

NOTICE: NOT FOR PUBLICATION.  
UNDER ARIZ. R. SUP. CT. 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT  
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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STATE OF ARIZONA, *Appellee*

*v.*

JACOURY LUKOR HORTON-HOUSTON, *Appellant.*

No. 1 CA-CR 12-0097  
FILED 12-26-2013

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Appeal from the Superior Court in Maricopa County  
No. CR2010-007434-001  
The Honorable Stephen P. Lynch, Judge

**AFFIRMED**

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COUNSEL

Arizona Attorney General, Phoenix  
By Craig W. Soland

*Counsel for Appellee*

Maricopa County Public Defender, Phoenix  
By Tennie B. Martin

*Counsel for Appellant*

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**MEMORANDUM DECISION**

Judge Patricia A. Orozco delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Samuel A. Thumma joined.

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**O R O Z C O**, Judge:

¶1 Jacoury Lukor Horton-Houston (Defendant) appeals his conviction and sentence for one count of possession or use of marijuana, a class one misdemeanor. Specifically, he argues his pre-trial identification by a police officer witness was the result of the prosecutor's unduly suggestive use of Defendant's photograph during witness preparation. Defendant contends the trial court abused its discretion in allowing the police officer to identify him at trial. For the following reasons, we find no abuse of discretion and affirm.

**FACTS AND PROCEDURAL HISTORY**

¶2 Phoenix Police Officer M. was on patrol the morning of January 28, 2010. He noticed a gray Buick Lucerne in the parking lot of a convenience store around 1:30 a.m. near Indian School Road. Officer M. saw the car exit the parking lot, driving westbound in the eastbound lane. Officer M. initiated a traffic stop for the violation.

¶3 The driver pulled over a short distance west of the convenience store into the parking lot of an apartment complex. Officer M. described the parking lot as being "well lit" by street lights. Officer M. directed his patrol vehicle's spotlight towards the Buick and approached the car with his flashlight illuminated.

¶4 The driver rolled down the window as Officer M. approached and Officer M. asked the driver for his identification, vehicle registration, and proof of insurance. The driver produced his identification card. Officer M. compared the picture on the identification card with the driver's face to confirm that he matched the physical description and age of the person on the card. Officer M. testified at the

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*Dessureault*<sup>1</sup> hearing that the identification card the driver handed him was Defendant's.

¶5 While Officer M. was at the car's window, the driver stated that his driving privileges were suspended and asked Officer M. to "give him a break." Officer M. immediately called for backup because the driver appeared "unusually nervous." He then returned to the patrol vehicle to determine the driver's status. Officer M.'s computer system alerted him that the driver had an outstanding warrant.

¶6 Simultaneously, the driver exited the car and fled the parking lot. Officer M. pursued the driver on foot. Officer R. responded to Officer M.'s call for backup and assisted in the foot pursuit. During the pursuit, Officer M. witnessed the driver remove and discard a plastic bag from his waistband. Officers M. and R. did not apprehend the driver. After the failed pursuit, Officer M. secured the driver's discarded bag, which contained 9.6 grams of marijuana. Officer M. determined the car was registered to Defendant's mother. He subsequently wrote a report that included the driver's physical description.

¶7 Defendant was indicted on June 15, 2011. The State scheduled an interview with Officer M. to be held on November 7, 2011. Defense counsel was to be present at the interview. Before the interview, defense counsel mentioned to the prosecutor that she wanted to show the officer some photographs during the interview. Officer M. arrived at the interview before defense counsel. Upon Officer M.'s arrival, the prosecutor showed him Defendant's booking photo and asked if the photo was of the individual with whom the officer had come in contact with the morning of January 28, 2012. He stated that it was. The prosecutor informed Officer M. that Defendant was claiming he was not the individual driving the vehicle. During the interview, defense counsel discovered that the prosecutor had shown Officer M. the photograph.

¶8 Defense counsel moved to exclude Officer M.'s in-court identification of Defendant, claiming the pretrial identification procedure was impermissibly suggestive. The court did not believe the out of court identification required a *Dessureault* hearing, but held one nonetheless.

¶9 At the hearing, Officer M. testified that as a matter of practice, he makes traffic stops under a "heightened sense of awareness."

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<sup>1</sup> See *State v. Dessureault*, 104 Ariz. 380, 454 P.2d 981 (1969).

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He stated that he had one minute and five seconds to identify Defendant during the traffic stop, including an opportunity to make a detailed comparison of the photograph on the identification card with Defendant's face.

¶10 The court found Defendant's physical description in Officer M.'s report was accurate and was corroborated by Officer M.'s testimony that he was "one hundred percent certain" Defendant was the person he confronted. The court noted that the nearly two years between the crime and the identification did not favor the State, but under the "totality of the circumstances," the *Biggers*<sup>2</sup> factors favored the State and Officer M.'s identification was therefore reliable. Having weighed and considered the evidence, arguments and credibility of the witness, the court denied the motion to exclude Officer M.'s in-court identification of Defendant.

¶11 Officer M. identified Defendant at trial. Officer R. also identified Defendant as the person whom he and Officer M. pursued. The court found Defendant guilty of Possession of Marijuana, a class one misdemeanor. The court sentenced him to one year unsupervised probation, twenty-four hours of community service, and a \$1,380 fine. We have jurisdiction over his timely appeal pursuant to the Arizona Constitution, Article VI, Section 9, and Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 (1992), 13-4031, and -4033 (2010).

DISCUSSION

¶12 We review the fairness and reliability of a trial court's ruling on a challenged identification for an abuse of discretion. *State v. Lehr*, 201 Ariz. 509, 520, ¶ 46, 38 P.3d 1172, 1183 (2002). The trial court's "findings will not be overturned on appeal absent a showing of clear and manifest error." *State v. Bracy*, 145 Ariz. 520, 530, 703 P.2d 464, 474 (1985). However, the constitutionality of a pre-trial identification is a "mixed question of law and fact" that this court reviews de novo. *State v. Moore*, 222 Ariz. 1, 7, ¶ 17, 213 P.3d 150, 156 (2009).

¶13 Pretrial identifications must be conducted in a fundamentally fair manner to ensure the defendant has received a fair trial consistent with the Due Process Clause of the Fourteenth Amendment. *State v. Nottingham*, 231 Ariz. 21, 24, ¶ 5, 289 P.3d 949, 952 (2012). The primary concern is to avoid the "very substantial likelihood of

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<sup>2</sup> See *Neil v. Biggers*, 409 U.S. 188, 199-201 (1972).

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irreparable misidentification” of the defendant. *Biggers*, 409 U.S. at 198. For example, pretrial procedures conducted in an unduly suggestive manner “may unfairly cause a witness to misidentify the defendant, and then to repeat the misidentification at trial.” *State v. Smith*, 146 Ariz. 491, 496, 707 P.2d 289, 294 (1985). However, the fact a pretrial identification procedure is unduly suggestive does not automatically bar the identification at trial. *Lehr*, 201 Ariz. at 520, ¶ 46, 38 P.3d at 1183. The standard must be “whether the identification is reliable in spite of any suggestiveness.” *Id.*

¶14 A defendant claiming that a pretrial identification procedure will taint a proposed identification at trial is entitled to a hearing to determine whether the pretrial identification was unduly suggestive. *See Dessureault*, 104 Ariz. at 384, 453 P.2d at 955.<sup>3</sup> Our supreme court has identified the following factors, to evaluate reliability: “(1) the opportunity the witness had to view the criminal at the time of the crime; (2) the witness’s degree of attention; (3) the accuracy of the witness’s prior description; (4) the level of certainty demonstrated by the witness at the identification; and (5) the length of time between the crime and the confrontation.” *State v. Hicks*, 133 Ariz. 64, 68, 649 P.2d 267, 271 (1982); *see also Biggers*, 409 U.S. at 199-200 (holding reliability of an identification is determined under the “totality of the circumstances”). However, even when the trial court has erroneously determined that a pretrial identification is reliable, the error does not require reversal of the conviction if the error is harmless. *See Dessureault*, 104 Ariz. at 384, 453 P.2d at 955.

¶15 In this case, under the “totality of the circumstances,” the identification of Defendant was reliable. At the initial confrontation, Officer M. viewed Defendant for more than a minute. In addition, he was able to compare Defendant’s identification card photograph with Defendant’s face. Officer M. testified that he viewed Defendant under a “heightened sense of awareness,” and his initial report of Defendant’s physical description was accurate. Officer M. reported that he was “one hundred percent” certain Defendant was the man he pulled over, even though two years had passed between the crime and the pretrial identification. The trial court did not abuse its discretion in finding the *Biggers* factors favored the State.

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<sup>3</sup> In this case, we do not hold that a *Dessureault* hearing was required. However, when in doubt, the better practice would be, as the trial court did here, to hold one.

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¶16 Moreover, even if the trial court erroneously admitted Officer M.'s identification at trial; the conviction should not be reversed because the error was harmless. Officer R. testified at trial that Defendant was the individual he helped Officer M. pursue. Nothing in the record before us indicates that Officer R. was shown a photograph of Defendant prior to trial. His positive identification of Defendant renders a hypothetically erroneous admission of Officer M.'s identification harmless. Officer R.'s testimony substantially reduces the "likelihood of an irreparable misidentification."

CONCLUSION

¶17 For the foregoing reasons, Defendant's conviction and sentence are affirmed.



Ruth A. Willingham · Clerk of the Court  
FILED: gsh