

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



DIVISION ONE
FILED: 03/25/2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 08-1007
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
FRANCISCO JAVIER SOTO,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court of Maricopa County

Cause No. CR2006-162380-001 SE

The Honorable Pamela D. Svoboda, Judge Pro Tem

AFFIRMED IN PART; REMANDED IN PART

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani,
Chief Counsel, Criminal Appeals Section
and Michael T. O'Toole, Assistant Attorney General
Attorneys for Appellee

Chad Pajerski Phoenix
And
Neal W. Bassett Phoenix
Attorneys for Appellant

T H O M P S O N, Judge

¶1 Francisco Javier Soto (defendant) appeals his
convictions and sentences for two counts of aggravated driving

under the influence and one count of forgery. For the following reasons, we affirm in part and remand in part.

¶2 A jury found defendant guilty of two counts of aggravated driving under the influence and one count of forgery. The trial court found that defendant had two prior felony convictions and sentenced defendant to the presumptive sentence of ten years' imprisonment on each count. The sentences were to run concurrently, and defendant received credit for sixty-nine days of presentence incarceration. The trial court also ordered reimbursement of \$100. Defendant appealed.

¶3 On appeal, defendant asserts that the trial court erred by not allowing the jury to view his father as an "exhibit" during defendant's closing argument. The state asserts that defendant could not introduce demonstrative evidence without proper foundation, the trial court has discretion in how it conducts a trial, and the jury had the opportunity to view defendant's father during closing argument because he was seated in the courtroom. Defendant's defense was that it was his father, and not defendant, who was driving the vehicle when defendant was arrested. Defendant's father testified at trial that it was he, and not defendant, who drove the vehicle and was arrested on the date in question.

¶4 According to defendant, the state can point out relevant aspects of a defendant's appearance or voice to the

jury. In addition, defendant argues that a person's appearance is non-testimonial, so the state can point out the defendant to the jury even if the defendant does not testify. Defendant further asserts that, during the presentation of evidence, a party can point out a witness's appearance. According to defendant, a party should also be able to do so during closing argument. Although defendant cites *Schmerber v. California*, 384 U.S. 757, 763-64 (1966), and *Washington v. United States*, 881 A.2d 575, 580-83 (App. D.C. 2005), for the proposition that having a non-testifying defendant appear before the jury is non-testimonial and does not constitute "new evidence," these cases are distinguishable because they dealt with pointing out a *defendant's* appearance to the jury, not that of a testifying *witness*.

¶15 During his testimony, defendant's brother was shown a picture of his father and described his physical characteristics to the jury. Defendant's father also testified. The jury therefore had the opportunity to discern any physical similarities between defendant and his father at that time. Moreover, the trial court allowed defendant's father to be present in the courtroom during closing argument. The trial court told defense counsel that he could remind the jury of what defendant's father looked like. The trial court, however, sustained the state's objection to defense counsel pointing at

defendant's father during closing argument or having defendant's father stand in front of the jury while going over the testimony presented. Nothing, however, prevented defense counsel from describing defendant's father's physical attributes to the jury. The trial court did not err in not allowing defendant to present his father to the jury during closing argument.

¶6 Defendant further argues that the trial court improperly imposed an "unidentified" \$100 reimbursement fee. The presentence report recommended such a fee, which the trial court imposed on one of the aggravated driving under the influence counts. Defendant admittedly did not object to the fee. We remand to the trial court so that it can clarify the nature of the \$100 reimbursement fee imposed.

¶7 For the foregoing reasons, we affirm defendant's convictions and sentences but remand for the trial court to clarify the nature of the \$100 reimbursement fee.

_____/s/_____
JON W. THOMPSON, Judge

CONCURRING:

_____/s/_____
PATRICIA A. OROZCO, Presiding Judge

_____/s/_____
DIANE M. JOHNSEN, Judge