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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 07/19/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 11-0074
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication - Rule
DARRYL HAMPTON,) 111, Rules of the Arizona
) Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-125256-001 DT

The Honorable Sherry K. Stephens, Judge

CONVICTIONS AFFIRMED; SENTENCES AFFIRMED AS CORRECTED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Stephen R. Collins, Deputy Public Defender
Attorneys for Appellant

N O R R I S, Judge

¶1 Darryl Hampton timely appeals his convictions and sentences for one count of burglary in the first degree, five counts of armed robbery, and eight counts of kidnapping, all

class 2 dangerous felonies.¹ After searching the record on appeal and finding no arguable question of law that was not frivolous, Hampton's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), asking this court to search the record for fundamental error. This court granted counsel's motion to allow Hampton to file a supplemental brief *in propria persona*, but Hampton did not do so. Nevertheless, through counsel, Hampton argues the State did not present sufficient evidence to support his convictions, the State relied on "tainted" identifications of him by various witnesses, and his trial counsel was ineffective. We reject these arguments, and after reviewing the entire record, find no fundamental error. Therefore, we affirm Hampton's convictions and sentences as corrected.

FACTS AND PROCEDURAL BACKGROUND²

¶12 At 12:30 in the morning on April 10, 2010, Hampton and two accomplices walked uninvited into the apartment of S.R., who had seven friends visiting him at the time, and closed and

¹Although the State charged Hampton with other crimes, the superior court acquitted him of three charges and the jury found him not guilty of another.

²We view the facts in the light most favorable to sustaining the jury's verdict and resolve all reasonable inferences against Hampton. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

locked the door behind them. S.R. and several of the other victims testified they knew and recognized Hampton. The victims testified at least one of the intruders had a gun, but their testimony was inconsistent as to whether Hampton had a gun. The victims testified Hampton and his accomplices threatened them, ordered them not to move, and robbed them, taking their phones, money, computers, and video games. After Hampton and his accomplices left, the victims called the police and identified Hampton as one of the intruders. That night at the crime scene, police showed some of the witnesses a photograph of Hampton on a police cell phone and one officer testified "[e]verybody that [was shown] the photograph . . . said that's [Hampton]" ("cell phone identification"). Although the officer testified he was unsure whether all of the victims had seen the photograph on the cell phone, at least three of the victims testified they remembered the cell phone identification. S.R. also testified he later exchanged text messages and phone calls with Hampton about the intrusion. Approximately two weeks later, detectives showed some of the victims a photo lineup and the victims again identified Hampton as one of the intruders.

¶13 At trial, seven of Hampton's victims testified and identified him in the courtroom. As described in more detail below, after the first day of trial, Hampton's counsel moved "for a mistrial based on the fact that two witnesses started

talking about" the cell phone identification. The superior court denied his motion.

¶14 After the jury returned its guilty verdicts, it also found the State had proven two aggravating circumstances: the presence of an accomplice, and the motive of pecuniary gain. At sentencing, the superior court found the State had presented clear and convincing evidence Hampton had three prior convictions, two of which were historical priors. The court sentenced Hampton as a category three repetitive offender to a "[s]lightly [a]lgravated" term of 22 years in prison, concurrent on all counts, and gave Hampton 251 days of pre-sentence incarceration credit.

DISCUSSION

I. Sufficiency of the Evidence

¶15 We review the sufficiency of the evidence to determine whether the State presented substantial evidence, that is, evidence "reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997) (citation omitted). Our review reflects the State presented substantial evidence to support Hampton's convictions, including the victims' testimony, as discussed above. We therefore reject his argument the State did not present sufficient evidence to support his convictions.

II. The Cell Phone Identification

¶16 On appeal, Hampton raises the “[u]nduly suggestive use of a photograph by the police prior to [his] arrest.” We interpret this argument to incorporate the arguments his counsel made at trial: first, admitting testimony regarding the cell phone identification was unduly prejudicial and, second, the cell phone identification “tainted” the formal photo lineup and the victims’ in-court identifications. See *State v. Dessureault*, 104 Ariz. 380, 382-84, 453 P.2d 951, 953-55 (1969).

¶17 First, we disagree the admission of testimony regarding the cell phone identification prejudiced Hampton because it “[told] the jury that the police had some reason to have his photo.” At trial, the court read to the jury the parties’ stipulation Hampton “was a prohibited possessor, based on the fact he had a prior felony conviction.” As the superior court noted, based on this stipulation, the jury would have known Hampton had been convicted of a felony and, thus, the suggestion “the police had some reason to have his photo” was not prejudicial.

¶18 Second, we disagree the cell phone identification tainted the later photo lineup and in-court identifications. Assuming without deciding the pretrial identifications were “unduly suggestive,” the question is “whether the identification[s were] reliable in spite of any suggestiveness.”

State v. Lehr, 201 Ariz. 509, 520, ¶ 46, 38 P.3d 1172, 1183

(2002) (quotations and citations omitted). Further,

due process is not violated so long as there is no substantial likelihood that [the defendant] would be misidentified. We use the so-called *Biggers* test to determine reliability.

[T]he factors to be considered [in evaluating the likelihood of misidentification] include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

Id. at 521, ¶ 48, 38 P.3d at 1184 (quotations and citations omitted). Here, the police conducted a formal photo lineup approximately two weeks after the crimes, and three of the victims who testified they saw the cell phone identification also testified they knew Hampton before the crimes and recognized him when he entered S.R.'s apartment. Applying the *Biggers* factors to these facts, we determine the photo lineup was reliable and did not create a substantial likelihood of misidentification, regardless of whether the cell phone identification was "unduly suggestive." Moreover, "if the pretrial identification comports with due process, subsequent identification at trial does not violate a defendant's rights

merely by following on the heels of the earlier confrontation." *Id.* at ¶ 52, 38 P.3d at 1184 (citations omitted). Thus, considering these factors, the court did not abuse its discretion in finding the cell phone identification did not "taint" the later photo lineup or in-court identifications. *Id.* at 520, ¶ 46, 38 P.3d at 1183 (citation omitted) (appellate court reviews "fairness and reliability of a challenged identification for clear abuse of discretion").³

III. Ineffective Assistance of Counsel

¶9 Hampton further asserts his trial counsel was ineffective. We do not review claims of ineffective assistance of counsel on direct appeal; any such claim must be brought pursuant to Arizona Rule of Criminal Procedure 32. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002).

IV. Anders Review

A. Jury Instructions on Hampton's Presumption of Innocence

¶10 Our review reveals the superior court, during its final instructions, did not instruct the jury on Hampton's presumption of innocence. See generally *Taylor v. Kentucky*, 436 U.S. 478, 479, 98 S. Ct. 1930, 1931, 56 L. Ed. 2d 468 (1978) (quotation and citation omitted) ("[T]he presumption of

³We also note the superior court instructed the jury the State was required to "prove beyond a reasonable doubt that the in court identification of the defendant at this trial [was] reliable," and further instructed the jury to consider the *Biggers* factors quoted above.

innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."). Because Hampton did not object, we evaluate this error "in light of the totality of the circumstances -- including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors," and determine the error was not fundamental. *State v. White*, 160 Ariz. 24, 31, 770 P.2d 328, 335 (1989) (citation omitted).

¶11 First, during voir dire of the potential jury pool, the court told the jury pool the "defendant is presumed by law to be innocent. This means the defendant is not required to prove innocence or produce any evidence," and no juror indicated he or she "disagree[d] with those princip[les]." Later in voir dire, Hampton's counsel emphasized to the jury pool:

if the Judge asked you to render a decision right now, your first choice would be, well, we haven't heard any evidence, yet I'm going to find him not guilty. The . . . second choice would be, well, he's charged with these crimes, where there's smoke there's fire, I'm going to find him guilty. And the third choice is, well, we haven't heard anything yet. I'd like to wait and hear more. So I can't make a decision. . . .

The correct answer is number one.

¶12 Second, once the jury members were selected, the court preliminarily instructed them verbally and in writing that

Hampton was presumed innocent, the charges were not evidence against him, and the State was required to prove every element of each charge beyond a reasonable doubt. Then, during opening statements, Hampton's counsel directed the jurors to review their written copies of the preliminary instructions, emphasizing Hampton's presumption of innocence and the State's burden of proof.

¶13 Third, although the court did not re-instruct the jury on Hampton's presumption of innocence in its final instructions, it nevertheless re-instructed the jury the State had the burden of proving each element beyond a reasonable doubt, Hampton was not required to testify or present evidence, and the charges were not evidence against him. Finally, the evidence against Hampton was overwhelming. Viewing these facts as a whole, we see no fundamental, prejudicial error.

B. Other Matters

¶14 We have reviewed the entire record for reversible error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. Hampton received a fair trial. He was represented by counsel at all stages of the proceedings and was present at all critical stages.

¶15 The jury was properly comprised of 12 members and the court properly instructed the jury on the elements of the charges, the State's burden of proof, and the necessity of a

unanimous verdict. The superior court received and considered a presentence report, Hampton spoke at sentencing, and his sentences were within the range of acceptable sentences for his offenses.

¶16 We note, however, that although the jury found Hampton's offenses were "dangerous," the superior court's sentencing minute entry described them as non-dangerous. We hereby correct the sentencing minute entry to state Hampton's offenses were dangerous but he was sentenced as a repetitive offender. See *State v. Trujillo*, 227 Ariz. 314, 321-22, ¶¶ 30-37, 257 P.3d 1194, 1201-02 (App. 2011) (citations omitted) ("[T]he law allows a trial court to select between the dangerous and repetitive sentencing options.").

CONCLUSION

¶17 We decline to order briefing and affirm Hampton's convictions and sentences as corrected.

¶18 After the filing of this decision, defense counsel's obligations pertaining to Hampton's representation in this appeal have ended. Defense counsel need do no more than inform Hampton of the outcome of this appeal and his future options, unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984).

