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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THE STATE OF ARIZONA, Appellee, v. JOSE JESUS PALLANES, Appellant.	2 CA-CR 2010-0305 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20094305001

Honorable Edgar B. Acuña, Judge
Honorable Michael O. Miller, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Diane Leigh Hunt
Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Robb P. Holmes
Tucson
Attorneys for Appellant

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

¶1 Following a jury trial, appellant Jesus Pallanes was convicted of attempted robbery and sentenced to a three-year term of imprisonment. On appeal, he contends the trial court erred by denying his motion to preclude the victim's in-court identification of him and by refusing to give an instruction on simple assault. 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). On October 20, 2009, the victim and her friend, W., went to an apartment complex in Tucson where the victim was considering renting a unit. As the two women entered the complex, W. saw a man there whom she recognized as Pallanes. W. knew Pallanes as a customer of her husband, who was a car salesman.

¶3 The women briefly separated in the complex shortly after arriving, and the victim ascended a stairway by herself. There, a man pushed her against a wall and demanded her purse. When the victim resisted, the man punched her, causing her to fall down the stairs, and he kicked her as she tried to get up. When W. responded to the victim's screams, she saw Pallanes at the base of the stairwell on top of the victim and beating her. Pallanes fled without the purse, and police officers were unable to apprehend him that evening.

¶4 The victim did not know of Pallanes before the attack, but when law enforcement officers responded to the women's call for assistance, W. reported that Pallanes was the man who had committed the crime. The next day, the victim received a copy of Pallanes's driver's license from W.'s husband. About two weeks later, a police

detective created a photographic lineup that included a different picture of Pallanes, and the victim identified him in the lineup as her attacker.

¶5 Before trial, Pallanes filed a *Dessureault* motion[1] to preclude any identification by the victim, which the trial court denied after a hearing. The victim then testified at trial about the photographic lineup and identified Pallanes in court as her attacker. The detective likewise testified about the victim's lineup identification of Pallanes. The court denied Pallanes's request for a jury instruction on assault, finding it was not a lesser-included offense of attempted robbery. The jury found Pallanes guilty, as noted above, and this appeal followed his conviction and sentence.

Discussion

Identification

¶6 Pallanes first argues the trial court should have suppressed the victim's in-court identification of him "because it was tainted by an unduly suggestive lineup procedure" and violated his right to due process guaranteed by the United States and Arizona constitutions.[2] Our review of this issue is limited to the evidence presented at the *Dessureault* hearing. *State v. Garcia*, 224 Ariz. 1, ¶ 6, 226 P.3d 370, 376-77 (2010). We defer to any factual findings made by the trial court, provided they are not clearly erroneous, but "[t]he 'ultimate question of the constitutionality of a pretrial identification

[1]*See State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969).

[2]Although Pallanes sought to preclude the victim's pretrial and in-court identifications of him in his motion below, on appeal he challenges only the trial court's admission of the victim's in-court identification.

is . . . a mixed question of law and fact,' which we review de novo." *Id.*, *quoting State v. Moore*, 222 Ariz. 1, ¶ 17, 213 P.3d 150, 156 (2009).

¶7 "The Due Process Clause of the Fourteenth Amendment requires us to ensure that any pretrial identification procedures are conducted in a manner that is fundamentally fair and secures the suspect's right to a fair trial." *State v. Lehr*, 201 Ariz. 509, ¶ 46, 38 P.3d 1172, 1183 (2002). A due process violation is established if "(1) . . . the circumstances surrounding the pretrial identification 'created a substantial likelihood of irreparable misidentification,' and (2) . . . the state bore sufficient responsibility for the suggestive pretrial identification to trigger due process protection." *State v. Williams*, 166 Ariz. 132, 137, 800 P.2d 1240, 1245 (1987), *quoting Simmons v. United States*, 390 U.S. 377, 384 (1968). "The 'due process clause does not preclude every identification that is arguably unreliable; it precludes identification testimony procured *by the state* through unduly suggestive pretrial procedures.'" *Garcia*, 224 Ariz. 1, ¶ 9, 226 P.3d at 377, *quoting Williams*, 166 Ariz. at 137, 800 P.2d at 1245; *accord State v. Prion*, 203 Ariz. 157, ¶ 15, 52 P.3d 189, 192 (2002); *State v. Nordstrom*, 200 Ariz. 229, ¶ 24, 35 P.3d 717, 729 (2001).

¶8 Here, the state was not responsible for W.'s pretrial suggestions to the victim that Pallanes was her attacker, and the state's mere knowledge that the victim had received a copy of Pallanes's driver's license from W.'s husband did not make the state responsible for this fact or otherwise render the photographic lineup unduly suggestive. *See Williams*, 166 Ariz. at 137-38, 800 P.2d at 1245-46. In the absence of improper state action, a court need not fully assess the reliability of a witness's identification. *Garcia*,

224 Ariz. 1, ¶ 12, 226 P.3d at 377. "Only identification evidence allegedly tainted by state action must meet the reliability standard articulated in [*Neil v.*] *Biggers*[, 409 U.S. 188 (1972)]." *Nordstrom*, 200 Ariz. 229, ¶ 25, 25 P.3d at 729. Thus, the fact that the victim's ability to provide "an objective evaluation" of the photo lineup may have been compromised by her previous exposure to a photograph of Pallanes by a civilian, did not render her identification inadmissible.

¶9 The victim's identification here was based on adequate foundation and was presented to the jury in a way that allowed the defendant to point out its weaknesses. *See Nordstrom*, 200 Ariz. 229, ¶ 26, 25 P.3d at 729-30. The identification therefore cleared the minimum threshold of reliability required to ensure due process. *See Prion*, 203 Ariz. 157, ¶¶ 16-17, 52 P.3d at 192-93. "Any complaints concerning the identification go to its weight and credibility, not its admissibility." *Id.* ¶ 18.

¶10 Even were we to assume that the pretrial identification here was somehow unduly suggestive and that the lineup "reinforc[ed the victim's] preconceived notion about the assailant's identity," we would nevertheless affirm the trial court's ruling, based on its determination that the victim could make an in-court identification of Pallanes that would be independent of her pretrial identification. *See State v. Dessureault*, 104 Ariz. 380, 385, 453 P.2d 951, 956 (1969). When determining the likelihood of misidentification pursuant to *Biggers*, a court examines the totality of the circumstances and considers factors such as

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of

> certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

409 U.S. at 199-200.

¶11 Here, the victim testified that she had observed her attacker's face closely for a significant length of time, especially when he was on top of her punching her, and that her memory of him was distinct. The record thus supports the trial court's finding that the victim's opportunity to observe her assailant, the degree of her attention, and the time within which she made her identification established the identification was reliable. The court did not err in denying Pallanes's motion or in admitting the challenged evidence.

Jury Instructions

¶12 Pallanes next argues he "was entitled to a lesser-included instruction for simple assault as a lesser [offense] to attempted robbery." Rule 23.3, Ariz. R. Crim. P., requires a trial court to submit to the jury all offenses and attempted offenses "necessarily included" in the crime charged. This means a jury must be instructed on a lesser offense "if the crime is a lesser[-]included offense to the one charged and if the evidence supports the giving of the instruction." *State v. Reffit*, 145 Ariz. 452, 463, 702 P.2d 681, 692 (1985); *accord State v. Wall*, 212 Ariz. 1, ¶¶ 13-14, 126 P.3d 148, 150 (2006). "To constitute a lesser-included offense, the offense must be composed solely of some but not all of the elements of the greater crime so that it is impossible to have committed the crime charged without having committed the lesser one." *State v. Celaya*, 135 Ariz. 248, 251, 660 P.2d 849, 852 (1983). When analyzing lesser-included offenses, courts examine

the statutory elements of the crimes, not the facts underlying the particular case. *State v. Laffoon*, 125 Ariz. 484, 487, 610 P.2d 1045, 1048 (1980). Accordingly, "[w]hether an offense is a lesser-included offense of another crime involves a matter of statutory interpretation, which we review de novo." *In re James P.*, 214 Ariz. 420, ¶ 12, 153 P.3d 1049, 1052 (App. 2007).

¶13 Pallanes was charged with attempted robbery pursuant to A.R.S. §§ 13-1001 and 13-1902.

> A person commits robbery if in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property.

§ 13-1902(A). A person commits misdemeanor assault by

> 1. Intentionally, knowingly or recklessly causing any physical injury to another person; or
>
> 2. Intentionally placing another person in reasonable apprehension of imminent physical injury; or
>
> 3. Knowingly touching another person with the intent to injure, insult or provoke such person.

A.R.S. § 13-1203(A). An attempt occurs when a person "intend[s] to engage in illegal conduct and . . . take[s] a step to further that conduct." *Mejak v. Granville*, 212 Ariz. 555, ¶ 20, 136 P.3d 874, 878 (2006).[3]

[3]Section 13-1001 specifically defines attempt as follows:

¶14 We once held that our assault statute, § 13-1203(A), "does not create three separate offenses" but "merely enumerates three ways the single offense of assault can be committed." *State v. Rineer*, 131 Ariz. 147, 149, 639 P.2d 337, 339 (App. 1981). Our jurisprudence has evolved since then and now makes clear that "the three subsections of § 13-1203(A) are not simply variants of a single, unified offense; they are different crimes" with different elements. *In re Jeremiah T.*, 212 Ariz. 30, ¶ 12, 126 P.3d 177, 181 (App. 2006); *accord State v. Freeney*, 223 Ariz. 110, ¶¶ 15-17, 219 P.3d 1039, 1042 (2009); *State v. Sanders*, 205 Ariz. 208, ¶¶ 33, 39, 44, 68 P.3d 434, 442-43, 444 (App. 2003), *overruled in part on other grounds by Freeney*, 223 Ariz. 110, ¶ 26, 219 P.3d at 1043.

> A. A person commits attempt if, acting with the kind of culpability otherwise required for commission of an offense, such person:
>
> 1. Intentionally engages in conduct which would constitute an offense if the attendant circumstances were as such person believes them to be; or
>
> 2. Intentionally does or omits to do anything which, under the circumstances as such person believes them to be, is any step in a course of conduct planned to culminate in commission of an offense; or
>
> 3. Engages in conduct intended to aid another to commit an offense, although the offense is not committed or attempted by the other person, provided his conduct would establish his complicity under chapter 3 if the offense were committed or attempted by the other person.
>
> B. It is no defense that it was impossible for the person to aid the other party's commission of the offense, provided such person could have done so had the circumstances been as he believed them to be.

¶15 Pallanes proposed a pair of instructions that stated "[t]he crime of attempted robbery includes the lesser offense of assault" and defined "[t]he crime of assault" as being committed under any of the circumstances specified in § 13-1203(A)(1) through (3). Insofar as his proffered instructions grouped the separate assault offenses together, thereby suggesting they formed a single crime with disjunctive elements, the proposed instructions were legally incorrect, and the trial court could have properly rejected them on this ground. *See State v. Cox*, 217 Ariz. 353, ¶ 17, 174 P.3d 265, 268 (2007) ("Courts do not err by refusing to give instructions that misstate the law."); *accord State v. Paredes-Solano*, 223 Ariz. 284, ¶ 24, 222 P.3d 900, 908 (App. 2009). Additionally, we note the proposed instructions, as they were worded, appeared to suggest that an attempted robbery entailed a completed assault, which is a false proposition of law. The court therefore acted within its discretion to the extent it rejected this proposed instruction in order to avoid confusing the jury. *See State v. Musgrove*, 223 Ariz. 164, ¶¶ 5-6, 221 P.3d 43, 45-46 (App. 2009).

¶16 Moreover, the trial court was not independently required by Rule 23.3, Ariz. R. Crim. P., to instruct the jury on any form of assault. Assaults under § 13-1203(A)(1) and (3) are not lesser-included offenses of robbery, because robbery, unlike these forms of assault, can be committed without any physical contact or injury. *See* § 13-1902(A); *State v. Cutright*, 196 Ariz. 567, ¶ 21, 2 P.3d 657, 662 (App. 1999) ("The elements test requires that commission of the greater offense always result in commission of the lesser offense."), *disapproved on other grounds by State v. Miranda*, 200 Ariz. 67, ¶ 5, 22 P.3d 506, 508 (2001). Similarly, robbery does not necessarily include "reasonable

apprehension" assault under § 13-1203(A)(2) because a robbery can be accomplished, for example, by waylaying a victim and forcibly taking his or her property without creating any fear of injury, as with a blow to the back of the head rendering the victim unconscious. Thus, because it is possible to commit attempted robbery without also committing assault,[4] the latter is not a lesser-included offense of the former, and the trial court did not err in refusing the requested instruction. *Cf. State v. Branch*, 108 Ariz. 351, 355, 498 P.2d 218, 222 (1972) (concluding battery not lesser offense of robbery because, "[t]hough some robberies may include battery, clearly all do not").

¶17 Pallanes nevertheless urges that the trial court was required to instruct the jury on the offense of assault because it is a lesser-included offense of attempted robbery, relying primarily on *State v. Sowards*, 147 Ariz. 185, 709 P.2d 542 (App. 1984), and because it was supported by the evidence. Yet *Sowards* compared the offenses of armed robbery and aggravated assault and did so in the context of a double-punishment analysis. *Id.* at 190, 709 P.2d at 547. As this court clarified in *State v. Price*, 218 Ariz. 311, ¶¶ 7-9, 183 P.3d 1279, 1281-82 (App. 2008), *Sowards* does not stand for the proposition that aggravated assault is a lesser-included offense of armed robbery. And nothing in *Sowards* compels the conclusion that assault is a lesser-included offense of attempted robbery.

[4]Because Pallanes has not argued in his briefs that attempted assault is a lesser-included offense of attempted robbery, we do not address that issue.

Disposition

¶18 For the foregoing reasons, Pallanes's conviction and sentence are affirmed.

/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