

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

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JAN -9 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0231
)	DEPARTMENT B
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
ERNESTO SANTAMARIA,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20102731001

Honorable Howard Hantman, Judge

AFFIRMED

Barton & Storts, P.C.
By Brick P. Storts, III

Tucson
Attorneys for Appellant

K E L L Y, Judge.

¶1 Appellant Ernesto Santamaria was convicted after a jury trial of robbery, assault, and theft of means of transportation. The trial court sentenced him to time served on the assault conviction, and to concurrent, presumptive sentences, the longer of which is 6.5 years on the robbery and theft convictions, all to be served consecutive to the six concurrent sentences imposed in another matter. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, ¶ 32, 2 P.3d 89, 97 (App. 1999), stating he has reviewed the record and has found no arguable issues to raise on appeal and asking this court to review the record for fundamental error. In his pro se supplemental briefs,¹ Santamaria raises numerous arguments. Finding no error, we affirm.

¶2 We view the evidence in the light most favorable to upholding the jury's verdicts. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). Early in the morning on June 29, 2010, the victim's truck alarm sounded. When the victim went to the front door of the apartment he was visiting to investigate, he was confronted by a man he identified at trial as Santamaria, who "pulled a gun" and demanded the keys to his truck. After the victim complied, Santamaria took the truck. Santamaria's sister told South Tucson police officers that Santamaria had committed the offense and that she had seen him seated "on the driver's side" of the victim's truck during the incident. The evidence was sufficient to support Santamaria's convictions. *See* A.R.S. §§ 13-1203(A)(2), 13-1902, 13-1814(A)(5).

¹After filing a pro se supplemental brief, Santamaria filed a direct appeal in pro per, which we treat as a second supplemental brief.

¶3 In his pro se supplemental briefs, Santamaria argues (1) the presumption of innocence was “destroyed” when a police officer referred to the victim as a “victim,” despite the trial court’s having granted Santamaria’s motion to preclude the state from referring to the alleged victim as such; (2) by “injecting issues, things going on, trouble . . . suggest[ing] something about [his] family, like criminal activity,” Santamaria’s sister too destroyed the presumption of his innocence; (3) the court erroneously permitted the victim’s in-court identification of Santamaria and refused to give a special jury instruction on eye-witness identification; (4) the motion for judgment of acquittal should have been granted; and, (5) trial counsel was ineffective. We address each of these arguments below.

¶4 First, Santamaria correctly notes the trial court granted his motion in limine precluding the state from referring to the alleged victims as “victims,” and ordered the state to “refer to the victims in this case as named victims or alleged victims.” Santamaria complains the presumption of his innocence was destroyed when a police officer referred to the victim as a “victim” because that testimony informed the jury there was an actual victim before it had heard all of the evidence. But defense counsel objected to the officer’s testimony and the court sustained that objection, ordering the statement stricken. Second, in a related argument, Santamaria asserts the presumption of his innocence also was destroyed when his sister testified: “It’s so many issues in my family right now. It’s like I talk to a lot of people.” Following defense counsel’s objection to this testimony, the trial court ordered it stricken from the record.

¶5 “Ordinarily the striking out of improper testimony, coupled with an instruction to the jury to entirely disregard it, cures the error, except in cases where it can readily be seen that the error was so prejudicial as to be incapable of being cured in that manner.” *McCann v. State*, 20 Ariz. 489, 496, 182 P. 96, 99 (1919). When improper testimony has been presented unexpectedly, the court should consider: “(1) whether the remarks called to the attention of the jurors matters that they would not be justified in considering in determining their verdict, and (2) the probability that the jurors, under the circumstances of the particular case, were influenced by the remarks.” *State v. Stuard*, 176 Ariz. 589, 601, 863 P.2d 881, 893 (1993). Because the trial court here struck the offensive testimony and instructed the jury to disregard it, and there is no evidence suggesting Santamaria was prejudiced by that testimony, we reject his first two claims.

¶6 Third, Santamaria argues the trial court erroneously permitted the victim to identify him at trial, denied his motion to suppress that identification, and refused to give a special jury instruction on eye-witness identification. The trial court denied the motion to suppress the in-court identification: “[B]ased upon the record, the pleading, that identification is admissible. Goes to the weight, not admissibility. It’s a jury question. So it can come in over the Defense objection.” The court again considered, and rejected, Santamaria’s argument regarding the admissibility of the in-court identification when it denied his motion for judgment of acquittal.

¶7 Santamaria has not established that the trial court erred by denying his motion to suppress the in-court identification. Rather, he essentially reasserts the same

arguments his attorney presented to the trial court, which we reject primarily because he has failed to establish how the court erred in ruling that any potential flaws related to the in-court identification were a matter of weight and credibility rather than admissibility. *See State v. Prion*, 203 Ariz. 157, ¶ 18, 52 P.3d 189, 193 (2002) (complaints concerning in-court identification go to weight and credibility, not admissibility); *see also State v. Hooper*, 145 Ariz. 538, 544, 703 P.2d 482, 488 (1985) (“The fairness and reliability of a challenged identification are preliminary matters for the trial court whose findings will not be overturned on appeal absent a showing of clear and manifest error.”). Moreover, as the court noted when it denied Santamaria’s motion to suppress, the victim identified an individual who was not Santamaria in the photographic lineup and that fact would be presented to the jury. *See State v. Myers*, 117 Ariz. 79, 84-85, 570 P.2d 1252, 1257-58 (1977) (“[W]henver possible, the 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.”), *quoting People v. Belenor*, 246 N.W.2d 355, 357 (Mich. Ct. App. 1976). We thus conclude the court did not abuse its discretion by admitting the victim’s in-court identification of Santamaria.

¶8 The trial court likewise denied Santamaria’s request to provide a jury instruction based on New Jersey law,² stating “I think [the proposed jury instruction] is a terrible [precedent]. Over [defense counsel’s] objection I’m not going to give anything beyond the standard Arizona instructions approved by the Supreme Court.” Notably,

²*New Jersey v. Henderson*, 27 A.3d 872 (N.J. 2011).

Santamaria has not demonstrated that the court erred by rejecting the proffered jury instruction based on law his own attorney acknowledged “is not the Arizona law, but [it is counsel’s] hope . . . that eventually it will be.” We find no reason, nor has Santamaria offered one, to reverse the court’s ruling. *See State v. Moody*, 208 Ariz. 424, ¶ 197, 94 P.3d 1119, 1162 (2004) (trial court’s refusal to give requested jury instruction reviewed for abuse of discretion); *cf. State v. Rivera*, 177 Ariz. 476, 479, 868 P.2d 1059, 1062 (App. 1994) (trial court should reject “proffered jury instruction that misstates the law or has the potential to mislead or confuse the jury”).

¶9 In what appears to be his fourth argument, Santamaria asserts: “Also, Rule 20 Motion, there was insufficient evidence of identification, all that I stated above.” Rule 31.13(c)(1)(vi), Ariz. R. Crim. P., requires that the legal argument in an appellant’s opening brief contain record citations for each contention raised on appeal. When an appellant fails to comply with Rule 31.13 and presents an insufficiently developed argument that does not permit appellate review, we will find the argument waived, *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995), and we do so here.

¶10 Finally, Santamaria’s claims of ineffective assistance of trial counsel, raised briefly in the supplemental brief and in slightly more detail in the second supplemental brief, cannot be raised on appeal, but must be raised in a proceeding pursuant to Rule 32, Ariz. R. Crim. P. *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002).

¶11 Santamaria’s sentences were within the prescribed statutory range and were imposed lawfully. *See* A.R.S. §§ 13-703, 13-707. We have rejected the claims

Santamaria raised in his supplemental briefs and, pursuant to our obligation under *Anders*, searched the record for fundamental, reversible error and found none. Therefore, Santamaria's convictions and sentences are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge