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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



DIVISION ONE
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BY: DN

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

STATE OF ARIZONA,) 1 CA-CR 08-0284
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
DAVID WAYNE SROUT,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Mohave County

Cause No. CR2006-1144

The Honorable Robert R. Moon, Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

Dana P. Hlavac, Mohave County Public Defender Kingman
by Jill L. Evans, Deputy Public Defender
Attorneys for Appellant

I R V I N E, Judge

¶1 David Wayne Srout ("Srout") appeals his convictions
for first-degree murder, armed robbery, and hindering

prosecution of murder in the first degree. Srout argues that the trial court abused its discretion in denying his motion for a new trial by precluding exculpatory statements by an unavailable accomplice pursuant to Rule 804(b)(3) of the Arizona Rules of Evidence. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY¹

¶12 In August, 2005, Srout and Shannon Blair ("Blair") lived with Gene Tate ("Tate"), a friend of Srout.² Behind Tate's house was a small "shed," containing a room with an engine hoist, a general living room area, and an office area.³ Srout, Tate, and Withers spent the majority of their time in this shed. On the evening of August 3, 2005, Tate informed Blair and Srout that Victim was planning on buying a car with cash from Withers. While Withers and Victim were on a test-drive, Tate instructed Blair to hide in a small area in the rear of the shed with a crow bar and wait for them to return.

¶13 When Victim and Withers entered the shed, Blair hit Victim in the face with the crow bar. Tate then shoved Victim

¹ We present the facts in the light most favorable to sustaining the jury's verdict. *State v. Tucker*, 205 Ariz. 157, 160 n.1, 68 P.3d 110, 113 n.1 (2003).

² Tate's wife and children, Srout's son, and Mike Withers ("Withers"), another friend of Srout and Tate, also lived at Tate's house.

³ Sally Roberts, Tate's previous girlfriend, testified that "[a person] could hear anybody in that shed anywhere. It's that small."

into a different room. As they struggled, Srout handed Tate a pillow to place over Victim's mouth. Tate then grabbed a knife and cut Victim's throat, which ultimately resulted in Victim's death. After Victim was wrapped in a blanket and carpet, Blair and Srout drove to a desert area near the airport, dug a ditch, and buried Victim. Blair and Srout then met a friend at a convenience store and gave him Withers' car.⁴ Tate picked-up Blair and Srout from the store and they returned to Tate's house.

¶4 On July 7, 2006, the grand jury issued an indictment, charging Srout with Count 1, first-degree murder, a class one felony; Count 2, armed robbery, a class two felony; and Count 3, hindering prosecution of murder in the first degree, a class three felony. Before trial, Srout filed a "Notice of Intent to Use Statements by Mike Withers." The State responded and agreed "that all statements against interest made by Mike Withers to law enforcement should come in;" however, the State noted that the court must determine whether each statement is truly against penal interest, and that "attempts to shift blame and curry favor are not truly self-inculpatory and fail to qualify as statements against interest."

⁴ The police later found the car abandoned in a Safeway parking lot.

¶15 A jury trial commenced on February 20, 2008. At trial, Blair's and Srout's testimony contradicted one another. The court allowed Srout to present a portion of Withers' interview with investigators. Sergeant Cooper testified that Withers admitted to: knowing of the plan to rob Victim; seeing Tate sitting on top of Victim and placing his hands around Victim's throat; using bleach to clean the carpet in the shed; and receiving money from Tate. The jury found Srout guilty as charged. The court sentenced Srout to life imprisonment with no possibility of release for 25 years for Count 1, a concurrent mitigated term of 10 years' imprisonment for Count 2, and an aggravated term of 6 years' imprisonment for Count 3. The court further ordered that Count 2 be served concurrently with Count 1 and that Count 3 be served consecutively with Counts 1 and 2.⁵

¶16 Srout timely appealed from his convictions and sentences. We have jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001), and 13-4033(A)(1) (Supp. 2008).

⁵ On February 27, 2008, Srout filed a motion for new trial that asserted "[j]udicial error in not allowing all of Mike Withers interview regarding Mr. Srout under State -v- Gibson" and "[j]udicial error in assisting County Attorney." At the post-trial hearing on the motion, the court denied the motion.

DISCUSSION

¶17 Srout argues that the trial court abused its discretion in precluding exculpatory statements by Withers, an unavailable accomplice. Srout contends that the court erred in finding that Withers' out-of-court statements were not against interest, or if against interest, not trustworthy. Srout further contends that the court erred because there was neither corroborating nor conflicting evidence to support the court's decision to preclude the statements on the ground that they were not trustworthy.

¶18 "We review the admission or exclusion of evidence for abuse of discretion. This court 'will not reverse the [trial] court's rulings on issues of the relevance and admissibility of evidence absent a clear abuse of its considerable discretion.'" *State v. Davis*, 205 Ariz. 174, 178, ¶ 23, 68 P.3d 127, 131 (App. 2002) (internal quotations and citations omitted). An out-of-court statement that "tend[s] to expose the declarant to criminal liability and [is] offered to exculpate the accused" may be admitted under an exception to the hearsay rule if three requirements are met: (1) The declarant is unavailable as a witness; (2) the statement is against the declarant's interest; and (3) "corroborating circumstances clearly indicate the trustworthiness of the statement." Ariz.R.Evid. 804(b)(3); see

also *State v. Tankersley*, 191 Ariz. 359, 370, ¶ 45, 956 P.2d 486, 497 (1998).

¶9 At trial, despite finding the entire interview unreliable, the court permitted Sroust to introduce a portion of Withers' previous statements made in an interview with investigators. The court excluded the remainder of the statements as hearsay. It determined that these statements reflected "denying, minimizing, and rationalizing." Additionally, the court found that many of Withers' statements did not inculcate Withers, did not exculpate Sroust, and did not find "the sufficient circumstantial indicia of trustworthiness of his statements."

¶10 The first requirement of Rule 804(b)(3) is that the declarant must be unavailable. Sroust and the State agree that this requirement was satisfied because Withers' attorney stated that Withers would invoke his Fifth Amendment right if called to testify. We agree.

¶11 Second, as mentioned above, the out-of-court statement must be against the declarant's interests. The statement must be so far against the declarant's interest that he would not have made it unless he believed it to be true. Ariz.R.Evid. 804(b)(3). A statement that does not inculcate the declarant or exculpate another person is not admissible. *Williamson v. United*

States, 512 U.S. 594, 599-604 (1994); *State v. Soto-Fong*, 187 Ariz. 186, 195-96, 928 P.2d 610, 619-20 (1996).

¶12 Our review of the record indicates that many of Withers' statements did not subject him to criminal liability. For example, Withers stated that: he did not know what was going on; he was scared and crying; he ran out of the house when he heard Victim scream; he did not see Srout in certain locations of the house/shed or was unsure of Srout's whereabouts; and Tate and Blair were responsible. Srout also sought to present Withers' statement that Tate and Victim were doing drugs together. Such statements are not self-inculpatory and were properly excluded.

¶13 Finally, Rule 804(b)(3) provides that "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." Ariz.R.Evid. 804(b)(3). To determine if trustworthiness is adequately established, the judge should examine both the corroborating evidence and the contradictory evidence. *State v. LaGrand*, 153 Ariz. 21, 27, 734 P.2d 563, 569 (1987). This requires an evaluation of a number of factors, including: "the existence of supporting and contradictory evidence, the relationship between the declarant and the listener, the relationship between the declarant and the

defendant, the number of times the statement was made, the length of time between the event and the statement, the psychological and physical environment at the time of the statement, and whether the declarant would benefit from the statement." *Tankersley*, 191 Ariz. at 370, ¶ 45, 956 P.2d at 497. The judge's inquiry is limited to the question of "whether evidence in the record corroborating and contradicting the declarant's statement would permit a reasonable person to believe that the statement could be true." *LaGrand*, 153 Ariz. at 28, 734 P.2d at 570. "If the judge determines that a reasonable person could conclude that the statement could be true, the evidence comes in for the jury's consideration." *State v. Lopez*, 159 Ariz. 52, 55, 764 P.2d 1111, 1114 (1988).

¶14 The record here lacks corroborating evidence to support Withers' statements. We initially note that Withers' interview was conducted approximately one year after the night in question. During the interview, Withers admitted that he could not remember and did not know specific details and admitted to doing drugs on the night in question. Further, there was no evidence that corroborated Withers' statement that Tate and Blair were the only two people involved. Blair testified at length to Withers' and Srout's involvement, and Srout testified that he did not know who was involved. Neither Blair nor Srout corroborated Withers' statements that Withers and Srout were

scared or ran out of the house. In fact, Withers' statements were inconsistent with Srout's statements to police and trial testimony. Withers stated that he and Srout were scared and crying when they heard Victim scream. Conversely, Srout continuously asserted that he never saw Victim and did not know of the murder until after he buried the carpet.

¶15 Given the unreliability of the statements, the presence of contradictory evidence, and the lack of corroborating evidence, we conclude that the trial court did not abuse its discretion when it precluded portions of Withers' interview.

CONCLUSION

¶16 For the foregoing reasons, we affirm.

/s/

PATRICK IRVINE, Judge

CONCURRING:

/s/

JOHN C. GEMMILL, Presiding Judge

/s/

ANN A. SCOTT TIMMER, Chief Judge