

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: 03/04/2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 08-1111
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication - Rule
IVORY LEWIS DENNIS,) 111, Rules of the Arizona
) Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2007-006874-001 DT

The Honorable George H. Foster, Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Craig W. Soland, Assistant Attorney General
Attorneys for Appellee

Law Office of Nicole T. Farnum Tempe
By Nicole T. Farnum
Attorneys for Appellant

N O R R I S, Judge

¶1 Ivory Lewis Dennis appeals from his convictions and sentences for aggravated assault, a dangerous felony, and misconduct involving weapons. Dennis argues the superior court

should not have admitted photographs depicting the victim's injuries because the State offered them "solely for the purpose of inflaming the jury." Dennis also contends the court should not have admitted a surveillance video and argues the superior court should have precluded the victim's in-court identification because he was shown an "unduly suggestive" pretrial photographic lineup. As we explain below, we agree in part with Dennis's argument concerning the photographs. Their introduction, however, did not contribute to or affect the verdict, and because we disagree with Dennis's other arguments, we affirm his convictions and sentences.

FACTS AND PROCEDURAL BACKGROUND¹

¶12 Shortly before 9:00 p.m. on June 3, 2007, F. and R. walked to a convenience store near Maryvale Parkway and West Indian School Road in Phoenix. Using a payphone outside the store, F. called a taxi. While F. and R. were waiting near the payphone, Dennis pulled into the parking area in a white PT Cruiser. Dennis approached F. and accused him of taking Dennis's cell phone. The confrontation escalated, culminating with Dennis pulling a gun from his pants and shooting F. in the

¹We view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Dennis. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

face. At trial, F. testified the bullet "went in [my eye], out, hit me in the [back of my] shoulder [], went in and out."

¶13 A jury found Dennis guilty of aggravated assault, a dangerous felony, and misconduct involving weapons. Dennis timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21 (2003), 13-4031 (2001), and -4033 (Supp. 2009).

DISCUSSION

I. Photographic and Video Evidence

¶14 Dennis first argues the superior court should not have admitted "repetitive and gruesome" photographs in violation of Arizona Rule of Evidence 403.² Although some of the graphic photographs depicting the injury to the victim's face were cumulative, and had little to no probative value to any contested fact, their admission did not contribute to or affect the jury's verdict.

¶15 We review evidentiary rulings on allegedly gruesome or cumulative photographs for an abuse of discretion. *State v. Jones*, 203 Ariz. 1, 9, ¶ 28, 49 P.3d 273, 281 (2002). Here,

²"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Ariz. R. Evid. 403.

over Dennis's objection, the superior court admitted seven photographs taken after F. was admitted to the hospital. These photographs included four close-ups of F.'s face, one showing the destroyed eye socket, two photographs of the shoulder injury, and another photograph of F. lying on a stretcher, taken from a few feet away. At trial, the State published each of the hospital photographs to the jury while F. explained what each photograph depicted. F. also testified in detail about the extent of his injuries and surgeries, and pointed out to the jury his substantial facial damage and missing eye.³

¶16 Although the superior court would not have abused its discretion had it admitted a photograph depicting each of F.'s injuries, most of the photographs were cumulative, of little probative value, and introduced for their "shock" value, as Dennis argues. See *Jones*, 203 Ariz. at 10, ¶ 33, 49 P.3d at 282 (cumulative, nonessential, and gruesome photographs generally should not be admitted into evidence). Error, however, "be it constitutional or otherwise, is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict." *Id.* (quoting *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993)). Here, the superior court's error was harmless.

³F. also pointed to an exit wound scar on his shoulder, but it is unclear from the record whether he displayed the injury to the jury.

¶17 Overwhelming evidence supported Dennis's conviction. Dennis's girlfriend at the time of the incident, M., witnessed the altercation while sitting in the PT Cruiser only a few feet away, and testified Dennis shot the victim. M.'s eight year old daughter, A., was sitting in the backseat of the PT Cruiser, witnessed most of the altercation, and also testified Dennis shot the victim. Although M. and A.'s versions of events were not completely congruent with F.'s, they corroborated key portions of F.'s testimony. Had the photographs been excluded, F., M., and A.'s testimony overwhelmingly supported the jury's verdicts.

¶18 Dennis next argues the superior court should not have admitted a "graphic" surveillance video, in violation of Rule 403. We disagree.

¶19 The video shows F. running into the convenience store after he was shot in the face, covering his bloody wounds while an off-duty nurse tries to calm him down. The video is captured from a distance and vantage point such that it is not overly gruesome. More importantly, the video, nearly contemporaneous with the shooting, is highly probative to corroborate F.'s testimony and to prove the State's allegation of dangerousness

and serious physical injury.⁴ Thus, we see no abuse of discretion.

II. Photographic Lineup

¶10 Finally, Dennis argues police presented an unduly suggestive photographic lineup to F. and therefore his in-court identification should have been precluded. We disagree.

¶11 "We review the fairness and reliability of a challenged identification for clear abuse of discretion." *State v. Lehr*, 201 Ariz. 509, 520, ¶ 46, 38 P.3d 1172, 1183 (2002). Once an identification has been challenged, the superior court must hold a hearing to determine whether identification "contained unduly suggestive circumstances." *State v. Dessureault*, 104 Ariz. 380, 384, 453 P.2d 951, 955 (1969). If the superior court determines pretrial identification was unduly suggestive, it then must determine whether or not it was reliable. *Lehr*, 201 Ariz. at 520-21, ¶¶ 46-48, 38 P.2d at 1183-84 (citing *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S. Ct. 375, 382, 34 L. Ed. 2d 401 (1972)).

¶12 At the *Dessureault* hearing, Dennis argued the tilt of his head, the color of the background, and the light on his face caused his photograph to stand out from the others. The

⁴At trial, F. used the video to aid in his explanation of the layout of the convenience store and parking area and also pointed out the PT Cruiser could be seen on the video leaving the store after the shooting.

superior court found, and the record clearly supports "by clear and convincing evidence," its finding the photographic lineup was not unduly suggestive. The subjects fit a similar description; they wore similar clothing; at least two individuals had a direct light on the face; and another photograph featured the same background hue as and a comparable subject to Dennis. Because the pretrial photographic lineup was not unduly suggestive, we do not reach the second step addressing the reliability of the identification. See *Lehr*, 201 Ariz. at 521, ¶ 48, 38 P.2d at 1183.

CONCLUSION

¶13 For the foregoing reasons, we affirm Dennis's convictions and sentences.

/s/

PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/

DANIEL A. BARKER, Judge

/s/

PETER B. SWANN, Judge