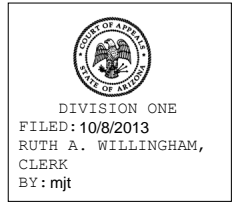


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) CA-CR 12-0625
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 111, Rules of the
ROY ALLEN PRUITT,) Arizona Supreme Court)
)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-006379-002

The Honorable Warren J. Granville, Judge

AFFIRMED

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

Bruce F. Peterson, Legal Advocate Phoenix
by Consuelo M. Ohanesian, Deputy Legal Advocate
Attorneys for Appellant

T H U M M A, 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 Roy Alan Pruitt has advised the court that, after searching the entire record, he has found no arguable questions of law, and has filed a brief requesting this court to conduct an *Anders* review of the record. Pruitt was given the opportunity to file a supplemental brief *pro se*, which the court has considered. The court has reviewed the record and finds no reversible error. Accordingly, Pruitt's convictions and resulting sentences are affirmed.

FACTS¹ AND PROCEDURAL HISTORY

¶2 As relevant here, Pruitt and C.B. were indicted for first degree felony murder of the victim J.B and sale or transportation of methamphetamine.² On January 14, 2010, C.B. drove his truck to where one of his friends lived. Pruitt, who C.B. had not met before, arrived a short time later. Although the exact amount of time is disputed, C.B. and Pruitt spent a total of two and a half to three hours together on the day of the murder. In the evening, C.B. and Pruitt left in C.B.'s truck

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

² Initials are used to protect the identity of the victim and witnesses. See *State v. Maldonado*, 206 Ariz. 339, 341, ¶2 n.1, 78 P.3d 1060, 1062 n.1 (App. 2003). Although Pruitt also was charged with sale or transportation of marijuana, on the State's motion, that charge was dismissed with prejudice during trial. Prior to Pruitt's trial, C.B. accepted a plea in which he agreed to an 8.5 year prison sentence.

to search for a hotel where Pruitt could stay the night. At that time, Pruitt was carrying a handgun, which was not concealed.

¶3 At about 9:30 p.m., S.J., a woman C.B. had known for a few months, called C.B. looking to trade electronics for methamphetamine. S.J. was at an apartment with friends, including the victim. C.B. told S.J. that he did not have any drugs, but knew someone who might be interested in a trade, referring to Pruitt.

¶4 C.B. and Pruitt met S.J. in a parking lot where S.J. commented on Pruitt's gun. C.B. and Pruitt then followed S.J. into the apartment, where Pruitt introduced himself as "Jim" and quickly examined the electronics S.J. had available for trade. When Pruitt said he did not see anything of interest, the victim said he might have something in his car that Pruitt would like. Pruitt and the victim then left the apartment.

¶5 Later, S.J. and C.B. went to the parking lot to check on Pruitt and the victim. As S.J. and C.B. began to get into the car, the victim said there was no room for them, so they both returned to the apartment, leaving Pruitt and the victim alone in the car. Later, C.B. returned to the parking lot, moved his truck closer to the victim's car and fell asleep.

¶6 A short time later, gun shots woke C.B. and C.B. saw Pruitt leaving the victim's car holding a gun. Pruitt then jumped into C.B.'s truck, and the pair drove a short distance

until Pruitt ordered C.B. to stop and Pruitt threw the gun into a garbage can. Pruitt and C.B. then split up, because Pruitt believed "they would be looking for two, not one person," and were later arrested.

¶17 The gunshots prompted S.J. to run from the apartment to the parking lot, where she saw C.B. and Pruitt leaving in C.B.'s truck. S.J. found the victim lying on the ground. The victim had been shot nine times and died at the scene.

¶18 After being indicted, Pruitt filed a motion to suppress pretrial and in-court identification by C.B., which the superior court denied following an evidentiary hearing. After a nine day trial, a jury found Pruitt guilty of first degree felony murder and sale or transportation of methamphetamine. The court sentenced Pruitt to life in prison without the possibility of parole for the murder conviction and imposed a concurrent presumptive sentence of 10 years for the methamphetamine conviction, with 447 days' presentence incarceration.

¶19 Pruitt timely appealed his convictions and sentences. This court has jurisdiction over this appeal pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1), 13-4031, and -4033(A)(1) (2013).³

³ Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

DISCUSSION

¶10 The court has reviewed and considered counsel's brief and Pruitt's supplemental and amended supplemental briefs,⁴ and has searched the entire record for reversible error. See *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). In his supplemental briefs, Pruitt asserts the following errors: (1) his expert witnesses did not explain clearly how they reached their conclusion; (2) a juror was a police officer; (3) C.B.'s in court identification was improper; (4) a recording of a telephone call should not have been played and (5) additional defense witnesses should have been called. These issues are addressed, in light of the entire record, for reversible error. See *id.*

I. Expert Witnesses' Conclusions.

¶11 Pruitt argues his expert witnesses did not explain clearly how they reached their conclusions, citing A.R.S. § 12-2203. Prior to Pruitt's trial, however, A.R.S. § 12-2203 was found unconstitutional. *Lear v. Fields*, 226 Ariz. 226, 223, ¶ 22, 245 P.3d 911, 918 (App. 2011). The applicable standard for the admissibility of expert testimony is set forth by rule. "A witness who is qualified as an expert . . . may testify in the

⁴ On August 26, 2013, Pruitt filed an untimely amended supplemental brief. Given the nature of an *Anders* appeal, the arguments in Pruitt's August 26, 2013 brief have been considered on the merits.

form of an opinion . . . if: (c) the testimony is the product of reliable principles and methods." Ariz. R. Evid. 702. There is no indication that the various testifying experts did not reliably apply the methods they used to the facts of the case or otherwise failed to comply with the requirements of Rule 702. Although additional explanation for how the experts reached their conclusions was, undoubtedly, possible, all witnesses were subject to full questioning by both parties and no timely objections were made on that ground. Thus, there was no reversible error regarding the receipt of the expert testimony at trial.

II. Police Officer As Juror.

¶12 Pruitt claims error because Juror 11 had served as a police officer. Pruitt did not object or move to strike Juror 11 for cause, and thus the review is limited to fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (fundamental error review is limited and a defendant who fails to object at trial forfeits the right to obtain appellate relief except in situations where the error goes to the foundation of the case).

¶13 Juror 11 had been a member of a police unit when living in Bosnia. However, Juror 11 was not a police officer at the time of trial, had never served as a police officer in the

United States and was not currently pursuing a career in law enforcement.

¶14 On appeal, Pruitt cites A.R.S. § 21-211(2), which states that “[t]he following persons shall be disqualified to serve as jurors in any particular action [p]ersons interested directly or indirectly in the matter under investigation.” A person is “interested” under this statute if there is “a desire to see one side prevail in litigation or an alignment with or loyalty to one party or side.” *State v. Eddington*, 228 Ariz. 361, 363, ¶ 11, 266 P.3d 1057, 1059 (2011). “The working relationship between the prosecution and the investigating agency is the type of interest [A.R.S.] § 21-211(2) is meant to cover.” *Id.* at 365, ¶ 18, 266 P.3d at 1061.

¶15 Here, there is no evidence of any type of relationship between any investigating agency and Juror 11. Juror 11 was never employed by any of the investigatory agencies involved in this case. Moreover, at the time of trial, Juror 11 worked in the information technology field for an employer unrelated to law enforcement. Thus, there was no error (let alone fundamental error) in Juror 11 serving on the jury.

III. C.B.’s Identification Of Pruitt.

¶16 Pruitt claims the in-court identification by C.B. was improper because “he would have made a positive identification of anyone who sat at [the defense] table” and also challenges

the foundation for his in-court identification testimony. The in-court identification and the pretrial photographic lineup were hotly contested issues before and at trial.

¶17 Pretrial, Pruitt filed a motion to suppress pretrial and in-court identification by C.B. and requested a hearing pursuant to *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969). Following that evidentiary hearing, the superior court found a pretrial photographic lineup was not unduly suggestive, and also allowed the in-court identification. When Pruitt reurged the point during trial, the court found "that the identification, if made in court, will go to the weight or the fact that he may have made inconsistent statements . . . and not admissibility." The court noted that it would also give a jury instruction addressing "factors regarding identification."

¶18 During C.B.'s trial testimony, on direct, he was asked about a photographic lineup that occurred after he was arrested. C.B.'s testimony implied that he identified Pruitt based on the photographs. Later on direct, he was asked "so is it fair to say that you did not identify these photographs as ones that [are] on Mr. Pruitt's body?" C.B. answered, "[a]gain, I gave that some really serious thought last night and it would be fair to say that I would say no, that I did not identify him." C.B. then made an in-court identification of Pruitt.

¶19 C.B. was extensively cross-examined and impeached about the photographic lineup. C.B. admitted that he did not know at the time he viewed the photographs that they included a photograph of Pruitt. He was then asked “[b]ut you were told after the fact that those pictures were actually Roy Pruitt, you read that in a police report, correct?” C.B. responded, “[a]t some time.” C.B. admitted knowing that he would not get a plea deal unless he could identify Pruitt, and that the reasons he later made a positive identification was because he felt his “chances of acquittal were slipping away.”

¶20 Based on this record, Pruitt has not established that the superior court erred in allowing this testimony by C.B. “[T]he fact that witnesses were previously unable to identify a defendant should properly go to the credibility and not to the admissibility of subsequent positive in-court identifications.” *State v. Myers*, 117 Ariz. 79, 84-85, 570 P.2d 1252, 1257-58 (1977) (citation omitted). Pruitt had ample opportunity to cross-examine C.B. regarding the pretrial photographic lineup and the in-court identification. Pruitt called into question the amount of time C.B. had spent with him on the day of the murder, attempting to undercut the reliability of the identification. Pruitt also impeached C.B. regarding the pretrial photographic lineup. Finally, the court gave a standard jury instruction regarding the identification. On this record, the court did not

err in allowing evidence of the pretrial photographic lineup or the in-court identification.

IV. Telephone Recording Played For The Jury.

¶21 Pruitt argues the superior court erred by denying his motion in limine and admitting a recording of a telephone call he made from jail to his sister because it was unfairly prejudicial and implied he was in custody. This court will not reverse a ruling on a motion in limine or issues of admissibility absent an abuse of discretion. See *State v. Superior Court*, 128 Ariz. 583, 585, 627 P.3d 1081, 1083 (1981).

¶22 During the recording of the call, which was played to the jury, Pruitt described giving a handwriting sample and how he was only asked to write with his right hand, even though he is left-handed, with a reference to being handcuffed when he provided the sample. The record does not suggest that the jury was aware Pruitt was in custody during trial or that the jury ever saw Pruitt in jail clothing or handcuffed. In addition, the recording was edited so it did not suggest Pruitt was in custody when he participated in the call. The court carefully considered Pruitt's motion in limine to preclude the recording and found that "the relevance of it being recorded from the jail [is] not substantially outweighed by the unfair prejudice, especially in light of the references made by Mr. Pruitt that he . . . was handcuffed at the time of the writing sample." On this record,

there was no abuse of discretion in allowing the jury to hear the recording.

V. Additional Defense Witnesses.

¶23 Pruitt's final argument is that he "should have had defense witnesses called [on his] behalf." Such a strategic decision implicates the legal representation of Pruitt, is not subject to challenge on direct appeal and will not be considered at this time. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002) (reiterating "that ineffective assistance of counsel claims are to be brought in [Arizona] Rule 32 [of Criminal Procedure] proceedings").

CONCLUSION

¶24 This court has read and considered counsel's brief and Pruitt's supplement briefs, and has searched the record provided for reversible error. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881; *Clark*, 196 Ariz. at 537, ¶ 30, 2 P.3d at 96. From the court's review, the record reveals no reversible error. The proceedings appear to have been conducted in compliance with the Arizona Rules of Criminal Procedure, Pruitt was represented by counsel at all stages of the proceedings and the sentences imposed are within the statutory limits. Pruitt's convictions and resulting sentences are therefore affirmed.

¶25 Upon the filing of this decision, defense counsel is directed to inform Pruitt of the status of his appeal and of his

future options. Defense counsel has no further obligations unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. See *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Pruitt shall have thirty days from the date of this decision to proceed, if he desires, with a pro se motion for reconsideration or petition for review.

/S/ _____
SAMUEL A. THUMMA, Judge

CONCURRING:

/S/ _____
MAURICE PORTLEY, Presiding Judge

/S/ _____
DONN KESSLER, Judge