitted). “In deciding whether to grant a mistrial based on a witness’s testimony, the trial court considers (1) whether the testimony called to the jury’s attention matters that it would not have been justified in considering in reaching the verdict, and (2) the probability that the testimony influenced the jury.” *State v. Gulbrandson*, 184 Ariz. 46, 62 (1995) (citation omitted).

¶24 After Shepherd’s arrest, he hand-wrote a motion to dismiss. To prevent relitigating the legality of Shepherd’s initial stop, the superior court prohibited him from testifying why he wrote that document. However, during a bench conference, defense counsel informed the court that Shepherd had written it in response to DM’s contradictory statements at earlier preliminary hearings about the initial stop. Without this context before the jury, the prosecutor had Shepherd answer questions about the letter on cross-examination during the defense case-in-chief. The prosecutor

---

<sup>2</sup> Given our holding on this issue, we deny as moot Shepherd’s motion to provide sealed or confidential jury list.

STATE v. SHEPHERD  
Decision of the Court

elicited the following five differences between Shepherd's testimony on direct and his statements in the letter:

Shepherd's testimony on direct examination:

- (1) He was dropped off at the motel by a coworker;
- (2) Officer DM searched his backpack first;
- (3) He discussed working that day before coming to the motel;
- (4) He was dropped off at I-17 and 7th Street, went to his room, and then walked to the laundry room; and
- (5) He did not mention jumping a fence.

Shepherd's letter from April 2014:

- (1) He took the bus to the motel;
- (2) Officer DM searched his pockets first;
- (3) He does not mention work at all;
- (4) He writes that he got off the bus at Central and Mohave; and
- (5) He writes that he jumped one fence to get onto hotel property.

On redirect, Shepherd explained the discrepancies:

- (1) He was writing about a different day in the letter;
- (2) He was in a hurry when he wrote the letter; and
- (3) He was unable to explain this discrepancy because of the State's objection. He was indirectly able to testify that he did not mention his work or how he was paid in the letter because it was not relevant to the point he was trying to get across to the judge at the time.

¶25 The jury submitted a question asking why Shepherd would mention a fence in his letter at all. Defense counsel asked that Shepherd be allowed to answer the question, or the court declare a mistrial. Defense counsel conceded to the court that Shepherd gave two different timelines,

STATE v. SHEPHERD  
Decision of the Court

but explained that Shepherd was not permitted to explain why they were different because counsel was not allowed to get into the issues related to the legality of the stop. Defense counsel explained to the court that Shepherd's document was an explanation of a shortcut he had taken in the past, when he had jumped over only one fence to get to the motel. Defense counsel explained to the court that Shepherd had described a different day in the letter to impeach Officer DM's testimony from earlier hearings where DM had testified that Shepherd had jumped two fences to get onto the motel property that day in January.

¶26 Shepherd again moved for a mistrial based on how the State had elicited the discrepancies and information about the fence, and the court denied it. On re-cross-examination after Shepherd answered a jury question, the State continued to use the document to try to impeach him. The State moved to admit the document and then tried to withdraw it, but the court admitted it into evidence over the State's objection.

¶27 We construe Shepherd's raising of this issue as an argument that the document was hearsay, and not admissible under the prior inconsistent statements exception. Therefore, he argues, the information was improperly before the jury and merited a mistrial. We conclude that the court did not abuse its discretion in admitting the document Shepherd wrote, allowing the line of questioning related to discrepancies in the document, or denying Shepherd's motion for a mistrial. The document and discrepancies within it were properly before the jury as a prior inconsistent statement by Shepherd. "A statement's inconsistency . . . is not limited to cases in which diametrically opposite assertions have been made." *State v. King*, 180 Ariz. 268, 275 (1994) (citations and quotations omitted). "[I]nconsistency is to be determined, not by individual words or phrases alone, but by the whole impression or effect of what has been said or done." *State v. Hines*, 130 Ariz. 68, 71 (1981) (citation and quotation omitted). The superior court has considerable discretion in determining whether a witness's answers could be inconsistent with previous statements. *State v. Salazar*, 216 Ariz. 316, 319, ¶ 15 (App. 2007) (citations omitted).

¶28 Shepherd testified that the statements he wrote were about a different day than the one in January 2014, and therefore plausibly consistent with his testimony. However, the statements could have also been reasonably interpreted as describing the same day and thus inconsistent with his trial testimony. Intended to be a broad exception to the hearsay rule, Arizona Rule of Evidence 801(d)(1)(A) is based on the principle that a jury should be allowed to consider previous inconsistent statements to make credibility determinations. *State v. Carr*, 154 Ariz. 468,

STATE v. SHEPHERD  
Decision of the Court

471 (1987). Thus, the court did not abuse its discretion in finding that the statements were inconsistent or by allowing the questioning and admission of the letter into evidence for impeachment of Shepherd as a witness.

CONCLUSION

¶29 After careful review of the record, we find no meritorious grounds for reversal of Shepherd's convictions or modification of the sentences imposed. The evidence supports the verdict, the sentence imposed was within the sentencing limits, and Shepherd was represented at all stages of the proceedings below and was allowed to address the court before sentencing. Accordingly, we affirm Shepherd's convictions and sentences.

¶30 Upon the filing of this decision, counsel shall inform Shepherd of the status of the appeal and his options. Defense counsel has no further obligations, unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85 (1984). Shepherd shall have thirty days from the date of this decision to proceed, if he so desires, with a pro per motion for reconsideration or petition for review.



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