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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. SAMUEL LESTER GARRELS, Appellant.	)	2 CA-CR 2011-0304 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR200901666

Honorable Boyd T. Johnson, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
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H O W A R D, Chief Judge.

¶1 Samuel Garrels was convicted after a jury trial of aggravated assault, and the trial court sentenced him to a presumptive, 7.5-year prison term. On appeal, he argues the court erred by denying his motion to suppress evidence of the victim's out-of-

court identification of him, by limiting his cross-examination of that victim, and by declining to give his requested jury instruction on justified use of force in defense of an occupied vehicle, pursuant to A.R.S. §§ 13-418 and 13-419. He additionally asserts the court failed to properly consider certain mitigating factors at sentencing. We affirm.

¶2 We view the facts in the light most favorable to sustaining the jury's verdict. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In October 2009, Garrels went to a bar and began mingling with other patrons. After receiving complaints from the bar's other customers that Garrels had been acting strangely, the owner, Y., asked Garrels to leave. Because Garrels ignored two such requests, Y. and an ex-employee, D., escorted Garrels to the door. As they reached the door, Garrels turned and struck D. in the head. While D. was being restrained by other patrons, Garrels walked into the parking lot and turned and motioned for D. to follow him, stating "Come here, I have something I want to shoot you with." After Y. and D. followed Garrels around a corner, they saw Garrels standing near his truck and holding an assault rifle, which he pointed at D. Garrels left in his truck as Y. and D. retreated.

¶3 Garrels claimed at trial he had not spoken with Y. and that he had left only after D. had become angry with him after a brief conversation. He testified that D. had hit him several times as he tried to leave and that several other bar patrons had kicked him. He stated that he had run to his truck and gotten in the driver's seat, but that "six or eight" bar patrons, including D., were "charging" at his vehicle. Claiming that he feared the patrons would pull him from his truck and beat him, Garrels testified that he had picked up his rifle, stepped out of his truck, displayed his rifle "in a military defensive

manner" without pointing it at anyone, and yelled for the men to stop before driving away.

¶4 Garrels was arrested a short time later in the parking lot of another bar, and police officers found in his truck an assault rifle and two handguns. The officers then brought D. to the parking lot, where D. confirmed that Garrels was the man who had pointed an assault rifle at him.

¶5 Before trial, Garrels moved to suppress D.'s out-of-court identification. The trial court denied that motion after an evidentiary hearing, concluding D. "clearly had sufficient time and opportunity to closely observe [Garrels]" and that D.'s identification "was the result of his initial contact with [Garrels] and was independent of the 'show up' identification." Garrels asserts on appeal that the identification procedure was unduly suggestive and that D.'s identification was unreliable. In reviewing a trial court's denial of a motion to suppress, we consider only the evidence presented at the suppression hearing and view that evidence in the light most favorable to upholding the court's findings. *State v. Fornof*, 218 Ariz. 74, ¶ 8, 179 P.3d 954, 956 (App. 2008). "We review the fairness and reliability of a challenged identification for clear abuse of discretion," *State v. Lehr*, 201 Ariz. 509, ¶ 46, 38 P.3d 1172, 1183 (2002), and "defer to a trial court's factual findings that are supported by the record and are not clearly erroneous," *State v. Moore*, 222 Ariz. 1, ¶ 17, 213 P.3d 150, 156 (2009).

¶6 The state concedes, and we agree, that a one-person "show-up" like the one at issue here is inherently suggestive. *State v. Williams*, 144 Ariz. 433, 439, 698 P.2d 678, 684 (1985). But, "even though the confrontation procedure was suggestive,"

evidence of an identification is admissible if "under the 'totality of the circumstances' the identification was reliable." *Neil v. Biggers*, 409 U.S. 188, 199 (1972). In determining whether an identification was reliable, a court should consider "the opportunity of the witness to view the criminal at the time of the crime, the witness'[s] degree of attention, the accuracy of the witness'[s] prior description . . . , the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Id.* at 199-200; *see also State v. Cañez*, 202 Ariz. 133, ¶ 47, 42 P.3d 564, 581 (2002); *Williams*, 144 Ariz. at 440, 698 P.2d at 685.

¶7 Our supreme court "has consistently held that show up identification procedures are permissible if they take place near in time to criminal offense or at the scene of the crime." *State v. McLoughlin*, 133 Ariz. 458, 462, 652 P.2d 531, 535 (1982). "Such a procedure allows the police to either have the culprit identified while the witness has a fresh mental picture of him or her or else release an innocent person and continue searching for the culprit before he or she escapes detection." *Id.* Here, police brought D. to the scene of Garrels's arrest only forty-five minutes after the incident. *See Williams*, 144 Ariz. at 440, 698 P.2d at 685 (one-person show up thirty minutes after burglary permissible); *State v. Salcido*, 109 Ariz. 380, 381-82, 509 P.2d 1027, 1028-29 (1973) (one-person show up "approximately 25 to 30 minutes" after robbery permissible). And the remaining *Biggers* factors clearly support the trial court's finding that D.'s identification was reliable. D. testified at the evidentiary hearing that he had watched Garrels closely for thirty to forty-five minutes before the incident because Garrels was disturbing other bar patrons. *See Williams*, 144 Ariz. at 440, 698 P.2d at 685

(opportunity to observe for "a 'couple of minutes'" sufficient); *State v. Fierro*, 166 Ariz. 539, 546, 804 P.2d 72, 79 (1990) (six-minute observation sufficient). And there is little question that D.'s attention was further focused on Garrels during their confrontation.

¶8 Garrels complains that D.'s description was "very vague" because "[t]he only thing unique about the description was that [D.] described the assailant as very tall, almost as tall as [D.]" We find nothing "vague" about D.'s description of Garrels and Garrels cites no authority suggesting a description is insufficient if it does not describe "unique" features. D. told police that the man with the assault rifle was a "tall and baldheaded" white male, close to his own six-foot, seven-inch height—a description Garrels does not dispute. And his description of the assailant's truck as a white "dually" flatbed pickup with a toolbox and a dog on the rear platform was entirely consistent with Garrels's truck. Descriptions similar to the one D. provided have been found to support a finding that an identification was reliable. *See, e.g., State v. Schilleman*, 125 Ariz. 294, 296, 609 P.2d 564, 566 (1980) (description of suspect as "a white male with a mustache and light blonde, shoulder-length hair, between, five feet ten inches and six feet tall, with a very thin build" sufficient). Indeed, an identification may be reliable even if there was no description given prior to identification. *See Williams*, 144 Ariz. at 440, 698 P.2d at 685. In regards to the final *Biggers* factor, D. stated that he was certain of his identification. Garrels also asserts that D.'s identification "was merely a confirmation of what the police told him" because police had told D. that they had found the man he had described. But the trial court expressly found, consistent with D.'s testimony, that he had not been influenced by that statement, and Garrels has identified no error in that finding.

The court did not abuse its discretion in denying Garrels's motion to suppress D.'s pre-trial identification of him.

¶9 Garrels next argues the trial court erred in limiting his cross-examination of D. by precluding evidence that D. previously had been found incompetent to stand trial and had suffered memory problems following an injury. In 2002, D. had been charged with a felony in Maricopa County but, following an examination, was found to be incompetent to stand trial and the case ultimately was dismissed in 2003. Garrels moved to preclude D. from testifying, arguing he had not been restored to competency and thus, was incompetent to be a witness. At an evidentiary hearing, D. acknowledged he had received mental health treatment in the past but had been "reviewed" in 2002 and 2004 and was "competent." He also stated he had been stabbed in 2002 and, due to a "lack of oxygen" caused by "hospital error" he had suffered memory problems, but had not had any memory problems since that time. After reviewing the relevant documents and evaluating D.'s testimony at the evidentiary hearing, the court denied G.'s motion, finding D.'s testimony "clearly demonstrated that he is competent to testify."

¶10 The state moved to preclude any evidence concerning "any mental issues that [D.] may have had nine years ago," and the trial court granted the motion, finding that, absent any other evidence, the previous finding of incompetence eight years prior did not suggest D. currently was incompetent to testify. The court ordered that Garrels "may only inquire of [D.] whether he is currently receiving any mental health treatment or is currently prescribed medication, such as psychotropic drugs, which might adversely impact his ability to perceive, recall and relate events."

¶11 Garrels argues on appeal that the trial court erred by precluding evidence both of D.'s previous incompetency and his memory loss stemming from the 2002 injury. He argues that, because there were discrepancies between Y.'s testimony, D.'s testimony, and his own, such evidence was "relevant to explain to the jury a possible reason for [D.'s] perceptions and his different understanding of what had occurred." Garrels cites no authority in support of this argument, and we find none.[1] *See* Ariz. R. Crim. P. 31.13(c)(1)(vi). Although a defendant has a constitutional right to cross-examination, a trial court may place reasonable limits on that right. *See State v. Fleming*, 117 Ariz. 122, 125, 571 P.2d 268, 271 (1977). For example, a court "may prevent cross-examination into collateral matters of a personal nature having minor probative value and tending to bring up collateral matters such as extensive medical histories, which would require unnecessary use of court time." *State v. Zuck*, 134 Ariz. 509, 513, 658 P.2d 162, 166 (1982). Evidence of psychiatric history is admissible on cross-examination to discredit a witness only if the evidence's proponent makes "an offer of proof showing how it affects the witness's ability to observe and relate the matters to which he testifies." *Id.* Garrels made no such showing here.

[1]Garrels asserts a trial court may limit cross-examination only if "it can be found beyond a reasonable doubt that the preclusion had no influence on the jury's verdict." The cases Garrels cites in support of this proposition do not support it. *See State v. Luzanilla*, 179 Ariz. 391, 397-98, 880 P.2d 611, 617-18 (1994) (court may apply harmless error review when trial court erroneously admits evidence); *State v. Fleming*, 117 Ariz. 122, 125, 571 P.2d 268, 271 (1977) (trial court has discretion to limit scope of cross-examination).

¶12 And, in circumstances such as these, "[a]s evidence of the witness'[s] condition becomes more remote in time, it has proportionately less bearing on the credibility of the witness." *Fleming*, 117 Ariz. at 125-26, 571 P.2d at 271-72. In *Fleming*, our supreme court determined that, in the absence of any evidence a witness "continued to have mental problems," a brief stay in a mental facility "at least three years prior to the transaction with the defendant and approximately four years prior to trial" had no bearing on that witness's credibility. *Id.* at 126, 571 P.2d at 272. Similarly, we see no reasonable possibility that a finding of incompetency and transient memory problems that occurred at least six years before the incident in question and eight years before trial would have any bearing on D.'s credibility, given the absence of any evidence of current symptoms. The trial court did not err in precluding evidence of D.'s memory problems or previous incompetency.

¶13 Garrels next argues the trial court erred by refusing to give his requested jury instruction based on A.R.S. §§ 13-418 and 13-419. Section 13-418 provides a justification defense for a person's use or threatened use of force in defense of an occupied vehicle when

> the person reasonably believes himself or another person to be in imminent peril of death or serious physical injury and the person against whom the physical force or deadly physical force is threatened or used was in the process of unlawfully or forcefully entering, or had unlawfully or forcefully entered, a[n] . . . occupied vehicle, or had removed or was attempting to remove another person against the other person's will from the . . . occupied vehicle.

Pursuant to § 13-419(A), a person is presumed to reasonably believe that force is necessary "if the person knows or has reason to believe that the person against whom . . . force is threatened or used is unlawfully or forcefully entering or has unlawfully or forcefully entered and is present in the person's . . . occupied vehicle." Similarly, pursuant to § 13-419(B), "a person who is unlawfully or forcefully entering or who has unlawfully or forcefully entered and is present in a[n] . . . occupied vehicle is presumed to pose an imminent threat of unlawful deadly harm to any person who is in the . . . vehicle."

¶14 The trial court refused to give an instruction based on §§ 13-418 and 13-419, concluding there was "not sufficient reasonable evidence, credible evidence, that [anyone was] actually in the process of forcibly removing [Garrels] from the vehicle or forcibly entering the vehicle."[2] We review a trial court's denial of a requested jury instruction for an abuse of discretion. *State v. Cox*, 217 Ariz. 353, ¶ 15, 174 P.3d 265, 268 (2007). Although "[a] defendant 'is entitled to a jury instruction on any theory reasonably supported by the evidence,' . . . a trial court's refusal to give an instruction for a lack of factual basis is within its discretion." *State v. Vandever*, 211 Ariz. 206, ¶ 7, 119 P.3d 473, 475 (App. 2005), *quoting State v. Tschilar*, 200 Ariz. 427, ¶ 36, 27 P.3d 331, 340 (App. 2001). In determining whether the evidence warranted a particular instruction, we view the evidence in the light most favorable to the instruction's proponent. *State v. King*, 225 Ariz. 87, ¶ 13, 235 P.3d 240, 243 (2010).

[2]The trial court instructed the jury on self-defense consistent with A.R.S. §§ 13-404 and 13-405.

¶15 Apparently relying on his testimony that D. and several bar patrons were "charging" at his truck and that he was afraid they would pull him from the truck and beat him, Garrels asserts there was sufficient evidence to support an instruction based on § 13-418. He also argues the trial court erred in evaluating the credibility of the evidence and therefore improperly "intruded upon the province of the jury."

¶16 We agree with Garrels that, if the trial court based its decision to reject the proposed instruction on Garrels's credibility, it erred by doing so. *See King*, 225 Ariz. 87, ¶ 13, 235 P.3d at 243. But we agree with the court that there was insufficient evidence to support the instruction. Garrels suggests that "[n]o reasonable person would expect that [D.] ran after [him] . . . just to talk to him." But merely because D., and possibly others, were allegedly pursuing Garrels does not mean a § 13-418 instruction is warranted. To justify an instruction pursuant to § 13-418, there must be evidence from which the jury reasonably could conclude that the individuals approaching Garrels's truck were "in the process" of entering the truck or were "attempting to remove" him from the truck. Nothing in the record suggests that to be the case.

¶17 Even viewed in the light most favorable to giving the instruction, all the evidence suggests any altercation took place in or near the bar. Then, according to Garrels, several individuals were "charging" toward the truck in the "seconds" it took him to start it. He did not testify that he had been threatened, or that the bar patrons' alleged assault of him had continued once he had left the bar. Furthermore, Garrels did not suggest the individuals came close enough to his truck to attempt to enter it or remove him from it. He offered no evidence disputing D.'s testimony that he had been no closer

than a car length from the truck when Garrels produced his rifle. And, Garrels stated he had left his truck before producing his rifle. Under these circumstances, the trial court did not abuse its discretion in determining the evidence did not show that any individuals approaching Garrels's truck were "in the process" of entering his truck or were "attempting to remove" him from it. § 13-418(A). Therefore, the trial court did not err in rejecting Garrels's requested instruction.

¶18 Last, Garrels argues the trial court failed to place proper weight on several mitigating factors at sentencing, specifically his age, lack of prior criminal history, how his service in the Vietnam War would have "affected his perception of events that night," and the possibility he was "suffer[ing] from some sort of mental disability." "A trial court has broad discretion to determine the appropriate penalty to impose upon conviction, and we will not disturb a sentence that is within statutory limits . . . unless it clearly appears that the court abused its discretion." *State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003). A court abuses its discretion when it acts arbitrarily and capriciously or fails to adequately investigate the facts relevant to sentencing. *State v. Ward*, 200 Ariz. 387, ¶ 6, 26 P.3d 1158, 1160 (App. 2001). It is within the court's discretion to determine whether certain factors constitute aggravating or mitigating circumstances for sentencing purposes and how much weight to give any such factors. *State v. Harvey*, 193 Ariz. 472, ¶ 24, 974 P.2d 451, 456 (App. 1998).

¶19 Evidence of his age, mental capacity, and military service were all presented to the trial court. Garrels is incorrect that he has no criminal history, and that history, which included violent offenses, was provided to the court. The court is

presumed to have considered all information presented, *State v. Medrano*, 185 Ariz. 192, 196, 914 P.2d 225, 229 (1996), and need not find that information mitigating, *State v. Long*, 207 Ariz. 140, ¶ 41, 83 P.3d 618, 626 (App. 2004). We find no abuse of discretion.

¶20 For the reasons stated, Garrels's conviction and sentence are affirmed.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge