

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

SHAWN JAMES SAMPSON, *Appellant*.

Nos. 1 CA-CR 16-0010, 1 CA-CR 16-0425
(Consolidated)
FILED 6-8-2017

Appeal from the Superior Court in Maricopa County
Nos. CR2014-000851-001
CR2014-000852-001
The Honorable M. Scott McCoy, Judge

AFFIRMED AS MODIFIED

COUNSEL

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

Maricopa County Public Defender's Office, Phoenix
By Christopher V. Johns, Tennie B. Martin
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Samuel A. Thumma delivered the decision of the Court, in which Judge Lawrence F. Winthrop and Judge James P. Beene joined.

T H U M M A, Judge:

¶1 In these consolidated cases, Shawn James Sampson appeals his convictions and resulting sentences for kidnapping, two counts of armed robbery, aggravated assault and unlawful discharge of a firearm. He argues fundamental error based on testimony from a detective that Sampson looked like photos of the suspect and that Sampson refused to voluntarily give a DNA sample. Because Sampson has shown no fundamental error resulting in prejudice, his convictions and resulting sentences are affirmed as modified.

FACTS¹ AND PROCEDURAL HISTORY

¶2 In August 2012, a man described as being similar in appearance to Sampson robbed two gas stations at gun point. The man was wearing a bandana over his face, blue latex gloves and, at one of the robberies, a black hat. Police obtained surveillance videos of the robberies, took still photographs from the videos and circulated a bulletin with those photographs. Later that day, a stolen vehicle, similar to the one used in the robbery, was involved in an accident and the driver fled. Among other things, police recovered a bandana, blue latex gloves and a black hat from the vehicle. The driver, however, was ruled out as the man in the photographs.

¶3 After viewing the police bulletin, former Salt River Pima-Maricopa Police Officer Hubble recognized the man in the photographs as Sampson, given his previous interactions with Sampson. Officer Hubble provided this information to the Mesa Police.

¹ On appeal, this court views the evidence in the light most favorable to sustaining the conviction and resolves all reasonable inferences against defendant. *State v. Karr*, 221 Ariz. 319, 320 ¶ 2 (App. 2008).

STATE v. SAMPSON
Decision of the Court

¶4 Mesa Detective Johnson interviewed Sampson about the robberies but did not, at that time, read his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Detective Johnson told Sampson the hat worn in the robbery was recovered and asked if his DNA would be on the hat. After Sampson said “absolutely not,” Detective Johnson offered to take his DNA sample to prove it. Sampson declined. Detective Johnson later obtained a court order to take Sampson’s DNA, and the sample matched the DNA on the bandana and could not be excluded from the DNA on the hat.

¶5 As relevant here, in two separate indictments and with the charges later consolidated, Sampson was charged with one count of kidnapping, a Class 2 dangerous felony; two counts of armed robbery, Class 2 dangerous felonies; one count of aggravated assault, a Class 3 dangerous felony and one count of unlawful discharge of a firearm, a Class 6 dangerous felony. After a hung jury resulting in a mistrial in April and May 2015, a second trial began in October 2015.

¶6 During trial, several witnesses, including Officer Hubbell, identified Sampson. Without objection by Sampson and with later cross examination by Sampson’s counsel, the State questioned Detective Johnson regarding his interview with Sampson:

Q. At some point during your conversation with him, did you show him any of the surveillance footage from either of the robberies?

A. I showed him still photos from the videos, yes.

Q. And what was it -- what was your purpose in showing them to -- showing him those photos?

A. Well, I believe they were photos of him. And when I saw him, I saw that he, he looked like the, the guy in the, in the photos, especially the Scottsdale photos. And I wanted to see if he would take responsibility for that and say that it was him. And it was just part of the interview.

....

STATE v. SAMPSON
Decision of the Court

Q. In fact, when you were interviewing Mr. Sampson, did you offer to take his DNA sample right there so that you can straighten this all out for him?

A. I did.

Q. And did he take you up on your kind offer?

A. He did not.

¶7

In closing argument, the State discussed the topic as follows:

Also, ladies and gentlemen, you have the interview that Detective Johnson conducted with the defendant where he could not account for his whereabouts on the day of the robbery. He could recall in detail what he did on other days and at other times, but he could not account for where he was on this date.

Detective Johnson also asked him during that interview about the hat, if his DNA would be on the hat; and the defendant said there was no reason for his DNA to be on the hat. And when Mr. - or Detective Johnson gave the defendant the opportunity to provide a DNA sample to test the hat, he refused. So, ladies and gentlemen, your job as a jury today and what is in dispute is, is the robber from the [first gas station] and the robber from the [second gas station] the defendant.

After a five-day trial and unsuccessful motions for judgment of acquittal, the jury convicted Sampson on all counts. At the sentencing hearing, the court found the State had proven beyond a reasonable doubt that Sampson had four prior felony convictions. The court sentenced Sampson to terms of years for the kidnapping, the first armed robbery, aggravated assault and the unlawful discharge of firearm convictions. For the second armed robbery conviction, the court's minute entry reflects a sentence of life imprisonment without the possibility of "PAROLE" until 25 years have been served. The court ordered all sentences served concurrently. This court has jurisdiction over Sampson's timely appeal pursuant to Article 6,

STATE v. SAMPSON
Decision of the Court

Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1), 13-4031 and 13-4033(A) (2017).²

DISCUSSION

I. Sampson Has Shown No Fundamental Error In Detective Johnson Testifying About Why He Showed Sampson Photographs From The Robbery During His Interview.

¶8 Sampson argues Detective Johnson’s testimony about why he showed Sampson photographs in the interview “bolstered the state’s case, invaded the providence of the jury, lacked the foundation required by Rule 602, and was unfairly prejudicial under Rule 403.” According to Sampson, this testimony was lay opinion that identified Sampson as the person in the photographs and, because it was the testimony of a detective, it “placed the prestige of the state behind its case.” Sampson asserts this testimony transformed Detective Johnson into “the second eyewitness.” Not so.

¶9 Detective Johnson testified about the context and content of his interview with Sampson. As the State points out, this testimony “was not offered to prove that the photographs were, in fact, those of [Sampson], but, instead,” to give context to the interview. *See State v. Boggs*, 218 Ariz. 325, 335 ¶ 40 (2008) (finding no error where court admitted false statements by a detective during interrogation because they “were part of an interrogation technique and were not made for the purpose of giving opinion testimony at trial”); *State v. Womble*, 225 Ariz. 91, 97 ¶ 13 (2010) (“The testimony was not offered to prove that [defendant] was involved in the murder, but rather only to explain why the detective obtained the order to listen to [informant’s] calls to [defendant].”).

¶10 As Sampson concedes, his failure to object at trial limits this court’s review to fundamental error. *See Ariz. R. Crim. P. 21.3(c); State v. Henderson*, 210 Ariz. 561, 567 ¶¶ 19-20 (2005). “Accordingly, [Sampson] ‘bears the burden to establish that “(1) error exists, (2) the error is fundamental, and (3) the error caused him prejudice.”” *State v. James*, 231 Ariz. 490, 493 ¶ 11 (App. 2013) (citations omitted). The record shows that eyewitnesses identified Sampson at trial, the photographs were admitted at trial, physical evidence connected Sampson with the robberies and another officer familiar with Sampson testified he was a “hundred percent” sure

² Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

STATE v. SAMPSON
Decision of the Court

Sampson was the person in the photographs. On this record, Sampson has not shown that Detective Johnson's testimony was received in error.

II. Detective Johnson's Testimony That Sampson Did Not Accept His Offer To Provide A DNA Sample, And The State's Resulting Argument, Did Not Prejudice Sampson.

¶11 Sampson argues the State improperly elicited testimony that he did not consent to DNA testing and then commented on it during closing argument. Again, Sampson concedes that he did not object to this at trial, meaning the review is for fundamental error. *See* Ariz. R. Crim. P. 21.3(c); *Henderson*, 210 Ariz. at 567 ¶¶ 19-20.

¶12 Without citation to the record, Sampson claims that "counsel in his first trial moved to preclude the refusal to provide a DNA sample, and the prosecutor agreed not to raise it. Hence, under such a finding by this Court, the error was trial error." The record is to the contrary. In his first trial, the State asked Detective Johnson if he offered to take Sampson's DNA sample during his interview and he answered that he did. The State then asked if Sampson accepted the offer and Detective Johnson responded "[h]e did not." Sampson did not object. Later, Sampson's counsel asked that the State not to go into the circumstances surrounding the later collection of his DNA sample pursuant to a court order (where Sampson, apparently, had to be restrained before a buccal swab sample could be obtained). The request, however, did not address evidence that Sampson did not initially consent to provide a DNA sample.³ Accordingly, the proper standard of review is fundamental error.

¶13 Even assuming error that was fundamental, Sampson has not shown resulting prejudice. He argues that, "but for the improper testimony, a reasonable jury might have reached a different verdict. The jury's inability to reach a verdict in the first trial supports the unfair prejudice to Sampson and the tipping of the scale." However, the record reveals the same testimony was received in the first trial. Additionally, as summarized above, there was substantial independent evidence presented to the jury demonstrating his guilt. On this record, Sampson has shown no resulting prejudice.

³ Similarly, Sampson's assertion that the State engaged in prosecutorial misconduct because the prosecutor "knowingly violated the superior court's ruling, and her own promise to refrain from tainting the jury with inadmissible evidence," is not supported by the record.

STATE v. SAMPSON
Decision of the Court

III. Sampson Has Shown No *Miranda* Violation.

¶14 Sampson asserts “[t]he inculpatory statements made to Detective Johnson when he seized a DNA sample from Sampson with the help of tribal officers violated *Miranda v. Arizona*.” First, as the State points out, Sampson has mischaracterized the record. According to Sampson, he was in custody because officers had to hold him down to get a DNA sample pursuant to court order, and, “whether held down or not, Sampson was not free to leave until Detective Johnson obtained a DNA sample.” The record shows that Detective Johnson’s interview of Sampson and the taking of a DNA sample from Sampson (where he was physically restrained) occurred nearly a year apart, negating his claim that he was in custody for the interview.

¶15 Sampson has not shown that any of his statements obtained during the interview, which were that he could not remember where he was on the day of the robberies, were inculpatory. Finally, Sampson did not move to suppress any statements and he has shown no fundamental error resulting in prejudice in admitting those statements. *See* Ariz. R. Crim. P. 21.3(c); *Henderson*, 210 Ariz. at 567 ¶¶ 19-20; *see also State v. Anaya*, 170 Ariz. 436, 443 (App. 1991) (“The defendant is responsible for properly raising issues such as voluntariness and *Miranda* compliance.”).

CONCLUSION

¶16 For the second armed robbery conviction (in CR2014-000851), the minute entry states that Sampson was sentenced to life without the possibility of parole until serving 25 years. At the sentencing hearing, however, the superior court sentenced Sampson to life in prison, noting “he is not eligible for suspension of sentence, probation, pardon, or release from confinement on any basis except as authorized by A.R.S. Section 31-233, Subsection A or B, until he has served at least 25 years or the sentence is commuted.” Because the oral pronouncement correctly reflects the nature of the sentence, A.R.S. § 13-706(A), the sentencing minute entry for that conviction is modified to read as follows:

Count 1: LIFE WITHOUT THE POSSIBILITY
OF SUSPENSION OF SENTENCE,
PROBATION, PARDON OR RELEASE FROM
CONFINEMENT ON ANY BASIS, EXCEPT AS
SPECIFICALLY AUTHORIZED BY SECTION
31-233, SUBSECTION A OR B, UNTIL 25

STATE v. SAMPSON
Decision of the Court

YEARS HAVE BEEN SERVED OR THE
SENTENCE IS COMMUTED from 12/11/2015.

See also State v. James, 239 Ariz. 367, 368 ¶ 7 (App. 2012) (“When there is a discrepancy between the trial court’s oral statements at a sentencing hearing and its written minute entry, the oral statements control.”). In all other respects, because Sampson has shown no reversible error, his convictions and sentences are affirmed.



AMY M. WOOD • Clerk of the Court
FILED: AA