

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



DIVISION ONE
FILED: 07/21/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

STATE OF ARIZONA,) 1 CA-CR 10-0690
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 111, Rules of the
KARAE JUSTIN BRANCH,) Arizona Supreme Court)
)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-104272-001 DT

The Honorable Sherry K. Stephens, Judge

AFFIRMED

Thomas C. Horne, 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 Kathryn L. Petroff, Deputy Public Defender
Attorneys for Appellant

P O R T L E Y, Judge

¶1 This is an appeal under *Anders v. California*, 386 U.S.

738 (1967) and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878

(1969). Counsel for Defendant Karae Justin Branch has advised us that, after searching the entire record, she has been unable to discover any arguable questions of law, and has filed a brief requesting us to conduct an *Anders* review of the record. We have also reviewed the supplemental brief filed by Defendant.

FACTS¹

¶2 A direct complaint was filed charging Defendant with criminal damage, resisting arrest and two counts of aggravated assault. After his preliminary hearing, the trial court found that there was no probable cause for the criminal damage count. Defendant was then arraigned and pled not guilty to the three remaining charges. The State subsequently alleged that he had two historical priors and other aggravating circumstances other than prior convictions, including the fact that the offenses had been committed while he was released from confinement.

¶3 After jury selection and opening statements, Officer David Seitter testified that on January 23, 2010, he, along with Officer Zachary Wright, responded to an emergency call about a burglary in progress and went to Defendant's residence. After speaking briefly to Defendant, the officers left and when they returned to try to speak to Defendant a second time, he advised the police that he did not want to speak with them. After

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

Officer Seitter prevented Defendant from closing the door, he and his partner grabbed the Defendant, pulled him out of the doorway, turned him around, handcuffed him and placed him under arrest.

¶4 The police walked Defendant to their patrol Tahoe, and just as they were about to search him before putting him into the Tahoe, Defendant began to scream "[t]his is an illegal search." Defendant also began to actively resist their attempt to search him by twisting his body hard, pushing back and trying to hit them with his head, attempting to head-butt Officer Wright as he was trying to finish the search, and kicking backwards. The officers then took his legs out from under him and put Defendant on the ground. Defendant continued to twist and started "mule kicking backwards."

¶5 After the officers completed their search, they helped Defendant back to his feet and attempted to put him in the Tahoe. Defendant, however, stood on the running board of the Tahoe and kicked backwards. Both officers stumbled backwards, got their balance, grabbed Defendant, and tried to get him into the Tahoe in spite of his attempts not to be placed in the vehicle. The officers, however, eventually got Defendant into the Tahoe despite his contrarian best attempts. Defendant was subsequently booked for resisting arrest.

¶6 After the jury heard from two other witnesses, the defense, outside of the jury's presence, made an unsuccessful motion pursuant to Ariz. R. Crim. P. 20. The Defendant then called two witnesses, who had been standing near the townhouse, to testify that they did not see Defendant resist arrest or try to harm the officers. After all of the witnesses testified, the jury was instructed, and heard closing arguments. The jury subsequently found Defendant guilty of resisting arrest and aggravated assault against Officer Wright; not guilty of aggravated assault against Office Seitter, but guilty of attempted aggravated assault, a lesser included offense.

¶7 Defendant subsequently stipulated to an exhibit demonstrating one prior felony. The trial court heard from the victims and other witnesses, and then described the aggravating facts, as well as the mitigating factors. Defendant was then sentenced to slightly aggravated, concurrent four-year terms in prison for resisting arrest and aggravated assault, and given credit for thirty-eight days of presentence incarceration. He was sentenced to time served for the misdemeanor crime of attempted aggravated assault.

¶8 We have jurisdiction over the appeal 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, and -4033(A)(1) (2010).

DISCUSSION

¶9 Defendant has raised a number of issues in his supplemental brief. First, he argues that the defense did not have the opportunity to interview the State's witnesses. There is, however, nothing in the record to reflect that the defense did not have the opportunity to interview the officers or did not take advantage of the opportunity.

¶10 Defendant next contends that the evidence was insufficient to sustain his convictions. Specifically, he makes three arguments: (1) although the officers testified that there was no need to charge him with aggravated assault, they testified that they feared for their life; (2) the State did not prove its case beyond a reasonable doubt because the officers were allowed to testify about his statements during the scuffle which were inadmissible hearsay statements; and (3) the officers committed perjury; which, in essence, challenges their credibility.

¶11 The record reflects that the jury heard the evidence, that they were properly instructed and, in order to reach a verdict, had to determine the relevant facts. In fact, as part of their responsibility to determine the facts, the jury had to decide the credibility of each witness. *See State v. Harrison*, 111 Ariz. 508, 509, 533 P.2d 1143, 1145 (1975). Clearly, the jury decided credibility because it decided that Defendant only

committed aggravated assault against Officer Wright, even though he attempted to assault Officer Seitter. Accordingly, we will not second-guess the jury's credibility determination.

¶12 We also disagree with the argument that the officers should not have been allowed to testify about Defendant's statements during the scuffle because they were inadmissible hearsay. Arizona Rule of Evidence 801(d)(2) clearly states that hearsay does not include a defendant's statement. The Rule provides, in relevant part, that a "statement is offered against a party [the Defendant] and is (A) the party's own statement" Because Defendant's statements during the scuffle were not hearsay, the jury was free to consider them in reaching its verdict.

¶13 Finally, we have read and considered the opening brief and Defendant's supplemental brief, and have searched the entire record for reversible error. We find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. The record, as presented, reveals that Defendant was represented by counsel at all stages of the proceedings, and the sentence imposed was within the statutory limits.

CONCLUSION

¶14 After this decision has been filed, counsel's obligation to represent Defendant in this appeal has ended.

Counsel need do no more than inform Defendant of the status of the appeal and Defendant's 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, 585, 684 P.2d 154, 157 (1984). Defendant can, if desired, file a motion for reconsideration or petition for review pursuant to the Arizona Rules of Criminal Procedure.

¶15 Accordingly, we affirm Defendant's convictions and sentences.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

LAWRENCE F. WINTHROP, Judge

/s/

PATRICK IRVINE, Judge