

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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 08-1076
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
)
JUAN A. OCHOA,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2007-005479-002 DT

The Honorable George H. Foster, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Michael O'Toole, Assistant Attorney General
Attorneys for Appellee

Droban & Company PC Anthem
By Kerrie M. Droban
Attorney for Appellant

K E S S L E R, Judge

¶1 Juan A. Ochoa was convicted by a jury of first degree
burglary, three counts of armed robbery, and four counts of

kidnapping. The trial court sentenced Ochoa to concurrent and consecutive prison terms totaling 27.5 years. On appeal, Ochoa contends the trial court erred by admitting evidence of an out-of-court identification and denying his motion for judgment of acquittal. For reasons that follow, we affirm.

¶12 The convictions stemmed from a home invasion robbery in which a family was held at gunpoint while their property was taken. Ochoa was one of four suspects apprehended by the police shortly after the robbery. The police brought the victims to where the men were in custody to individually determine whether they were the robbers. One of the victims identified Ochoa as having participated in the robbery.

¶13 Prior to trial, Ochoa moved to suppress the out-of-court identification, claiming it was the result of an unduly suggestive procedure. After hearing testimony from the officers who conducted the identification, the trial court ruled that the identification was sufficiently reliable and denied the motion to suppress. The victim was unable to make an in-court identification of Ochoa at trial, but evidence of the out-of-court identification was admitted.

DISCUSSION

A. Admissibility of Identification

¶14 A criminal defendant is entitled to have a pretrial identification procedure conducted in a fundamentally fair

manner so as to not deprive him of a fair trial. *State v. Smith*, 146 Ariz. 491, 496, 707 P.2d 289, 294 (1985) (citations omitted). "Pretrial identifications which are fundamentally unfair implicate the due process clause of the Fourteenth Amendment." *State v. Prion*, 203 Ariz. 157, 160, ¶ 14, 52 P.3d 189, 192 (2002) (citations omitted). To have a pretrial identification suppressed on due process grounds, a defendant must prove that the circumstances surrounding the identification "were so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *State v. Gonzales*, 181 Ariz. 502, 509, 892 P.2d 838, 845 (1995) (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)). We review a trial court's ruling regarding the fairness of a challenged identification for abuse of discretion. *State v. Lehr*, 201 Ariz. 509, 520, ¶ 46, 38 P.3d 1172, 1183 (2002).

¶15 The pretrial identification of Ochoa involved one-on-one show-ups of the suspects by each victim.¹ "Single person identifications are inherently suggestive." *State v. Canez*, 202 Ariz. 133, 150, ¶ 47, 42 P.3d 564, 581 (2002); see also *State v. Williams*, 144 Ariz. 433, 439-40, 698 P.2d 678, 684-85 (1985) (holding suggestiveness inherent in one-man show-up). "However,

¹ While the record is not entirely clear, the identification here appears to have consisted of the four suspects being in the street, the police shining spotlights on each one individually, and each victim separately viewing each suspect.

even where the pretrial identification procedure is unduly suggestive, reliable identifications will be admitted." *Canez*, 202 Ariz. at 150, ¶ 47, 42 P.3d at 581; see also *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) ("[R]eliability is the linchpin in determining the admissibility of identification testimony").

¶16 In denying the motion to suppress, the trial court found that the identification was sufficiently reliable to be admitted notwithstanding the use of the "one-man show-up" procedure. We determine reliability of a pretrial identification using the five factors set forth in *Neil v. Biggers*, 409 U.S. 188 (1972). *State v. Bracy*, 145 Ariz. 520, 531, 703 P.2d 464, 475 (1985). The *Biggers* factors include:

- (1) the opportunity of the witness to view the criminal at the time of the crime,
- (2) the witness' degree of attention,
- (3) the accuracy of the witness' prior description of the criminal,
- (4) the level of certainty demonstrated by the witness at the confrontation, and
- (5) the length of time between the crime and the confrontation.

Id. at n.6.

¶17 Despite the suggestive procedure used, applying the *Biggers* factors, the victim's pretrial identification of Ochoa was reliable enough to avoid a substantial likelihood of misidentification. In reaching this conclusion, we note that, while the one-on-one show-up procedure employed by the police

was suggestive, there were circumstances that tended to mitigate the suggestiveness. These included the advisement given by the police to the victims prior to having them individually view the suspects to keep an open mind and that simply because they had been stopped by the police did not mean they were involved. In addition, the victims were asked to view four suspects, not just one person, and not all of the suspects were identified by the victims as having participated in the robbery.

¶18 Turning to the reliability of the identification of Ochoa, the victim had the opportunity to observe Ochoa two separate times the evening of the robbery -- first when Ochoa initially came to the home to inquire about a vehicle parked in front, and later when he and the others burst into the home with guns and ordered everyone to the floor. Moreover, being a victim rather than a mere witness to the home invasion, this victim's attention would clearly have been drawn to the armed men ordering the victims around. *See State v. Hooper*, 145 Ariz. 538, 544, 703 P.2d 482, 488 (1985) (citation omitted) (finding out-of-court identification reliable where victim "was not [just a] casual observer of defendant, but rather her attention was focused on the suspect").

¶19 While the victim did not provide much of a description of Ochoa to the police prior to the identification, the absence of a description does not preclude an identification from being

reliable. See *Williams*, 144 Ariz. at 440, 698 P.2d at 685 (finding identification reliable even though no description of perpetrator provided prior to show-up identification). The victim, however, did describe Ochoa as wearing white gloves during the robbery and that description was confirmed by the police locating one white glove outside the getaway vehicle and a second glove inside the vehicle. Finally, the victim made an unequivocal identification of Ochoa less than two hours after the robbery. Indeed, the victim had an instant emotional and physical reaction to seeing Ochoa and began sobbing while identifying him. Considering the totality of the circumstances, the out-of-court identification bore sufficient indicia of reliability so that its admission did not violate Ochoa's due process rights. Thus, the trial court did not abuse its discretion in admitting the identification.

B. Sufficiency of Evidence

¶10 Ochoa also maintains that his convictions should be reversed for insufficient evidence. Ochoa does not contend the evidence at trial was insufficient to establish the elements of the charged offenses. Instead, his challenge focuses solely on the issue of identification. Specifically, he argues that the State failed to meet its burden of proving he participated in the robbery. We review a claim of insufficient evidence *de novo*, viewing the evidence in a light most favorable to

upholding the verdicts. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993) (citation omitted).

¶11 In considering a claim of insufficient evidence, our review is limited to whether substantial evidence exists to support the verdicts. *State v. Scott*, 177 Ariz. 131, 138, 865 P.2d 792, 799 (1993) (citation omitted); see also Arizona Rules of Criminal Procedure 20(a) (directing that trial court shall enter judgment of acquittal "if there is no substantial evidence to warrant a conviction"). Substantial evidence is such proof that "'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990) (quoting *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980)). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶12 Here, there was evidence that a victim made a positive out-of-court identification of Ochoa as one of the robbers. Although this victim was unable to identify Ochoa at trial, this does not eliminate the evidentiary value of the out-of-court identification. Once a finding has been made that an out-of-court identification is admissible, the weight of that evidence

then becomes a jury question. *State v. Campbell*, 146 Ariz. 415, 417, 706 P.2d 741, 743 (App. 1985) (citation omitted); see also *State v. Skelton*, 129 Ariz. 181, 183, 629 P.2d 1017, 1019 (App. 1981) (noting victim's inability to make in-court identification "affects only the weight to be given to the identification and not the admissibility"). The arguments made by Ochoa challenging the credibility of the identification are matters for the jury, not this court. See *State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995) ("The finder-of-fact, not the appellate court, weighs the evidence and determines the credibility of witnesses."). Given the evidence at trial, including the out-of-court identification, the jury could reasonably find that Ochoa was guilty of the robbery and related offenses beyond a reasonable doubt. Accordingly, substantial evidence exists to support the trial court's denial of the motion for judgment of acquittal.

CONCLUSION

¶13 For the forgoing reasons, we affirm Ochoa's convictions and sentences.

/S/

DONN KESSLER, Judge

CONCURRING:

/S/

PATRICK IRVINE, Presiding Judge

/S/

MICHAEL J. BROWN, Judge