DIVISION ONE
FILED: 06/05/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 11-0232
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
JUSTIN RICHARD SOBOLIK,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-127421-001SE

The Honorable Susanna C. Pineda, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel, Criminal Appeals/ Capital Litigation Division
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Joel M. Glynn, Deputy Public Defender
Attorneys for Appellant

Justin Richard Sobolik — Florence
Appellant

S W A N N, Judge

¶1 Justin Richard Sobolik ("Defendant") appeals his convictions and sentences for child abuse and first-degree felony murder. This case comes to us as an appeal under *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Defendant's appellate counsel has searched the record on appeal and found no arguable question of law that is not frivolous, and asks us to review the record for fundamental error. *See Anders*, 386 U.S. 738; *Smith v. Robbins*, 528 U.S. 259 (2000); *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Defendant has filed a supplemental brief *in propria persona* in which he raises several issues for appeal.

¶2 We have searched the record and considered the issues identified by Defendant. We find no fundamental error and affirm.

FACTS AND PROCEDURAL HISTORY

¶3 In May 2007, Defendant was indicted for child abuse, a class 2 felony under A.R.S. § 13-3623(A)(1)[1] and a dangerous crime against children and domestic violence offense under A.R.S. §§ 13-604.01 and 13-3601, and one count of first-degree murder, a class 1 felony under A.R.S. § 13-1105(A)(2) and a dangerous crime against children and domestic violence offense

[1] All citations are to the statutes in effect at the time of the offense in August 2006. Some of the statutes have since been amended or renumbered.

under A.R.S. §§ 13-604.01 and 13-3601. Defendant waived his right to a jury trial and the matter proceeded to a twelve-day bench trial in early 2011.

¶4 At trial, the state presented evidence of the following facts. The victim, L.B., was born in December 2005. Though initially confined to the hospital because he was born prematurely, L.B. was a healthy baby who had regular well-child checkups with his pediatrician and whose respiratory issues were limited to one brief cold in early 2006 that was effectively treated with medication. L.B. lived with his mother and father in an apartment in Mesa until around June 2006, when his father moved out. Shortly thereafter, L.B.'s mother began a relationship with Defendant, and Defendant began spending his nights at the apartment and babysitting L.B. there when L.B.'s mother was at work.

¶5 On August 3, 2006, L.B.'s mother woke up around noon and left for work shortly thereafter, leaving L.B., who appeared healthy, in Defendant's care. That night, Defendant went to a neighbor's apartment and told the neighbor that L.B. was not breathing. Defendant asked for the apartment complex's address and the neighbor gave it to him. The neighbor then exited her apartment to see L.B. in a different neighbor's arms. She took L.B. from the other neighbor and saw that he was gasping for air

and his eyes were rolling back in his head. She also saw that he had red marks around his shoulders and neck.

¶6 The Mesa Police Department, Mesa Fire Department, and Southwest Ambulance were dispatched to the scene. The first responder was a Mesa patrol officer who arrived at the scene one minute after receiving the call at 7:03 p.m. The officer made contact with Defendant and the neighbor, who was still holding L.B., and saw that L.B. was unconscious with shallow breathing. Defendant told the officer that he had left L.B. alone in a room with a bottle of formula, heard L.B. start to cry "unusually" about an hour later, and then picked up L.B. from his crib and felt L.B. go limp. Defendant stated that he immediately sought help from his neighbors to get the apartment complex's address and then called 911 and L.B.'s mother.

¶7 Within minutes of the officer's arrival at the scene, the fire department truck and the ambulance arrived. At that time, L.B. was still limp, his breathing was shallow and irregular, his skin was mottled, and he appeared to have no pulse. The medical personnel began working on L.B. immediately, and within minutes had placed him in the ambulance for transport to the hospital. They gave L.B. an intraosseous infusion, started CPR and bag-mask therapy, suctioned a milk-like substance from his trachea, and placed an endotracheal tube. They confirmed that the endotracheal tube was correctly placed

in the trachea by listening to L.B.'s breath sounds. Some milky froth came up through the tube, but they were still able to breathe for the baby using the tube and they saw some improvement in L.B.'s condition over the five minutes it took for the ambulance to reach the hospital.

¶8 Upon arriving at the hospital, the ambulance personnel confirmed that the endotracheal tube was still in place and immediately transferred L.B. to the care of an emergency room ("ER") doctor. At that time, L.B. was still limp, was still having trouble breathing, and had a weak pulse. The ER doctor checked to see if L.B.'s endotracheal tube had dislodged from his trachea during his transfer from the ambulance, saw that it had, and removed it. The doctor saw pink foam in the tube that he believed to be blood and mucus, and inserted a new tube of larger diameter. He then transferred L.B. to the pediatric intensive care unit ("PICU") because L.B. was in critical condition.

¶9 A PICU doctor evaluated L.B. and found that he was in shock, with decreased oxygenation, low blood pressure, and a dropping heart rate. The doctor saw that L.B.'s endotracheal tube was in the correct position, but observed frothy secretions from the tube and therefore replaced it with a cuffed tube of the same diameter to try to improve L.B.'s ventilation. She then continued to try to improve L.B.'s ventilation by using

suctioning and different ventilator modes, took an x-ray of his chest, and determined that his white blood cell count was normal.

¶10 L.B.'s condition continued to worsen and the PICU doctor ultimately concluded that there was nothing more she could do to help him. The doctor spoke to L.B.'s mother and father at the hospital and told them the prognosis. L.B.'s parents decided to let L.B. pass away, and he died that night.

¶11 Though there was no physical evidence of trauma on L.B.'s body, the PICU doctor suspected from L.B.'s symptoms that the cause of death could be blunt force trauma. A county medical examiner with special expertise in child deaths performed an autopsy and agreed. The autopsy revealed no external signs of trauma, no broken bones, no obvious organ damage, and no internal bruising or significant edema on L.B.'s head. But an accumulation of fresh blood was found over L.B.'s brain, and microscope slides of the brain tissue showed a shearing injury to the brain. Diffuse, multi-layer, bilateral hemorrhages were also found over L.B.'s retinas.

¶12 The medical examiner testified that the shearing injury to L.B.'s brain, the retinal hemorrhages, and L.B.'s clinical symptoms were consistent with blunt force head trauma. The medical examiner explained that blunt force trauma may be caused by either direct impact or by inertial movement of the

brain due to a repetitive motion such as shaking, and is not always accompanied by external injuries, fractures or neck injuries. The medical examiner further testified that though he found evidence of old bleeding in the subdural space of L.B.'s brain, the old bleeding was from a past injury or birth trauma and did not cause L.B.'s symptoms or death. The medical examiner concluded that the cause of L.B.'s death was blunt force head trauma and that the manner of his death was homicide.

¶13 Defendant was eventually arrested and jailed. In September 2007, Defendant's former cellmate contacted law enforcement and reported that Defendant had confessed that he had shaken L.B. and hit his head against the wall. The former cellmate was able to provide accurate details about Defendant's case that had not been publicized, such as the location of L.B.'s crib in the apartment.

¶14 At the conclusion of the State's case in chief, Defendant moved for a judgment of acquittal pursuant to Ariz. R. Crim. P. 20. The motion was denied.

¶15 For his defense, Defendant testified that he never shook or hit L.B. and never told his former cellmate otherwise. Defendant testified that he had left L.B. alone in a room and heard him make a crying and choking noise. According to Defendant, he immediately responded to the noise by going to L.B. and picking him up, and felt L.B. go limp and unconscious

in his arms. Defendant testified that L.B.'s mother told him that L.B. had previously fallen off the couch. Several character witnesses testified in support of Defendant's character for non-violence.

¶16 Defendant also offered the testimony of his own forensic expert. Defendant's expert reviewed L.B.'s medical records and the county medical examiner's report, and opined that L.B. died not from being shaken but from an acute life threatening event possibly precipitated by a kidney infection, pneumonia, or a "rebleed" from an old head injury. The county medical examiner testified in rebuttal. He disagreed with the bases for Defendant's expert's opinions and reasserted his opinion that L.B. died from blunt force head trauma.

¶17 At the close of evidence, the court denied Defendant's renewed motion for a judgment of acquittal and heard closing arguments. After considering the evidence, the court found Defendant guilty of intentional and knowing child abuse and first-degree felony murder, and found that each offense was a dangerous crime against children and a domestic violence offense. The court entered judgment on the verdict and sentenced Defendant to consecutive prison terms of seventeen years for the child abuse count and life (with no eligibility for release for thirty-five years) for the murder count, with credit for 1,430 days of presentence incarceration. The court

also ordered Defendant to pay restitution for L.B.'s funeral expenses.

¶18 Defendant timely appeals his convictions and sentences. We have jurisdiction under Article 6, Section 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

DISCUSSION

¶19 Defendant raises multiple issues for review in his supplemental brief. He makes several arguments related to the superior court's implicit finding that L.B.'s death was caused by blunt force head trauma inflicted while L.B. was in Defendant's care. He also contends that several of the state's fact witnesses testified untruthfully, that his trial counsel convinced him to waive his right to a jury trial by promising him he would prevail in a bench trial, and that he was denied a fair trial because he was sleep-deprived by the schedule on which the sheriff's office transported him to trial from jail. We address each of Defendant's arguments.

I. EVIDENCE OF CAUSE OF DEATH

A. Sufficiency of the Evidence

¶20 Defendant contends that the physical evidence showed that L.B. died from the old injury to his brain, not blunt force head trauma inflicted while he was in Defendant's care. "When reviewing the sufficiency of the evidence, an appellate court

does not reweigh the evidence to decide if it would reach the same conclusions as the trier of fact. All evidence will be viewed in the light most favorable to sustaining the conviction and all reasonable inferences will be resolved against the defendant." *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989) (citation omitted). Bound by this standard of review, we find that there was sufficient evidence to support the superior court's conclusion (necessary to the conviction) that L.B. died from recent blunt force head trauma.

¶21 The State and Defendant presented conflicting evidence regarding L.B.'s cause of death through the testimony of the county medical examiner and the forensic expert Defendant hired. The resolution of the conflict in the evidence was for the superior court to decide as the trier of fact. *State v. Ware*, 27 Ariz. App. 645, 648, 557 P.2d 1077, 1080 (1976).

¶22 The medical examiner's testimony provided substantial evidence to allow the court to resolve the conflict in favor of finding that the cause of death was recent blunt force head trauma. Substantial evidence is proof that "reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). Reasonable persons could accept the medical examiner's testimony in support of his opinion that L.B. died of recent blunt force head trauma.

The medical examiner was qualified to offer an expert opinion, and he explained in detail the physiological and medical bases for his opinion. In giving his opinion, he specifically addressed the old injury to L.B.'s brain and the absence of external or internal signs of trauma. He also provided testimony to rebut the conclusions of Defendant's expert.

B. Post-trial Expert Opinion

¶23 Defendant next contends that an expert whom he contacted after the trial felt that the county medical examiner's testimony was misleading. Defendant has attached a copy of a letter from that expert to his supplemental brief. The letter criticizes the medical examiner's testimony and opines that the questions of how and when L.B. sustained the trauma to his brain were not sufficiently addressed.

¶24 Our review of the record reveals that Defendant submitted this letter to the superior court before sentencing but the state objected and the court declined to consider the letter. This ruling did not constitute reversible error. The letter was relevant to L.B.'s cause of death. Defendant had a full and fair opportunity to present evidence on that issue at trial, and the issue was decided by the verdicts. At the sentencing phase, the only remaining question was what sentence was appropriate. The letter was not relevant to that question. The letter provided no information concerning any of the

statutory grounds for sentence mitigation set forth in A.R.S. § 13-701(D) and did not otherwise describe facts relevant to sentence mitigation, and the superior court did not err in declining to consider it.

C. Superseding Cause

¶25 Defendant next asserts that the evidence showed that L.B.'s endotracheal tube became dislodged during his treatment. It is not clear from Defendant's brief why he makes this assertion, as it is apparent from the state's own evidence that the tube became dislodged at some point between the ambulance's arrival at the hospital and the ER doctor's evaluation of L.B. To the extent that Defendant intends to argue that the tube's brief dislodgment was a superseding cause of L.B.'s death,[2] we reject that argument. The criminal standard for superseding cause is the same as the tort standard -- an event is superseding only if it is unforeseeable and abnormal or extraordinary. *State v. Bass*, 198 Ariz. 571, 576, ¶ 13, 12 P.3d

[2] At trial, one of the defense theories was that the tube did not become dislodged but was instead initially misplaced in L.B.'s esophagus. This theory relied on the PICU doctor's belief that the ER doctor had replaced L.B.'s tube the first time because it was in his esophagus. But the PICU doctor conceded that the only basis for her belief about the tube's misplacement was her telephone conversation with the ER doctor before L.B.'s transfer to PICU, and the ER doctor testified that he never saw that the tube was in the esophagus. There was also evidence that the ambulance personnel's checks confirmed that the tube was placed in the trachea. There was therefore sufficient evidence for the superior court to conclude that the tube was not misplaced in L.B.'s esophagus.

796, 801 (2000). The ER doctor specifically testified that tube dislodgment is always a concern during patient transfer because it can be caused by even slight movement. There was sufficient evidence for the superior court to conclude that the brief period of dislodgment was foreseeable and did not constitute a legal excuse even if it did contribute to L.B.'s death.

II. FACT WITNESS TESTIMONY

¶26 Defendant contends that two of the state's fact witnesses testified untruthfully. He contends that the neighbor who helped him the night of L.B.'s death lied when she testified she saw red marks on L.B.'s body, and contends that L.B.'s mother lied when she testified Defendant told her before his arrest that he intended to leave the state. Defendant had a full and fair opportunity at trial to discredit any factual testimony he believed to be inaccurate through cross-examination and his own evidence. It was within the superior court's discretion to determine the credibility of witnesses and the weight to be given to their testimony. *See State v. Cox*, 217 Ariz. 353, 357, ¶ 27, 174 P.3d 265, 269 (2007).

III. WAIVER OF RIGHT TO JURY TRIAL

¶27 Defendant contends that his trial counsel convinced him to waive his right to a jury trial by promising him he would prevail in a bench trial. But even if Defendant's trial counsel did express confidence in Defendant's chances at a bench trial,

the record shows that Defendant was well aware of the rights he waived by agreeing to a bench trial. The court confirmed that Defendant's waiver was knowing, voluntary, and intelligent in a pretrial colloquy, and repeated the colloquy on the first day of trial. Defendant also signed a written waiver that explained his rights. The record reflects that Defendant made a fully informed decision to waive his right to a jury trial.

IV. TRANSPORT TO TRIAL

¶28 Finally, Defendant contends that he was denied a fair trial because he was sleep-deprived by the schedule on which the sheriff's office transported him to trial from jail. The record shows that Defendant was timely transported to court each day of his trial in accord with his due process rights. The determination of the schedule and manner for his transport was within the sheriff's authority. *See* A.R.S. § 11-441(A)(5) (sheriff has authority to maintain and operate county jails); *Trombi v. Donahoe*, 223 Ariz. 261, 267, ¶¶ 23-24, 222 P.3d 284, 290 (App. 2009) (superior court may dictate timely appearance of inmates but may not micromanage the sheriff's management of the jails and methods of achieving timely transport). Any grievance regarding the schedule and manner of transport was properly addressed to the sheriff's office.

V. REMAINING ISSUES

¶29 The record reflects that Defendant received a fair trial. Defendant was present and represented by counsel at all critical stages. The state's closing and rebuttal arguments were proper and there was sufficient evidence to support Defendant's convictions for intentional and knowing child abuse under A.R.S. § 13-3623(A)(1) and felony first-degree murder under A.R.S. § 13-1105(A)(2). There was also sufficient evidence to support the court's determination that each of these offenses was a dangerous crime against children and a domestic violence offense.

¶30 Before imposing sentence, the court ordered and considered a presentence report. Defendant was given the opportunity to speak at the sentencing hearing, and the court stated on the record the evidence and materials it considered and the factors it found in imposing sentence. The court imposed lawful sentences for Defendant's child abuse conviction under A.R.S. § 13-604.01(D) and for his felony murder conviction under A.R.S. §§ 13-1105(D), 13-703(A), and 13-703.01(A); lawfully ordered the sentences to run consecutively under A.R.S. § 13-604.01(K); and correctly calculated Defendant's presentence incarceration credit.

CONCLUSION

¶31 We have reviewed the record for fundamental error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. Accordingly, we affirm Defendant's convictions and sentences.

¶32 Defense counsel's obligations pertaining to this appeal have come to an end. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Unless, upon review, counsel discovers an issue appropriate for petition for review to the Arizona Supreme Court, counsel must only inform his client of the status of this appeal and his future options. *Id.* Defendant has thirty days from the date of this decision to file a petition for review *in propria persona*. Ariz. R. Crim. P. 31.19(a). Upon the court's own motion, Defendant has thirty days from the date of this decision in which to file a motion for reconsideration.

/s/
_____
PETER B. SWANN, Presiding Judge

CONCURRING:

/s/
_____
MICHAEL J. BROWN, Judge

/s/
_____
JON W. THOMPSON, Judge