FILED BY CLERK
AUG -4 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA Appellee, v. JOHNNY STEVE SANCHEZ, Appellant.	2 CA-CR 2009-0309 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20090756002

Honorable Jane L. Eikleberry, Judge

AFFIRMED

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E C K E R S T R O M, Judge.

¶1 After a jury trial, appellant Johnny Sanchez was found guilty of second-degree burglary, attempted aggravated robbery, and misdemeanor assault, a lesser-

included offense of aggravated assault.[1] The trial court sentenced him to concurrent terms of imprisonment, the longest of which was 3.5 years. On appeal, Sanchez contends the court committed reversible error when it refused three requested jury instructions related to his defense of misidentification. Finding no error, we affirm.

Factual and Procedural Background

¶2 "We view the evidence in the light most favorable to upholding the jury's verdict." *State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). During the evening of February 16, 2009, two men entered the victim's apartment, repeatedly hit and punched him to the ground, and then ran out the back door. He described one man as tall and skinny with a long ponytail, and the other as "stocky and short" with a "crooked eye." Approximately two hours later, police located and detained two men mostly matching the victim's descriptions. An officer drove the victim to where the men were being detained, and the victim identified them as the perpetrators. Before trial, Sanchez filed a motion to suppress the proposed in-court identification and the pretrial identification on the ground the show-up was unduly suggestive. However, he later withdrew the motion.

¶3 Sanchez's central defense at trial was misidentification. He argued the victim had identified Sanchez and his codefendant because the police officers had suggested before the show-up that the two men were the perpetrators. Sanchez also presented evidence that other persons who lived in the area of town where the offense took place had "crooked eyes" and wore long ponytails respectively.

[1]Sanchez's codefendant, Martin Martinez, was charged with the same offenses as Sanchez. The two were tried together, and the jury found Martinez guilty of second-degree burglary, attempted aggravated robbery, and aggravated assault.

¶4 In conformity with that defense, Sanchez requested that the jury be instructed: (1) that the state was required to prove beyond a reasonable doubt that he had committed the charged offenses and the jury was required to find him not guilty if there was a reasonable doubt as to the perpetrator of the offense; (2) that it could not consider the victim's identification of Sanchez unless it first determined that the in-court identification was reliable; (3) that it could "consider whether the out-of-court show-up was unduly suggestive" in determining whether the state had sustained its burden of proving Sanchez was the person who had committed the offenses; and (4) that, if it found the pretrial identification procedure unduly suggestive, it could not find him guilty unless the victim's identification of him was independent of the pretrial identification or other evidence established his guilt beyond a reasonable doubt.

¶5 Sanchez argued he was entitled to the instructions because show-up procedures such as the one used here are inherently suggestive and the jury must decide whether the victim's identifications of him, both before and during trial, were reliable. The trial court refused the requested instructions.

¶6 During closing argument, defense counsel insisted Sanchez had been arrested "because he had a ponytail" and argued that his arrest was the reason the victim had identified Sanchez as one of the two perpetrators. Defense counsel described this case as "the reason why we have that standard of proof beyond a reasonable doubt. Because somebody has to be careful before they convict somebody else." The jury subsequently found Sanchez guilty of burglary in the second degree and attempted aggravated robbery. It found him not guilty of aggravated assault but guilty of the lesser-included offense of assault. This appeal followed.

Identity Instruction Relating to Reasonable Doubt

¶7 Sanchez proposed the following instruction:

> It is necessary and incumbent upon the State to prove beyond a reasonable doubt that the defendant was the person who committed the offenses charged and if you entertain a reasonable doubt as to the question of the identity of the person who committed the offenses, you must find the defendant not guilty.

Sanchez contends the trial court erred in refusing to give the instruction because "the entire case rested on the jury's decision regarding [his] identification." He further argues that, given the nature of the offenses and the fact that the victim had been drinking before the attack, the possibility of misidentification was great.

¶8 "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] trial court is not required to give a proposed instruction when its substance is adequately covered by other instructions." *State v. Mott*, 187 Ariz. 536, 546, 931 P.2d 1046, 1056 (1997). The test is whether the instructions given, when considered as a whole, adequately set forth the applicable law. *Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d at 1009. We review the trial court's decision to reject a requested instruction for an abuse of discretion. *See State v. Johnson*, 205 Ariz. 413, ¶ 10, 72 P.3d 343, 347 (App. 2003).

¶9 Sanchez argues the instruction was necessary to prevent the jury from applying a lower standard of proof and to ensure the jurors applied the reasonable doubt standard when assessing whether Sanchez was one of the two men who had committed the charged offenses. But the trial court instructed the jury that the state had "the burden of proving beyond a reasonable doubt that each defendant committed the crimes with

which he is charged." The jury was also instructed, with respect to the elements of each offense, that each required proof that the "defendant" committed the crime described. These instructions clearly required the jury to find beyond a reasonable doubt that Sanchez had committed the offenses and that the state had established the elements of the offenses, which were the subject of other, specific instructions. *See State v. Navallez*, 131 Ariz. 172, 174-75, 639 P.2d 362, 364-65 (App. 1981). Furthermore, the court informed the jury of its duty to weigh the evidence presented at trial, evaluate the testimony, and determine the credibility of the witnesses.

¶10 As we noted above, "[w]hen examining instructions for error on appeal we will consider the instructions as a whole, and where matters are adequately covered by other instructions it is not error for the trial court to refuse to single out a particular element of the case for special instruction." *State v. Taylor*, 109 Ariz. 267, 274, 508 P.2d 731, 738 (1973). The court is "not required to provide additional instructions that merely reiterate or enlarge the instructions in a defendant's language." *State v. Barr*, 183 Ariz. 434, 442, 904 P.2d 1258, 1266 (App. 1995). Addressing a similar requested instruction in *State v. Corrales*, 95 Ariz. 401, 403, 404, 391 P.2d 563, 565-66 (1964), our supreme court observed:

> The requested instruction on "identification" would not have added anything to the[] general instructions given the jury. The trial court's references to the presumption of innocence, the necessity of proving "all material allegations," and the credit to be given witnesses would certainly have meaning for the jury as applied to the testimony of the "identity" witnesses.

¶11 Relying on *State v. Leyvas*, 221 Ariz. 181, ¶¶ 31-32 & n.7, 211 P.3d 1165, 1174-75 & n.7 (App. 2009), Sanchez contends the requested instruction has been used in

other cases and recognized as important to ensure accuracy in cases where similar show-up identification procedures have been used. In *Leyvas*, however, we only noted that the trial court had given the same instruction requested here without addressing whether it was proper. That was not the issue on appeal. Moreover, no pretrial identification had occurred in that case. *Id*. We thus conclude the court did not abuse its discretion by refusing to give the requested instruction.

Instructions Based on *Dessureault*

¶12 In a separate but related argument, Sanchez contends the trial court committed reversible error when it refused to give two jury instructions utilizing language derived from our supreme court's opinion in *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969). Sanchez requested the following instructions based on *Dessureault*:

> In determining whether the State has proven beyond a reasonable doubt that the defendant is the person who committed the charged offense, you may consider whether the out-of-court show-up was unduly suggestive. If you determine that it was unduly suggestive, then the State must prove beyond a reasonable doubt that the in-court identification of the defendant was independent of that show up. If you determine that the in-court identification is not independent of that show-up, then you must find the defendant not guilty unless there is other evidence in the case to support a finding that the defendant is guilty beyond a reasonable doubt.
>
> The State must prove beyond a reasonable doubt that the in-court identification of the defendant at this trial is reliable. In determining whether this in-court identification is reliable you may consider such things as:
>
> (1) The witness'[s] opportunity to view at the time of the crime;

> (2) The witness'[s] degree of attention at the time of the crime;
>
> (3) The accuracy of any descriptions the witness made prior to the pretrial identification;
>
> (4) The witness'[s] level of certainty at the time of the pretrial identification;
>
> (5) The time between the crime and the pretrial identification;
>
> (6) Any other factor that affects the reliability of the identification.
>
> If you determine that the in-court identification of the defendant at this trial is not reliable, then you must not consider that identification.

¶13 In *Dessureault*, our supreme court explained the procedure courts must use when the reliability of an out-of-court identification procedure is challenged. 104 Ariz. at 384, 453 P.2d at 955. "The requirements of *Dessureault* are sequential; that is, after the court finds that the pretrial identification was unduly suggestive and that by clear and convincing evidence the in-court identification was not tainted, then, if requested, the court must give the above instruction." *State v. Harris*, 23 Ariz. App. 358, 359, 533 P.2d 569, 570 (1975). Similarly, a court is not required to "instruct the jury concerning identification procedures where the judge concludes that the pretrial identification was not unduly suggestive." *Id.* at 360, 533 P.2d at 571.

¶14 Sanchez acknowledges he did not challenge the pretrial identification before trial and never requested a hearing pursuant to *Dessureault.* In fact, Sanchez withdrew a pretrial motion to suppress the pretrial identification and proposed in-court identification. Thus, Sanchez declined to take the steps necessary to trigger a trial court's

duty to provide specific instructions regarding a jury's use of evidence arising from allegedly improper identification procedures.

¶15 Moreover, this court rejected a similar argument in *State v. Dominguez*, 192 Ariz. 461, ¶ 14, 967 P.2d 136, 140 (App. 1998). There, the court emphasized that a *Dessureault* "instruction is required only when the trial court has previously determined that an out-of-court identification procedure was unduly suggestive." *Id.* Therefore, the court found the trial court had not erred by failing to give a *Dessureault* instruction sua sponte when the court had made no determination "that an out-of-court identification procedure was unduly suggestive" because the "defendant failed to request a *Dessureault* hearing." *Id.* Unlike the defendant in *Dominguez*, Sanchez requested the instruction. But here, as in *Dominguez*, no determination was made before trial that the pretrial identification procedure had been unduly suggestive because Sanchez had not challenged the identification procedure and did not request a *Dessureault* hearing.

¶16 Sanchez maintains that show-up identification procedures are unduly suggestive as a matter of law and he was entitled to the instruction regardless of whether the trial court had previously considered the issue in a *Dessureault* hearing. But, even assuming trial courts retain the discretion—absent the orderly procedure set forth in *Dessureault*—to determine whether trial evidence supports an instruction regarding the trustworthiness and use of evidence obtained through suggestive identification procedures, our holding in *Dominguez* makes clear that a court does not abuse its discretion in declining to make such a determination.

¶17 Sanchez also contends the second of the two instructions was necessary because the "ultimate fact finding regarding the reliability of the identification must be

made by the jury" and the trial court's failure to instruct deprived Sanchez of his rights to due process and a fair trial. We disagree.

¶18 Sanchez was permitted to and did argue the identification issue at trial. Defense counsel continually urged the jury to question the reliability of the identification procedure and made clear that it was up to them to determine whether the procedure was in fact reliable. Defense counsel, in lengthy cross-examinations of the state's witnesses, addressed the reliability of the identification procedure used here and the reliability of identification procedures in general. During summation, defense counsel argued at length that the show-up procedure was unduly suggestive. Counsel maintained the police had arrested Sanchez "because he had a ponytail[,]" and the victim had only identified Sanchez later "because the police arrested him." Defense counsel specifically suggested that a photographic line-up with six different subjects should have been used, requiring the victim to pick from a group, "[n]ot tell me whether this guy who is in handcuffs, a police officer beside him with a spotlight on him, tell me whether he is the guy. What kind of identification is that?"

¶19 In short, Sanchez exhaustively addressed whether the identification procedure was reliable. And the jury was properly instructed in its role to evaluate and determine the credibility of the evidence presented. In our view, the requested instruction—which itemized factors a jury might consider in evaluating the reliability of the identification procedure—would not have added anything to the general instructions given the jury when coupled with appropriate argument of counsel. *See Corrales*, 95 Ariz. at 404, 391 P.2d at 565-66. Accordingly, Sanchez was not deprived of due process or his right to a fair trial. We find no error in the trial court's refusal to give the requested

instructions on the suggestiveness of the pretrial identification and on the reliability of the in-court identification.

Disposition

¶20 For the foregoing reasons, we affirm Sanchez's convictions and the sentences imposed.

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

CONCURRING:

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

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