DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 12-0091
	)	
Appellee,	)	DEPARTMENT E (JULY)
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
DAVID THOMAS HARMON,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-005952-001

The Honorable Dawn M. Bergin, Judge
The Honorable Susan M. Brnovich, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
by Joseph T. Maziarz, Chief Counsel,
Criminal Appeals Section
and Craig W. Soland, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
by Terry J. Reid, Deputy Public Defender
Attorneys for Appellant

G O U L D, Judge

¶1 David Thomas Harmon appeals his convictions for kidnapping, second-degree burglary, attempted kidnapping, and

attempted second-degree burglary. For the reasons that follow, we find no reversible error and affirm.

¶2 A grand jury indicted Harmon for kidnapping and second-degree burglary on November 28, 2009, when he allegedly restrained Kathleen L. and entered her residence with the intent to commit a theft or felony therein, and for attempted kidnapping and attempted second-degree burglary on January 2, 2010, when he allegedly attempted to do the same to Monica P.

¶3 The two victims -- one 36 years old and the other 25 years old -- lived in the same condominium complex, a short distance away from the mobile-home park where Harmon resided. Kathleen L. testified that when she returned home on November 28, 2009, at about 11 p.m., a man suddenly appeared from behind a pillar next to her garage and grabbed her by the neck, covering her mouth. She described him as a white male about six feet tall, of thin build, wearing a navy hooded jacket, work boots, jeans, leather work gloves, and prescription wire-rimmed glasses. After knocking her down on the garage floor, he forced her inside her residence, where he looked at the electronic equipment in her living room before leaving abruptly when the house alarm sounded. She positively identified Harmon at trial as the man who had attacked her.

¶4 Monica P. testified that she became frightened when she returned home at about 12:30 a.m. on January 2, 2010, and a

man in a red Jeep Cherokee abruptly swerved around her and parked two car-lengths in front of her. She rushed into her house as he got out of his car. After she locked her front door and shut off the hallway light, she looked out a front window and saw him walking toward her residence, wearing gloves and putting a beanie on his head. She woke her brother and they both observed the man walk up toward the residence door before disappearing into a blind spot. She described the man as a white male about five feet ten inches tall, of slender build, dressed in blue jeans and a blue sweater with black gloves and a beanie. Shortly afterward, she identified Harmon as the person who had followed her to her door. Another resident of the condominium complex also identified Harmon as the person whom he had observed acting suspiciously at about the same time.

¶5 The jury convicted Harmon of the charged offenses and found the existence of aggravating circumstances. The judge further found the existence of two historical prior convictions, and sentenced Harmon to super-aggravated terms totaling sixty years in prison. Harmon filed a timely notice of appeal, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2), 13-4031, and 13-4033(A).

Reliability of Identification by Kathleen L.

¶6 Harmon argues first that the trial court erred in admitting Kathleen L.'s identification of Harmon as her attacker

following what the trial court found was an unduly suggestive pretrial photo lineup. Police woke Kathleen L. up sometime between 1 and 3 a.m. on January 2, 2010, and showed her what she described as a "kind of poor quality" black-and-white photo lineup including a photo of Harmon. At that time, Kathleen L. picked the photograph of a person other than Harmon, but was not "extremely confident" of her identification, in part because she was "shocked and upset" that the person might have returned to her neighborhood, she was "exhausted," and the dining room in which she made the identification was "dimly lit." At the time, she identified Harmon's voice from a recording of his interaction with police after being stopped earlier that night.

¶7 Two days later, a detective who was not aware that this victim had already been shown a black-and-white photo lineup with Harmon's picture, came by around 10 or 11 a.m. and showed her a color photo lineup. This time, the victim picked Harmon's photo, and testified that she was so certain that it was the person who had attacked her, she started "shaking." She testified that she recognized her attacker in the second photo lineup because his "facial features, his eyes, and his nose . . . were pretty distinctive," and she simply had not looked closely enough during the first lineup. She testified that the black-and-white photo had made Harmon's hair appear whiter, and because of her attacker's clothing and the fact "his

face wasn't really wrinkly," she had not expected him to be "real old." "The second time, I looked past the hair and actually looked at his face closer, and I recognized him from those features."

¶8 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). 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. *State v. Dessureault*, 104 Ariz. 380, 384, 453 P.2d 951, 955 (1969). In this case, after hearing evidence, the judge found that because Harmon's photograph had already been shown to this victim in the first lineup, the second lineup procedure was unduly suggestive.

¶9 "The mere fact that a pretrial identification procedure is overly suggestive, however, does not bar the admission of an identification. Instead the question is whether the identification is reliable in spite of any suggestiveness." *Lehr*, 201 Ariz. at 520, ¶ 46, 38 P.3d at 1183 (citation omitted). Accordingly, if the court determines that the

procedure was unduly suggestive, as it did in this case, it must then 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 id.* To determine reliability, courts look to the so-called *Biggers* factors: the opportunity of the witness to see the criminal at the time of the crime; the witness's degree of attention; the accuracy of the witness's prior description; the witness's certainty; and the length of time between the crime and the identification. *State v. Hicks*, 133 Ariz. 64, 67-68, 649 P.2d 267, 270-71 (1982) (citing *Neil v. Biggers*, 409 U.S. 188, 199 (1972).

¶10 In reviewing Harmon's claim that the trial court erred in finding the identification reliable, "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). "The ultimate question of the constitutionality of a pretrial identification is, however, a mixed question of law and fact, which we review *de novo*." *Garcia*, 224 Ariz. at 7, ¶ 6, 226 P.3d at 376 (citation and internal punctuation omitted).

¶11 Following an evidentiary hearing, the trial court found that the state had established that Kathleen L.'s

identification was reliable because, in summary: 1) she had three opportunities to see her attacker's face in lighted conditions, and described special characteristics of his eyes and nose; 2) she focused on her attacker, "trying to take things in"; 3) she described the attacker's height, build, and eyeglasses accurately, although she described him as younger than he was; 4) she was not certain of her initial misidentification, but was certain when she identified Harmon; and 5) she identified Harmon in the photo lineup conducted about five weeks after the attack.

¶12 We find that the trial court's factual findings were not clearly erroneous, and we do not find that Kathleen L.'s identification of Harmon as her attacker was so unreliable that it deprived him of due process. Kathleen L. testified, consistent with the trial court's finding, that she had the opportunity to see her attacker at least three times in well-lit conditions, and, as the judge noted, was "trying to take in all the details [she] could." She described him as a "tall, white male, slender build, 30s, you know, to 40s approximately, clean shaven, wearing a hooded sweatshirt/jacket, leather work gloves, jeans . . . wire rimmed glasses, and some kind of boots." She described his eyes as deep-set and his nose as "larger." She identified Harmon in the courtroom as her attacker, and testified, again consistent with the judge's finding, that other

than his age, she believed she had described her attacker accurately from the beginning. Finally, again consistent with the judge's finding, she testified that she was not certain about the identification she made from the first black-and-white photo lineup, but was certain about her identification of the person whose photo she had picked from the second, color-photo lineup, which took place about five weeks after the attack.

¶13 We are not persuaded that the judge's findings were erroneous or that the identification was unreliable by Harmon's argument on appeal that Kathleen L. had little time during the attack to observe her assailant's face because she was occupied with other tasks, including trying to defend herself, and was unable to provide enough specifics to allow police to prepare a composite drawing. Nor are we persuaded that her identification of Harmon in the second lineup was unreliable because she had identified another person in the first lineup, in light of her detailed explanation of the factors that undermined this initial misidentification. On this record, we find that the evidence supported the judge's factual findings, and that she did not abuse her discretion or deny Harmon due process in allowing the challenged identification.

Denial of Motion to Sever Counts

¶14 Harmon next argues that the trial court denied him his right to due process and a fair trial when it failed to sever trial of the offenses of kidnapping of Kathleen L. and burglary of her residence from the offenses of attempted kidnapping of Monica P. and the attempted burglary of her residence. The trial court denied Harmon's pretrial motion for severance, finding that: the offenses were joined because they were of the same or similar character; evidence of the offenses against Monica P. would be admissible at a separate trial of the offenses against Kathleen L. to show identity; evidence of the offenses against Kathleen L. would be admissible at a separate trial of the offenses against Monica P. to show motive or intent; and evidence from the other offenses would not be unduly prejudicial.

¶15 When joinder is based solely on the offenses having the same or similar character, a defendant is entitled to severance "unless evidence of the other offense or offenses would be admissible under applicable rules of evidence if the offenses were tried separately." Ariz. R. Crim. P. 13.4(b). Denial of a motion to sever under Rule 13.4(b) requires reversal "if the evidence of other crimes would not have been admitted at trial" for a proper evidentiary purpose. *State v. Aguilar*, 209 Ariz. 40, 51, ¶ 38, 97 P.3d 865, 876 (2004) (citation omitted).

¶16 We review a trial court's ruling on severance for abuse of discretion. *State v. Prince*, 204 Ariz. 156, 159, ¶ 13, 61 P.3d 450, 453 (2003). We likewise review a trial court's ruling on admissibility of evidence for abuse of discretion. *State v. Roscoe,* 184 Ariz. 484, 491, 910 P.2d 635, 642 (1996). Because Harmon failed to renew his severance motion "at or before the close of evidence," as required by Rule 13.4(c), however, we review for fundamental error only. *See State v. Laird,* 186 Ariz. 203, 206, 920 P.2d 769, 772 (1996); *see also State v. Flythe*, 219 Ariz. 117, 120, ¶ 9, 193 P.3d 811, 814 (App. 2008) (noting that the rule "prevents a defendant from strategically refraining from renewing his motion, allowing a joint trial to proceed, then, if he is dissatisfied with the final outcome, arguing on appeal that severance was necessary"). Harmon thus bears the burden of establishing error, that the error was fundamental, and that the error caused him prejudice. *State v. Henderson,* 210 Ariz. 561, 568, ¶ 22, 115 P.3d 601, 608 (2005).

Identity

¶17 Harmon argues first that the trial court erred in finding that evidence of the attempted offenses against Monica P. would be admissible in a separate trial of the completed offenses against Kathleen L. to show identity. He argues that the characteristics of the offenses were not so unusual or

distinctive that they represented a "signature," and there were more significant differences than there were similarities, and thus the offenses against Monica P. did not meet the threshold requirement to prove identity under *State v. Roscoe*, 145 Ariz. 212, 700 P.2d 1312 (1984). *See id.* at 217-18, 700 P.2d at 1317-18.

¶18 We disagree. Evidence is admissible to prove "identity" under Rule 404(b) if the behavior of the accused on different occasions is "so unusual and distinctive as to be like a signature. While identity in every particular is not required, there must be similarities between the offenses in those important aspects when normally there could be expected to be found differences." *State v. Stuard*, 176 Ariz. 589, 597, 863 P.2d 881, 889 (1993) (internal punctuation and citations omitted) (holding that offenses were sufficiently similar based on the fact that all of the victims were elderly women who had hired defendant to do yard work, the attacks all involved multiple stabbings coupled with severe beatings, the attacker ate and drank during some of the attacks, and all occurred in the same general area). In this case, the similarities between the offenses committed against Kathleen L. and Monica P. were sufficiently distinctive to show identity: the offenses were committed in the same condominium complex, a short distance from Harmon's residence, five weeks apart, against relatively young,

unaccompanied women, around midnight, by a man who approached them suddenly as they walked to their residences, and who left suddenly when it appeared he might be apprehended. Both women described the assailant as a tall white male with a slender build, dark clothing, a beanie or a hood that covered his head, and gloves, and were certain it was Harmon. On this record, we find sufficient basis for admission of evidence of the offense against Monica P. in a separate trial of the offenses against Kathleen L. as proof of identity under Rule 404(b), and are not persuaded that any unfair prejudice would substantially outweigh its probative value on this issue. We accordingly find no abuse of discretion, much less fundamental, prejudicial error, in the trial judge's denial of severance on this basis.

Intent

¶19 Harmon also argues that the trial court erred in finding that evidence of the completed offenses against Kathleen L. would be admissible in a separate trial of the attempted burglary and kidnapping of Monica P. to show his intent, because his defense was a flat denial that he committed the charged offenses. He relies on *State v. Ives*, 187 Ariz. 102, 927 P.2d 762 (1996), for the proposition that evidence is inadmissible under Evidence Rule 404(b) for the purpose of proving intent if the defense to the charged offenses is a complete denial. *See id.* at 109-10, 927 P.2d at 769-70. In this case, however,

unlike in *Ives*, there was the potential for shifting defense theories. *Cf. id.* at 109-11, 927 P.2d at 769-71. Prior to the court ruling on the motion to sever, Harmon had disclosed a variety of defenses, including alibi,[1] mere presence, and lack of intent. In his pretrial motion to sever, moreover, Harmon did not argue that his defense to both charges would be a complete denial, and that evidence of his intent therefore was not relevant or admissible under Rule 404(b). Nor did he file a reply challenging the State's argument that the evidence of the offenses against Kathleen L. was admissible to show his intent with respect to Monica P., or renew his motion to sever before or during trial on the ground he was relying solely on a defense that he was completely innocent. Instead, at trial, he put his intent squarely at issue by cross-examining Monica P. as to whether the assailant had actually talked to her, touched her, threatened her, or entered her residence. *See* A.R.S. § 13-1001(A)(2) (A person commits attempt if, with the kind of culpability otherwise required, he "intentionally does . . . anything which, under the circumstances as such person believes them to be, is any step in the course of conduct planned to culminate in commission of an offense.") In his motion for

[1] Defense called an alibi witness for only one of the charged offenses, the kidnapping of Kathleen L. and burglary of her residence. Intent thus remained an issue with respect to the attempted kidnapping of Monica P. and the attempted burglary of her residence.

judgment of acquittal, Harmon also argued that the conduct in evidence did not by itself constitute a crime, again putting his intent at issue. On this record, we find that the judge did not err in finding the evidence admissible under Rule 404(b) to show intent, or in finding that any unfair prejudice did not substantially outweigh its probative value. We accordingly find no abuse of discretion, much less fundamental, prejudicial, error, in the judge's denial of severance on this ground.

Alleged Prosecutorial Misconduct

¶20 Harmon next argues that the prosecutor engaged in misconduct by arguing in closing that Harmon intended to commit a sexual offense in the absence of any evidence to support this claim. The trial court had removed any reference to sexual offenses from the kidnapping instruction, reasoning that there was no evidence presented to show that Harmon had intended to commit any sort of sexual offense, and any reference in jury instructions to such would severely prejudice him. In closing, the prosecutor argued at length that Harmon was "in a hurry" when he followed Monica P. to her door because "he has this drive inside him" that was not satisfied in the attack on Kathleen L., and common sense and experience would tell the jury "what he was there to do. Why do men put on ski masks and gloves and chase women up to their houses? You all know from your common sense and experience why men do that . . . . He was

there to attack women just like he had attacked [Kathleen L.]." In rebuttal closing, the prosecutor asked the jury to "[t]ell him it's not okay to follow women to their homes, putting on a ski mask and gloves. Tell him that it's not okay to grab a woman by the throat and force her into the house. It's not okay to do that. And, he needs to be told it's not okay." Harmon did not object during the closing or rebuttal arguments to any of these comments, but argues on appeal that they suggested that the jury should convict him based on their emotions and a purported intent to sexually assault these women in the absence of any evidence supporting such a claim.

¶21 "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Morris*, 215 Ariz. 324, 335, ¶ 46, 160 P.3d 203, 214 (2007) (citation and internal punctuation omitted). "The misconduct must be so pronounced and persistent that it permeates the entire atmosphere of the trial." *Id.* (citation and internal punctuation omitted). "[P]rosecutorial misconduct 'is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial and which he pursues for any improper purpose with indifference to a

significant resulting danger of mistrial.'" *State v. Aguilar*, 217 Ariz. 235, 238-39, ¶ 11, 172 P.3d 423, 426-27 (App. 2007) (quoting *Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984)).

¶22 Because Harmon failed to object to the alleged prosecutorial misconduct at trial, he bears the burden of establishing on appeal that the court erred in permitting it, that the error was fundamental, and that the error caused him prejudice. *See Henderson,* 210 Ariz. at 568, ¶¶ 21-22, 115 P.3d at 608. Error is fundamental when it goes to the foundation of the defendant's case, takes from him a right essential to his defense, and is error of such magnitude that he could not possibly have received a fair trial. *Henderson,* 210 Ariz. at 567, ¶ 19, 115 P.3d at 607 (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)).

¶23 The prosecutor's argument, viewed in context, suggested to the jury Harmon intended to commit a sexual offense against the victims. Because the State had failed to present any evidence Harmon had intended to commit any sort of sexual offense, see supra ¶ 20, the prosecutor should not have suggested this. On this record, however, the prosecutor's comments did not deprive Harmon of either a right essential to his defense or a fair trial. Further, the court instructed the jury that the attorneys' arguments were not evidence, and that

it must decide the case only on the evidence presented to it. As our supreme court has instructed, we must presume the jury followed the court's instructions. See *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). Under these circumstances, therefore, we reject Harmon's prosecutorial misconduct argument.

Insufficient Evidence of Offenses Against Monica P.

¶24 Harmon finally argues that the evidence was insufficient to support his conviction for the attempted kidnapping of Monica P. and the attempted burglary of her residence, because there was no evidence he took any step toward contacting or restraining her, or even touched a window or the door of her residence, much less attempted to forcibly enter it. We review *de novo* the sufficiency of the evidence to support a conviction. *State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011). We view the facts in the light most favorable to upholding the jury's verdict, and resolve all conflicts in the evidence against defendant. *State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). We do not distinguish between direct and circumstantial evidence. *See Stuard*, 176 Ariz. at 603, 863 P.2d at 895. Intent may be proven by circumstantial evidence; it "rarely can be proven by any other means." *See State v. Thompson*, 204 Ariz. 471, 479, ¶ 31, 65 P.3d 420, 428 (2003).

¶25 The evidence, viewed in the light most favorable to upholding the conviction, was sufficient to show the attempted kidnapping and attempted burglary. A person commits the offense of kidnapping by "knowingly restraining another person with the intent to . . . aid in the commission of a felony." A.R.S. § 13-1304(A)(3). A person commits the offense of second-degree burglary "by entering or remaining unlawfully in or on a residential structure with the intent to commit any theft or any felony therein." A.R.S. § 13-1507. A person commits attempt if, with the kind of culpability otherwise required, he "intentionally does . . . 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." *See* A.R.S. §13-1001(A)(2). The evidence showed that Harmon was parked outside Monica P.'s residence at 12:30 a.m., and when she returned home, he quickly moved his car a few spaces in front of hers, then jumped out of his car, put on gloves and a black beanie, and closely pursued her to the front door. The evidence also showed that Kathleen L. identified Harmon as the person who had jumped out from behind a pillar when she arrived home at about 12:30 p.m. and choked her, forced her into her residence, and began inspecting the electronic equipment in her living room. On this evidence, the jury could find that Harmon intended to kidnap Monica P. and force his way

into her residence to commit a felony, and intentionally took steps "in the course of conduct planned to culminate in commission of the offense," but was thwarted by her quick action in getting out of her car and into her residence before he reached her. This evidence accordingly was sufficient to convict Harmon of the crimes of attempted kidnapping and attempted burglary.

Conclusion

¶26 For the foregoing reasons, we affirm Harmon's convictions and sentences.

/S/
ANDREW W. GOULD, Presiding Judge

CONCURRING:

/S/
KENT E. CATTANI, Judge

/S/
PATRICIA K. NORRIS, Judge