

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: 08/10/2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 09-0317
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
HERVE HOLEMEN,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-048916-001 DT

The Honorable Pendleton Gaines, Judge

AFFIRMED

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

Droban & Company, P.C. Anthem
By Kerrie M. Droban
Attorneys for Appellant

O R O Z C O, Judge

¶1 Herve Holemen¹ (Defendant) appeals his convictions and sentences on three counts of armed robbery, four counts of kidnapping, two counts of first-degree burglary, and four counts of aggravated assault stemming from two home invasion robberies that occurred approximately fifteen minutes apart in the same neighborhood. Defendant contends the trial court erred in admitting evidence of the eyewitness identifications. He also argues that there was insufficient evidence to support his convictions. For the reasons that follow, we affirm.

¶2 At trial, two victims from the first residence and one victim from the second residence made in-court identifications of Defendant. In addition, the jury heard evidence that one of the victims from the first home invasion, who identified Defendant at trial, had also identified him from a photographic line-up the day after the robberies. Furthermore, one of the victims of the second home invasion, who identified Defendant at trial, had also identified him shortly after the robbery in a one-person show-up. Defendant acknowledges that he did not object to the out-of-court identifications as unduly suggestive or request a *Dessureault* hearing regarding their admissibility.

¹ Throughout the record before us, Defendant's name appears in several different variations, including, but not limited to Herve' Holeman, Herve' Holman, Herve J. Holeman, Herve Joreem Holmen and Herve J. Holman. For purposes of consistency, we spell Defendant's name as it appears in the Order of Confinement and Notice of Appeal.

State v. Dessureault, 104 Ariz. 380, 453 P.2d 951 (1969). Nevertheless, Defendant contends he was denied a fair trial by the admission of the out-of-court identifications. Specifically, he argues that the photographic line-up and the one-person show-up procedures employed by police to obtain the two out-of-court identifications were unduly suggestive and tainted the in-court identifications.

¶3 In *Dessureault*, our supreme court held that where an in-court identification is challenged as tainted by an unduly suggestive procedure, the trial court must hold a hearing to determine the admissibility of the identification to ensure that it comports with due process. *Id.* at 384, 453 P.2d at 955. Where the in-court identification is not challenged in the trial court, however, there is a conclusive presumption that the prior identification procedures did not taint the in-court identification. *Id.*; see also *State v. Collins*, 104 Ariz. 449, 451, 454 P.2d 991, 993 (1969) ("The in-court identification was not challenged at the trial level here, hence we shall presume that the prior identification did not taint the in-court identification."). Because Defendant failed to raise the issue of the reliability of the three in-court identifications in the trial court, he is precluded from raising the issue of their admissibility on appeal. *Id.*

¶4 We further conclude Defendant waived his right to appellate review of the admission of the evidence of the out-of-court identifications. When, as in this case, a defendant fails to object to alleged error at trial, the right to appellate review of the issue is forfeited absent fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Id.* (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)). Under this standard of review, Defendant bears the burden of establishing both that fundamental error exists and that the error caused him prejudice. *Id.* at ¶ 20. Given that admission of the in-court identifications were not challenged at trial and cannot be challenged on appeal, Defendant cannot establish fundamental error by the admission of the two out-of-court identifications because they are merely cumulative of the in-court identifications. See *State v. Moody*, 208 Ariz. 424, 455, ¶ 121, 94 P.3d 1119, 1150 (2004) (holding no fundamental error where challenged evidence is cumulative to other evidence).

¶5 Defendant also argues the trial court erred in admitting the out-of-court photographic line-up identification, claiming the resulting prejudice outweighs any probative value.

Evidence that is otherwise relevant is inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice." Ariz. R. Evid. 403. Because "[t]he trial court is in the best position to balance the probative value of challenged evidence against its potential for unfair prejudice," it has broad discretion in deciding whether to exclude evidence as unfairly prejudicial. *State v. Harrison*, 195 Ariz. 28, 33, ¶ 21, 985 P.2d 513, 518 (App. 1998), *aff'd*, 195 Ariz. 1, 985 P.2d 486 (1999).

¶6 "Unfair prejudice" means "an undue tendency to suggest a decision on an improper basis, such as emotion, sympathy or horror." *State v. Gulbrandson*, 184 Ariz. 46, 61, 906 P.2d 579, 594 (1995). "It is only when the evidence is likely to be used for an impermissible purpose that it can be excluded for prejudice." 1 Morris K. Udall et al., *Arizona Practice: Law of Evidence* § 82 at 168 (3d ed. 1991). Defendant fails to indicate how the photographic line-up identification might have been misused by the jury, and we find nothing about this evidence that would tend to encourage conviction on an improper basis. The trial court did not abuse its discretion in declining to exclude the photographic line-up as unfairly prejudicial.

¶7 Defendant also contends the evidence presented at trial was insufficient to support his convictions. No claim is made of lack of proof in regards to any specific element of the

offenses. Instead, Defendant limits his argument to the sufficiency of the evidence identifying him as one of the robbers.

¶8 Pursuant to Arizona Rule of Criminal Procedure 20.a, the trial court "shall enter a judgment of acquittal . . . if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20.a. Substantial evidence is such proof that "reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Davolt*, 207 Ariz. 191, 212, ¶ 87, 84 P.3d 456, 477 (2004). "Our review of the sufficiency of evidence [underlying a conviction] is limited to whether substantial evidence supports the verdict." *State v. Sharma*, 216 Ariz. 292, 294, ¶ 7, 165 P.3d 693, 695 (App. 2007). We will reverse for insufficiency of evidence "only where there is a complete absence of probative facts to support the conviction." *Id.* (quoting *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996)).

¶9 Defendant argues that substantial evidence does not support his convictions because the victims' identifications are suspect. This challenge to the sufficiency of the evidence goes merely to the weight and credibility of the identifications, which are matters for the jury's consideration. *State v. Prion*, 203 Ariz. 157, 161, ¶ 18, 52 P.3d 189, 193 (2002). We do not reweigh the evidence on appeal. *State v. Williams*, 209 Ariz.

228, 231, ¶ 6, 99 P.3d 43, 46 (App. 2004). Moreover, the identifications were not the only evidence linking Defendant to the home invasions. Police recovered property taken in the first robbery from the inside of Defendant's vehicle, which was found parked down the street from the second robbery. Together, this evidence is more than sufficient to permit the jury to find beyond a reasonable doubt that Defendant was guilty of the robberies and related offenses.

¶10 For the foregoing reasons, Defendant's convictions and sentences are affirmed.

/S/

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

MAURICE PORTLEY, Judge

/S/

DIANE M. JOHNSEN, Judge