

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DANIEL ALEJANDRO MACIAS,
Appellant.

No. 2 CA-CR 2014-0249
Filed April 20, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20111954001
The Honorable Jane L. Eikleberry, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Jonathan Bass, Assistant Attorney General, Tucson
Counsel for Appellee

Nicole Farnum, Phoenix
Counsel for Appellant

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MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

MILLER, Presiding Judge:

¶1 Daniel Macias was convicted after a jury trial of burglary in the first degree, aggravated robbery, armed robbery, theft of a means of transportation, three counts of aggravated assault with a deadly weapon, six counts of kidnapping, and three counts of aggravated assault with a deadly weapon of a minor under age fifteen. Macias was sentenced to concurrent and consecutive prison terms totaling 112.5 years. On appeal, he argues that his due process rights were violated when the trial court allowed in-court identifications, admitted evidence of pretrial identifications, and failed to give a cautionary jury instruction *sua sponte*. For the reasons set forth below, we affirm Macias’s convictions and sentences.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the convictions on appeal. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On June 1, 2011, Macias and another individual entered the home of M.W. Macias held M.W., her aunt, her niece, and her three minor children at gunpoint while his accomplice ransacked the house; the two men then drove off in M.W.’s vehicle. Based on a police broadcast for the stolen vehicle, Macias and his accomplice were spotted and arrested a short time later. Five of the victims were separately driven past the two suspects, and all of them positively identified Macias and the other suspect as the robbers.

¶3 Before trial, Macias filed a “Motion to Exclude Eyewitness Identification Evidence,” seeking to preclude any in-court identifications by the victims. The trial court denied the motion without a hearing. Macias later filed a “Motion to Suppress

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Identification,” to prevent any testimony about the witnesses’ positive identifications on the day of the crime, also renewing the request to preclude in-court identifications. The court treated it as a motion for reconsideration and held a *Dessureault*¹ hearing.

¶4 At the hearing, Macias conceded that in-court identifications were permissible. Macias also conceded he was challenging only the suggestiveness of the show-up procedure, not the reliability of the out-of-court identifications. After the testimony of five detectives about the show-up procedure used for each of the victims, the trial court ruled that the show-up identifications were not unduly suggestive and denied the motion to suppress.

¶5 Macias was convicted and sentenced in Pima County Superior Court as described above, and this timely appeal followed.

In-Court Identification

¶6 On appeal, Macias contends the trial court erred by admitting the victims’ in-court identifications over his objection that the show-up procedure was unduly suggestive. As noted above, although Macias moved before trial to preclude any in-court identification, he expressly conceded admissibility at the *Dessureault* hearing. Not only did he fail to argue that the in-court identifications were tainted by the show-up procedure, defense counsel volunteered, “The State can still ask the alleged victims if they can identify Mr. Macias in Court. But I think that the out-of-court lineup is suggestive.”

¶7 Although not addressed in the state’s answering brief, we conclude any error on this issue was invited and is foreclosed by the invited error doctrine. *See State v. Moody*, 208 Ariz. 424, ¶ 111, 94 P.3d 1119, 1148 (2004). Further, we do not determine whether the error is fundamental, “for doing so would run counter to the purposes of the invited error doctrine,” which “is to prevent a party from ‘inject[ing] error in the record and then profit[ing] from it on appeal.’” *State v. Logan*, 200 Ariz. 564, ¶¶ 9, 11, 30 P.3d 631, 632-33

¹*State v. Dessureault*, 104 Ariz. 380, 383-84, 453 P.2d 951, 954-55 (1969).

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(2001), *quoting State v. Tassler*, 159 Ariz. 183, 185, 765 P.2d 1007, 1009 (App. 1988) (alterations in *Logan*). Accordingly, we do not address Macias's argument that the in-court identifications were improper.

Pretrial Identification

¶8 Macias next argues that the pretrial identification testimony should have been suppressed. The state's answering brief focuses on this issue alone. When a pretrial identification has been made, "there is a two-part test for determining admissibility: (1) whether the method or procedure used was unduly suggestive, and (2) even if unduly suggestive, . . . whether it was reliable." *State v. Lehr*, 201 Ariz. 509, ¶ 46, 38 P.3d 1172, 1183 (2002). At the *Dessureault* hearing, the trial court ruled that the show-up identifications were not unduly suggestive and denied Macias's motion to suppress on that basis. On appeal, Macias contends the court erred when it concluded the show-up was not unduly suggestive, relying on several Arizona cases holding that one-man show-ups are inherently suggestive. *State v. Cañez*, 202 Ariz. 133, ¶ 47, 42 P.3d 564, 581 (2002); *State v. Williams*, 144 Ariz. 433, 440-41, 698 P.2d 678, 685-86 (1985). The state counters that the show-up procedure was not unduly suggestive because of the exigent circumstances and cites primarily federal cases to support that assertion. However, we have previously refused to conclude "that due process violations associated with suggestive identifications can be cured by evidence of exigent circumstances . . . in the absence of further guidance from the Arizona or United States Supreme Court." *State v. Rojo-Valenzuela*, 235 Ariz. 617, ¶¶ 12-14, 334 P.3d 1276, 1280 (App. 2014).

¶9 Even assuming, without deciding, that the trial court erred in concluding the pretrial identification procedure was not unduly suggestive,² we will uphold the court's ruling for any reason

² Courts have used inconsistent language regarding procedures that are unduly suggestive and those that are inherently suggestive. *Compare Williams*, 144 Ariz. at 441, 698 P.2d at 686 (finding trial court's conclusion that one-man show-up was not unduly suggestive was "clearly error since one-man show-ups are inherently suggestive"), *with State v. Hoskins*, 199 Ariz. 127, ¶ 35, 14

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supported by the record. *See State v. Boteo-Flores*, 230 Ariz. 551, ¶ 7, 288 P.3d 111, 113 (App. 2012). For instance, an identification resulting from an unduly suggestive procedure may still be reliable. *Lehr*, 201 Ariz. 509, ¶ 48, 38 P.3d at 1183.

¶10 Here, the trial court was not afforded the opportunity to determine reliability because Macias conceded during the *Dessureault* hearing he was not objecting to the reliability prong. Although this concession arguably constituted invited error, the state suggested in its answering brief that Macias waived the issue of the identifications' reliability. This court has cautioned against applying the invited error doctrine "unless the facts clearly show that the error was actually invited by the appellant." *State v. Lucero*, 223 Ariz. 129, ¶ 18, 220 P.3d 249, 255 (App. 2009). In this circumstance, where the defendant had not volunteered the erroneous procedure to the court, we will not apply the doctrine. Nonetheless, because Macias agreed with the state that he would not challenge the reliability of the show-up, we limit our review to fundamental, prejudicial error.³ *See id.* ¶ 31.

¶11 We determine reliability by considering the factors from *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972):

[T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of

P.3d 997, 1008 (2000) (holding that one-man show-up identification not unduly suggestive if procedure was reliable).

³Even if the trial court erred by failing to explicitly address the reliability of the out-of-court identifications, we may independently review the court's finding. *See Cañez*, 202 Ariz. 133, ¶ 48, 42 P.3d at 581 (conducting de novo analysis on appeal); *Williams*, 144 Ariz. at 440-41, 698 P.2d at 685-86 (same); *State v. Rodriguez*, 110 Ariz. 57, 59, 514 P.2d 1245, 1247 (1973) (upholding denial of motion to suppress because trial court "could have reasonably concluded that, regardless of the[] suggestive circumstances . . . , the procedure did not contaminate the identification then or later").

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the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Our review of these five factors is derived principally from the victims' testimony at trial.

Viewing Opportunity and Attention at the Time of the Crime

¶12 The victims observed Macias at the house for thirty to forty-five minutes, and spent some of that time in a bedroom in close proximity. Although Macias had at times covered half of his face with his shirt, at least three of the victims saw his entire face. Two victims testified they were close to Macias during the event. He took his shirt off his face and apologized to one, and he stood shoulder-to-shoulder with another.

Certainty, Accuracy, and Temporal Proximity of the Pretrial Identifications

¶13 The officers' testimony at the *Dessureault* hearing indicated that the victims expressed no hesitation in identifying the persons who had assaulted them several hours earlier. At trial, the victims' descriptions of the men were consistent with each other. All four testifying victims described the robbers as one "skinny" and one "chunky" man, and several victims described race, complexion, clothing, and the types of guns the robbers held. The victims also testified they were able to affirmatively identify Macias at the show-up.

¶14 We conclude that the record supports the reliability of the pre-trial identifications. *See, e.g., Biggers*, 409 U.S. at 200 (identification reliable where defendant originally observed for half hour under artificial light and full moon, witness "was no casual observer, but rather the victim" of serious and personal crime, and witness gave accurate and detailed description); *Williams*, 144 Ariz. at 440, 698 P.2d at 685 (identification reliable where defendant originally observed for a "couple of minutes" from distance of three

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to four feet, and witness had “no doubt at all” about person identified). Therefore, the trial court did not commit fundamental, prejudicial error when it admitted the out-of-court identifications.

***Dessureault* Instruction**

¶15 Finally, Macias argues that the trial court’s failure to give, *sua sponte*, a *Dessureault* cautionary jury instruction constitutes fundamental, prejudicial error. We first note that a *Dessureault* instruction is required only “if requested.” *Dessureault*, 104 Ariz. at 384, 453 P.2d at 955; *see also State v. Dominguez*, 192 Ariz. 461, ¶ 14, 967 P.2d 136, 140 (App. 1998). Here, Macias did not request the instruction. Even assuming for the purpose of argument that the trial court should have provided a *Dessureault* instruction on its own motion, Macias has not met his burden of establishing prejudice in view of the significant evidence against him. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 20, 27, 115 P.3d 601, 607, 609 (2005) (defendant must show both fundamental error and prejudice; prejudice means reasonable jury might have reached different result).

¶16 Macias and his accomplice were arrested twenty to thirty minutes after the robbery at an apartment complex less than fifteen minutes, by car, from the scene of the robbery. They were found driving M.W.’s distinctive vehicle, which had custom rims and a decorative front license plate. In their possession, Macias and his accomplice had items identified as those stolen from M.W.’s residence. These included M.W.’s rhinestone-cased cell phone, a laundry basket containing M.W.’s son’s clothes, shoes belonging to M.W.’s son, and a Hello Kitty music player that was taken from M.W.’s daughter by Macias while he was holding the family at gunpoint. Macias has failed to show he was prejudiced by the lack of a *Dessureault* instruction.

Disposition

¶17 Based on the foregoing, Macias’s convictions and sentences are affirmed.