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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

RANDY S. DIEHL, *Appellant*.

No. 1 CA-CR 16-0377
FILED 6-29-2017

Appeal from the Superior Court in Maricopa County
No. CR2015-001922-001
The Honorable Colleen L. French, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Eliza Ybarra
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Terry Reid
Counsel for Appellant

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MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Kent E. Cattani and Judge Paul J. McMurdie joined.

T H O M P S O N, Judge:

¶1 Randy Diehl appeals his conviction and sentence for sale or transportation of dangerous drugs. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 At approximately 3:30 p.m. on December 3, 2013, undercover detectives S.A. and R.E. drove to a neighborhood they had been investigating to conduct a drug buy. After R.E. parked their unmarked vehicle, S.A. approached a man on the street and “struck up a conversation.” Before long, the man inquired why S.A. was there, and S.A. explained that he was interested in purchasing “a teener of jale,” which is street terminology for a sixteenth ounce of methamphetamine.

¶3 At that point, the man introduced himself as “Randy,” stated he could provide the desired methamphetamine, and invited S.A. inside a nearby apartment. Once inside, S.A. and Randy negotiated a price and S.A. tendered the agreed amount. Randy briefly walked into a back room, and then returned and handed S.A. the methamphetamine.

¶4 After completing the buy, S.A. exited the apartment building and rejoined R.E. in the unmarked vehicle. As the detectives began talking, they saw a man walk directly past the driver’s side window and S.A. identified the man as “Randy,” the individual who had sold him the methamphetamine.

¶5 When the detectives returned to the police station a few hours later, R.E. searched the police database for the methamphetamine dealer. Having heard from neighborhood contacts that a man named Randy Diehl was a possible drug dealer, R.E. entered the name into the database and retrieved a picture of an individual he “immediately” recognized as the man S.A. had identified. R.E. printed two copies of the photograph. He signed and dated one, evidencing his positive identification, and presented the other to S.A., asking whether he recognized the pictured individual.

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S.A. also “immediately” recognized the pictured individual as the man who had sold him methamphetamine, and signed and dated the photograph.

¶6 The state charged Diehl with one count of sale or transportation of dangerous drugs. The state also alleged aggravating circumstances and that Diehl had multiple prior felony convictions.

¶7 At trial, the state introduced as exhibits the signed and dated photographs of Diehl, and both detectives positively identified Diehl in-court as the methamphetamine dealer. The state also presented evidence that the substance S.A. purchased from Diehl was 1.67 grams of usable methamphetamine.

¶8 After a three-day trial, the jury found Diehl guilty as charged and found one aggravating circumstance—that he committed the offense for pecuniary gain. The trial court then found that Diehl had two historical prior felony convictions and sentenced him to a mitigated term of ten and one-half years’ imprisonment. Diehl timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2016), 13-4031 (2010), and -4033(A)(1) (2010).

DISCUSSION

¶9 On appeal, we view the facts in the light most favorable to upholding the verdict and resolve all reasonable inferences against the defendant. *State v. Harm*, 236 Ariz. 402, 404 n.2, ¶ 2, 340 P.3d 1110, 1112 n. 2 (App. 2015) (citing *State v. Valencia*, 186 Ariz. 493, 495, 924 P.2d 497, 499 (App. 1996)).

I. Admission of Identification Evidence

¶10 Diehl contends the trial court improperly denied his motion to suppress the detectives’ pre-trial identifications and preclude the detectives’ in-court identifications. He asserts the admission of the identification evidence violated his due process rights.

¶11 “We review the fairness and reliability of a challenged identification for a clear abuse of discretion.” *State v. Lehr*, 201 Ariz. 509, 520, ¶ 46, 38 P.3d 1172, 1183 (2002). Although we defer to the trial court’s factual findings that are supported by the record, we consider de novo the “ultimate question of the constitutionality of a pretrial identification,” which is a mixed question of law and fact. *State v. Moore*, 222 Ariz. 1, 7, ¶ 17, 213 P.3d 150, 156 (2009) (citations omitted). In reviewing the trial court’s

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ruling, we consider only the evidence presented at the suppression hearing.
Id.

¶12 Before trial, Diehl moved to suppress any identification testimony. At a two-day evidentiary hearing held on the motion, S.A. testified that the primary objective of his undercover investigations is to identify and charge drug dealers. Accordingly, he is particularly attentive to facial details during drug buys.

¶13 Because S.A. approached the methamphetamine dealer on the street in “daylight,” he had the opportunity to clearly view the man in direct sunlight while speaking with him face-to-face for several minutes. S.A. noted that the man was in his late 30’s to early 40’s, Caucasian, clean-shaven with a “conservative” haircut, and approximated his height at six feet and two inches. Inside the “fairly well lit” apartment, S.A. had another unobstructed opportunity to view the dealer up close. Finally, after the drug buy, S.A. “got another good look” at the dealer as he walked directly past the unmarked vehicle.

¶14 When asked about his subsequent identification of Diehl as the methamphetamine dealer, S.A. acknowledged that R.E. only showed him a single photograph and admitted that he did not take any notes immediately after the drug buy and therefore relied only on his memory to make the identification. Nonetheless, he was “positive” that the pictured individual, Diehl, was the man who had sold him methamphetamine. He also explicitly denied that his identification of Diehl was in any way influenced by R.E. Likewise, R.E. testified that he immediately recognized Diehl when he conducted the database search, and stated he was “100 percent” certain of his identification.

¶15 After receiving the evidence and hearing argument from the parties, the court found the “out-of-court identification process was unduly suggestive.” The court further found, however, that the detectives’ identifications were “sufficiently reliable to be introduced without violating [Diehl’s] due process rights.” Specifically, the court found the detectives: (1) had sufficient opportunity to view the dealer, (2) established their penchant for detail, (3) demonstrated a high level of certainty in their identifications, and (4) made their identifications within a “relatively short” time frame.

¶16 A “criminal defendant’s due process rights include the right to a fair identification procedure.” *State v. Leyvas*, 221 Ariz. 181, 185, ¶ 10, 211 P.3d 1165, 1169 (App. 2009). “It is the likelihood of misidentification

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which violates a defendant's right to due process." *Lehr*, 201 Ariz. at 520, ¶ 46, 38 P.3d at 1183 (quoting *Neil v. Biggers*, 409 U.S. 188, 198 (1972)). Nonetheless, an "overly suggestive" pretrial identification procedure does not necessarily "bar the admission of an identification." *Id.* "Instead, the question is whether the identification is reliable in spite of any suggestiveness." *Id.* To evaluate reliability, the court considers several factors: (1) the opportunity of the witness to view the criminal at the time of the offense; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty the witness demonstrates "at the confrontation;" and (5) the "time between the crime and the confrontation." *Id.* at 521, ¶ 48, 38 P.3d at 1184. In considering the relevant factors, a court must determine whether the totality of the circumstances demonstrate that the identification is reliable. *State v. Swoopes*, 155 Ariz. 432, 434, 747 P.2d 593, 595 (App. 1987).

¶17 Applying these factors here, S.A. had the opportunity to squarely view the methamphetamine dealer for several minutes. Although R.E. did not have the same degree of close contact with the dealer, he had the opportunity to view the dealer before S.A. accompanied him into the apartment and as he walked directly past the unmarked vehicle's window. Each of the detectives had at least twenty-five years of experience in law enforcement, and S.A. testified that the purpose of the undercover investigation was to identify drug dealers and bring charges against them, so the men paid careful attention to facial details. The detectives testified that they were certain that the pictured individual was the methamphetamine dealer, and they made their identifications within four and one-half hours of the drug deal. Although neither detective provided a written description of the suspect before viewing the photograph, the factors overall reflect that their identifications were reliable.

¶18 Because the detectives' out-of-court identifications were reliable, their in-court identifications were admissible. *See Lehr*, 201 Ariz. at 521, ¶ 52, 38 P.3d at 1184 (noting an in-court identification "may be tainted by suggestive lineup procedures," but explaining when a "pretrial identification comports with due process" a "subsequent identification at trial does not violate a defendant's rights merely by following on the heels of the earlier confrontation"). Therefore, the trial court did not abuse its

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discretion by denying Diehl's motion to suppress or admitting the detectives' in-court identifications at trial.¹

II. Response to Jury Deliberation Question

¶19 Diehl contends the trial court committed structural error by responding to a jury deliberation question without notifying the parties. In the alternative, he argues the court improperly responded to the question, thereby violating his due process rights.

¶20 Shortly after noon on April 13, 2016, the jurors retired to consider their verdict. Excluding their lunch period, the jurors deliberated for approximately two hours before returning a guilty verdict. While deliberating, the jurors submitted a question to the court, "Is positive photo identification enough to rule out reasonable doubt?" The trial court responded in writing, "That is an issue for the jury to decide." At a subsequent hearing conducted by the trial court to settle the record, the parties agreed that the court did not notify them of the jurors' question.

¶21 "The general rule in Arizona is that reversible error occurs when a trial judge communicates with jurors after they have retired to deliberate unless the defendant and counsel have been notified and given an opportunity to be present." *State v. Dann*, 220 Ariz. 351, 368, ¶ 86, 207

¹ Diehl correctly notes that a court may consider other relevant factors when evaluating the reliability of an identification, *see State v. Rojo-Valenzuela*, 235 Ariz. 617, 620, ¶ 10, 334 P.3d 1276, 1279 (App. 2014), and argues the detectives' (1) inability to remember various details regarding the drug buy, and (2) participation in subsequent drug buys on the day in question undermine the reliability of their identifications. Given the overall strength of the other factors, we cannot say the detectives' failure to remember minor details of the drug buy (i.e., whether the dealer had the drugs in his pocket, whether S.A. left the money on the table or handed it directly to the dealer, who had told R.E. that a man named Randy Diehl may be a drug dealer, and the address of the apartment) rendered their identifications unreliable. Likewise, on this record, there is no basis to conclude that the detectives' participation in two subsequent drug buys the same afternoon undermined the accuracy of their identifications. *See State v. Rojo-Valenzuela*, 237 Ariz. 448, 451, ¶¶ 10-11, 352 P.3d 917, 920 (2015) (explaining that once the trial court determines the identification is sufficiently reliable to meet the threshold for admissibility, the jury assesses "the weight and credibility of testimony and resolving any evidentiary conflicts" in undertaking its role as fact-finder).

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P.3d 604, 621 (2009). “Erroneous jury communications do not require reversal, however, if it can be said beyond a reasonable doubt that the defendant was not prejudiced by the communication.” *Id.*

¶22 Here, the trial court erred by communicating with the jurors without notifying counsel. But the error does not warrant reversal because the communication conveyed accurate information that was consistent with the instructions given to the jurors, and the error did not harm Diehl.

¶23 In its final instructions, the trial court admonished the jury regarding identification as follows:

The State must prove beyond a reasonable doubt that the in-court identification of the defendant at this trial is reliable. In determining whether this in-court identification is reliable you may consider such things as:

1. the witness’ opportunity to view at the time of the crime;
2. the witness’ degree of attention at the time of the crime;
3. the accuracy of any descriptions the witness made prior to the pretrial identification;
4. the witness’ level of certainty at the time of the pretrial identification;
5. the time between the crime and the pretrial identification;
6. any other factor that affects the reliability of the identification.

If you determine that the in-court identification of the defendant at this trial is not reliable, then you must not consider that identification.

More generally, the court also instructed the jurors that: (1) it was their duty to determine the facts and assess the credibility of witnesses, (2) law enforcement officers were not entitled to any greater importance or believability than other witnesses, (3) Diehl was presumed innocent, and (4) the state had the burden of proving each element of the charge beyond a reasonable doubt and the jurors should only convict if “firmly convinced” of Diehl’s guilt.

¶24 Viewed within the context of these other instructions, the trial court’s written statement affirming that only the jurors could determine

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whether the state had met its burden of proof was both “legally correct and appropriate.” *Id.* at ¶ 87, 207 P.3d at 621 (citation omitted); *see also State v. Sammons*, 156 Ariz. 51, 57, 749 P.2d 1372, 1378 (1988) (concluding trial court’s ex parte communication that the jurors had “received all the instructions relevant to th[e] case” was harmless, specifically noting that “the judge’s response was in writing and added nothing to the settled instructions which had been given”). Therefore, although the trial court erred by responding to the jury’s question without notifying the parties, its response, which “did not impart any erroneous information to the jury,” caused no prejudice. *State v. Shumway*, 137 Ariz. 585, 587, 672 P.2d 929, 931 (1983).

CONCLUSION

¶25 We affirm Diehl’s conviction and sentence.



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