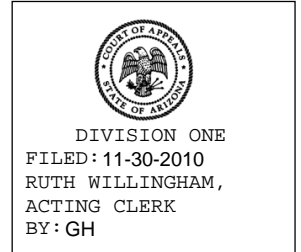


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 10-0211
)
Appellee,)
) DEPARTMENT A
v.)
) **MEMORANDUM DECISION**
TYRON DOUGLAS WEBB, JR.,)
)
Appellant.) (Not for Publication -
) Rule 111, Rules of the
) Arizona Supreme Court)
)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-121663-001 SE

The Honorable Steven Lynch, Judge *Pro Tempore*

AFFIRMED

Terry Goddard, Arizona Attorney General	Phoenix
By Kent E. Cattani, Chief Counsel	
Criminal Appeals/Capital Litigation Section	
Attorneys for Appellee	
James J. Haas, Maricopa County Public Defender	Phoenix
By Terry J. Adams, Deputy Public Defender	
Attorneys for Appellant	
Tyron Douglas Webb Jr., Appellant	Mesa

B A R K E R, Judge

¶1 Tyron Douglas Webb ("Webb") appeals his conviction for one count of aggravated assault, a class five felony. Webb was sentenced on February 19, 2010 and timely filed a notice of appeal on March 11, 2010. His 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 searching the entire record on appeal, he found no arguable question of law that is not frivolous. We granted Webb leave to file a supplemental brief *in propria persona* on or before November 8, 2010. Webb filed his supplemental brief on November 9, 2010. In our discretion, we have accepted the late-filed supplemental brief and discuss the issues it raises below.

Facts and Procedural History¹

¶2 On March 27, 2010, at about 2:00 A.M., Officers R., M., and B. were in police uniform and positioned outside of the Margarita Rocks restaurant in Tempe. As approximately one hundred to two hundred people were exiting the restaurant at closing time, Webb approached Officer M., said to him, "you're doing a good job," and then extended his hand. After Officer M.

¹ We view the facts in the light most favorable to sustaining the court's judgment and resolve all inferences against Webb. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998); *State v. Moore*, 183 Ariz. 183, 186, 901 P.2d 1213, 1216 (App. 1995).

shook Webb's hand, Webb leaned in to give Officer M. a hug with his left arm. Noticing that Webb appeared intoxicated, Officer M. lifted up his right elbow to prevent Webb from getting closer and then used his left hand to direct Webb away. Officer M. told Webb that he would not hug him and to leave. Webb became upset and said, "You can't f***ing touch me." Webb then planted his feet and raised his hands, causing Officer M. and others to believe that Webb was about to become violent. Officer M. gave Webb an impact push to create distance between them. The push sent Webb backwards, and someone in the crowd tried to hold Webb and prevent him from engaging with the Officer.

¶13 Webb then broke free and came toward Officer M. saying, "I'm going to sock you in the f***ing mouth." Webb grabbed the top of Officer M.'s police vest and pulled him into the crowd and away from the other officers. As Officer M. was off balance, Webb released his right hand from the vest and punched Officer M. in the mouth. Officer M. responded by picking Webb up and throwing him to the ground. As both Webb and Officer M. hit the ground, Webb immediately placed Officer M. in a front headlock with his arm around the Officer's neck, cutting off his airway. Officer M. started to see spots and could not breathe. Feeling that he was in a deadly encounter, Officer M. twisted his neck to partially free his airway and then began striking Webb's face with fists and elbows.

¶4 Officer R. made his way through the crowd and commanded, "Tempe police, stop resisting." Webb continued to fight with the officers on the ground, including throwing punches and kicks and shoving his thumb into Officer M.'s mouth, causing a laceration. Officer M. eventually shot Webb with a Taser and the officers detained him. The officers testified that during the altercation they repeatedly commanded Webb to stop resisting, but that they did not inform him that he was under arrest until after he was handcuffed. Officer M. suffered facial lacerations and reported that after the altercation he was light headed, very dizzy, and was having trouble breathing.

¶5 A jury found Webb guilty of aggravated assault, and the court sentenced Webb to one year of supervised probation. Webb timely filed a notice of appeal.

¶6 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 (2001), and 13-4033(A) (2001). We are required to search the record for reversible error. Finding no such error, we affirm.

Discussion

¶7 Webb raises four issues in his supplemental brief: (1) the jury was biased in favor of the State, (2) three of the State's witnesses gave false testimony, (3) Webb only received a portion of an exculpatory security-camera recording, and (4) a

cell phone recording of the altercation was impounded by police and erased.

¶8 We review issues raised in an *Anders* appeal for fundamental error. See *Anders*, 386 U.S. at 738; *Leon*, 104 Ariz. 297, 451 P.2d 878; *State v. Banicki*, 188 Ariz. 114, 117, 933 P.2d 571, 574 (App. 1997). Under fundamental error review, the “defendant must establish that (1) error exists, (2) the error is fundamental, and (3) the error caused him prejudice.” *State v. Smith*, 219 Ariz. 132, 136, ¶ 21, 194 P.3d 399, 403 (2008) (citing *State v. Henderson*, 210 Ariz. 561, 567, ¶ 20, 115 P.3d 601, 607 (2005)). To be fundamental, an error must go “to the foundation of the case, . . . take[] from the defendant a right essential to his defense,” or be so significant “that the defendant could not possibly have received a fair trial.” *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607 (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)).

1. Jury Composition

¶9 Webb alleges that the jury was biased in favor of the State in two ways: (1) “most” of the jurors had family in law enforcement; and (2) “the majority” of the jurors were Caucasian and Webb is African-American. As to the first allegation, only three out of the eight jurors who decided the case had family in law enforcement - including the department of corrections and the military police. Moreover, all three of these jurors stated

that their connections to law enforcement would not affect their ability to be fair and impartial. Thus, it was not error for these jurors to remain on the jury.

¶10 As to the jury's racial composition, the law states that a defendant does not have a right to a particular jury, or even to a single juror of his particular race. *Batson v. Kentucky*, 476 U.S. 79, 85 (1986) (citation omitted). It is sufficient that the jury be chosen in a nondiscriminatory fashion from a cross section of the community. *See id.* at 85-86. Here, there is no evidence of judicial bias in jury selection. The trial court also questioned all jurors for possible racial bias and found that they could be unbiased. Thus, there was no fundamental error in the racial composition of the jury.

2. False Testimony

¶11 Webb alleges that three of the State's witnesses gave false testimony. Specifically, Webb claims that (1) Officer M. gave testimony that contradicted a statement he made to the court in a settlement conference; (2) Officer B.'s testimony was internally inconsistent because he testified that he was able to hear one thing Webb said to Officer M. but not another; and (3) Officers M., B., and R. gave details of the incident that were inconsistent with the details given by one of the defense's witnesses. Webb's false testimony claims actually amount to

attacks on these witnesses' credibility. We have consistently held that issues of credibility are for the jury and not for this court to decide. See *State v. Fimbres*, 222 Ariz. 293, 297, ¶ 4, 213 P.3d 1020, 1024 (App. 2009) ("The finder-of-fact, not the appellate court, weighs the evidence and determines the credibility of witnesses." (quoting *State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995))). The mere presence of actual or potential inconsistencies does not itself prove that the testimonies at trial were false. Accordingly, we reject Webb's claims of false testimony.

3. Video Surveillance

¶12 Webb asserts in his brief that the State possesses a surveillance video recording of the incident that would exculpate him and that the State erred by sending the defense an incomplete copy of that recording. As an initial matter, we note that there was no evidence presented at trial that the recording truly existed or that it contained exculpatory evidence. Thus, Webb cannot establish that he was prejudiced. Moreover, the pre-trial references to the recording confirm that Webb was not prejudiced. In a reply brief to one of the defense's pre-trial motions, defense counsel stated,

During the officer interview that was conducted on Friday, October 2, I asked the officer about viewing the surveillance video from the crime scene, because my copy was just colored static. He said it must be

viewed on the equipment at the location where it was taped.

Then, on January 11, 2010, the court ordered that Webb be allowed to return to the scene of the crime to view the surveillance video. Thus, even if the recording contained exculpatory information, it appears that the State may not have been able to provide the defense with a more complete recording than it did and that Webb was permitted to view the entire recording prior to trial. On this record, we conclude that Webb cannot establish error or prejudice on this point.

4. Cell Phone Recording

¶13 Finally, Webb argues that "evidence in police impound was erased. The video Cory O'Dell was taking." The only evidence presented of any such recording was from Officer B. who testified that he saw Cory O'Dell pointing his cell phone at the officers during the incident and heard O'Dell say that he was making a recording. However, this observation and hearsay statement alone do not provide sufficient evidence to establish on appeal that there actually was a recording made, that the police were ever in possession of it, or that the recording was subsequently erased. Accordingly, we are unable to conclude that there was error committed or that Webb suffered any prejudice with regard to the alleged O'Dell recording.

Conclusion

¶14 This court has reviewed the record and found no meritorious ground to reverse Webb's conviction. See *Anders*, 386 U.S. at 744; *Leon*, 104 Ariz. at 300, 451 P.2d at 881. Webb was present at all critical stages of the proceedings and was represented by counsel. All proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. Accordingly, this court affirms.

¶15 After the filing of this decision, counsel's obligations pertaining to this appeal have ended, subject to the following. Unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court, counsel need only inform Webb of the status of the appeal and his future options. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Webb has thirty days from the date of this decision to proceed if he desires with a *pro per* motion for reconsideration or petition for review to the Arizona Supreme Court.

/s/

DANIEL A. BARKER, Judge

CONCURRING:

/s/

DONN KESSLER, Presiding Judge

/s/

JON W. THOMPSON, Judge