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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



DIVISION ONE
FILED: 08/13/09
PHILIP G. URRY, CLERK
BY: DN

STATE OF ARIZONA,)
)
 Appellee,) 1 CA-CR 08-0732
)
 v.) DEPARTMENT E
)
) MEMORANDUM DECISION
 JESSE JOE CABONIAS,) (Not for Publication -
) Rule 111, Rules of the
 Appellant.) Arizona Supreme Court)
)
 _____)

Appeal from the Superior Court of Maricopa County

Cause No. CR 2007-149086-002 DT

The Honorable Warren J. Granville, Judge

AFFIRMED

Terry Goddard, Attorney General
by Kent E. Cattani, Chief Counsel
Criminal Appeals Section
Attorneys for Appellee

Phoenix

The Law Office of Janelle A. McEachern
by Janelle A. McEachern
Attorneys for Appellant

Chandler

W E I S B E R G, Judge

¶1 Jesse Joe Cabonias ("Defendant") appeals from his convictions for first-degree murder, aggravated robbery, and first-degree burglary as well as the sentences imposed. His counsel has filed a brief in accordance with *Anders v. California*, 386 U.S.

738, 744 (1967), and *State v. Leon*, 104 Ariz. 297, 299, 451 P.2d 878, 880 (1969), advising this court that after a search of the entire record on appeal, she finds no arguable ground for reversal. This court granted Defendant an opportunity to file a supplemental brief, and he has done so. Counsel now requests that we search the record for fundamental error. *Anders*, 386 U.S. at 744; *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999).

¶12 We have jurisdiction pursuant to Arizona Revised Statutes (“A.R.S.”) sections 12-120.21(A)(1) (2003), 13-4031 (2001), and 13-4033 (A) (2001). We view the facts in the light most favorable to sustaining the verdict. *See State v. Stroud*, 209 Ariz. at 410, 412, ¶ 6, 103 P.3d 912, 914 (2005).

BACKGROUND

¶13 Defendant was charged with one count of first-degree (felony) murder, a class 1 dangerous felony; one count of aggravated robbery, a class 3 dangerous felony, and one count of first-degree burglary, a class 2 dangerous felony. The victim of these crimes was a seventy-eight year old man, F.G., who routinely sold small quantities of drugs.

¶14 A jury trial took place on May 22, 27, 28, 29 and June 2, 3, 4, 5, 2008. At trial, Deputy T.W. testified that he was called to F.G.'s house for a reported shooting on July 27, 2007. The dispatcher described the perpetrator as wearing a white shirt and blue jeans with a towel over his face. He testified that he found F.G. on the floor in the bedroom and soon after fire personnel

arrived to attempt first aid. F.G. was pronounced dead within thirty minutes.

¶15 J.M. testified that she and her boyfriend, P.R., lived in a room addition on the rear of F.G.'s house. On July 27, she and P.R. had returned from the store and found an acquaintance, Kent Hall standing inside the gate to F.G.'s house. Kent asked J.M. to buy \$10 worth of methamphetamine from F.G. J.M. normally would knock on the bathroom window to get F.G.'s attention, but she saw Kent's girlfriend, Desaree Austin, in the bathroom and handed her the money. J.M. then went to see if F.G. was at home, and as she walked toward the front, saw a Hispanic male jump over the front gate and walk toward the house. J.M. noticed that the front door was open, although she noted that F.G. never liked for it to be open, and she went back to speak to P.R. because she wondered why Kent had asked her to buy the drugs when Desaree was in F.G.'s house and could have done so directly. J.M. then heard a gunshot, and as she again went toward the front of the house, she saw the same man who had jumped the fence walked by with a gun in his hand. She noticed that he had tattoos all over his right arm, identified Defendant in court as that person, and testified that recent photographs of the tattoos on Defendant's arm were the type that she remembered. J.M. said that she entered F.G.'s house and found him lying on the floor. She ran back to her room and told P.R. that F.G. was dead, at which time Kent ran off. She then called 911.

¶16 W.S. testified that on July 27, she encountered B.C. and Desaree on the street and walked with them toward F.G.'s house. W.S. continued past F.G.'s house to her grandmother's trailer next door and later sat in a car parked outside. After hearing what sounded like a firecracker, W.S. saw B.C. and Desaree running toward the front of F.G.'s yard. W.S. identified photographs of B.C., Desaree, and Kent. Sergeant A.A. testified that when interviewed on July 27, W.S. had said that she also had seen Kent run toward the rear of F.G.'s property.

¶17 B.C. testified that she had pled guilty to armed robbery for events that occurred in F.G.'s home on July 27, 2007.¹ She identified Defendant and said that he had been her boyfriend and had told her that several months before July he had robbed F.G. of \$1,500 and some drugs. B.C. said that after the robbery, F.G. had purchased a .22 handgun and would not allow Defendant in his house. Accordingly, she, Defendant, Desaree, and Kent agreed that Kent would go to the back and occupy J.M. and P.R. with a drug deal and that she and Desaree would go to F.G.'s door alone and make sure the door was unlocked so that Defendant could enter. She said that Kent gave Defendant a .38 caliber handgun. As planned, Kent arrived first and went to the back. B.C. and Desaree arrived, and F.G. let them in. They went into his bedroom, and then Defendant

¹B.C. admitted that her plea agreement required her testimony at Defendant's trial and that the trial's outcome would not determine whether she had complied with her agreement. Her plea agreement was admitted into evidence.

entered and told the women to get on the ground. Defendant yelled at F.G. to give him his drugs, money, and gun. She heard a "tussle" and "a hitting noise," and heard F.G. say, "Okay, okay" and "Here" to Defendant, then a gunshot and Defendant saying, "See, now you're dead." She and Desaree ran out of the house and later met Defendant and Kent. Defendant had taken drugs, \$700 to \$1,000 in cash, and F.G.'s gun. B.C. said that Defendant was wearing jeans and a tee-shirt with cut-off sleeves.

¶18 G.C., the father of B.C., testified that on the night of July 27, B.C. and Defendant had come to his house and that Defendant had asked him to sell two handguns, a .22 and a .38 caliber. G.C. recognized the .22 as F.G.'s gun. After wiping off both guns and removing the shells from the .38, G.C. noticed that one shell was missing from that gun. G.C. hid the guns and took B.C. and Defendant to a motel. While there, B.C. told her father that Defendant had shot F.G. Two days after the shooting, police came to G.C.'s house, and he gave them the guns.

¶19 A firearms examiner testified that he had determined that a bullet taken from F.G.'s head had been fired by the .38 revolver. Detective K.B. testified that she had traveled to California where B.C. had been taken into custody and interviewed B.C., who admitted her role in the robbery.

¶10 Defendant took the stand and testified that he was at home at about 6:00 or 6:30 p.m. on July 27 when G.C. came to the door and asked B.C. to accompany him to sell some pills. He said

that B.C. returned between 8:00 and 9:00 p.m. Between 9:30 and 10:00 p.m., Defendant said that he and B.C. went over to her parents' house and that G.C. took Defendant and B.C. to a motel to spend the night. Defendant denied ever being at F.G.'s that night and admitted that he had two prior felony convictions. Defendant said that the next day, because B.C. had said that she was pregnant, he and B.C. decided to go to California so that B.C. could meet his mother. Defendant also said that his brother used his identification to purchase bus tickets because Defendant had outstanding warrants for nonpayment of child support. Sergeant A.A. testified on rebuttal that Defendant had no outstanding warrants in Arizona or California and that when interviewed after his arrest, he had never said that B.C.'s pregnancy was the reason for going to California.

¶11 The jury found Defendant guilty as charged. At sentencing, the court found the following aggravating factors: the presence of accomplices; Defendant's criminal history; and F.G.'s age. In mitigation, the court considered Defendant's family circumstances and support. The court sentenced Defendant to natural life in prison for first-degree murder, to a concurrent, aggravated term of fifteen years for aggravated robbery, and to a concurrent, aggravated term of ten years for first-degree burglary. The court credited him with 340 days of presentence incarceration and ordered that he pay a probation surcharge of \$10.00 and submit to DNA testing.

¶12 Defendant has filed a supplemental opening brief in which he contends that B.C. perjured herself at trial when she said that she had received no compensation for her testimony because, he asserts, she had agreed to testify in exchange for a lighter sentence. B.C.'s plea and testimonial agreements were admitted in evidence; she agreed to be sentenced to the Department of Corrections but there was no promise regarding the length of her sentence. We find no reversible error on this basis.

¶13 Defendant argues that an audio tape introduced at trial showed that he had taken the blame but that others had been directly involved in causing F.G.'s death. Testimony from J.M. and B.C. established that there were other individuals involved in the robbery, but that fact does not lessen Defendant's guilt for his part in the events.

¶14 Defendant states that no DNA linked him to the scene and no ballistic evidence linked him to the murder weapon. While true, Defendant overlooks that no direct evidence is necessary to convict an accused because circumstantial evidence alone may constitute substantial evidence for purposes of conviction. *State v. Pena*, 209 Ariz. 503, 505, ¶ 7, 104 P.3d 873, 875 (App. 2005) (citing *State v. Blevins*, 128 Ariz. 64, 67, 623 P.2d 853, 856 (App. 1981) and *State v. Webster*, 170 Ariz. 372, 374, 824 P.2d 768, 770 (App. 1991)). In this case, B.C. and J.M. testified to Defendant's presence and use of a gun, and substantial evidence supported his convictions.

¶15 Finally, Defendant argues that trial counsel was ineffective for failing to interview witnesses and prepare for trial. This contention is a matter that cannot be raised on appeal but rather must be raised in a Rule 32 post-conviction proceeding. *State ex rel. Thomas v. Rayes*, 214 Ariz. 411, 415, ¶ 20, 153 P.3d 1040, 1044 (2007). We do not address it further.

CONCLUSION

¶16 We have read and considered the briefs of counsel and Defendant; we also have searched the entire record for reversible error. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find none. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. So far as the record reveals, Defendant was represented by counsel at all stages of the proceedings; the sentences imposed were within the statutory limits; and sufficient evidence existed for the jury to find that Defendant had committed the charged offenses.

¶17 After the filing of this decision, counsel's obligations pertaining to Defendant's representation in this appeal have ended. Counsel need do no more than inform Defendant of the status of the appeal and of Defendant's future options, unless counsel's review reveals 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). On the court's own motion, Defendant has thirty days from the date of this decision to

proceed, if he desires, with a motion for reconsideration or petition for review *in propria persona*.

¶18 We affirm the convictions and sentences imposed.

SHELDON H. WEISBERG, Judge

CONCURRING:

DONN KESSLER, Presiding Judge

LAWRENCE F. WINTHROP, Judge