DIVISION ONE
FILED: 7/9/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 11-0665
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
JESUS MANUEL BRISENO,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-158515-001

The Honorable Michael D. Jones, Judge (Retired)

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Joseph T. Maziarz, Chief Counsel, Criminal Appeals Section
And Alice Jones, Assistant Attorney General
Attorneys for Appellee

The Nolan Law Firm, P.L.L.C. — Mesa
By Cari McConeghy Nolan
Attorneys for Appellant

W I N T H R O P, Chief Judge

¶1 Jesus Manuel Briseno appeals his convictions for two counts of manslaughter, five counts of aggravated assault, and one count of endangerment arising from an automobile collision

in which two persons died and six others were injured. For the reasons that follow, we affirm.

BACKGROUND[1]

¶2 The evidence at trial showed Briseno was driving a Cadillac Escalade north on Grand Avenue near 35th Avenue when he turned left against a red arrow, colliding with a car that was traveling through the intersection on a green light. Two of the occupants in the other car died, and four others were injured. The two passengers in Briseno's car also sustained injuries.

¶3 Testing revealed Briseno had a blood alcohol concentration of .138 approximately three hours after the collision. Although Briseno admitted to several police officers that he had been driving the Escalade, defense counsel argued at trial that the State had failed to prove Briseno was the driver.

¶4 The jury convicted Briseno of the charged offenses, and the trial court sentenced him to a total of 30.75 years in prison. Briseno filed a timely notice of appeal. We have jurisdiction pursuant to Arizona Revised Statutes sections 12-120.21(A)(1) (West 2013),[2] 13-4031, and 13-4033(A).

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[1] We view the evidence in the light most favorable to supporting the convictions, resolving all conflicts against Briseno. *See State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983).

[2] We cite the current version of the applicable statutes because no revisions material to this decision have occurred since the offenses.

ANALYSIS

I. Jury Panel Taint

¶5 Briseno argues the trial court abused its discretion when it denied his motions to strike the jury panel for taint during voir dire. He argues that two jurors tainted the jury pool by describing crimes committed against them or a relative for which the perpetrator was not held responsible, and then suggesting this case was not the same.

¶6 One prospective juror said her brother died sometime after an automobile collision in which the other driver was drunk, and in her opinion the other driver, who had wealthy relatives, "got away with murder because she wasn't held responsible." The prospective juror said that experience would not affect her ability to be fair in this case, however, because "I am going to assume this case is going to be different. He will be held responsible for what he did or did not do as far as the court system." Another prospective juror said she was a victim of domestic violence, but police officers who were friends and relatives of the perpetrator protected him from prosecution. She said she believed she could be impartial, however, explaining that "there [are] good and bad people in every profession," and "I don't think it is the same as this."

¶7 The trial court denied Briseno's motion to strike the

panel for cause based on taint after each of these remarks.[3] The court subsequently advised the voir dire panel, however, that the court needed jurors who could be fair notwithstanding prior experiences, because "we can't afford to let Mr. Briseno be penalized because of some previous case where you think someone might have gotten off or gotten off easy." Later, the prosecutor asked the panel members if any of them who knew of someone who was not held accountable for a crime would use that experience in finding Briseno guilty or not guilty. No one responded.

¶8 We review a ruling on a motion to strike the jury panel for an abuse of discretion. *State v. Glassel*, 211 Ariz. 33, 45, ¶ 36, 116 P.3d 1193, 1205 (2005). The trial court has considerable discretion in evaluating claims that any remarks tainted the panel because that court is in the best position to assess the remarks' impact on the jury. *State v. Doerr*, 193 Ariz. 56, 62, ¶ 23, 969 P.2d 1168, 1174 (1998).

¶9 We find no abuse of discretion. Although an accused person has a constitutional right to be tried by a fair and impartial jury, he is not entitled to be tried by any one particular jury. *State v. Greenawalt*, 128 Ariz. 150, 167, 624 P.2d 828, 845 (1981). As the party challenging the panel,

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[3] The court later struck for cause both of the prospective jurors who made the comments.

Briseno has the burden of showing that jurors could not be fair and impartial because they were tainted by the remarks of the other two jurors. *See State v. Davis*, 137 Ariz. 551, 558, 672 P.2d 480, 487 (App. 1983). We are not persuaded the comments at issue were so inflammatory or prejudicial as to have tainted the other members of the panel. Rather, the comments simply related the experiences each of the two prospective jurors had as victims of crimes, from their perspective. Their experiences were readily distinguishable from this case: one believed the perpetrator was protected from prosecution by wealthy relatives, and the other believed relatives and friends of the perpetrator who were policemen had protected him from prosecution. Each noted, however, that she believed this case was different, and one of them noted she assumed "the court system" would work to ensure that "what he did or did not do" would determine any responsibility borne by Briseno. Neither the details of these incidents nor the comments that this case would be different were so excessive as to prejudice or inflame the other jurors. Moreover, the court's subsequent admonition - that Briseno should not be penalized for anything the prospective jurors had personally experienced - minimized any conceivable prejudice, as evidenced by the failure of any prospective juror to acknowledge any such bias when the prosecutor asked the panel directly. Finally, there is nothing in the record to affirmatively show

that a fair and impartial jury was not secured, as is necessary for reversal. *See Greenawalt*, 128 Ariz. at 167, 624 P.2d at 845. We therefore decline to reverse on this basis.

II. Pretrial Identification

¶10 Briseno next argues the trial court abused its discretion by denying his motion to preclude a pretrial identification of him as the driver of the Escalade because the identification was made from "an unduly suggestive and unreliable photographic line-up." Briseno argues that the fact his photo was lighter in tone or brightness than the rest of the photos rendered the photographic lineup unnecessarily suggestive, and the suggestive lineup was not overcome by the reliability of the identification. Following an evidentiary hearing, the court found the variance in lighting did not make the photographic lineup impermissibly suggestive, and it admitted evidence of the pretrial identification at trial.

¶11 "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, 520, ¶ 46, 38 P.3d 1172, 1183 (2002) (citation omitted), *supplemented by* 205 Ariz. 107, 67 P.3d 703 (2003). A defendant who challenges an unduly suggestive pretrial identification procedure is entitled to a hearing, at

which the State is required to prove by clear and convincing evidence that the pretrial identification procedure was not unduly suggestive. *See State v. Dessureault*, 104 Ariz. 380, 384, 453 P.2d 951, 955 (1969). If the court determines the procedure was unduly suggestive, only then can it consider whether, under the totality of the circumstances, the identification was nevertheless reliable, i.e., it would not have led to a substantial likelihood of misidentification. *See Lehr*, 201 Ariz. at 520, ¶ 46, 38 P.3d at 1183.

¶12 In reviewing this claim of error, "we consider only the evidence presented at the suppression hearing and defer to the trial court's factual findings unless clearly erroneous." *State v. Garcia*, 224 Ariz. 1, 7, ¶ 6, 226 P.3d 370, 376 (2010) (citation omitted). We review *de novo*, however, the ultimate question of the constitutionality of a pretrial identification, which is a mixed question of law and fact. *Id*. at 7-8, ¶ 6, 226 P.3d at 376-77.

¶13 The trial court did not err in finding this lineup was not impermissibly suggestive. The detective who conducted the lineup testified at the *Dessereault* hearing that he had tried to make the photographs as similar as possible, but he had "never seen two pictures that are lighted [the same] or have the same

contrast."[4] Although the headshot of Briseno was slightly lighter than those of the others in the lineup, such differences in lighting do not necessarily render a lineup unnecessarily suggestive. *See State v. Phillips*, 202 Ariz. 427, 433-34, ¶ 20, 46 P.3d 1048, 1054-55 (2002) ("[A] photographic lineup may contain differences in lighting between the defendant's photograph and other photographs." (citation omitted)), *supplemented by* 205 Ariz. 145, 67 P.3d 1228 (2003); *see also State v. Gonzales*, 181 Ariz. 502, 509, 892 P.2d 838, 845 (1995) (finding that an "almost imperceptible" difference in lighting did not render a lineup impermissibly suggestive).

¶14 The law recognizes the composition of photographic lineups need not be perfect, and requires only "that they depict individuals who basically resemble one another such that the suspect's photograph does not stand out." *Phillips*, 202 Ariz. at 433, ¶ 20, 46 P.3d at 1054 (citation omitted). In this case, the persons depicted in the photographic lineup had similar facial characteristics, ethnicity, facial hair, and weight. All of the photographs appeared to have been taken from the same distance and angle, and each of the persons depicted had a similarly serious expression. Although Briseno's photo was lighter than the rest, it was only marginally so, and none of

[4] Both the detective and the witness also testified at the *Dessereault* hearing that the detective did not in any manner suggest or indicate a photo for the witness to select.

the photographs had identical shading. On this record, we cannot say the court erred in finding that the fact Briseno's photograph was lighter than the others did not make the lineup impermissibly suggestive. Accordingly, the trial court did not err in ruling that Briseno's pretrial identification was admissible at trial.[5]

III. Objections to Testimony on DNA Transfer

¶15 Briseno next argues the trial court abused its discretion in failing to preclude testimony from a DNA analyst that the mixed DNA profile from a possible bloodstain on the airbag from the Escalade's driver's side, which did not match Briseno's DNA profile, could have come from the person who installed the airbag, a person who replaced the airbag, or anyone else who had previously driven the car when the airbag was deployed. The trial court overruled defense counsel's motion to strike the testimony because it assumed facts not in evidence, lacked foundation, and was misleading. Briseno argues on appeal that the testimony lacked foundation, and the questions assumed facts not in evidence and therefore violated his rights under the Confrontation Clause.

¶16 We review the trial court's rulings on the

[5] Moreover, even had the court erred in admitting Briseno's pretrial identification, which it did not, we would find any error harmless given the cumulative nature of the evidence. *See State v. Lopez*, 217 Ariz. 433, 436 n.2, ¶ 12, 175 P.3d 682, 685 n.2 (App. 2008).

admissibility of evidence for an abuse of discretion. *State v. Rutledge*, 205 Ariz. 7, 10, ¶ 15, 66 P.3d 50, 53, *supplemented by* 206 Ariz. 172, 76 P.3d 443 (2003), *superseded by statute as recognized in State v. Nordstrom*, 230 Ariz. 110, 118, ¶ 35, 280 P.3d 1244, 1252 (2012). We review *de novo*, however, evidentiary rulings that implicate the Confrontation Clause. *State v. Ellison*, 213 Ariz. 116, 129, ¶ 42, 140 P.3d 899, 912 (2006).

¶17 We conclude that the admitted testimony did not violate the Confrontation Clause. The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The right to present a complete defense is secured in part by the right to cross-examination provided by the Confrontation Clause. *See Davis v. Alaska*, 415 U.S. 308, 315-16 (1974). In this case, the State's witness was available at trial for cross-examination, and Briseno was not precluded from asking her any questions to clarify her lack of knowledge of the manufacture, installation, or replacement of airbags in general, or in this instance. Accordingly, Briseno's confrontation rights were not violated.

¶18 The gravamen of Briseno's foundation argument appears to be that the responses to the hypothetical questions lacked foundation because the DNA analyst would have had no knowledge of the ordinary process of installing and replacing airbags, and

whether a human being would have touched the airbag during such procedures, and no such evidence was admitted at trial.[6] We agree. Although the DNA analyst may have had the expertise to testify on the ease of transfer of DNA, no evidence was offered to show she had any knowledge of the human contact that might be involved in installing and replacing airbags, or that the airbag in this case had ever been replaced.

¶19 We conclude, however, that any error in allowing this testimony was harmless. To demonstrate the error was harmless, the State must "prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence." *State v. Henderson*, 210 Ariz. 561, 567, ¶ 18, 115 P.3d 601, 607 (2005) (citation omitted). In this case, we are firmly convinced this brief line of questioning had no effect on the verdict for the same reason it was improper. Briseno's expert testified he was familiar with the manufacture and installation of airbags, and because robots manufactured and installed the airbags in a clean room environment "without any human involvement whatsoever," it was not possible for DNA transfer to occur during installation or replacement of the airbags. Because the State offered no evidence to suggest a person would have had contact with the

[6] Briseno's reliance on Arizona Rule of Evidence 901 is misplaced: Rule 901 has no applicability to the expert's opinion on the transfer of DNA, because the rule applies only to "an item of evidence," and not to opinion testimony of this nature. *See* Ariz. R. Evid. 901(a).

airbag in installing or replacing it, and its witness offered no expertise in the installation or replacement of airbags, we are convinced the jury would not have considered the objected-to testimony in reaching its verdicts. Moreover, the State did not rely on the objected-to testimony in its arguments to the jury.[7] Consequently, we find no reversible error on this ground.

IV. Denial of Mistrial for Failure to Disclose

¶20 Briseno next argues the trial court abused its discretion in declining to declare a mistrial as a sanction for the State's failure to disclose that its accident reconstructionist would offer expert opinion testimony on "occupant kinematics."[8] In response to Briseno's motion for mistrial, the prosecutor acknowledged she had not specifically disclosed that the reconstructionist would offer an opinion on occupant kinematics, but she argued this expert's opinion was relevant to rebut Briseno's theory that the fact his blood was not on the driver's side airbag showed he was not the driver.

¶21 The trial court denied the motion for mistrial,

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[7] Instead, the State argued the theory that, based on testimony at trial, any blood on the airbag may have come from a passenger who bled profusely after the collision and likely had to exit out of the driver's side door of the Escalade.

[8] In general, occupant kinematics refers to the predictable movement of bodies and objects in a moving vehicle as a result of directional forces. *See, e.g., State v. Baltzell*, 175 Ariz. 437, 441, 857 P.2d 1291, 1295 (App. 1992); *Commonwealth v. Arroyo*, 723 A.2d 162, 165 n.4 (Pa. 1999).

finding it was untimely made (after the testimony on this issue had been completed), and therefore waived. None the less, the court found a discovery violation, and determined the appropriate sanction was to postpone cross-examination to allow Briseno time to interview the State's reconstructionist and consult with his own expert.[9] Defense counsel questioned his own accident reconstructionist extensively on occupant kinematics, and ultimately also thoroughly cross-examined the State's reconstructionist on occupant kinematics when he was recalled for the State's rebuttal case.

¶22 We review a trial court's imposition of sanctions for discovery violations for an abuse of discretion. *See State v. Lee*, 185 Ariz. 549, 555-56, 917 P.2d 692, 698-99 (1996). "In order for a reviewing court to find an abuse of discretion, [an] appellant must demonstrate that he suffered prejudice by nondisclosure." *State v. Martinez-Villareal*, 145 Ariz. 441, 448, 702 P.2d 670, 677 (1985) (citation omitted).

¶23 A court may impose any remedy or sanction for nondisclosure that it finds just under the circumstances, and in determining the appropriate sanction, the court must "take into account the significance of the information not timely disclosed, the impact of the sanction on the party and the

[9] The court also issued an order allowing the defense expert to examine the interior of the Escalade.

victim and the stage of the proceedings at which the disclosure is ultimately made." Ariz. R. Crim. P. 15.7(a). "In selecting the appropriate sanction, the trial court 'should seek to apply sanctions that affect the evidence at trial and the merits of the case as little as possible since the Rules of Criminal Procedure are designed to implement, not to impede, the fair and speedy determination of cases.'" *State v. Roque*, 213 Ariz. 193, 210, ¶ 50, 141 P.3d 368, 385 (2006) (citation omitted).

¶24 A declaration of mistrial is "the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Dann*, 205 Ariz. 557, 570, ¶ 43, 74 P.3d 231, 244 (citation omitted), *supplemented by* 206 Ariz. 371, 79 P.3d 58 (2003). We review a trial court's denial of a motion for mistrial for an abuse of discretion. *State v. Jones*, 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000). The trial judge retains broad discretion "because he is in the best position to determine whether the evidence will actually affect the outcome of the trial." *Id.* (citation omitted).

¶25 We find no abuse of discretion. The trial court's remedy for the disclosure violation was appropriate because it served the purpose of the rule requiring disclosure of expert reports, without impeding the fair and speedy determination of the charges against Briseno. The rule requiring disclosure of

an expert's conclusions is "designed to give the defendant an opportunity to check the validity of the conclusions of an expert witness and to call such expert as his own witness or to have the evidence examined by his own independent expert witness." *Roque*, 213 Ariz. at 207, ¶ 32, 141 P.3d at 382 (citation omitted). The court's remedy gave Briseno that opportunity. Moreover, Briseno has failed to show he suffered any prejudice from the lack of disclosure that was not cured by the additional time he was given to prepare: Briseno ultimately cross-examined the State's reconstructionist thoroughly regarding his opinions on how the occupants of the Escalade moved during the collision, and Briseno's own expert offered his opinion on why it was unlikely, given the physical evidence and lack of injury to Briseno, that he was the driver. Consequently, the trial court did not abuse its discretion by imposing this sanction rather than granting the more drastic sanction of a mistrial, as Briseno requested.

V. Failure to Record Bench Conferences

¶26 Briseno next argues the trial court committed reversible error by not recording "the vast majority of bench conferences," with no record indicating defense counsel knew they were not being recorded. To the contrary, the record indicates Briseno knew at least some of the bench conferences were not recorded because during voir dire, the court

erroneously noted one of the bench conferences had not been recorded, and on at least one later occasion asked if counsel wanted a bench conference recorded.

¶27 Because Briseno raises this issue for the first time on appeal, we review for fundamental error only. *See Henderson*, 210 Ariz. at 568, ¶ 22, 115 P.3d at 608. Briseno thus bears the burden of establishing there was error, the error was fundamental, and the error caused him prejudice. *Id*. at ¶¶ 23-26.

¶28 "The court record must be sufficiently complete to allow 'adequate consideration of the errors assigned.'" *State v. Hargrave*, 225 Ariz. 1, 16, ¶ 61, 234 P.3d 569, 584 (2010) (citations omitted). Although courts generally disapprove the practice of not recording bench conferences, *State v. Dann*, 220 Ariz. 351, 370, ¶ 104, 207 P.3d 604, 623 (2009), the failure to record bench conferences is not fundamental error absent a showing of "demonstrable prejudice." *State v. Scott*, 187 Ariz. 474, 476, 930 P.2d 551, 553 (App. 1996). Prejudice may be shown if the subject of the unrecorded conferences might have been critical to the defense arguments on appeal. *See generally State v. Berndt*, 138 Ariz. 41, 46, 672 P.2d 1311, 1316 (1983); *State v. Paxton*, 186 Ariz. 580, 589, 925 P.2d 721, 730 (App. 1996).

¶29 In this case, none of the unrecorded bench conferences cited by Briseno appear to directly relate to the issues raised on appeal. Instead, it is apparent from the subsequent record that many of the unrecorded conferences relate to scheduling issues. Further, Briseno has not persuaded us, as is his burden on fundamental error review, that the subject of the few remaining unrecorded bench conferences was critical to the defense arguments on appeal. Consequently, Briseno has failed to demonstrate the necessary prejudice for reversal on fundamental error review.

CONCLUSION

¶30 Briseno's convictions and sentences are affirmed.

_____/S/_____
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

_____/S/_____
JON W. THOMPSON, Presiding Judge

_____/S/_____
DONN KESSLER, Judge