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.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee,	2 CA-CR 2011-0177 DEPARTMENT B
v.	MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court
JOSE ALEJANDRO MEJIA, Appellant.	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20102938002

Honorable Jose H. Robles, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz,
and Amy M. Thorson — Tucson
Attorneys for Appellee

Angela C. Poliquin — Tucson
Attorney for Appellant

V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, Jose Mejia was convicted of armed robbery and sentenced to an enhanced, presumptive prison term of 15.75 years. On appeal, Mejia argues the trial court erred in: (1) denying his motion for a mistrial; (2) refusing his request to provide a voice sample to the jury; (3) failing to give a jury instruction on the definition of "simulated weapon"; and (4) denying his motion for a judgment of acquittal. Mejia also contends he was denied his constitutional right to a fair trial because the victim's in-court identification was tainted by an unduly suggestive pretrial identification. For the reasons set forth below, we affirm.

Factual Background and Procedural History

¶2 We view the facts in the light most favorable to upholding Mejia's conviction. *See State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). Around 11:00 p.m. one night in August 2010, A.G. was sitting in his white Honda Accord in the parking lot outside his apartment when he heard a knock on the driver-side window. A.G. opened the door and Mejia, who was holding a handgun and wearing a blue bandana partially covering his face, ordered A.G. out of the car at gunpoint. Eyewitnesses to the incident also noticed another man, later identified as Mejia's brother, standing in the parking lot next to a gray Toyota Camry that later was determined to be stolen. After Mejia drove away in the white Honda, A.G. went to his apartment and asked his roommate to call 9-1-1.

¶3 Less than twenty minutes later, Tucson Police Officer Jeff Rumsley observed Mejia driving A.G.'s car in another part of town. Rumsley also noticed that a dark vehicle apparently was following the white Honda. After a short pursuit, officers

stopped the two vehicles and found a toy gun and blue bandana on the passenger-side floorboard of A.G.'s car. A.G. was brought to that location and identified Mejia as the robber. Mejia was standing next to his brother when A.G. made the identification.

¶4 Mejia was charged with armed robbery.[1] A jury found him guilty and he was sentenced as described above. This timely appeal followed. We have jurisdiction pursuant to A.R.S. §§ 13-4031 and 13-4033(A).

Discussion

Mistrial

¶5 Mejia contends the trial court erred in refusing to grant his request for a mistrial when the state elicited testimony the court had ordered precluded regarding the theft of the gray Toyota by Mejia's brother. "A declaration of a mistrial is the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Murray*, 184 Ariz. 9, 35, 906 P.2d 542, 568 (1995). We review the denial of a motion for mistrial for an abuse of discretion. *State v. Dann*, 205 Ariz. 557, ¶ 43, 74 P.3d 231, 244 (2003). "[B]ecause the trial judge is in the best position to assess the impact of . . . statements on the jury, we defer to the trial judge's discretionary determination." *Id.* And we "will not reverse a conviction based on the erroneous admission of evidence without a 'reasonable probability' that the verdict would have been different had the evidence not been

[1]Mejia's brother was charged with unlawful presence in a means of transportation for driving the stolen Toyota and was convicted of that charge pursuant to a plea agreement.

admitted." *State v. Hoskins*, 199 Ariz. 127, ¶ 57, 14 P.3d 997, 1012-13 (2000), *quoting State v. Atwood*, 171 Ariz. 576, 639, 832 P.2d 593, 656 (1992).

¶6 Before trial, Mejia moved to "preclude the [s]tate from any mention of the gr[a]y Toyota . . . or his brother's arrest for the theft of the [Toyota]." The trial court granted the motion in part, precluding "[a]ny mention that the gray Toyota was stolen or that [Mejia's] brother was arrested for the theft" but allowing the witnesses to testify as to their observations surrounding the robbery and Mejia's arrest. At trial, during the state's direct examination, A.G. was shown a series of photographs taken by the police on the night of the incident after Mejia's arrest. A.G. identified a man depicted in one of the photos as Mejia's brother. Mejia objected, and, on his motion, the court ordered the statement stricken from the record. Later, Rumsley testified that, while pursuing Mejia, he saw a "dark sedan" following A.G.'s vehicle and he "started thinking about a previous carjacking." Mejia moved for a mistrial, arguing the testimony violated the court's earlier ruling. The court denied the motion.

¶7 In deciding whether to grant a mistrial, a trial court should consider: "(1) Whether the remarks called to the attention of the jurors matters that they would not be justified in considering in determining their verdict, and (2) Whether . . . the jurors, under the circumstances of the particular case, were influenced by the remarks." *State v. Bailey*, 160 Ariz. 277, 279, 772 P.2d 1130, 1132 (1989). Mejia essentially argues that both of these factors weighed in favor of the court granting a mistrial, and it therefore erred in failing to do so. He contends A.G.'s and Rumsley's testimony violated the court's preclusion order and improperly influenced the jury by suggesting "that the

person driving the white [Honda] was the person who robbed it from [A.G.] because of [the] reference to his brother and another recent carjacking."

¶8 Although A.G.'s testimony suggested that Mejia had a brother and identified him as the man depicted in a photograph, this in no way implied that Mejia's brother was involved in an earlier theft of the Toyota. And although Rumsley testified that while pursuing Mejia a "dark sedan" was following the white Honda and that he started thinking about a "previous carjacking," Rumsley did not testify there was any connection between the "dark sedan," the previous carjacking, or Mejia and his brother. Given this vague, fleeting testimony about Mejia's brother, a "dark sedan," and a previous carjacking, we cannot say the court abused its discretion in denying Mejia's motion for a mistrial. *See Bailey*, 160 Ariz. at 280, 772 P.2d at 1133 (mistrial not required where jurors would have to infer from "innocuous" statements defendant was imprisoned and even if they "reached that conclusion, they would have no idea how much time he spent in prison or for what crime"). And, even assuming the evidence was improper, we conclude there was no "'reasonable probability' that the verdict would have been different had the evidence not been admitted." *Hoskins*, 199 Ariz. 127, ¶ 57, 14 P.3d at 1012-13.

In-court Identification

¶9 Mejia argues A.G.'s in-court identification was tainted by an unduly suggestive pretrial identification. He maintains A.G.'s identification of him at the arrest scene was influenced by law enforcement, and his subsequent in-court identification therefore was tainted and unreliable. The state argues Mejia has forfeited this issue by

failing to make a timely objection at trial. *See State v. Fulminante*, 193 Ariz. 485, ¶ 64, 975 P.2d 75, 93 (1999) (objection sufficiently made if judge has opportunity to provide remedy).

¶10 We agree with the state. Because Mejia neither moved in limine to preclude A.G. from making the in-court identification nor objected to or moved to strike A.G.'s testimony, he has forfeited the right to seek relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005) (failure to object to alleged error in trial court results in forfeiture of review for all but fundamental error). And, because Mejia does not argue on appeal that the error is fundamental, and because we see no error that can be so characterized, the argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it).

¶11 Even assuming, however, the argument had been preserved, it is without merit. To determine whether the in-court identification was tainted by the pretrial show-up, we consider the nature of the pretrial encounter to determine whether it "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384 (1968). And, "even where the pretrial identification procedure is unduly suggestive," the in-court identification is admissible if it is reliable. *State v. Canez*, 202 Ariz. 133, ¶ 47, 42 P.3d 564, 581 (2002).

¶12 Mejia argues the show-up was unduly suggestive because "[t]he officer took the victim to the show-up and said, 'That's him, isn't it?'" But Mejia has overstated the testimony. A.G. testified that the officer showed him two men and asked him, "Is it one of these individuals?" and that A.G. then identified Mejia as the robber. He further stated, "[W]hen I identified him, I [was] convinced it was the same person because of the clothing." Nothing in the record demonstrates the pretrial show-up encounter otherwise was unduly suggestive and certainly not to the extent it created a "substantial likelihood of irreparable misidentification." *Simmons*, 390 U.S. at 384.

¶13 Moreover, A.G.'s subsequent in-court identification was reliable. We assess its reliability using the *Biggers* factors: (1) the opportunity of the witness to view the criminal at the crime scene; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness; and (5) the length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972).

¶14 Here, A.G. testified he was face-to-face with Mejia for "about 2 minutes," and he recognized Mejia's face. During the investigation, A.G. told officers about the blue bandana Mejia wore over his face and explained that it had fallen down around his neck during the encounter, exposing tattoos on Mejia's neck. A.G. described the perpetrator as five feet, six inches to five feet, eight inches in height; medium build; dark hair with a "faded cut"; mustache; and deep voice.[2] Another officer also testified that

[2]There was no evidence that the officers had Mejia speak for A.G. during the show-up encounter.

A.G. had made a positive identification of Mejia at the scene based on his facial features, neck tattoos, and clothing. And, although A.G.'s testimony about the pretrial identification was somewhat confusing, he unequivocally identified Mejia at trial as the man who had robbed him at gunpoint. We conclude that, even had Mejia made a timely objection to the identification evidence, the pretrial encounter was not unduly suggestive and the subsequent in-court identification was reliable.

Voice Sample

¶15 Mejia argues "[t]he trial court committed reversible error in refusing to allow [him] to provide a voice sample to the jury." We review the trial court's ruling on the admissibility of evidence for an abuse of discretion. *State v. Rutledge*, 205 Ariz. 7, ¶ 15, 66 P.3d 50, 53 (2003).

¶16 At the conclusion of the state's case, Mejia asked permission to read a short passage from a book to "let the jury decide if he has a deep voice or not." In making the request, he noted A.G.'s "testimony that [the perpetrator] ha[d] a deep voice." Mejia asserted that such a demonstration would be non-testimonial in nature and "would have the same effect" as standing in front of the jury to demonstrate his height. The trial court denied the request, noting that Mejia had failed to properly disclose the voice sample as evidence, that none of the witnesses had identified Mejia based on the sound of his voice, and that Mejia had done nothing previously "to develop that particular piece of evidence as a defense."

¶17 Generally, the display of a defendant's physical characteristics is non-testimonial in nature. *See State v. Gaines*, 188 Ariz. 511, 513-14, 937 P.2d 701, 703-04

(App. 1997). Consequently, the state has the right to compel the defendant to display his physical characteristics to the jury without violating his Fifth Amendment right against self-incrimination. *Id.* at 513, 937 P.2d at 703. Likewise, the defendant can offer the same type of demonstration without being required to submit to cross-examination. *Id.* at 514, 937 P.2d at 704. Permissible displays may include a sample of the defendant's speaking voice where the purpose of the demonstration is to "measure the physical properties of the witnesses' voices, [and] not for the testimonial or communicative content of what was to be said." *United States v. Dionisio*, 410 U.S. 1, 7 (1973). That such evidence is non-testimonial, however, does not automatically require its admission into evidence. *State v. Newman*, 548 N.W.2d 739, 752 (Neb. 1996). It also must be relevant and reliable. *Id.*; *see also* Ariz. R. Evid. 401, 403.

¶18 "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." *See* Ariz. R. Evid. 401. In this case, the "fact that is of consequence" is A.G.'s identification of Mejia as the person who robbed him. Mejia asserts correctly that A.G. testified the perpetrator had a deep voice. But neither A.G.'s pretrial identification, nor, for that matter, his in-court identification of Mejia, was based on listening to Mejia's voice. Thus, Mejia's voice demonstration would have had minimal, if any, impact on the accuracy of A.G.'s identification.

¶19 With respect to the reliability of the evidence, other courts have observed that voice demonstrations, unlike demonstrations of immutable physical characteristics, are easily manipulated and thus suffer from serious reliability concerns. *See, e.g.*, *United*

States v. Esdaille, 769 F.2d 104, 107 (2d Cir. 1985). This is especially true when the characteristic in question is as subjective as the pitch of one's voice. *Cf. id.* (discussing reliability of accents). Thus, even assuming the evidence was relevant, we conclude the trial court did not abuse its discretion in precluding the evidence as unreliable.

¶20 Moreover, we agree with the trial court's finding that Mejia failed to properly disclose his intent to offer such evidence at trial. Rule 15.2(b), Ariz. R. Crim. P., provides that "the defendant shall provide a written notice to the prosecutor specifying all defenses as to which the defendant intends to introduce evidence at trial, including . . . mistaken identity." The notice must include a "broad disclosure of the defendant's case." Ariz. R. Crim. P. 15.2(b) cmt. The rule is limited to those matters about which the defendant will present evidence, and the limitation "is designed to allow the defendant to argue deficiencies in the state's case (not requiring the presentation of defense evidence) without prior warning." *Id.* Here, Mejia intended to present demonstrative evidence of his voice. Thus, pursuant to Rule 15.2(b), he had an obligation to, but did not, timely disclose to the state his intent to present the evidence within the time provided for in Rule 15.2(d). And although the court had discretion to consider a sanction other than precluding the evidence, *see* Ariz. R. Crim. P. 15.7; *State v. Scott*, 24 Ariz. App. 203, 205, 537 P.2d 40, 42 (1975), the court did not abuse its discretion in precluding the voice demonstration considering its limited probative value. *See* Ariz. R. Evid. 403.

Jury Instruction

¶21 Mejia contends "[t]he trial court committed reversible error by failing to give the jury a definition of 'simulated weapon' after stating it would do so." He maintains that in settling jury instructions, the court agreed to instruct the jury that "simulated weapon" is defined as a "pretend weapon." But as the state points out, the court instructed the jury as follows: "The term simulation means an offense is committed with a pretend deadly weapon or an article fashioned to resemble a deadly weapon." And, because this instruction substantially covered the definition of "simulated weapon," the court was not required to give the specific instruction requested by Mejia. *State v. De Nistor*, 143 Ariz. 407, 414, 694 P.2d 237, 244 (1985) ("In settling jury instructions, the court is not required to give a specific instruction if it is substantially covered by other instructions."). We find no error.

Judgment of Acquittal

¶22 Mejia argues the trial court erred in denying his motion for a judgment of acquittal, made pursuant to Rule 20, Ariz. R. Crim. P. On appeal, we review the court's denial of a Rule 20 motion de novo. *See State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011); *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). We will reverse only if there is "no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20; *see also State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 32, 154 P.3d 1046, 1056 (App. 2007). "'Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt.'" *State v. Hall*, 204 Ariz. 442, ¶ 49, 65 P.3d 90, 102 (2003), *quoting State v. Spears*, 184

Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). The "[e]vidence may be direct or circumstantial . . . but if reasonable minds can differ on inferences to be drawn therefrom, the case must be submitted to the jury." *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993).

¶23 Pursuant to A.R.S. § 13-1902(A), "[a] person commits robbery if in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property." Section 13-1904(A), A.R.S., elevates the offense to "armed robbery" when the person is armed with, uses, or threatens to use a deadly weapon, dangerous instrument, or simulated deadly weapon. Mejia contends the evidence was insufficient to prove he had committed armed robbery because the identification evidence was not substantial and there was "too much uncertainty and conflict[in the] statements to allow any reasonable person to be firmly convinced of [his] guilt." We disagree.

¶24 We view the evidence in a light most favorable to sustaining the verdict when considering a Rule 20 motion. *State v. McCurdy*, 216 Ariz. 567, ¶ 14, 169 P.3d 931, 937 (App. 2007). In his opening statement, Mejia's counsel conceded that Mejia was driving A.G.'s car shortly after the robbery and that the car contained a toy gun and blue bandana, which A.G. described as being used in the robbery. On the night of the incident, A.G. positively identified Mejia as the person who had stolen his car. Although there was some confusion in A.G.'s testimony at trial about Mejia's clothing, tattoos, and height, A.G. testified he saw Mejia's eyes and "clearly knew it was him." There was

sufficient evidence from which the jury reasonably could find beyond a reasonable doubt that Mejia had committed armed robbery.

Disposition

¶25 For the foregoing reasons, Mejia's conviction and sentence are affirmed.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge