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

DIVISION ONE
FILED: 04/24/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 10-0688
Appellee,	)	DEPARTMENT D
v.	)	**MEMORANDUM DECISION**
ALBERT SERMENO,	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)
Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2006-137150-003 DT

The Honorable Janet E. Barton, Judge

AFFIRMED

Thomas Horne, Arizona Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
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Criminal Appeals/Capital Litigation Section
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Attorneys for Appellant

G E M M I L L, Judge

¶1 Albert Sermeno appeals from his convictions and sentences for first degree murder, kidnapping, and aggravated

robbery. He argues that the trial court erred when it denied his motion to suppress and violated the Confrontation Clause when it permitted a substitute medical examiner to testify at trial. For reasons set forth below, we affirm.

FACTS[1] AND PROCEDURAL HISTORY

¶2 On June 20, 2006, Sermeno, his mother, Connie Sermeno, his brother, Carlos Medina, and Connie's boyfriend, Jose Vergara-Martinez, arranged with Sermeno's friend, Patricia Chavez, a prostitute, to rob one of Chavez's male customers in order to replenish Connie's pre-paid electricity card, which was about to run out. Chavez met the victim at a convenience store and brought him back to Connie's trailer on the ruse that she needed to pay her babysitter before they could go to a motel. Once the victim was inside Connie's trailer, Sermeno, his brother, and Jose came out from where they were hiding and began beating the victim; according to Sermeno, Jose had a chain wrapped around his hand when he beat the victim.

¶3 Jose tied the victim's hands behind his back using electrical cords. According to Chavez, the victim was alive at that time because he kept "asking [the men] to stop." The men then wrapped the victim in a sheet, placed him in the back of

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[1] The applicable standard of appellate review requires that we view the evidence — and resolve all reasonable inferences — in the light most favorable to sustaining the jury verdicts. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

the van the victim had been driving, and drove the van out into the desert in the vicinity of I-17 and Cave Creek Road where Jose dumped the victim's body. While the men were gone, Connie and Chavez tried "to clean up all the blood" that was in the trailer, on the couch, and in various parts of the patio.

¶4 The men returned to Connie's trailer about an hour later, unloaded property from the victim's van, and placed the property in Connie's bedroom closet. Connie did not want the victim's van at her trailer, so Sermeno and Chavez drove it to a field near South Mountain and abandoned it there.

¶5 Sermeno used one of the victim's credit cards to buy gas for his Uncle Pete B.'s Buick. Sermeno then drove with Pete B. to a second gas station where Sermeno used the credit card to pay for several other customers' gas in exchange for their giving him cash. The manager of the gas station became aware of what was happening. She stopped the pumps, printed out the receipts for the suspect transactions, took down the Buick's license plate, and reported the matter to the police. The police traced the Buick to Pete B. and arrested him.

¶6 Sermeno told his grandmother that day that he "did something wrong," that he had "hurt someone," and that "there was a truck at South Mountain." In the early morning of June 21, Sermeno also placed a 911 call in which he stated, among other things, that he "needed an officer to come pick [him] up."

When the 911 operator asked him why, Sermeno replied "Because they're charging my uncle for a charge that he was, wasn't even . . . but he was with me today, and I had murdered some man in my mother's house . . . and I need to be picked up." He admitted to being a "suspect in a murder" and that the murder happened at his mother's house "when everybody was gone." Sermeno stated that the murder had happened the day prior. Sermeno identified himself as "Anthony Medina" and gave a location where he could be found. When the officers arrived at that location, Sermeno was not there. They ultimately located Sermeno at his aunt's trailer and arrested him.

¶7 After reading Sermeno his *Miranda*[2] rights, Phoenix Police Detective M. interviewed Sermeno for approximately four and one half hours. Sermeno initially denied any involvement in the crime, but ultimately admitted that he, his brother, and Jose had beaten the victim, although Sermeno maintained that he had only hit the victim a few times. Sermeno admitted that he had driven the van to where they left the body, approximately thirty-three miles outside of Phoenix. Sermeno also maintained that the victim was still alive when he was being transported because he could hear the victim breathing and that Jose may have "cut his throat." Sermeno admitted using the victim's

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

credit cards to buy gasoline for his uncle and for other customers in order to obtain cash. Sermeno also took detectives to the site where the victim's body was located.

¶8 The State charged Sermeno, his mother, brother, Jose, and Chavez[3] with Count 1, first degree murder, a Class 1 dangerous felony; Count 2, kidnapping, a Class 2 dangerous felony, and Count 3, aggravated robbery, a Class 3 dangerous felony. At the conclusion of trial, a jury found Sermeno guilty of all of the offenses as charged. The same jury also elected not to sentence Sermeno to death. On August 13, 2010, the trial court sentenced Sermeno to natural life in prison for first degree murder, and to aggravated terms of 21 years and 15 years in prison respectively for kidnapping and aggravated robbery. The court ordered that all sentences be served concurrently.

¶9 Sermeno timely appeals. 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 (2010) and 13-4033 (2010).[4]

ANALYSIS

<u>Denial of Motion to Suppress</u>

¶10 Prior to trial, Sermeno moved to suppress the

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[3] Sermeno's case was severed for trial.

[4] We cite to the current versions of statutes when no revisions material to this decision have occurred since the date of the alleged offenses.

statements he made to Detective M. during his interview. According to Sermeno, his statements had been obtained through a violation of his *Miranda* rights and also were involuntary because they "were taken under conditions that were coercive considering his physical and emotional state."

¶11 The trial court held a hearing at which both Detective M. and Sermeno testified. After considering the testimony and also viewing the CDs of Sermeno's interview, the trial court denied the motion. In so doing, the court found that no *Miranda* violation occurred because Sermeno had expressly stated that he understood his rights and had clearly waived them "by conduct when he freely answered questions after having been advised of his rights and acknowledging an understanding of them." With respect to the voluntariness issue, the court found that "there was no impermissible police conduct or coercive pressures on the part of Detective M." Based on viewing the CDs, the court also found that, although Sermeno had told Detective M. that he had consumed alcohol and ingested drugs in the previous twelve hours and also appeared to doze in his chair from time to time when he was alone in the interview room, Sermeno "certainly did not appear so intoxicated as to render his statements involuntary." The fact that Sermeno "was able to reason and comprehend . . . what he was being asked and the meaning of his statements" indicated that his statements to Detective M. "were not so

unreliable that they should be excluded from evidence."

¶12 On appeal, Sermeno renews his arguments and maintains that the trial court erred in concluding that he waived his *Miranda* rights and that his statements were voluntary. We conclude that the record supports the trial court's denial of the motion to suppress.

¶13 When reviewing a trial court's ruling on a motion to suppress defendant's statements, we must view the facts in the light most favorable to upholding the trial court's decision. *State v. Ellison*, 213 Ariz. 116, 126, ¶ 25, 140 P.3d 899, 909 (2006). We consider only the evidence presented at the suppression hearing because that is the evidence the trial court considered in reaching its decision. *See id.*; *State v. Flower*, 161 Ariz. 283, 286 n.1, 778 P.2d 1179, 1182 n.1 (1989). We give deference to the trial court's factual findings, but review the court's ultimate legal determination *de novo*. *See State v. Newell*, 212 Ariz. 389, 397, ¶ 27, 132 P.3d 833, 841 (2006).

Miranda

¶14 Sermeno argues that, although Detective M. read him his rights and asked him if he understood them, Detective M. failed to specifically ask him if he agreed to waive those rights and speak with him before Detective M. started questioning him. Sermeno contends that, in the absence of such a specific waiver, the trial court abused its discretion in

finding that he had, in fact, waived his rights.

¶15 *Miranda* requires the police to warn a suspect who is in custody of his or her rights before initiating questioning. *State v. Spears*, 184 Ariz. 277, 286, 908 P.2d 1062, 1071 (1996) (citing *Miranda*, 384 U.S. at 444). Specifically, a person who is in custody and subjected to interrogation must be advised that he has the right to remain silent; that anything he says can be held against him; that he has the right to the presence of an attorney; and that, if he cannot afford an attorney, one will be appointed for him prior to any questioning. *Miranda*, 384 U.S. at 479. After these warnings have been given, the individual may knowingly and intelligently waive these rights and answer questions or agree to make a statement. *Id.* However, an express waiver is not required. *Berghuis v. Thompkins*, ___ U.S. ___, 130 S. Ct. 2250, 2261 (2010). Thus, a waiver may be implied through dedendant's silence coupled with an understanding of his or her rights and a course of conduct indicating waiver. *Id.* "Answering questions after police properly give the *Miranda* warnings constitutes a waiver by conduct." *State v. Trostle*, 191 Ariz. 4, 14, 951 P.2d 869, 879 (1997) (citation omitted). That is what happened in this case.

¶16 The video recording of the interview establishes that Detective M. advised Sermeno of his rights before initiating questioning. In response to Detective M.'s inquiry about

whether he understood those rights, Sermeno clearly replied "Yep." Sermeno testified at the suppression hearing that he had had no sleep, had ingested drugs and alcohol, and had no recollection of having spoken with Detective M. However, the CDs show that he was awake and responsive during the entire interview and that he understood and answered all of Detective M.'s questions cogently throughout the entire session. He also clearly and unequivocally stated that he understood his rights before answering all the questions. The record supports the trial court's determination that Sermeno waived his *Miranda* rights by conduct.

Voluntariness

¶17 Sermeno also claims that his statements during the interview were involuntary because Detective M. "overreached" by taking advantage of the fact that he was sleep deprived, had used methamphetamine and alcohol in the hours prior to his arrest, and was "confused." "Voluntariness and *Miranda* are two separate inquiries." *In re Jorge D.*, 202 Ariz. 277, 281, ¶ 19, 43 P.3d 605, 609 (App. 2002) (citation omitted). "Preclusion of evidence obtained in violation of *Miranda* is based on the Fifth Amendment privilege against self-incrimination." *Id.* (citations omitted). "Preclusion of involuntary confessions is based on the Due Process Clause of the Fourteenth Amendment and applies to confessions that are the product of coercion or other

methods offensive to due process." *Id.* (citations omitted).

¶18 When evaluating the voluntariness of a defendant's statements, the trial court must examine the totality of the circumstances surrounding defendant's statements. *State v. Ross*, 180 Ariz. 598, 603, 886 P.2d 1354, 1359 (1994). "[W]hile personal circumstances, such as intelligence and mental or emotional status, may be considered in a voluntariness inquiry, the critical element necessary to such a finding is whether police conduct constituted overreaching." *State v. Stanley*, 167 Ariz. 519, 524, 809 P.2d 944, 949 (1991). That is because "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connolly*, 479 U.S. 157, 167 (1986). Furthermore, the police misconduct must be causally related to the statements at issue. *State v. Scott*, 177 Ariz. 131, 136, 865 P.2d 792, 797 (1993) (citations and quotations omitted).

¶19 The trial court here found that Sermeno's statements were not the result of "impermissible police conduct or coercive pressures on the part of Detective [M.]." At the suppression hearing, Sermeno testified that he had not slept for "nine or [ten] days" prior to being interviewed and that he had also ingested copious amounts of alcohol and smoked methamphetamine "about every two hours." Although he remembered being at the

interview, Sermeno claimed that he did not remember talking with Detective M. or "anything about the time [he was] in the interview room." Detective M. testified that Sermeno never indicated to him during the four hour interview that he was having problems speaking, that he was falling asleep, or that he had any physical impairments. He also stated that Sermeno had not yawned at all during the interview but was always responsive to his questions and coherent throughout. The video of the interview bears out Detective M.'s testimony. It also shows that Detective M. provided Sermeno with food and drink during the interview and also allowed Sermeno to take bathroom and cigarette breaks. While Sermeno appears to "have dozed in his chair from time to time while alone in the interview room," as the trial court noted, it is clear that Sermeno was awake and engaged whenever Detective M. was in the room. Furthermore, some of Sermeno's responses to Detective M., such as his comment that he did not want to be viewed as "a snitch" or his concern that he did not want his brother to know that he had identified him as a participant, show that he was "able to reason and comprehend" during the interview and that he "clearly understood what he was being asked and the meaning of his statements" as the trial court noted.

¶20 The trial court's finding of voluntariness is fully supported by the record. Given the totality of the

circumstances in this case, the trial court did not abuse its discretion in denying Sermeno's motion to suppress.

Medical Examiner Testimony

¶21 Prior to trial, Sermeno filed a motion to preclude the State from calling a substitute medical examiner[5] from testifying about the autopsy that was carried out by a different medical examiner, arguing that allowing the State to do so would constitute a violation of his Confrontation Clause rights pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004) and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). The trial court denied Sermeno's motion based on our supreme court's decision in *State v. Smith*, 215 Ariz. 221, 159 P.3d 531 (2007). On appeal, Sermeno renews his Confrontation Clause arguments and claims this was error. We disagree.

¶22 "The decision whether to admit or exclude evidence is

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[5] At the time of the motion, the state anticipated calling Dr. Vladimir Shvartz as its witness. At the time of trial, he was replaced with Dr. Philip Keen. Sermeno mentions in his opening and reply briefs that Dr. Keen was "never . . . interviewed by the defense." However Sermeno fails to develop this argument or cite any authority in support of it in his briefs. We therefore consider it waived. *See State v. Sanchez*, 200 Ariz. 163, 166, ¶ 8, 24 P.3d 610, 613 (App. 2001). The focus of his argument both below and on appeal is that Keen testified using someone else's autopsy report. Sermeno also mentions, without more, that the State did not show that the medical examiner who performed the autopsy was "unavailable." However, the State informed the court and Sermeno in its reply to the motion to preclude that that individual was "no longer employed by the Office of the Medical Examiner." In any case, as Sermeno does not develop this argument either, it is also waived. *Id*.

left to the sound discretion of the trial court." *State v. Murray*, 162 Ariz. 211, 214, 782 P.2d 329, 332 (App. 1989). "Evidentiary rulings that implicate the Confrontation Clause, however, are reviewed *de novo*." *State v. Snelling*, 225 Ariz. 182, 187, ¶ 18, 236 P.3d 409, 414 (2010) (citation omitted); *Smith*, 215 Ariz. at 228, ¶ 20, 159 P.3d at 538.

¶23 Our supreme court's decisions in *Smith* and *Snelling*, are dispositive. In both those cases, the supreme court considered Confrontation Clause challenges to the testimony of medical examiners who based their opinions at trial in part on autopsy reports conducted by other medical examiners. In both those cases, our supreme court found that "[e]xpert testimony that discusses reports and opinions of another is admissible . . . if the expert reasonably relied on these matters in reaching his own conclusion." *Snelling*, 225 Ariz. at 187, ¶ 19, 236 P.3d at 414 (quoting *Smith*, 215 Ariz. at 228, ¶ 23, 159 P.3d at 538). So long as the testifying medical examiner was not merely "act[ing] as a conduit" for another, non-testifying medical examiner's medical opinion, but was, in fact, presenting his or her own opinion as to the cause of death, then there was no Confrontation Clause violation. *Id.* at ¶¶ 19-21; *Smith*, 215 Ariz. at 228, ¶¶ 23-24, 159 P.3d at 538; *see also State v. Gomez*, 226 Ariz. 165, 169, ¶ 22, 244 P.3d 1163, 1167-68 (2010) ("We have held that a medical examiner may offer an expert

opinion based on review of reports and test results prepared by others, as long as the testifying expert does not simply 'act as a conduit for another non-testifying expert's opinion.'").

¶24 The supreme court specifically found that expert testimony that discussed the reports and opinions of others was admissible under Rule 703 of the Arizona Rules of Evidence if the testifying expert "reasonably relied" on those in reaching his or her own independent conclusion. *Smith*, 215 Ariz. at 228, ¶¶ 22-23, 159 P.3d at 538. The court reasoned that such testimony was not hearsay because it was not being offered to prove the truth of the prior reports or opinions, but only to show the basis for the testifying expert's opinion. *Id.* at ¶ 23. And because the testimony was not hearsay, it was not subject to the Confrontation Clause. *Smith*, 215 Ariz. at 229, ¶ 26, 159 P.3d at 539 ("[T]he Confrontation Clause is not violated by use of a statement to prove something other than the truth of the matter asserted.") That is precisely what happened in this case.

¶25 By the time of trial, Dr. Ruth Kohlmeier, who had performed the autopsy of the victim, was no longer employed by the medical examiner's office. Dr. Philip Keen, the chief medical examiner, testified at trial. Dr. Keen testified only about *his* opinion of the injuries sustained and the cause of death based on his review of the photographs and x-rays taken

during the victim's autopsy as well as his review of the autopsy and toxicology reports. He never reported any of Dr. Kohlmeier's observations or opinions regarding the victim's injuries or cause of death. While Dr. Keen referred to some of the observations in the written autopsy and toxicology reports, he did so only to explain or to note how these formed the basis for his own opinions. The written autopsy report from Dr. Kohlmeier and the toxicology reports were not admitted into evidence.

¶26 Dr. Keen testified that it was his opinion that the victim had died due to "multiple blunt force head injuries" from eight blows the victim had received to the head, but that he could also "not exclude" the possibility that the actual cause of death had been "strangulation" or "positional asphyxiation.[6]" On this record and based on the *Smith* and *Snelling* decisions from our supreme court, we conclude that no Confrontation Clause violation occurred here. *Snelling*, 225 Ariz. at 187, ¶¶ 20-21, 236 P.3d at 414; *Smith*, 215 Ariz. at 229, ¶ 26, 159 P.3d at 539.

¶27 We recognize that Sermeno relies on *Bullcoming v. New Mexico*, but his reliance is misplaced. *Bullcoming v. New Mexico*, ___ U.S. ___, 131 S. Ct. 2705 (2011), involved the admission of a prior analyst's report of the defendant's blood

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[6] This was based on the fact that the victim was found lying face down with his hands tied behind his back.

alcohol level into evidence, which did not occur here. *Id.* at 2710-12. Therefore, we do not find it persuasive. Further, because there is no United States Supreme Court case directly on point, and because we cannot overrule an Arizona Supreme Court case, we are bound by the decisions of our supreme court in *Smith* and *Snelling.* *Sult v. O'Brien*, 15 Ariz. App. 384, 388, 488 P.2d 1021, 1025 (1971) (following the decisions of the Arizona Supreme Court in a constitutional challenge when there existed no United States Supreme Court case on point).

CONCLUSION

¶28 For the foregoing reasons, we affirm Sermeno's convictions and sentences.

/s/
JOHN C. GEMMILL, Judge

/s/
JON W. THOMPSON, Presiding Judge

/s/
MAURICE PORTLEY, Judge