FILED BY CLERK
OCT 29 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DURRELL JAMAL EDWARDS, Appellant.	2 CA-CR 2008-0295 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20074760

Honorable Stephen C. Villarreal, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Alan L. Amann
Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By M. Edith Cunningham
Tucson
Attorneys for Appellant

V Á S Q U E Z, Judge.

¶1 After a jury trial, appellant Durrell Edwards was convicted of armed robbery and aggravated assault with a deadly weapon, both dangerous nature offenses. The trial court sentenced him to mitigated, concurrent prison terms of seven years for armed robbery and five years for aggravated assault. On appeal, Edwards argues the court erred by denying his motion to suppress the victim's pretrial and in-court identifications, rejecting his proposed jury instructions on third-party culpability and one-person show-up identification procedures, denying his motion to preclude any mention of churches or Bibles, declining to strike testimony he alleges violated disclosure rules, and denying his motion for a mistrial based on prosecutorial misconduct. For the reasons stated below, we affirm.

Facts and Procedural Background

¶2 We view the evidence presented in the light most favorable to sustaining the convictions. *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). On the morning of December 4, 2007, Vicki F. pulled her car into the parking lot of a Tucson church to attend a Bible study meeting. She had stepped out of the car, opened a rear door, and put her keys in her purse on the back seat when she realized someone was standing behind her. As she turned around, she saw a man—later identified as Edwards—pointing a gun at her. He demanded the keys to the car. When she told him they were in her purse, he reached into the car, grabbed the purse, and handed it to her. Vicki gave him the keys, and he and another man, who had been standing on the other side of the car, got in, and Edwards drove away. Kathy B., another member of the Bible study group, who had witnessed the robbery, called

911 and gave a description of Vicki's car. A few minutes later, Tucson police officer David Chrispen arrived at the church. Vicki gave him a description of her assailant as a black male between five feet, eleven inches, and six feet in height, wearing a red plaid shirt. Kathy described the other suspect as a black male in his twenties wearing a tan jacket. Chrispen broadcast this information over his police radio.

¶3 Shortly afterward, police sergeant Brad Pelton located the car in a line of traffic, noting that the occupants matched the descriptions he had received and the driver was wearing a red plaid shirt and the passenger a brown jacket. He pulled his marked sport utility vehicle (SUV) around to meet the car head-on and prevent it from leaving. The two suspects tried unsuccessfully to push the SUV out of the way with the car, then jumped out and fled on foot. Pelton radioed for back-up and pursued them on foot across the street, through several parking lots, over walls, and onto the roof of an assisted living center. During the pursuit, he saw Edwards take off his red shirt. The two suspects separated, and Pelton followed Edwards down an alley. When Edwards jumped over a fence and into a yard, Pelton directed another officer to intercept him. Officer Chrispen, who had been waiting with Vicki at the church parking lot, drove her to the location where Edwards had been apprehended. Vicki identified Edwards as the man who had taken her car.

¶4 The officers subsequently searched the car and found a gun, a cellular telephone, and two knit hats. A DNA[1] analysis of one of the hats showed a match with

[1]Deoxyribonucleic acid.

Edwards, and police identified the owner of the cellular telephone as Aaron W., a known associate of Edwards. Edwards was charged with armed robbery and aggravated assault with a deadly weapon. The jury found him guilty of both charges, and he was sentenced as noted above. This appeal followed.

Discussion

Identification

¶5 Edwards first argues the trial court erred in denying his motion to suppress evidence of Vicki's identification and to preclude her from identifying him in court. "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 Evidence of an identification is admissible "even though the confrontation procedure was suggestive" 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. Canez*, 202 Ariz. 133, ¶ 47, 42 P.3d 564, 581 (2002).

¶7 Following a hearing pursuant to *State v. Dessureault*, 104 Ariz. 380, 383-84, 453 P.2d 951, 954-55 (1969), the trial court found the one-person show-up at which Vicki had identified Edwards was "unduly suggestive" but concluded the identification was reliable pursuant to *Biggers*. Specifically, the court found:

> 1) The victim witness had ample opportunity to view her assailant for between one and two minutes from close range in the daylight;
>
> 2) The victim witness gave undivided attention to the assailant and the gun pointed at her;
>
> 3) The description provided to police immediately after the incident was largely accurate;
>
> 4) The victim witness immediately expressed a high level of certainty in her in[-]person identification of the defendant as the assailant;
>
> 5) The time between the incident and the in[-]person identification was . . . approximately 20 minutes . . . .

¶8 Edwards challenges the trial court's findings with respect to Vicki's opportunity to view her assailant and her description of him after the incident. He argues she "only had the opportunity to view the perpetrator, a stranger brandishing a gun, for between one and two minutes, . . . under highly stressful circumstances." However, our supreme court has found the "opportunity to view" factor supports the reliability of an identification where, although a witness did not have "an opportunity to view the culprit for long, [she] . . . had

a reason to have [her] attention[] riveted on him." *State v. McLoughlin*, 133 Ariz. 458, 462, 652 P.2d 531, 535 (1982); *see also State v. Smith*, 146 Ariz. 491, 495, 707 P.2d 289, 293 (1985) (finding this factor supported reliability where witness watched perpetrator as he walked from store to his car, where he turned and threatened witness with gun before driving away). At the suppression hearing, Vicki testified that, during the encounter, she had observed Edwards from a distance of two to four feet around 9:00 a.m. on a clear day. The court did not err in finding she had sufficient opportunity to view her assailant.

¶9 Edwards also contends Vicki's initial description of the perpetrator as a black male between five feet eleven and six feet tall and wearing a red plaid shirt was "vague." However, apart from his assertion that he was not wearing a shirt when he was apprehended, Edwards does not challenge the accuracy of her description; nor does he dispute that the officers recovered a red plaid shirt nearby. And, "[w]hile an inaccurate description may be an indication of unreliability, the absence of a detailed description in a situation where prompt police work permits little time for detailed inquiry, does not carry the same connotation." *Chavis v. Henderson*, 638 F.2d 534, 537 (2d Cir. 1980). Moreover, Vicki's level of certainty of her identification of Edwards at the show-up was bolstered by her specific recognition of his build, his hair, the shape of his face, and his ears. The trial court did not abuse its discretion in finding that, considering the totality of the circumstances, Vicki's identification of Edwards was reliable and consequently admitting evidence of the

show-up.[2] Because there was thus a reliable basis for an in-court identification independent of the suggestive show-up identification, the court did not err in permitting Vicki to identify Edwards in court. *See State v. Moore*, 222 Ariz. 1, ¶ 29, 213 P.3d at 158; *State v. Schmidgall*, 21 Ariz. App. 68, 70, 515 P.2d 609, 611 (1973).

Instructions

¶10 Edwards next argues the trial court erred in rejecting his requested jury instructions on third-party culpability and one-person show-up identifications. "A party is entitled to an instruction on any theory reasonably supported by the evidence." *State v. Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d 1006, 1009 (1998). However, a court need not give an instruction that is covered adequately by other instructions, *State v. Hoskins*, 199 Ariz. 127, ¶ 75, 14 P.3d 997, 1015 (2000), and should reject a "proffered jury instruction that misstates the law or has the potential to mislead or confuse the jury," *State v. Rivera*, 177 Ariz. 476, 479, 868 P.2d 1059, 1062 (App. 1994). We review a trial court's refusal to give a requested jury instruction for an abuse of discretion. *State v. Moody*, 208 Ariz. 424, ¶ 197, 94 P.3d 1119, 1162 (2004).

---

[2]Relying on cases from other jurisdictions, Edwards also argues we should both discard the "level of certainty" factor and adopt a new requirement that a show-up identification be "necessary" in order to be admissible. However, our supreme court has explicitly adopted the *Biggers* factors, *see Canez*, 202 Ariz. 133, ¶ 47, 42 P.3d at 581, and "has consistently held that show[-]up identification procedures are permissible if they take place near in time to [the] criminal offense or at the scene of the crime," *McLoughlin*, 133 Ariz. at 462, 652 P.2d at 535. To the extent Edwards thus invites us to overrule or disregard a decision of our supreme court, we are not at liberty to do so. *See State v. Foster,* 199 Ariz. 39, n.1, 13 P.3d 781, 783 n.1 (App. 2000).

¶11 Edwards's proposed third-party-culpability instruction required the jury to find him not guilty if it had "a reasonable doubt that [he] was the person who committed the charged offense." However, the trial court also instructed the jury on accomplice liability. To convict Edwards as an accomplice, the jury need only have found that he had aided, solicited, facilitated, or commanded another to commit the offense. *See* A.R.S. §§ 13-301 and 13-303. The instruction offered by Edwards was thus misleading, if not a misstatement of the law. *See Rivera*, 177 Ariz. at 479, 868 P.2d at 1062. Moreover, Edwards's theory of third-party culpability was not reasonably supported by the evidence. *See Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d at 1009. In support of this theory, Edwards maintains that, because "Aaron's cell phone was found on the driver's seat and two black males ran" from the car, "there was evidence Aaron was the perpetrator." However, such evidence did nothing to exclude Edwards from culpability as either the perpetrator or an accomplice. *See id.*; *cf. State v. Berry*, 101 Ariz. 310, 313-14, 419 P.2d 337, 340-41 (1966) (failure to give alibi instruction not error because alibi not supported by evidence).

¶12 Edwards's second proffered jury instruction, stating only that "[a] one person show-up is inherently suggestive," similarly had the potential to confuse or mislead the jury given that the trial court had already found the pretrial identification to be reliable. *See Rivera*, 177 Ariz. at 479, 868 P.2d at 1062. Furthermore, pursuant to *Dessureault*, the jury was instructed to consider the in-court identification only if it found the state had proved beyond a reasonable doubt that it was independent of the show-up identification. Thus, with

respect to the in-court identification, the proposed instruction added nothing of significance. *See Hoskins*, 199 Ariz. 127, ¶ 75, 14 P.3d at 1015. The court therefore did not abuse its discretion in rejecting Edwards's two jury instructions. *See Moody*, 208 Ariz. 424, ¶ 197, 94 P.3d at 1162.

Religious references

¶13 Edwards argues the trial court erred in denying his motion to "preclude testimony relating to churches and Bibles," which he anticipated being introduced because the offense took place in a church parking lot and the victim was on her way to a Bible study meeting. All relevant evidence is admissible unless otherwise prohibited. Ariz. R. Evid. 402. We review a trial court's ruling on the relevance and admissibility of evidence for an abuse of discretion. *State v. Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d 865, 874 (2004); *State v. Jeffrey*, 203 Ariz. 111, ¶ 13, 50 P.3d 861, 864 (App. 2002).

¶14 Pursuant to Rule 401, Ariz. R. Evid., evidence is relevant when it has a tendency to prove or disprove a material fact at issue. However, "[t]he threshold for relevance is a low one," *State v. Roque*, 213 Ariz. 193, ¶ 109, 141 P.3d 368, 396 (2006), and a trial court has "'considerable leeway'" to admit "'details which fill in the background of the narrative and give it interest, color and lifelik[e]ness,'" *Higgins v. Ariz. Sav. & Loan Ass'n*, 90 Ariz. 55, 62, 365 P.2d 476, 481 (1961), *quoting* Charles McCormick, *Evidence* § 152, at 315 (1954). We cannot say the court abused its discretion in finding details about the location of the offense and the victim's reason for being there to be relevant.

¶15 Relevant evidence is generally admissible if its probative value is not substantially outweighed by its prejudicial effect. Ariz. R. Evid. 403; *see State v. Oliver*, 158 Ariz. 22, 27, 760 P.2d 1071, 1076 (1988). Edwards contends the low probative value of the contested evidence, which was a "mere detail in the story of the offense," *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1098 (9th Cir. 2005), was substantially outweighed by its prejudicial effect because "[r]eligion is an emotional and often inflammatory topic." He also notes that Rule 610, Ariz. R. Evid., and article 2, § 12 of the Arizona Constitution expressly prohibit the introduction of evidence of a witness's religious beliefs to enhance or impeach her testimony. *See State v. Thomas*, 130 Ariz. 432, 436, 636 P.2d 1214, 1218 (1981). However, as the trial court found, the evidence here did not concern the victim's personal beliefs and was not introduced to enhance her credibility. And Edwards provides no authority to support his tacit argument that any mention of a church, the Bible, or a religious event is inherently prejudicial or that the prejudicial effect of such evidence in this case substantially outweighed its probative value.[3] We therefore conclude the court did not abuse its discretion in admitting this evidence. *See Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d at 874.

---

[3]Edwards also contends he was prejudiced by "[t]he prosecutor's repeated and unnecessary emphasis of the religious circumstances." However, this is essentially an allegation of prosecutorial misconduct, separate from his argument that the court should have precluded such evidence in the first instance. To the extent the state's gratuitous church and Bible references were intended to engender sympathy for the victim and were improper, they were not so prejudicial as to deprive Edwards of a fair trial. *See State v. Newell*, 212 Ariz. 389, ¶ 67, 132 P.3d 833, 847 (2006).

Disclosure of evidence

¶16 Edwards next argues the trial court erred in denying his request to strike, for lack of pretrial disclosure, a detective's testimony that Edwards associated with Aaron W. We review a trial court's discovery rulings for an abuse of discretion. *State v. Kemp*, 185 Ariz. 52, 59, 912 P.2d 1281, 1288 (1996). We will only find an abuse of discretion when an appellant demonstrates he suffered prejudice, "relate[d] to the issue of surprise or delay under the discovery rules," as a result of nondisclosure. *State v. Martinez-Villareal*, 145 Ariz. 441, 448, 702 P.2d 670, 677 (1985).

¶17 Pursuant to Rule 15.1(b)(7), Ariz. R. Crim. P., the state is required to make available to the defendant "a list of all prior acts of the defendant which the prosecutor intends to use . . . at trial." *See Kemp*, 185 Ariz. at 59, 912 P.2d at 1288. However, this rule is satisfied when defense counsel was aware that an issue "potentially would be placed before the jury." *Id.* The state is not required "to provide a word-by-word preview to defense counsel of the testimony of the state's witnesses." *State v. Wallen*, 114 Ariz. 355, 361, 560 P.2d 1262, 1268 (App. 1977).

¶18 Here, in eliciting testimony from the detective that Aaron W. was a "person of interest" in the investigation "as the possible second person in th[e] vehicle," the prosecutor attempted to have the detective identify Aaron as the owner of the cellular telephone found in the victim's car. The detective initially stated he had not "definitively identified the owner of the phone." The prosecutor then suggested that the detective had "run across" Aaron's

name in computer records as someone who associated with Edwards. The detective agreed and stated that Aaron did in fact own the telephone.

¶19 Edwards argues that, "[because] the alleged prior association [with Aaron] was never disclosed, the defense had no opportunity [to] investigate it and therefore could not move . . . to preclude it."[4] However, there was no "surprise or delay," and thus no prejudice, from any failure to disclose Edwards's association with Aaron. *See Martinez-Villareal*, 145 Ariz. at 448, 702 P.2d at 677. Defense counsel informed the jury in his opening statement that evidence pertaining both to the cellular telephone and to Aaron would be introduced at trial. Thus, Edwards was aware that his association with Aaron likely would be placed before the jury. *See Kemp*, 185 Ariz. at 59, 912 P.2d at 1288. Moreover, assuming such an association existed, self-evidently Edwards was aware of it. *See State v. Armstrong*, 208 Ariz. 345, ¶ 57, 93 P.3d 1061, 1073 (2004) (state's nondisclosure of letters written by defendant not discovery violation because defendant necessarily aware of contents). The

[4]The state disputes that Edwards's association with Aaron constitutes an "act" for purposes of Rule 15.1(b)(7). Edwards argues that the rule applies based on a dictionary definition of "association" as "the act of associating." However, one of the principal purposes of the rule is to alert a defendant to the introduction of specific prior acts to which objection could be raised under Rule 404(b), Ariz. R. Evid. *See Martinez-Villareal*, 145 Ariz. at 448, 702 P.2d at 677; *State v. Johnson*, 145 Ariz. 482, 483, 702 P.2d 711, 712 (App. 1985). We are therefore not convinced that Rule 15.1(b)(7) requires disclosure of a defendant's relationships or applies to a general reference, such as the one here, that could be interpreted as implying past misconduct. But, because we find Edwards was not prejudiced by the nondisclosure, we do not reach this issue.

court therefore did not abuse its discretion in denying Edwards's motion to strike the detective's testimony.

Prosecutorial misconduct

¶20 Finally, Edwards argues the trial court erred in denying his motion for a mistrial based on two statements the prosecutor made during closing argument that Edwards contends constituted prosecutorial misconduct and denied him a fair trial.[5] "Because the trial court is in the best position to determine the effect of a prosecutor's comments on a jury, we will not disturb a trial court's denial of a mistrial for prosecutorial misconduct in the absence of a clear abuse of discretion." *State v. Newell*, 212 Ariz. 389, ¶ 61, 132 P.3d 833, 846 (2006).

¶21 In evaluating a prosecutor's argument at trial, a court should analyze "whether the remarks called to the jurors' attention matters that they should not consider, and whether, 'under the circumstances of the particular case, [the remarks] probably influenced' the jurors." *Roque*, 213 Ariz. 193, ¶ 128, 141 P.3d at 399, *quoting Sullivan v. State*, 47 Ariz. 224, 238, 55 P.2d 312, 317 (1936). If misconduct is present, we will reverse only if "a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying [the] defendant a fair trial." *State v. Atwood*, 171 Ariz. 576, 606, 832 P.2d

[5]Edwards also argues the state's introduction of evidence of his association with Aaron constituted prejudicial prosecutorial misconduct. However, we have already found no merit in his contention that he was prejudiced by the state's failure to disclose this evidence pursuant to Rule 15.1, the only support he offers for this argument.

593, 623 (1992), *overruled on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001). "If the cumulative effect of the conduct 'so permeate[s] the entire atmosphere of the trial with unfairness that it denie[s the defendant] due process,' it can warrant reversal even if the individual instances would not do so by themselves." *State v. Velazquez*, 216 Ariz. 300, ¶ 57, 166 P.3d 91, 103-04 (2007), *quoting Roque*, 213 Ariz. 193, ¶ 165, 141 P.3d at 405.

¶22 Before trial, the trial court granted Edwards's motion to preclude use of the term "ski mask" to describe the two knit hats found in the victim's car, reasoning that a ski mask connotes "something that a burglar uses or somebody uses for a[]lot of illegal purposes." However, the prosecutor made a single reference to a "mask" in his closing argument. When the court sua sponte instructed the prosecutor to correct the statement, the prosecutor told the jury that "what the lawyers say is not evidence. . . . And if I . . . misspoke and referred to a bandana or a mask, there's no such evidence in this case. We're talking about knit hats in . . . the car." Edwards argues that both the prosecutor's initial reference to a mask and his use of the term in the correction constituted prejudicial prosecutorial misconduct. We disagree. The correction, combined with the court's instruction that the attorneys' arguments are not evidence, remedied any potential prejudice from the prosecutor's fleeting references to a mask. *See State v. Spain*, 27 Ariz. App. 752, 754, 558 P.2d 947, 949 (1977) (misconduct cured by prosecutor's correction and court's instructions); *see also Newell*, 212 Ariz. 389, ¶ 69, 132 P.3d at 847 (presuming jurors follow instructions).

¶23 Edwards also argues the prosecutor's reference to the recent shooting death of a police officer constituted prosecutorial misconduct. On cross-examination of Pelton, Edwards had elicited testimony that he had "kept a distance quite a ways just for [his] safety," "paused for safety reasons," and briefly lost sight of the two suspects as they went over a wall. During closing argument, the prosecutor stated:

> [W]e all read tragically about the recent death of a police officer. I mean you hear [the officer in this case] testifying and you realize . . . this is reality for this guy. Here he is . . . in his daily workday and he is running through yards, climbing fences . . . and waiting before he . . . puts his head over the roof because he knows these guys have a gun and he doesn't want to go sticking his head up there.

It was improper for the prosecutor to invite the jury to think about this particular tragic incident when considering the testimony of the officer in this case, even if, as the trial court found, it was intended as an explanation of why the officer "was taking the care that he was taking when he was going after the assailants." *See Roque*, 213 Ariz. 193, ¶ 128, 141 P.3d at 399; *see also State v. Morris*, 215 Ariz. 324, ¶ 58, 160 P.3d 203, 216 (2007) (prosecutor "cannot make arguments that appeal to the fears or passions of the jury"); *but see State v. White*, 115 Ariz. 199, 203-04, 564 P.2d 888, 892-93 (1977) (prosecutor's inquiry whether "'[the witnesses] conspired to frame two black people? Two innocent black people? Would they ask you to convict two innocent people so that the alleged real robbers would still be out there?'" not improper because defendants had argued they were framed); *State v. Moore*, 112 Ariz. 271, 274, 540 P.2d 1252, 1255 (1975) (prosecutor's comment, "'We have all heard

about the rising crime rate throughout the country. We have heard about the rise in violence. We have read about it. We are sick of it.'" not improper).

¶24 Edwards suggests the prosecutor's remark bolstered the officer's identification "despite his distraction by fear and evidentiary inconsistencies." However, the officer's uncontroverted testimony indicated he observed Edwards leaving the stolen vehicle, saw him remove his red shirt, and, still recognizing him as the driver of the car, continued to pursue him until he was taken into custody. Moreover, the trial court specifically instructed the jury not to give any greater weight to a police officer's testimony merely because he was a police officer. We therefore do not find under the circumstances of this case that the prosecutor's isolated suggestion "probably influenced" the jurors, *see Roque*, 213 Ariz. 193, ¶ 128, 141 P.3d at 399, or that Edwards was consequently denied a fair trial, *see Atwood*, 171 Ariz. at 606, 832 P.2d at 623. Nor are we persuaded that the cumulative effect of the misconduct alleged by Edwards rendered the trial so unfair that it denied him due process. *See Roque*, 213 Ariz. 193, ¶ 165, 141 P.3d at 405. The court therefore did not err in denying Edwards's motion for a mistrial.

Disposition

¶25 For the reasons stated above, we affirm Edwards's convictions and sentences.

_____

GARYE L. VÁSQUEZ, Judge

CONCURRING:

_____

PETER J. ECKERSTROM, Presiding Judge

_____

J. WILLIAM BRAMMER, JR., Judge