IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MICHAEL SEAN PITTS,
Appellant.

No. 2 CA-CR 2014-0434
Filed July 18, 2016

Appeal from the Superior Court in Pima County
No. CR20130767001
The Honorable Casey F. McGinley, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Amy Pignatella Cain, Assistant Attorney General, Tucson
Counsel for Appellee

Steven R. Sonenberg, Pima County Public Defender
By Frank P. Leto, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Judge Kelly[1] concurred.

M I L L E R, Judge:

¶1 After a jury trial, Michael Pitts was convicted of three counts each of armed robbery and aggravated assault with a deadly weapon or dangerous instrument, and sentenced to a combination of concurrent, consecutive, presumptive prison terms that totaled 31.5 years. On appeal, he contends the trial court erred by failing to sua sponte instruct the jury on eyewitness identification pursuant to *State v. Dessureault*, 140 Ariz. 380, 384, 453 P.2d 951, 955 (1969). He also argues he did not consent to representation by a law student, and that such representation constituted structural or fundamental error. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Nottingham*, 231 Ariz. 21, ¶ 2, 289 P.3d 949, 951 (App. 2012). The charges against Pitts arose out of a series of robberies of taxi drivers.[2] Before trial, Pitts filed a motion to suppress the pretrial and in-court eyewitness identifications of him by the drivers, arguing the six-person photographic lineup sheets, or "six-packs," detectives showed the drivers were

[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

[2]Although Pitts was originally charged with additional counts of robbery, armed robbery and aggravated assault, three counts were severed on his motion. A jury later acquitted Pitts of robbery, and the trial court dismissed the remaining two counts with prejudice.

unnecessarily suggestive under *Dessureault*. After a hearing, the trial court did not find "that the line-up was suggestive, much less unduly so," but noted the identifications could be challenged at trial through expert testimony and cross-examination.

¶3 At trial, all three drivers testified and were cross-examined about the photographic lineup procedure, as were the detectives who administered the lineups. Pitts was convicted and sentenced as described above, and this appeal followed.

Dessureault Instruction

¶4 Pitts first argues the trial court erred by failing to sua sponte provide a *Dessureault* instruction to the jury. Because Pitts did not request the instruction below, we review for fundamental, prejudicial error. *See State v. Veloz*, 236 Ariz. 532, ¶ 18, 342 P.3d 1272, 1278 (App. 2015). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005).

¶5 The *Dessureault* instruction provides that "[t]he State must prove beyond a reasonable doubt that the in-court identification of the defendant at this trial is reliable." State Bar of Arizona, *Revised Arizona Jury Instructions (Criminal)* Std. 39 (2015). It further provides several factors the jury may consider in assessing reliability. *Id.* In *Dessureault*, our supreme court held that when a proposed in-court identification is challenged, the trial court must first hold a hearing to determine whether the pretrial identification was "unduly suggestive"; if it was, the court still may admit the in-court identification if it is satisfied it will not be "tainted by the prior identification." 104 Ariz. at 384, 453 P.2d at 955. Next, if requested, the court must provide the jury instruction. *Id.* In *Nottingham*, 231 Ariz. 21, ¶¶ 4, 13-14, 289 P.3d at 951-52, 954-55, we held that an instruction is also required upon request "when [the defendant] ha[s] shown suggestive circumstances attendant to a pretrial identification that tend to bring the reliability of the identification testimony into question," even in the absence of a formal hearing and findings.

¶6 Pitts does not challenge the pretrial or in-court identifications, arguing only that the instruction was required here. He seeks to expand *Dessureault* and *Nottingham* to require a trial court to sua sponte provide the instruction "even if the court has ruled the pretrial identification was not suggestive." Pitts relies on *Perry v. New Hampshire*, ___ U.S. ___, 132 S. Ct. 716 (2012), to support his argument.

¶7 In *Perry*, the Supreme Court held the Due Process Clause did not require a trial court to make a pretrial assessment of an eyewitness identification that was not "procured under improperly suggestive circumstances arranged by law enforcement." *Id.* at ___, ___, 132 S. Ct. at 728, 730. In so holding, the court noted that other safeguards are available to challenge the reliability of the identification, including cross-examination, jury instructions such as the *Dessureault* instruction, the burden on the state, and rules of evidence. *Id.* at ___ & n.7, 132 S. Ct. at 728-29 & n.7. Pitts contends the Supreme Court's discussion and analysis of those safeguards compels the conclusion that a jury instruction be given, even without a finding of suggestive circumstances.

¶8 But the Court in *Perry* did not state that such an instruction was required—rather, the instruction was just one tool for evaluating the reliability of an identification in the absence of a hearing. Indeed, Perry reiterates that "due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary." *Id.* at ___, 132 S. Ct. at 724. Here, the trial court held a hearing and determined that the six-pack lineup was not suggestive. No jury instruction was required.

¶9 Pitts also appears to argue that the evidence at trial established the identification procedures were suggestive, requiring the court to give a cautionary instruction sua sponte. Specifically, he contends the six-pack identification was suggestive because Pitts had more hair than the other men in the lineup, the detectives knew Pitts's position on the page, the drivers were able to compare all six photographs at one time, and detectives did not inform the

witnesses that the investigation would continue if no identification was made.[3] Pitts cites no case law to support this argument.

¶10 Generally, an array of photographs that contain a photograph of the suspect and several others is not suggestive if the others resemble the suspect. *See Simmons v. United States*, 390 U.S. 377, 383 (1968); *State v. Phillips*, 202 Ariz. 427, ¶¶ 19-22, 46 P.3d 1048, 1054-55 (2002). "Because '[l]ineups need not and usually cannot be ideally constituted . . . the law only requires that they depict individuals who basically resemble one another such that the suspect's photograph does not stand out.'" *Phillips*, 202 Ariz. 427, ¶ 20, 46 P.3d at 1054, *quoting State v. Alvarez*, 145 Ariz. 370, 373, 701 P.2d 1178, 1181 (1985) (alteration in *Phillips*). Here, the trial court found that "every individual is an African-American male with reasonably close colored skin tone, [and] reasonably close length of hair," noting that "Pitts has somewhat longer hair, but not so much so as to be a suggestive lineup." We find no error with the court's conclusion.

¶11 We also find no error with respect to the trial court's conclusion that the detectives' interactions with the drivers while showing them the photographic lineups were not suggestive. Detectives testified that they had told the drivers they were not obligated to identify anyone, and that they should not assume the guilty person had been caught. The witnesses also testified that they had not felt pressure to choose a photograph. Pitts has not shown that it was necessary for the detectives to further inform the witnesses that the investigation would continue in the absence of an identification.

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[3]Pitts also notes several specific details about each taxi driver's identification, such as whether the driver was the same race as Pitts, how long the driver had observed Pitts, and whether his photograph matched earlier eyewitness descriptions. These factors affect the reliability of the identification rather than the suggestiveness of the lineup itself. *See Neil v. Biggers*, 409 U.S. 188, 199-200 (1972) (listing reliability factors).

¶12 Moreover, although we see no error here, Pitts has not met his burden of showing he was prejudiced by the trial court's failure to provide the instruction. *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. The jury was instructed that it had the duty to determine the weight to be given to the evidence and evaluate witness testimony, and that the state had the burden of proving the defendant guilty beyond a reasonable doubt. We presume the jury followed these instructions. *State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006). Pitts also cross-examined the drivers and detectives about the pretrial identifications, and questioned the reliability of their identifications in opening statements and closing arguments. We find no error, let alone fundamental, prejudicial error, in the court's conclusion that the lineup was not unduly suggestive, and in its not having provided sua sponte a *Dessureault* instruction.

Law Student Representation

¶13 Pitts argues his attorney's assistance by a law student under Rule 38(d), Ariz. R. Sup. Ct., without written consent denied his right to counsel under the Sixth and Fourteenth Amendments of the United States Constitution. We review this constitutional claim de novo. *State v. Boggs*, 218 Ariz. 325, ¶ 50, 185 P.3d 111, 122 (2008).

¶14 The Sixth Amendment guarantees a criminal defendant who faces incarceration "the right to counsel at all critical stages of the criminal process." *Iowa v. Tovar*, 541 U.S. 77, 80-81 (2004). An indigent defendant is entitled to appointed counsel, *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963), but "is not entitled to counsel of choice, or to a meaningful relationship with his or her attorney," *State v. Hernandez*, 232 Ariz. 313, ¶ 12, 305 P.3d 378, 383 (2013), *quoting State v. Gomez*, 231 Ariz. 219, ¶ 19, 293 P.3d 495, 500 (2012). Complete denial of the right to counsel is structural error mandating reversal.[4] *State v. Valverde*, 220 Ariz. 582, ¶ 10 & n.2, 208 P.3d 233, 235-36 & n.2 (2009).

[4]Although Pitts briefly contends the alleged error is "both structural and fundamental," he focuses his argument on structural error and contends he need not show prejudice, which a defendant

¶15 At his arraignment, Pitts was appointed a licensed attorney from the public defender's office. However, there is no record of Pitts's written consent to counsel's assistance by a law student, nor any indication that any such consent was "brought to the attention of the judge," in violation of Rule 38(d)(5)(C)(i). Further, the law student filed several pre-trial motions, including the *Dessureault* motion, without the signature of appointed counsel, in violation of Rule 38(d)(5)(C)(ii)(a). Nothing in the record indicates Pitts objected to the student's assistance.

¶16 We recently considered a similar situation in *State v. Koepke*, 742 Ariz. Adv. Rep. 7 (Ct. App. June 29, 2016). In *Koepke*, the record did not contain a written consent or any indication the judge had been informed there was such a consent. *Id.* ¶ 4. Relying on *State v. Terrazas*, 237 Ariz. 170, 347 P.3d 1151 (App. 2015), and *In re Denzel W.*, 930 N.E.2d 974 (Ill. 2010), we concluded there was no structural error because licensed counsel had been present at all critical stages of the proceeding. *Koepke*, 742 Ariz. Adv. Rep. 7, ¶¶ 7 -10. We noted, "'[T]he presence of the licensed attorney, who certainly is counsel for constitutional purposes, is not somehow "cancelled out" by the law student's participation, even if the law student has not complied with' the applicable rules." *Id.* ¶ 7, *quoting Terrazas*, 237 Ariz. 170, ¶ 5, 347 P.3d at 1152.

¶17 As in *Koepke*, Pitts was represented by licensed counsel at all critical stages of his trial. *Id.* ¶ 10. His attorney was personally present at the proceedings in which the law student participated, and the attorney had full responsibility for the representation. *See* Ariz. R. Sup. Ct. 38(d)(5)(C)(i)(c), (E)(iii). Although the law student signed several of Pitts's pretrial motions, the appointed counsel was identified as Pitts's attorney below the signature line and his name and state bar number appeared in the return address. When the state filed responses to those motions, they were addressed to appointed counsel, and appointed counsel was present

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must establish as would be required to prevail on a fundamental error review. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08. Therefore, we analyze his contention under a structural error framework.

when the motions were argued in court. Nothing in the record establishes or even suggests that the motions were filed without supervision of appointed counsel. As in *Koepke*, Pitts's argument that he was completely denied his right to counsel fails.[5] 742 Ariz. Adv. Rep. 7, ¶ 10; *Terrazas*, 237 Ariz. 170, ¶ 5, 347 P.3d at 1152. Further, to the extent Pitts indirectly contends the Rule 38(d) violations resulted in ineffective assistance of counsel, we do not address such a claim because it can only be litigated in a post-conviction proceeding pursuant to Rule 32, Ariz. R. Crim. P. *See Koepke*, 742 Ariz. Adv. Rep. 7, ¶ 11; *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002).

Sentencing

¶18 The sentencing transcript and signed minute entry both reflect that the term of imprisonment for count seven is to be served concurrently with the term for count six, and consecutively to counts four and five. The commitment order,[6] however, does not state count seven is consecutive to counts four and five. In the fact statement of his opening brief, Pitts briefly notes this discrepancy and contends the "lesser sentence" in the commitment order must be imposed.

¶19 Arguments must be contained in the body of the brief. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995); *see also* Ariz. R. Crim. P. 31.13(c)(1)(vi). Even if it were in the body of the brief, however, Pitts's argument fails. He cites *State v. Tarango*,

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[5] As in *Koepke*, "we do not minimize the seriousness of counsel's failure to secure a defendant's written consent to representation by a Rule 38(d) student." 742 Ariz. Adv. Rep. 7, n.2. The consent requirement in Rule 38(d) "operates in the shadow of a defendant's Sixth Amendment rights—it is not a 'mere suggestion[].'" *Id.*, *quoting Denzel W.*, 930 N.E.2d at 980 (alteration in *Koepke*).

[6] A commitment order places a defendant in the custody of the county sheriff for incarceration in the jail or transport to the Department of Corrections.

185 Ariz. 208, 914 P.2d 1300 (1996), presumably for the proposition that the rule of lenity requires any doubt to be resolved in favor of the defendant. However, *Tarango* addresses statutory ambiguity. *Id.* at 209-10, 914 P.2d at 1301-02. When there are conflicts in the record regarding a sentence, we generally look to the oral pronouncement in open court. *See State v. Ovante*, 231 Ariz. 180, ¶ 38, 291 P.3d 974, 982 (2013). Here, both the oral pronouncement and judgment state that the sentence for count seven is consecutive to the terms on counts four and five, and concurrent with the term on count six. Accordingly, we affirm the trial court's oral pronouncement of sentence and sentencing order.

Disposition

¶20 We affirm Pitts's convictions and sentences.