

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

DEVALON BROOKS JACKSON, II, *Appellant*.

No. 1 CA-CR 16-0430
FILED 11-7-2017

Appeal from the Superior Court in Maricopa County
No. CR2014-153106-001
The Honorable David V. Seyer, Judge *Pro Tempore*

AFFIRMED

COUNSEL

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

Mays Law Office PLLC, Phoenix
By Wendy L. Mays
Counsel for Appellant

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MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge Kent E. Cattani and Judge Jon W. Thompson joined.

M c M U R D I E, Judge:

¶1 Devalon Brooks Jackson, II, appeals his conviction of one count of resisting arrest, a Class 6 felony, and the resulting sentence. Jackson's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297 (1969), certifying that, after a diligent search of the record, she found no arguable question of law that was not frivolous. Jackson was given the opportunity to file a supplemental and amended supplemental brief *in propria persona*, in which he raised several issues. Counsel asks this court to search the record for arguable issues. See *Penson v. Ohio*, 488 U.S. 75 (1988); *State v. Clark*, 196 Ariz. 530, 537, ¶ 30 (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), 13-4031, and -4033(A)(1). After reviewing the record, we affirm Jackson's conviction and sentence.

FACTS¹ AND PROCEDURAL BACKGROUND

¶2 On November 6, 2014, at approximately 3:00 A.M., Phoenix Police Officer Chris Wallin responded to an emergency phone call concerning shoplifting at a Walmart store. In April 2015, Wallin testified at a suppression hearing that he wore his police uniform and drove a marked police vehicle when he was called to the investigation. A dispatcher described the suspect to Wallin as a black male about 50 years old, wearing a gray T-shirt or shirt and black pants. Once Wallin arrived at the Walmart parking lot, a citizen approached him and described the suspect as a black male wearing a dark-colored hoodie. That person also told Wallin where the suspect went, which matched the direction given in the initial dispatch call. After Wallin drove to a nearby apartment complex, he saw two men walking. Wallin approached Jackson and repeatedly asked him to stop

¹ We view the evidence in the light most favorable to sustaining the convictions and resulting sentences. See *State v. Guerra*, 161 Ariz. 289, 293 (1989).

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because he needed to talk to him, but Jackson continued to a nearby staircase. Because Jackson did not stop, and said he was not going to stop, Wallin grabbed Jackson's arm. Once Wallin grabbed Jackson's arm, Jackson resisted with both men ending up struggling on the ground.

¶3 On November 14, 2014, Jackson was indicted on three counts: Aggravated Assault, a Class 4 felony (Count 1); Resisting Arrest, a Class 6 felony (Count 2); and Misconduct Involving Weapons, a Class 4 felony (Count 3). Count 3 was severed from Counts 1 and 2 and Jackson was ultimately acquitted on the charge.

¶4 Jackson was found guilty of resisting arrest (Count 2), but not guilty of the aggravated assault charge (Count 1). After the aggravation hearing, the jury found Jackson was on probation during the commission of the crime.

¶5 The superior court sentenced Jackson to a presumptive term of 3.75 years' imprisonment and revoked Jackson's probation, sentencing him to 2.5 years' imprisonment to run consecutive to the resisting arrest conviction. The court gave Jackson credit for 582 days of presentence incarceration. Jackson timely appealed.

DISCUSSION

¶6 We have read and considered counsel's brief and have reviewed the record for arguable error. *See Leon*, 104 Ariz. at 300. We find none.

¶7 In his supplemental briefs, Jackson raised the following issues as they relate to the suppression hearing: (1) Wallin lacked probable cause or reasonable suspicion to detain Jackson; (2) Jackson was denied ability to confront the unidentified tipster; (3) the prosecuting attorney misled the grand jury; (4) the court erred by not granting Jackson relief requested at the suppression hearing; (5) the court showed clear bias toward Jackson when it questioned Wallin, "prosecuting" the case for the State; and (6) the court's questioning of defense counsel amounted to shifting the State's burden to prove its case.

A. Irregularity During a Grand Jury Proceeding.

¶8 Jackson contends the prosecuting attorney misled the grand jury when she asked them to disregard the officer's initial pursuit of Jackson as a suspect of a shoplifting investigation. According to Jackson, the grand jury should have considered the investigation because Jackson did not fit

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the description given in the emergency dispatch call, leaving the officer with no probable cause to stop him. However, after a conviction, we do not consider claims regarding grand jury proceedings. *See State v. Agnew*, 132 Ariz. 567, 573 (App. 1982).

B. The Suppression Hearing.

¶9 Jackson argues the court abused its discretion when it denied his motion to suppress evidence because (1) Wallin wrongfully relied on an anonymous person's tip to pursue a suspect of Jackson's description when the dispatch call and the description of Walmart employees substantially differed, and (2) Wallin lacked probable cause or reasonable suspicion to detain Jackson and/or exceeded his authority to detain Jackson without a proper warning.

¶10 "We review the denial of a motion to suppress for an abuse of discretion." *State v. Ontiveros-Loya*, 237 Ariz. 472, 475, ¶ 5 (App. 2015). "We consider only the evidence presented at the suppression hearing, and we view that evidence in the light most favorable to sustaining the court's rulings." *Id.*

1. Inability to Confront an Unidentified Citizen.

¶11 Jackson argues he was denied a constitutional right to confront the anonymous person who directed Wallin in Jackson's direction and gave Wallin Jackson's description. Arizona courts have held that "'reliability is enhanced' when 'an ordinary citizen volunteers information which he has come upon in the ordinary course of his affairs, completely free of any possible ordinary gain.'" *State v. Gomez*, 198 Ariz. 61, 63, ¶ 15 (App. 2000); *State v. Diffenderfer*, 120 Ariz. 404, 406 (App. 1978) ("Information supplied by a citizen who voluntarily comes forward to aid law enforcement officers is presumed to be reliable.").

¶12 Here, the citizen voluntarily approached Wallin, who was dressed in a police uniform and arrived in a marked police vehicle. Wallin had an opportunity to assess the citizen's credibility when they talked face-to-face at the Walmart parking lot at approximately 3:00 A.M. Wallin was not required to conduct an additional reliability check. *See Diffenderfer*, 120 Ariz. at 406. The superior court, thus, did not abuse its discretion when it denied Jackson's motion to suppress on that basis.

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2. Lack of Probable Cause or Reasonable Suspicion to Detain.

¶13 Jackson argues he was improperly detained because Wallin lacked probable cause or reasonable suspicion for the detention and/or exceeded his authority to detain Jackson without a proper warning.

¶14 An officer needs only a reasonable suspicion to stop a person to conduct an investigatory stop, which is a standard lower than required for probable cause. *See State v. Ramsey*, 223 Ariz. 480, 484, ¶ 18 (App. 2010). “Officers may briefly stop an individual if, based on the totality of the circumstances, they have reasonable suspicion the individual is involved in criminal activity.” *Id.* at ¶ 17 (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). “[N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion.” *Id.* at ¶ 20 (citing *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000)).

¶15 Here, Jackson exhibited behavior sufficient to create reasonable suspicion prior to his detention and separate from the shoplifting charge. The superior court was within its discretion to deny Jackson’s motion to suppress on this basis.²

C. Court’s Questioning of a Witness.

¶16 Jackson argues the court showed clear bias toward him when it questioned a witness during the suppression hearing instead of, or in addition to, the prosecutor.

¶17 Under Arizona Rule of Evidence 614(b), however, “the court may examine a witness regardless of who calls the witness.” Moreover, a “party may object to the court’s . . . examining a witness” either immediately, or when a jury is not present, which did not happen here.

² Because there is not a colorable claim that the officer lacked reasonable suspicion to stop Jackson, we do not need to reach the issue of whether the lack of reasonable suspicion is a defense to the crime of resisting arrest. *See* A.R.S. § 13-404(B)(2) (justification defense unavailable for resistance to “lawful or unlawful” arrest unless in response to excessive force by officer); *State v. Windus*, 207 Ariz. 328, 331, ¶ 16, n.3 (App. 2004) (declining to suppress evidence of defendant’s resistance to arrest that ensued after police unlawfully entered premises); *State v. Sanders*, 118 Ariz. 192, 196 (App. 1978) (suggesting right to resist unlawful arrest “no longer the law in Arizona” after *Hatton*); *State v. Hatton*, 116 Ariz. 142, 147–49 (1977) (“question[ing] a blanket right to resist [unlawful] arrest”).

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Ariz. R. Evid. 614(c). Therefore, no fundamental error occurred. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19–20 (2005) (to prevail on a claim not objected to in the superior court, a defendant must show that fundamental error exists and caused prejudice).

D. Court’s Questioning Counsel.

¶18 Jackson further argues the court’s questioning of his defense counsel amounted to shifting the State’s burden to prove its case. However, an attorney’s argument is not evidence. *See State v. Morris*, 215 Ariz. 324, 336–37, ¶ 55 (2007). No fundamental error, thus, resulted from the court’s closer examination of defense counsel’s legal argument.

¶19 Jackson was present and represented by counsel at all stages of the proceedings against him. The record reflects the superior court afforded Jackson all his constitutional and statutory rights, and the proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. The court conducted appropriate pretrial hearings, and the evidence presented at trial and summarized above was sufficient to support the jury’s verdicts. Jackson’s sentences fall within the range prescribed by law, with proper credit given for presentence incarceration.

CONCLUSION

¶20 Jackson’s conviction and sentence are affirmed. After the filing of this decision, defense counsel’s obligations pertaining to Jackson’s representation in this appeal will end after informing Jackson of the outcome of this appeal and his future options, unless counsel’s review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584–85 (1984). On the court’s own motion, Jackson has 30 days from the date of this decision to proceed, if he desires, with a *pro se* motion for reconsideration or petition for review.



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