DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. GEORGE JONES, Appellant.	)	1 CA-CR 12-0771 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-007684-001

The Honorable Edward Bassett, Judge
The Honorable Warren J. Granville, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
by Joseph T. Maziarz, Acting Chief Counsel,
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

Bruce Peterson, Maricopa County Legal Advocate — Phoenix
by Consuelo M. Ohanesian, Deputy Legal Advocate
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). After searching the entire record, counsel for Defendant George Jones has advised us that 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. Jones was given the opportunity to file a supplemental brief and filed a timely supplemental brief.

FACTS[1]

¶2 Two men entered the Westward Tavern late on the evening of July 18, 1978, ordered the patrons onto the floor and began to rob them and the tavern. One patron, the victim, had back problems and could only get to his knees. After he was threatened by a man with a gun, the victim reached for his beer and, as one witness testified, "all hell broke loose." The victim was physically assaulted and shot twice in the back. He died from the gunshot wounds.

¶3 The two men quickly left the tavern, possibly with others, and sped away in a gray station wagon. The police were called, responded, and as part of the investigation, impounded a Coors beer bottle. The police later found the station wagon. Fingerprints were taken from the beer bottle and car. The case

[1] We view the facts "in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Rienhardt*, 190 Ariz. 579, 588-89, 951 P.2d 454, 463-64 (1997).

went cold until April 2011 when the police discovered that the prints on the beer bottle matched Jones' prints.

¶4 Once the match was discovered, the police located Jones and a detective interviewed him in June 2011. Jones told the police that there was a robbery, a scuffle, then he was on the ground and someone got shot. He was adamant that he did not carry a gun that night and was not the shooter. He left the tavern with the men and later jumped out of the car as it was being followed by a helicopter.

¶5 Jones was indicted for first degree murder, a class one dangerous felony (felony-murder). Before trial, Jones unsuccessfully moved to remand the case to the grand jury. He also moved to suppress his statement to the police detective. The court determined that: (1) Jones was read his *Miranda*[2] warnings; (2) he never unequivocally requested counsel during the interview; and (3) his statements were voluntary and not the product of any promise. The case went to trial and the jury found Jones guilty as charged. He was subsequently sentenced to life in prison with the possibility of parole after twenty-five years, and given 377 days of presentence incarceration credit.

¶6 We have jurisdiction over this appeal pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Revised Statutes sections 12-120.21(A)(1), 13-4031, and -4033(A)(1) (West 2013).

DISCUSSION

¶7 The opening brief asks us to review the record for fundamental error. The supplemental brief argues the following issues: (1) Jones' rights were violated when the detective visited him in prison to get a buccal swab because the detective did not immediately serve him with the order authorizing the swab; (2) Jones was not given the proper *Miranda* warnings because the detective failed to tell him that he had a right to stop the questioning at any time; (3) a witness, J.W., gave inconsistent statements or testimony; and (4) documents for the chain of custody for some of the evidence were missing or the evidence had been disturbed.

A.

¶8 The first issue Jones raises is whether his rights were violated because the detective failed to immediately serve him with the court order for a buccal swab when they met June 2011. He contends that the order constituted a contract and the detective was required to serve it without resorting to any pretense or pretext. Essentially, Jones complains that the detective lied to him about whether he was a suspect in the murder investigation and any information gathered under the ruse has to be suppressed. We disagree.

¶9 Generally, police officers and detectives can use trickery in their work so long as it does not overcome a suspect's will and induce an involuntary confession. *State v. Tapia*, 159 Ariz. 284, 289, 767 P.2d 5, 10 (1988); *State v. Strayhand*, 184 Ariz. 571, 579, 911 P.2d 577, 585 (App. 1995). Here, although the detective told Jones that he did not know whether Jones was a suspect in the murder investigation and did not immediately serve him with the order for the buccal swab, there is no evidence in the record that it overcame Jones' will and induced an involuntary confession. *See Tapia*, 159 Ariz. at 289, 767 P.2d at 10; *see also Strayhand*, 184 Ariz. at 579, 911 P.2d at 585.

¶10 Although the court denied his suppression motion, Jones also presented the issue at trial and argued in closing argument that his statement was not voluntary. The jury was properly instructed that it could not consider Jones' statements unless they found them to be voluntary. We presume that the jury followed the instructions. *See State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006); *State v. Reyes*, 664 Ariz. Adv. Rep. 15, ¶ 7 (App. July 2, 2013).

¶11 Jones also claims that the detective's failure to immediately serve him with the order for the buccal swab was a breach of contract. He, however, did not cite to any legal authority for his argument. Although he cites to general

contract law, an order from the court authorizing the collection of DNA using a buccal swab is not a contract: there was no offer, no acceptance, no consideration and Jones was not a third-party beneficiary of any contract. *See, e.g.*, *Sherman v. First Am. Title Ins. Co.*, 201 Ariz. 564, 567, ¶ 6, 38 P.3d 1229, 1232 (App. 2002). Consequently, the fact that the detective did not deliver the order to Jones before trying to convince him to talk about the incident did not require the suppression of his statements.

B.

¶12 Jones' second argument is that he was not given the full *Miranda* warnings. He contends that the detective never told him that he had a right to stop the questioning at any time. As a result, he argues that the failure to give the full warnings requires relief.

¶13 In *Miranda*, the United State Supreme Court stated that four warnings that must be given to a person during a custodial interrogation are as follows: (1) you have the right to remain silent; (2) anything you say can be used against you in a court of law; (3) you have the right to the presence of an attorney; and, (4) if you cannot afford an attorney one will be appointed for you prior to any questioning if you so desire. *Miranda,* 384 U.S. at 479; *see also Dickerson v. U.S.*, 530 U.S. 428, 435 (2000).

¶14 The Supreme Court has never required that a person in custodial interrogation must be told that he has the right to stop the questioning at any time. Although some law enforcement agencies have included a variation of the phrase "[y]ou also have the right to stop answering at any time," *Duckworth v. Eagan*, 492 U.S. 195, 203 n.4 (1989), including Arizona law enforcement, *Doody v. Schriro*, 596 F.3d 620, 661 (9th Cir. 2010) ("[Y]ou will still have the right to stop answering at any time."), our supreme court has never required the additional phrase. *State v. Bible*, 104 Ariz. 346, 347-48, 452 P.2d 700, 701-02 (1969); *State v. Navallez*, 10 Ariz. App. 135, 137, 457 P.2d 297, 299 (1969). *See also U.S. v. Lares-Valdez*, 939 F.2d 688, 689-90 (9th Cir. 1991) (collecting federal cases holding that a defendant does not need to be informed of a right to stop questioning after it has begun).

¶15 Here, there is no doubt that Jones was given the four required *Miranda* warnings. He stated such in his motion to suppress when he clearly stated that he "was advised of his Miranda rights." Additionally, the transcript of his meeting with the detective clearly demonstrates that Jones was given the four required *Miranda* warnings. Consequently, we find no error or basis for relief.

C.

¶16 Jones' third issue is entitled "prior inconsistent statement" and refers to statements by witness J.W., who was fifteen years old in 1978 and the only person who reported that one of the two men involved in the tavern robbery touched or threw a beer bottle. Specifically, Jones contends that J.W.'s testimony was inconsistent with statements made by J.W.'s mother, who gave her statement to the police in 2009 and was not called to testify, and other testimony or information in police reports. Jones argues that J.W.'s testimony was "made up."

¶17 Regardless of J.W.'s testimony and any contrary testimony and evidence, the jury had to determine whether to believe J.W. in whole or part, as well as the other testifying witnesses. The jury had to consider the veracity of each witness, any bias, as well as their perception and memory of the robbery and shooting in 1978. *State v. Roberts*, 139 Ariz. 117, 121, 677 P.2d 280, 284 (App. 1983). The jury then had to determine the facts in order to reach its verdict. As a result, whether the jury believed all of J.W.'s testimony from the event when he was fifteen, some of it or none of it, the jury had to make that determination in reaching its verdict. Consequently, regardless of whether J.W.'s testimony can be challenged or undermined by other evidence in the record, and was, it was the jury's responsibility to judge his credibility and the

credibility of all the witnesses in deciding the facts and reaching a verdict. We, as a result, cannot replace our analysis of the facts to find that the jury erred as a matter of law.

D.

¶18 The final argument entitled "missing documentation of the chain of custody of evidence" essentially contends that the record does not clearly demonstrate where the Coors beer bottle was found, when it was found, why it was not photographed, and how it was maintained by the police for more than thirty years before a matching print was discovered. The argument, like the challenge to J.W.'s testimony, challenges the sufficiency of the evidence pertaining to the collection and maintenance of the bottle.

¶19 Despite the argument and Jones' review of all the evidence along with any inference that could be given, the jury was responsible for listening to the evidence, determining the facts and rendering a verdict. Although the police procedures in 1978 for collecting evidence at a crime scene, including photographing, and memorializing where the evidence was found and then maintaining the evidence may not have been equal to today's standards for the Phoenix police department, the jury heard all the evidence. They heard about the collection, the packaging, the maintenance and storage of the evidence as well

as the fact that it all had to be moved to a new location. The jury then had to consider all the evidence presented and had to decide whether any defects in the crime scene collection and maintenance practices created a reasonable doubt. The verdict signified that the jury rejected the argument given all of the evidence. Because this court does not reweigh the trial evidence even in a cold case, we find no reversible error. *See Castro v. Ballesteros-Suarez*, 222 Ariz. 48, 52, ¶ 11, 213 P.3d 197, 201 (App. 2009).

E.

¶20 We have searched the entire record for reversible error. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find none. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. We further find that the record demonstrates that Jones was represented by counsel at all stages of the proceedings. Moreover, the sentence is within the statutory range and presentence incarceration credit was properly calculated. Accordingly, we find no reversible error that would require a new trial.

¶21 After this decision is filed, counsel's obligation to represent Jones in this appeal has ended. Counsel must only inform Jones of the status of the appeal and his future options, unless counsel identifies an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v.*

Shattuck, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Jones may, if desired, file a motion for reconsideration or petition for review pursuant to the Arizona Rules of Criminal Procedure.

CONCLUSION

¶22 Accordingly, we affirm the conviction and sentence of George Jones.

/s/
_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/
_____
SAMUEL A. THUMMA, Judge

/s/
_____
DONN KESSLER, Judge