

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

ARLIE GENE TUBBS, *Appellant*.

No. 1 CA-CR 15-0531
FILED 8-4-2016

Appeal from the Superior Court in Maricopa County
No. CR2014-001629-001
The Honorable Hugh E. Hegyi, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz
Counsel for Appellee

Office of the Legal Advocate, Phoenix
By Frances J. Gray
Counsel for Appellant

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MEMORANDUM DECISION

Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Kent E. Cattani and Judge Randall M. Howe joined.

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 (1969). Counsel for defendant Arlie Gene Tubbs has advised the court that, after searching the entire record, counsel has found no arguable question of law and asks this court to conduct an *Anders* review of the record. Tubbs was given the opportunity to file a supplemental brief pro se but has not done so. This court has reviewed the record and has found no reversible error. Accordingly, Tubbs' conviction and resulting sentence are affirmed.

FACTS¹ AND PROCEDURAL HISTORY

¶2 In September 1980, M.C.'s² naked body was found in the trailer she was living in on her property while her house was being renovated. Although M.C. neatly organized her belongings in the trailer, when her body was discovered, the interior of the trailer was in disarray. M.C. lived alone at the time in the same neighborhood as Tubbs and his then-wife. Although the police did an initial investigation at the time, and suspected Tubbs, no charges were filed at that time.

¶3 In 2013, a detective in the cold-case unit of the Phoenix Police Department began to investigate M.C.'s murder again. After reviewing the evidence and reports from 1980, and submitting evidence gathered at the scene in September 1980 to the Phoenix Crime Lab for DNA testing, the detective saw that Tubbs was questioned in 1980 and decided to contact

¹ This 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 (1997).

² Initials are used to protect the privacy of victims. *State v. Maldonado*, 206 Ariz. 339, 341 n.1 ¶ 2 (App. 2003).

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him. In July 2013, the detective interviewed Tubbs, who asserted his innocence. Tubbs provided a buccal swab to test for DNA.

¶4 After Tubbs' fingerprint matched those collected on the inside push-bar handle of M.C.'s trailer and Tubbs' DNA matched the DNA of a hair found in M.C.'s pubic hair, the State indicted Tubbs with one count of first degree murder, a Class 1 felony. The State pursued a felony murder theory based on Tubbs causing M.C.'s death in the course of the offense of sexual assault, kidnapping and/or burglary.

¶5 After extensive pre-trial motion practice, trial lasted 14 days. The State called as witnesses the detective from the cold-case unit, M.C.'s son, a forensic pathologist, two forensic scientists, and the DNA analyst. During trial, the Phoenix Crime Lab discovered that the FBI amended the DNA statistics tables, causing a minor change in the probabilities of Tubbs' DNA match. Before the DNA analyst testified, the superior court held an evidentiary hearing to determine the admissibility of the testimony pursuant to Ariz. R. Evid. 702, during which the court also heard argument for the State's Ariz. R. Crim. P. 15.6 motion to allow untimely-disclosed evidence to be presented at trial. After testimony showed that the FBI amended the tables due to clerical errors, but kept the same scientific methodology, the court found the expert's methods and opinion to be reliable and admissible. The court also granted the State's Ariz. R. Crim. P. 15.6 motion and allowed the DNA analyst to testify to the new statistics.

¶6 Tubbs called a DNA expert as a witness, who testified that there was some contamination in the sample resulting in Tubbs' DNA match. Tubbs also elected to testify and declared his innocence, stating he was friends with M.C. and touched the door to keep it open when he spoke to her from the doorway on multiple occasions before her death.

¶7 After closing instructions and arguments, the jury deliberated and found Tubbs guilty. The jury also found the following aggravating circumstance after an aggravation hearing: "The offense caused physical or emotional harm to the victim or, if the victim died as a result of the conduct of the Defendant, caused emotional or financial harm to the victim's immediate family."

¶8 At the sentencing, Tubbs requested that the court add five days to the 427 presentence incarceration credit to account for the time he spent in custody after his arrest in 1980. Tubbs, however, did not provide documentation proving those five days, so the superior court denied the request. After considering relevant mitigating circumstances, under

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Arizona Revised Statutes (A.R.S.) section 13-703 (1980), the court sentenced Tubbs to life with the possibility of parole after 25 years with 427 days of presentence incarceration credit. Because the aggravating circumstance that the jury found was not a recognized aggravating factor pursuant to A.R.S. § 13-703 (1980), the court did not consider it.

¶9 Tubbs timely appeals his conviction and resulting sentence. This court has jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A) (2016).³

DISCUSSION

¶10 This court has reviewed and considered counsel's brief and has searched the entire record for reversible error. *See State v. Clark*, 196 Ariz. 530, 537 ¶ 30 (App. 1999). Searching the record and brief reveals no reversible error. The record shows Tubbs was represented by counsel at all critical stages of the proceedings. Tubbs was present at all critical stages, and was not present for a only few minutes during trial, at the end of the day and outside the presence of the jury, when the court went back on the record to clarify which aggravators the State was pursuing and whether the attorneys would like to speak to the jury after the verdict. The evidence admitted at trial constitutes substantial evidence supporting Tubbs' conviction.

¶11 Because M.C. was killed in 1980 and the initial investigation happened that same year, a few participants in the initial investigation were unavailable in the 2015 trial. For example, Phoenix Police Department Identification Officer Jones, the person who collected and analyzed finger prints from M.C.'s trailer, died before trial. Tubbs objected to the admission of the fingerprint cards Officer Jones created, along with the comparison results she wrote on the cards, and any report she wrote based on foundation, hearsay and *Crawford v. Washington*, 541 U.S. 36 (2004).

¶12 The State established foundation through a Phoenix Crime Lab employee from 1980 who worked with Officer Jones, the detective that inventoried the cards in 2006 and the current forensic scientist who used the cards to make comparisons in 2013. The court also properly found the fingerprint cards met the business record exception to the rule against hearsay, but any comparisons Officer Jones documented did not meet any exception to the rule against hearsay and were precluded. *See Ariz. R. Evid.*

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

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803(6). Because the court precluded any comparisons, it needed only to determine whether the descriptive statements, such as the location of the print on the cards, would violate the Confrontation Clause. On this record, the court properly found the fingerprint cards were non-testimonial and did not violate the Confrontation Clause, meaning the court properly overruled Tubbs' objection. *See State v. King*, 213 Ariz. 632, 638 ¶ 26 (App. 2006) (noting records "akin to business records" that were "prepared and maintained regardless of their possible use in a criminal prosecution" were not testimonial under Crawford); *see also State v. Medina*, 232 Ariz. 391, 406 ¶¶ 61-62 (2013) (holding evidence from autopsy conducted one day after apparent murder non-testimonial because "[a]ny trace evidence obtained during the autopsy was gathered to determine the manner and cause of death in order to help 'catch a dangerous [murderer] who was still at large,' not to gather evidence to accuse [Defendant]") (quoting *Williams v. Illinois*, 132 S. Ct. 2221, 2243 (2012)).

¶13 From the record, all proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. The jury was properly comprised of 12 members. The court properly instructed the jury, including on the elements of the charges pursuant to the Arizona Revised Statutes in effect in 1980, the State's burden of proof and the necessity of reaching a unanimous verdict. The jury returned a unanimous verdict that was confirmed by juror polling. The sentence imposed was consistent with the sentence required in A.R.S. § 13-703 (1980).

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CONCLUSION

¶14 This court has read and considered counsel's brief and has searched the record provided for reversible error and has found none. *Leon*, 104 Ariz. at 300; *Clark*, 196 Ariz. at 537 ¶ 30. Accordingly, Tubbs' conviction and resulting sentence are affirmed.

¶15 Upon filing of this decision, defense counsel is directed to inform Tubbs of the status of his appeal and of his future options. Defense counsel has no further obligations unless, upon review, counsel identifies an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85 (1984). Tubbs shall have 30 days from the date of this decision to proceed, if he desires, with a pro se motion for reconsideration or petition for review.



Ruth A. Willingham · Clerk of the Court

FILED : AA