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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 03/29/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 11-0359  
)  
Appellee, ) DEPARTMENT D  
)  
v. ) **MEMORANDUM DECISION**  
)  
MARK DOUGLAS TICKNOR, ) (Not for Publication -  
) Rule 111, Rules of the  
Appellant. ) Arizona Supreme Court)  
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-145080-001DT

The Honorable Julie P. Newell, Commissioner

**AFFIRMED**

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

Maricopa County Public Defender's Office Phoenix  
By Spencer D. Heffel, Deputy Public Defender  
Attorneys for Appellant

G E M M I L L, Judge

¶1 Defendant Mark Douglas Ticknor appeals from his convictions for resisting arrest, a class six felony, and threatening or intimidating, a class one misdemeanor. Ticknor's

counsel filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that, having searched the record and found no arguable question of law, he requests this court to examine the record for reversible error. Ticknor was afforded the opportunity to file a *pro se* supplemental brief, and he has done so. See *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). We have reviewed both briefs and the entirety of the record. For the following reasons, we affirm.

#### **FACTS AND PROCEDURAL HISTORY**

¶12 "We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the convictions." *State v. Powers*, 200 Ariz. 123, 124, ¶ 2, 23 P.3d 668, 669 (App. 2001). The following facts were revealed at trial.

¶13 On July 8, 2009, City of Scottsdale uniformed police officers Patrick H. and Eric R. were dispatched to the Granite Reef Senior Center to investigate a disturbance. Staff at the center had reported Ticknor as the subject of the disturbance and directed the officers to the computer lab to find him. Ticknor was at a computer when Officer H. asked him to step outside. After an initial verbal protest, Ticknor proceeded to accompany the officers outside. While walking, Ticknor appeared very angry and made vulgar statements to Officer H. When the

three arrived outside, Officer R. asked Ticknor if there was a problem with the staff at the center, to which Ticknor asked Officer R. whether he was under arrest. Officer R. said no, and then Ticknor replied that "I don't need to f[-----]g talk to you." Officer R. then told Ticknor that he needed to leave the center.

¶14 The officers permitted Ticknor to return inside to gather his belongings, and they accompanied him so that he could do so. Ticknor continued to cast vulgarities at the officers as they walked, and his body language was very unsettled and mischievous. Approaching the exterior door to exit the building, Ticknor was first in line, followed in order by Officer H. and Officer R. Ticknor pushed open the door, walked out, grabbed the door, and proceeded to close it as Officer H. was right behind him attempting to exit. The glass and metal door closed onto Officer H. The two officers then went outside.

¶15 According to Officer R., Officer H. verbally told Ticknor that he was under arrest; however, Officer H. did not explicitly remember if he had so verbally indicated, because he was intently focused on Ticknor's demeanor and what had just happened to him. Nevertheless, Officer H. grabbed Ticknor around the waist in an attempt to place him under arrest, using a maneuver called an "arm bar." That method did not work, however, because Ticknor was trying to pull away from Officer H.

Officer R. attempted a "straight arm take down" by pushing down on Ticknor's shoulder and pulling him to the ground, but that too was unsuccessful.

¶16 Officer R. then engaged in a "leg sweep," literally tripping Ticknor's right leg so that he would go to the ground. Once on the ground, Ticknor tensed his muscles to prevent the officers from placing handcuffs on him, at which time Officer H. applied a pressure point technique (which causes momentary pain in hopes of distracting the arrestee from his non-compliance). Ticknor gave his compliance just a few moments after the pressure was applied, and the officers placed him in handcuffs and formally took him into custody.

¶17 The officers then placed Ticknor into Officer H.'s patrol car. As Officer H. drove away with Ticknor in the back, Ticknor exclaimed that he was going to "kill" the officer.

¶18 Ticknor was charged with aggravated assault, a class six felony, in violation of Arizona Revised Statutes ("A.R.S.") section 13-1204 (Supp. 2011); resisting arrest, a class six felony, in violation of A.R.S. § 13-2508 (2010); threatening or intimidating, a class one misdemeanor, in violation of A.R.S. § 13-1202 (2010); and disorderly conduct, a class one misdemeanor,

in violation of A.R.S. § 13-2904 (2010).<sup>1</sup> At trial, the State put forth the testimony of Officers R. and H., as well as evidence consisting of photographs and video surveillance. The jury returned verdicts of not guilty of aggravated assault and disorderly conduct and guilty of resisting arrest and threatening or intimidating.

¶9 At sentencing, the court found beyond a reasonable doubt that Ticknor possessed five prior felony convictions. The court sentenced Ticknor to four years' imprisonment for the resisting arrest charge, giving 205 days of presentence incarceration credit. The court also sentenced Ticknor to time served on the conviction of threatening and intimidating. After receiving permission from the superior court pursuant to Rule 32.1(f) of the Arizona Rules of Criminal Procedure, Ticknor filed a delayed notice of appeal to this court. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A)(3) (2010), and Article 6, Section 9 of the Arizona Constitution.

#### **DISCUSSION**

¶10 Ticknor filed a supplemental brief raising various issues, which we summarize as follows: (1) the evidence was

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<sup>1</sup> We cite to the current versions of the statutes when no revisions material to this decision have occurred since the date of the alleged offense.

insufficient to support the guilty verdict for resisting arrest; (2) the trial court did not properly exclude witnesses from the courtroom, in violation of Rule 9.3 of the Arizona Rules of Criminal Procedure; (3) Officer H. disrupted defense counsel's closing argument, which improperly swayed the jury; (4) Ticknor was precluded from testifying in his defense; (5) the trial court did not sentence Ticknor within the time provided by Rule 26.3 of the Arizona Rules of Criminal Procedure; and (6) the trial court improperly admitted evidence illegally obtained from Ticknor's person.<sup>2</sup>

### **1. Sufficiency of the Evidence**

¶11 In his supplemental brief, Ticknor appears to argue that the evidence entered at trial contradicted the testimony of Officers H. and R. surrounding the resisting arrest charge.<sup>3</sup> Specifically, he argues, Officer H.'s later affidavit in a federal civil case filed by Ticknor consists of a "fabricated" story in continuation of the testimony the officer provided in

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<sup>2</sup> The opening brief filed by counsel lists the issues that counsel believed Defendant wished to raise for this court's review. However, Defendant does not provide any argument for at least one of these issues in his supplemental brief. Because we have also done an independent review of the entire record for fundamental error, see *infra* ¶ 29, we will not specifically address any issues raised for which there is no argument provided in the briefs.

<sup>3</sup> Defendant makes no argument with respect to the sufficiency of the evidence on the threatening or intimidating charge, for which he was also found guilty.

the criminal trial at issue here. Ticknor also argues that the video surveillance tape from the day of the incident at the senior center contradicts both officers' testimony at trial that they told Ticknor he was under arrest.

¶12 As an initial matter, the affidavit in question, which is an exhibit attached to Ticknor's supplemental brief, was filed in a federal court lawsuit in August 2011. It was not even created before the criminal trial at issue in the present matter, let alone entered as evidence in the court below. Because it was not evidence in this trial to begin with, the affidavit therefore cannot be considered contradictory evidence.

¶13 To the extent that Ticknor is arguing that, in his view, Officer H. testified untruthfully about the events of July 8, 2009, such an argument is unpersuasive. There was sufficient evidence from the testimony of Officers H. and R. regarding the arrest of Ticknor (described *supra* ¶¶ 5-6) for the jury to convict him of resisting arrest. Determination of the credibility of the officers' testimony falls squarely within the province of the jury, and it is not this court's function to reweigh the evidence on appeal. See *State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997); *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996). We therefore do not disturb the jury's guilty verdict on the charge of resisting arrest.

¶14 Ticknor also argues that surveillance video evidence (trial exhibit 1) conflicts with the officers' testimony regarding the arrest. After review of the surveillance video, we find therein no evidence that is plainly contrary to the testimony of either officer at trial. The surveillance camera was mounted inside the building on the ceiling, and once Ticknor and the two officers went outside, they were generally out of sight of the camera. The arrest itself is not visible in the video. The jury was at liberty to take into account the video, along with the testimony of the officers, in determining the series of events leading to and including the arrest. Because the video evidence did not contradict the officers' testimony, and because we have determined, *supra* ¶ 13, that the jury was within its discretion to find the officers' testimony credible, we again note that there was sufficient evidence for the jury to find Ticknor guilty of resisting arrest.

## **2. The Rule of Exclusion of Witnesses**

¶15 It is apparent from the record that Rule 9.3 of the Arizona Rules of Criminal Procedure ("the rule of exclusion of witnesses") was in effect for the trial. The rule of exclusion of witnesses contains two exceptions. First, victims, as defined under Rule 39 of the Arizona Rules of Criminal Procedure and applicable statutes, are permitted to be in the courtroom for any proceeding (such as trial) when the defendant also has a



right to be present. Ariz. R. Crim. P. 9.3(a). Second, one investigator for each side is permitted to remain at the counsel table during trial. Ariz. R. Crim. P. 9.3(d).

¶16 During preliminary jury instructions, the trial court noted that it “[t]urns out that [the victim and the investigator] happen[] to be the same individual, and that’s why he’s here in the courtroom.” Though the identity of this person is not explicitly clear from this portion of the record, it is probable that the trial court was referring to Officer H. It was he who was at the counsel table earlier the same day during voir dire, and the prosecutor introduced him to the prospective jurors as follows: “Sitting with me today is the alleged victim in this case. His name is Patrick H[.]. He’s a Scottsdale police officer.” Because the State alleged that Ticknor had committed aggravated assault on Officer H. by shutting the door on him as he was exiting the senior center, Officer H. qualified under Rule 39 of the Arizona Rules of Criminal Procedure as the “victim” in this case.<sup>4</sup> Independent of that, he was, as noted by the trial court, also the State’s investigator. Officer H. was

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<sup>4</sup> The rule of exclusion of witnesses gives effect to Article 2, Section 2.1(A)(3) of the Arizona Constitution, which provides that “a victim of a crime has the right . . . [t]o be present at and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present.” As relevant here, this constitutional provision defines “victim” as “a person against whom the criminal offense has been committed.” *Id.* § 2.1(C).

therefore entitled to be present in the courtroom for the duration of trial. Such a time period includes the time during which Officer R. testified.

¶17 It is unclear whether Ticknor argues that Officer R. should have been excluded from the courtroom during the testimony of Officer H. The transcript does not provide an answer as to whether Officer R. remained in the courtroom following his own testimony. However, even if Officer R. were present for Officer H.'s testimony, this would not have violated the rule of exclusion of witnesses. The rule provides that

[o]nce a witness has testified on direct examination and has been made available to all parties for cross-examination, the witness shall be allowed to remain in the courtroom unless the court finds, upon application of a party or witness, that the presence of the witness would be prejudicial to a fair trial.

Ariz. R. Crim. P. 9.3(a). Officer R. was the first witness to testify for the State, and he was then cross-examined by Ticknor's counsel.<sup>5</sup> Ticknor's trial counsel never raised the issue of excluding Officer R. from the courtroom following his

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<sup>5</sup> The trial transcript lists "Mr. Crowley" as the attorney completing cross-examination, even though Deputy County Attorney Crowley represented the State. We believe this was an error on the part of the court reporter, because the line of questioning appears under the heading of "Cross-Examination," and Mr. Crowley conducted both direct and redirect questioning of Officer R. (whom the State had called to testify). On this basis, we conclude that Mr. Smiley, Defendant's trial counsel, must have cross-examined Officer R.

testimony. Therefore, even if Officer R. remained in the courtroom following his own testimony, there would have been no violation of the rule of exclusion of witnesses.

### **3. Officer H.'s Alleged Disruption During Trial**

¶18 Ticknor next contends that Officer H., who was present at the State's counsel table throughout trial, interrupted defense counsel during the latter's closing argument by making "snide remarks persua[d]ing the jury in [the State's] favor." As Ticknor recognizes, there is no record of any such interruption in the transcript. Ticknor did not raise the issue of any disruption with the trial court.

¶19 A defendant who fails to object to an error at trial forfeits the right to obtain appellate relief except when the error is fundamental. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). In deciding whether an error is fundamental, Ticknor must show that the error goes to the "foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *Id.* at 568, ¶ 24, 115 P.3d at 608. If Ticknor establishes fundamental error, he then bears the burden to show he was prejudiced by that error. *Id.* at 568-69, ¶ 26, 115 P.3d at 608-09.

¶20 On this record, we cannot agree with Ticknor's characterization that there was an outburst by Officer H. or

that such an outburst, if it occurred, swayed or otherwise prejudiced the jury against Ticknor. After all, the jury found Ticknor not guilty of two of the four charges against him. Further, we find it unlikely that the trial judge would not have maintained order (as she did on other occasions after Ticknor's own outbursts) during such a crucial moment of trial, and that any type of significant disruption would not have been noted by the court reporter or mentioned by anyone else in the courtroom. The record does not support Ticknor's argument that any error occurred, much less any fundamental error.

#### **4. Ticknor Precluded from Testifying**

¶21 Ticknor next argues that he was precluded from testifying at trial. First, he contends that the trial judge's direction that he only speak to his counsel was a command that he not testify. Second, he argues that his trial counsel told him he could not testify.

¶22 Ticknor cites various portions of the trial transcripts in which, following his own distracting movements or verbal outbursts, the trial judge immediately told him that he must communicate to the court through counsel. At no time in reprimanding Ticknor did the trial judge intimate that he had no right to testify in his own defense. Instead, the judge merely instructed him that she would not tolerate his outbursts, and that he needed to consult with counsel if he wished to address

the court.

¶23 Additionally, Ticknor takes issue with the court reporter's transcription of a sidebar conference held with only the judge and lawyers present immediately after the State rested. At sidebar, the following conversation ensued between the trial judge and Ticknor's counsel, Mr. Smiley:

THE COURT: [. . .] I know, Mr. Smiley, you need to do that Rule 20 motion.

MR. SMILEY: Right.

THE COURT: We could do it at the bench or we can do it -- do you have any witnesses do you think that you are --

MR. SMILEY: No. We're not going to call any witnesses. He is not going to.

THE COURT: Your client is not testifying?

MR. SMILEY: No.

THE COURT: Okay. [. . .]

It is Ticknor's position that, through this conversation, the trial judge forbade him from testifying, with the court reporter having erred in transcribing "[y]our client is not testifying?" as an interrogative rather than imperative statement. Neither the actual transcription nor the context of the discussion supports Ticknor's argument that the trial judge commanded that he could not testify. The most reasonable interpretation is that, because Rule 20 motions are heard outside the presence of

the jury, the judge simply inquired to see whether or not Ticknor would put on any witnesses in order to determine when to allow defense counsel to make such a motion. Defense counsel himself said nothing in response to the judge that would lead us to believe that any other motive was at play. We reject Ticknor's argument and conclude that the trial judge did not preclude Ticknor from taking the stand in his own defense.

¶24 Ticknor also raises an issue with regard to his counsel telling him he could not testify at trial. In his supplemental brief, Ticknor contends that he asked counsel when he would be able to testify, and in response counsel said, "[n]ever[,] it[']s over Mark." We construe this argument to be one suggesting that Ticknor received ineffective assistance of counsel at trial. Under Arizona law, this court cannot consider claims of ineffective assistance of counsel on direct appeal, regardless of merit. *State ex rel. Thomas v. Rayes*, 214 Ariz. 411, 415, ¶ 20, 153 P.3d 1040, 1044 (2007); *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). Such claims must be first presented to the trial court in a petition for post-conviction relief. *Id.* Ticknor is free to raise this claim in a post-conviction proceeding filed in superior court pursuant to Rule 32 of the Arizona Rules of Criminal Procedure.

#### **5. Trial Court's Continuation of Sentencing**

¶25 Ticknor argues that the trial court erred in

continuing his sentencing beyond the limit of 30 days from the date of the verdict, in violation of Rule 26.3 of the Arizona Rules of Criminal Procedure. We review the trial court's decision regarding a continuance of sentencing for abuse of discretion. *State v. Schackart*, 190 Ariz. 238, 254-55, 947 P.2d 315, 331-32 (1997). In this case, sentencing occurred 64 days after the guilty verdicts were rendered. Rule 26.3(b) permits sentencing to be continued to a date no later than 60 days after trial provided good cause is shown.

¶26 Sentencing was initially set for July 29, 2010. On July 6, 2010, the State filed a motion to continue the sentencing because Ticknor would not cooperate in providing his fingerprints for the State's verification in proving his prior convictions. The trial court held a status conference on July 20, 2010, at which Ticknor's fingerprints were obtained. At that hearing, the court, on its own motion and without objection from either party, continued the sentencing to August 10, 2010. On July 26, 2010, the State filed another motion to continue sentencing, stating that Officer R. would be unavailable to testify on August 10. The trial court denied this motion and reaffirmed the August 10 sentencing date. Ticknor did not appear, however, at the August 10 sentencing hearing. His counsel moved for a continuance, which the court granted. The new date for sentencing, and the date at which the sentencing

did indeed finally occur, was August 31, 2010.

¶27 The record reflects that the only sentencing continuances granted in this case were due to Ticknor's omissions. Because Ticknor initially refused to provide his fingerprints for the State's proving of prior offenses and did not appear at the August 10 sentencing hearing, the trial court was unable to proceed with sentencing within the 30-day or 60-day time limits provided for in Rule 26.3. No party objected to the first continuance granted, *see State v. Cornwall*, 114 Ariz. 502, 504, 562 P.2d 382, 384 (App. 1976) (holding that a trial court's grant of a continuance of sentencing for good cause, when agreed to by both the State and the defendant, is not reversible error), and the trial court was effectively forced to continue the August 10 sentencing due to Ticknor's non-appearance. We therefore conclude that, based on these facts, it was not an abuse of discretion for the trial court to sentence Ticknor 64 days following his conviction.

#### **6. Improper Admission of Evidence**

¶28 The last issue raised by Ticknor in his supplemental brief is that the trial court improperly admitted evidence that Officers R. and H. illegally seized from his person. The exhibit list at trial, however, does not reveal the admission of any evidence seized from Ticknor. A CD or DVD containing the surveillance video from the senior center was admitted, as well



as six photographs. Two of the photographs were of the senior center and a walkway outside it, and another two of the photographs were of a scratch on Officer H.'s arm. The two remaining photographs are of Ticknor's head and torso, and they do not feature any type of item (other than clothing) that Ticknor might have had on his person. As such, there was no evidence entered at trial that was the fruit of any seizure, much less an illegal seizure, of anything from Ticknor's person. Ticknor's argument on this point has no support in the record, and we need not consider whether any type of frisk or search of Ticknor's person the officers might have conducted met constitutional and statutory standards.

**7. This Court's Independent Review of the Record  
for Fundamental Error**

¶129 Finally, having considered both defense counsel's brief and Ticknor's own supplemental brief, and having independently examined the record for reversible error, see *Leon*, 104 Ariz. at 300, 451 P.2d at 881, this court finds none. The evidence presented supports the convictions, and the sentences imposed fall within the ranges permitted by law. As far as the record reveals, Ticknor was represented by counsel at all stages of the proceedings, and these proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure.

¶130 Pursuant to *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984), counsel's obligations in this appeal have ended. Counsel need do no more than inform Ticknor of the disposition 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. Ticknor has 30 days from the date of this decision in which to proceed, if he desires, with a *pro se* motion for reconsideration or petition for review.

**CONCLUSION**

¶131 The convictions and sentences are affirmed.

\_\_\_\_\_/s/\_\_\_\_\_  
JOHN C. GEMMILL, Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
JON W. THOMPSON, Presiding Judge

\_\_\_\_\_/s/\_\_\_\_\_  
MAURICE PORTLEY, Judge