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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 08/27/2013  
RUTH A. WILLINGHAM,  
CLERK  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) 1 CA-CR 12-0476  
)  
Appellee, ) DEPARTMENT C  
)  
v. ) **MEMORANDUM DECISION**  
)  
ROY SAIZ RODRIGUEZ, ) (Not for Publication -  
) Rule 111, Rules of the  
Appellant. ) Arizona Supreme Court)  
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-166584-001

The Honorable Jeanne Garcia, Judge

**AFFIRMED**

Thomas C. Horne, Arizona Attorney General Tucson  
By Joseph T. Maziarz, Section Chief Counsel  
Criminal Appeals/Capital Litigation Division  
And Diane Leigh Hunt, Assistant Attorney General  
Attorneys for Appellee

Marty Lieberman, Maricopa County Office of Phoenix  
The Legal Defender  
By Cynthia Dawn Beck, Deputy Legal Defender  
Attorneys for Appellant

**B R O W N**, Judge

¶1 Roy Saiz Rodriguez appeals his convictions and sentences for possession or use of dangerous drugs and

possession of drug paraphernalia. Rodriguez argues (1) he did not waive his right to appeal by delaying his sentencing; (2) the trial court erred when it admitted an unduly suggestive photograph of Rodriguez; and (3) the court did not properly instruct the jury. For the reasons that follow, we affirm.

**BACKGROUND**

¶2 Police stopped Rodriguez on his bicycle after they observed him commit a traffic violation. They identified Rodriguez through his Arizona Identification Card and arrested him for an outstanding misdemeanor warrant. The search incident to the arrest revealed methamphetamine and related drug paraphernalia in Rodriguez's clothing.

¶3 The State charged Rodriguez with possession or use of dangerous drugs (methamphetamine) and possession of drug paraphernalia. The trial proceeded in absentia after Rodriguez absconded. A jury convicted Rodriguez as charged and the trial court sentenced him to a mitigated aggregate term of six years' imprisonment. Rodriguez appealed and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A), 13-4031 and -4033.

**DISCUSSION**

**I. Waiver of the Right to Appeal**

¶4 Because Rodriguez absconded, the court was unable to sentence him until eleven months after his convictions. As set

forth in A.R.S. § 13-4033(C), a defendant may not appeal a conviction if the defendant's voluntary absence prevents sentencing within ninety days after the conviction. In apparent anticipation of the State's claim of waiver, Rodriguez first argues on appeal that he did not waive his right to appeal when he delayed sentencing by his absence because no one made him aware such a waiver was possible.

¶15 This court's opinion in *State v. Bolding* is dispositive. If a defendant delays sentencing for more than ninety days through a voluntary absence, that defendant waives the right to appeal only if the defendant was first warned that such a waiver was possible. 227 Ariz. 82, 88, ¶ 20, 253 P.3d 279, 285 (App. 2011). The parties do not dispute that Rodriguez was never informed he could waive his right to appeal based on his absence. Therefore, Rodriguez did not waive his right to appeal pursuant to A.R.S. § 13-4033(C). While the State argues *Bolding* was wrongly decided, the State has failed to persuade us that we should revisit or otherwise depart from its holdings.

## **II. Admission of the Photograph**

¶16 Rodriguez next argues the trial court erred when it admitted a photograph of Rodriguez that identified Rodriguez's full name, age, date of birth, sex, height, race, weight, hair length and color and eye color at the base of the photograph. Rodriguez does not contend the trial court should not have

admitted the photograph itself, but argues the failure to redact the information at the base of the photograph rendered it unduly suggestive for purposes of an in-court identification.

¶17 We review a trial court's evidentiary rulings for abuse of discretion. *State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990).

¶18 Because the police officers could not identify Rodriguez in person at trial due to his absence, the State argued it would be necessary for the officers to use a photograph to identify Rodriguez. Rodriguez conceded the State could use the photograph itself for this purpose, but objected to the additional information on the photograph as unduly suggestive.<sup>1</sup> The trial court held the photograph was admissible without further redaction of any information. The court held that Rodriguez's absence required the use of the photograph; the references to the subject's physical characteristics merely described what one could see in the photograph and inclusion of other information did not prejudice Rodriguez.

¶19 At trial, the officers used the photograph to identify Rodriguez to the jury as the person they arrested and who possessed the methamphetamine and paraphernalia. Before the prosecutor showed the first officer the picture, the officer

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<sup>1</sup> Rodriguez raised other objections he does not address on appeal.

testified he identified Rodriguez at the scene with the Arizona Identification Card Rodriguez provided him. The officer then described the contents of that card, including Rodriguez's name, height, weight and color of hair and eyes. The prosecutor then showed the officer the photograph and asked the officer if he recognized it. When the officer responded in the affirmative, the prosecutor asked, "What is it?" The officer identified it as a photograph of Rodriguez, the person he contacted during the traffic stop. The officer further testified he did not use or need any of the information at the bottom of the photograph to identify Rodriguez. Further, the officer was "100% positive" the person depicted in the photograph was the person he arrested and who possessed the methamphetamine and paraphernalia.

¶10 When the second officer involved in the arrest testified, the prosecutor asked him if he recognized the photograph. When the officer answered in the affirmative, the prosecutor again asked, "What is it?" The officer identified it as "the male . . . that we made the traffic stop with." The officer further testified that he, too, was "100%" certain.

¶11 The trial court did not abuse its discretion when it determined the photograph was not unduly suggestive for purposes of an in-court identification. A witness may use a booking photograph to make an in-court identification of a defendant who is absent from trial. *State v. Thibeault*, 131 Ariz. 192, 194,

639 P.2d 382, 384 (App. 1981). That the booking photograph may contain additional identifying information, such as that at issue here, is no more suggestive than asking a witness if the witness sees a person in the courtroom and that person is the only person sitting with defense counsel at a table with a sign that reads "Defense." See *State v. Meeker*, 143 Ariz. 256, 265, 693 P.2d 911, 920 (1984). Further, the physical characteristics described in the photograph are the same characteristics the witnesses would have observed if Rodriguez had chosen to appear at trial. Many of the characteristics described in the photograph, such as age, sex, race, hair length and color, eye color, the presence or absence of facial hair and whether the subject is wearing glasses appear in the photograph itself. The inclusion of additional information such as a name and date of birth was not unduly suggestive given the testimony presented at trial.

### **III. The Jury Instruction**

¶12 As the final issue on appeal, Rodriguez argues the trial court erred when it failed to instruct the jury regarding the factors it should consider in its evaluation of the reliability of the in-court identifications. Rodriguez concedes he did not request such an instruction. The failure to request a jury instruction waives the right to raise the issue on appeal absent fundamental error. See *State v. Gendron*, 168 Ariz. 153,

154, 812 P.2d 626, 627 (1991). "To establish fundamental error, [a defendant] must show that the error complained of goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 568, ¶ 24, 115 P.3d 601, 608 (2005). Even if fundamental error has been established, a defendant must still demonstrate the error was prejudicial. *Id.* at ¶ 26.

¶13 We find no error, fundamental or otherwise. First, Rodriguez has never identified the instruction he claims the court should have given and has never otherwise identified the factors the court should have instructed the jury to consider. We can find no error in the failure to submit an instruction under these circumstances when the appellant has never explained exactly what information that instruction should have contained. It is not enough to simply argue the court should have instructed the jury to consider unidentified factors.<sup>2</sup>

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<sup>2</sup> In *State v. Geeslin*, our supreme court reviewed the issue whether a trial court should have instructed the jury regarding a lesser-included offense even though the appellant never identified the specific instruction at issue. 223 Ariz. 553, 554, ¶ 3, 225 P.3d 1129, 1130 (2010). *Geeslin*, however, is distinguishable. In *Geeslin*, the supreme court upheld the general rule that an appellant must ensure that the record on appeal contains all material necessary for appellate review. *Id.* at ¶ 5. Even so, the court further held that while the record on appeal did not include the requested instruction, the record was still sufficient to permit appellate review. The record revealed the appellant requested an instruction that

¶14 Second, Rodriguez cites no authority for the proposition that when there is no suggestion an in-court identification was tainted by an unduly suggestive pretrial identification, a trial court must still instruct a jury regarding factors to consider when determining the reliability of the in-court identification. Further, we are aware of no such authority. The cases Rodriguez relies upon address situations in which witnesses made in-court identifications after they made pretrial identifications under circumstances that were arguably unduly suggestive. In *State v. Nottingham*, the trial court refused to instruct the jury regarding factors to consider when determining the reliability of eyewitness identification testimony. 231 Ariz. 21, 23, ¶ 3, 289 P.3d 949, 951 (App. 2012). This court reversed and held “defendants are entitled to a cautionary instruction when they have shown suggestive circumstances attendant to a pretrial identification that tend to bring the reliability of the [in-court] identification testimony into question.” *Id.* at 27, ¶ 14, 289 P.3d at 955. Our decision in *Nottingham* relied in part on *Perry*

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informed the jury that unlawful use of means of transportation was a lesser-included offense of theft of means of transportation. The trial court addressed the request on the record and “carefully explained” why it would not give the instruction. Therefore, the record contained everything necessary to address the issue and the reviewing court did not need the missing instruction itself. *Id.* at 554-55, ¶¶ 6-9, 1130-131. The circumstances and the record on appeal in this case are not analogous to those in *Geeslin*.



*v. New Hampshire*, also cited by Rodriguez. In *Perry*, the United States Supreme Court recognized a trial court can give "eyewitness specific jury instructions" that "warn the jury to take care in appraising identification evidence." *Perry v. New Hampshire*, \_\_ U.S. \_\_, 132 S.Ct. 716, 728-29 (2012). Like *Nottingham*, however, *Perry* addressed a situation in which the circumstances of a pretrial identification raised questions about the reliability of a subsequent in-court identification. *Id.* at 721-22.

¶15 Here, there is no evidence of "suggestive circumstances attendant to a pretrial identification that tend to bring the reliability of the [in-court] identification testimony into question." Further, for the reasons explained above, there is nothing in the record to otherwise suggest the in-court identification procedures were unduly suggestive. Therefore, the trial court did not err when it failed to instruct the jury regarding factors to consider in its determination of the reliability of the in-court identifications.

**CONCLUSION**

¶16 Based on the foregoing, we affirm Rodriguez's convictions and sentences.

\_\_\_\_\_/s/\_\_\_\_\_  
MICHAEL J. BROWN, Presiding Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
JON W. THOMPSON, Judge

\_\_\_\_\_/s/\_\_\_\_\_  
MARGARET H. DOWNIE, Judge