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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. SAUL HERRERA, Appellant.	)	2 CA-CR 2011-0369 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20111183001

Honorable John S. Leonardo, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
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E S P I N O S A, Judge.

¶1 Appellant Saul Herrera was convicted after a jury trial of three counts of sale of a narcotic drug and one count each of possession of a narcotic drug for sale and

possession of drug paraphernalia. He was sentenced to concurrent, minimum prison terms, the longest of which are four years. On appeal, he argues the trial court erred in denying his motion to preclude an undercover officer's identification of him. Finding no error, we affirm.

Background

¶2 "In reviewing the denial of a motion to suppress evidence, we consider only the evidence that was presented at the suppression hearing, which we view in the light most favorable to sustaining the trial court's ruling." *State v. Kinney*, 225 Ariz. 550, ¶ 2, 241 P.3d 914, 917 (App. 2010). On March 10, 2011, an undercover police officer contacted an individual to arrange a cocaine purchase. He met that individual in a grocery store parking lot "in the early evening" when "the sun was still up." The officer entered the suspect's car and purchased cocaine from him. The officer characterized the transaction as "very brief" but "longer than five seconds."

¶3 Five days later, on March 15, the officer called the same telephone number and talked to the same person to arrange another cocaine buy. He recognized the suspect's voice from the first telephone conversation and confirmed it was the same person he had spoken to before by referring to their previous transaction. He met the suspect at the same grocery store parking lot, where the suspect approached his car and sold him cocaine. The officer estimated he had approximately "fifteen, twenty seconds" to observe the suspect as he approached. The transaction was also in the early evening and "it was still bright outside."

¶4 On March 31, the officer again called the telephone number to arrange another transaction and spoke to the same individual, who recognized the name the officer had given him previously. They met in the parking lot of a fast food restaurant and the officer again purchased cocaine from the suspect. The officer stated the suspect used the same car for the second and third transactions. The suspect subsequently was arrested at an apartment and identified as Herrera. The officer identified Herrera from a photograph obtained from a police database as the same man from whom he had purchased cocaine on each occasion.

¶5 Herrera moved to preclude the officer's in-court and out-of-court identifications, arguing the identification from a single photograph was unduly suggestive and the officer's identification was not reliable when analyzed under the factors enumerated by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188 (1972).

¶6 After an evidentiary hearing, the trial court denied Herrera's motion. The court agreed the identification procedure was unduly suggestive but determined the officer's identification was nonetheless reliable. The court noted that the officer "had a good opportunity to observe [Herrera] as there were three hand to hand sales during daylight over a twenty one day period," that the officer's degree of attention was high due to his undercover experience and training, that his description of the suspect as a "Hispanic male" was accurate, that the officer was "100% certain" of his identification, and that the officer had made his identification "within hours of his last contact with [Herrera]."

Discussion

¶7 "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). However, the "ultimate question of the constitutionality of a pretrial identification" is a mixed question of law and fact that we review de novo. *Id.*

¶8 We agree with the trial court that a one-person photographic "show-up" like the one at issue here is inherently suggestive. *See 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." *Biggers*, 409 U.S. at 199. In determining whether an identification was reliable, a court should consider, as the trial court did here, "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 State v. Cañez*, 202 Ariz. 133, ¶ 47, 42 P.3d 564, 581 (2002); *Williams*, 144 Ariz. at 440, 698 P.2d at 685. Herrera argues that each of the *Biggers* factors weighs against admission of the undercover officer's identification. We address each factor in turn.

¶9 Regarding the first *Biggers* factor—the officer's opportunity to view the suspect—Herrera first contends the trial court erred in considering the final sale as part of that analysis. He reasons that, because Herrera did not dispute that he was the man who had conducted the third sale, any opportunity the officer had to view him at that sale was "not relevant to the inquiry." We disagree. The third sale permitted the officer to further confirm his conclusion that Herrera had been the man present at the first two sales and gave the officer an additional opportunity to view the suspect before the photographic identification.

¶10 Herrera further complains that the trial court erred in stating that all three encounters occurred during daylight. He speculates, without support, that because the first two meetings "occurred sometime between 5:00 and 7:00 p.m. on March 10th and 15th," that "time frame would be more accurately described as dusk than daylight." But the unequivocal and undisputed testimony of the officer was that there was ample light.

¶11 Herrera also contends the encounters were far too brief for the officer to properly observe the defendant. But he cites no authority suggesting a brief encounter necessarily renders a witness's opportunity to view a suspect insufficient. Indeed, courts have found no error in the admission of identifications based on extremely brief observations. *See, e.g.*, *State v. Alvarez*, 145 Ariz. 370, 372, 701 P.2d 1178, 1180 (1985) (three-second observation); *State v. Nieto*, 118 Ariz. 603, 606, 578 P.2d 1032, 1035 (App. 1978) (five- to ten-second observation). And, as we discuss below, the officer's attention was focused on Herrera, further decreasing the likelihood that his somewhat brief

opportunity to view him renders the identification unreliable. *See State v. McLoughlin*, 133 Ariz. 458, 462, 652 P.2d 531, 535 (1982) (finding sufficient reliability where, "[a]lthough none of the witnesses had an opportunity to view the culprit for long, they all had a reason to have their attentions riveted on him").

¶12 Moreover, the officer stated he recognized the suspect's voice from their telephone conversations and had confirmed during those conversations—either by the suspect's recognition of his name or by reference to a previous sale—that he was speaking with the same individual. Additionally, the encounters were face-to-face meetings during which the officer could observe the suspect from only a few feet away. *See State v. Armijo*, 26 Ariz. App. 521, 524, 549 P.2d 616, 619 (1976) (witness identification reliable when she had opportunity to view defendant at distance "of only 15 feet"). These facts further support the trial court's conclusion that the officer had more than adequate opportunity to observe the suspect before making his identification.

¶13 Relevant to the second *Biggers* factor, Herrera argues the officer's attention was divided between ensuring his safety and identifying the suspect and, thus, the trial court erred in concluding that the officer's degree of attention was high. He claims the officer's attention was "[p]resumably" divided between "visually scan[ning] the suspect's body for any indication of a weapon" and watching the suspect's hands and his "secondary goal of identifying the suspect." But the officer testified that identification was "pretty high on our list" in ensuring safety and that his attention was focused entirely on the suspect during each transaction. *See McLoughlin*, 133 Ariz. at 462, 652 P.2d at

535. And Herrera's "[p]resum[ption]" that the officer's attention instead was focused on the suspect's body or hands is without support in the record.

¶14 We reject Herrera's contention that the officer's "inability to remember other significant facts during his testimony demonstrated [a lack of attention]." Herrera complains that the officer did not recall at the evidentiary hearing exactly what had been said during the various telephone calls, which language the suspect had spoken during the calls, or the type of vehicle the suspect had been driving. But he has not explained how the officer's lack of recall of those details at an evidentiary hearing months after his identification are relevant to his degree of attention during his encounters with the suspect or his identification shortly after the last of those encounters, and only twenty-one days removed from his first encounter with the suspect.

¶15 Herrera next asserts the trial court's conclusion relevant to the third *Biggers* factor that the officer's description of him as a "Hispanic male" was accurate nonetheless does not support the reliability of the officer's identification. He reasons that, because that description lacked any significant detail and the officer had not recorded any identifying features, the officer's identification was "suspect" and "made it nearly impossible for either the court or the jury to accurately gauge the reliability of his identification." We agree with Herrera that the description of the suspect as a "Hispanic male," although accurate, does not significantly support a finding that his identification was reliable. But it does not weaken that conclusion. Indeed, an identification may be

reliable even when no previous description had been given. *See Williams*, 144 Ariz. at 440, 698 P.2d at 685.

¶16 Herrera next contends the trial court erred in relying on the officer's testimony concerning his level of certainty of his identification. He notes that the officer was asked, "[W]hat was your level of certainty when you looked at that photo that was of Saul Herrera?" and the officer responded, "At that point, it was 100%." Herrera asserts that response concerned only the third, most-recent transaction and "had no probative value" as to whether he "was also the man who had sold him cocaine on the two prior occasions." But Herrera reads the officer's testimony too narrowly—in the context of the examination, it was clear the officer referred to his certainty that Herrera was the same man with whom he had had three previous transactions. And he repeated throughout his testimony that Herrera was the individual he dealt with on all three occasions. Thus, the court did not err in relying on this testimony to conclude the officer was certain of his identification.

¶17 Finally, Hererra contends the trial court erred by relying on the fact that the officer's identification of him followed the final drug transaction by only a brief period. He reasons that fact does not support the conclusion that the officer's identification of Herrera as the man present at the previous two transactions was reliable. He asserts the sixteen- and twenty-one-day intervals between those transactions and the officer's identification are "significant periods of time" and that it was "unlikely" the officer could reliably identify him given the brevity of their previous transactions. Even assuming,

however, Herrera is correct that the time between the last encounter and the identification is irrelevant, the longer timeframes do not require the conclusion that the officer's identification was unreliable. *See, e.g.*, *Biggers*, 409 U.S. at 201 (finding identification made seven months after crime reliable); *Lehr*, 201 Ariz. 509, ¶ 51, 38 P.3d at 1184 (stating identification after four months "gives . . . pause" but identification nonetheless reliable).

¶18 Based on the foregoing, we conclude the trial court did not abuse its discretion in denying Herrera's motion to preclude the officer's pretrial identification. As we have explained, none of the five *Biggers* factors weighs against the court's finding that the identification was reliable, and the majority of factors strongly support it. Although the encounters were somewhat brief, they were not so brief as to prevent the officer from identifying Herrera, particularly given the officer's focused attention and close proximity to Herrera during the three daylight encounters. Herrera has provided no authority to support the proposition that a witness's identification is unreliable in similar circumstances, and any perceived deficiencies in the accuracy of the officer's identification go to its weight, not its admissibility. *See Moore*, 222 Ariz. 1, ¶ 29, 213 P.3d at 158.

¶19 Herrera also argues the trial court erred in rejecting his requested instruction that, "[i]f you believe that [the officer] may have mistakenly identified the defendant as the individual that sold cocaine to him on March 10th and/or March 15th, 2011, then you must find the defendant not guilty of those charges." The court determined this

instruction was an impermissible comment on the evidence. Herrera's argument on this point, however, is grounded in his claim that the officer's identification was unreliable and that the court erred by admitting it. He does not suggest the court's refusal to give the instruction constitutes an independent ground for reversal of his convictions. Consequently, because we have found no error in the court's conclusion that the officer's identification of Herrera was reliable and admissible, we do not address this argument further.

Disposition

¶20 For the reasons stated, Herrera's convictions and sentences are affirmed.

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

CONCURRING:

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

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