IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

NICOLAS ROGELIO CORTEZ, *Appellant*.

No. 1 CA-CR 15-0420
FILED 6-7-2016

Appeal from the Superior Court in Maricopa County
No. CR2012-160587-001
The Honorable Sam J. Myers, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Craig W. Soland
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Kathryn L. Petroff
Counsel for Appellant

MEMORANDUM DECISION

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Margaret H. Downie and Judge Kent E. Cattani joined.

K E S S L E R, Judge:

¶1 Appellant Nicolas Rogelio Cortez ("Cortez") appeals his conviction and sentence for misconduct involving weapons, a class 4 felony, Arizona Revised Statutes ("A.R.S.") section 13-3102(A)(4) (2014).[1] Cortez appeals the superior court's refusal to (1) give the jury a standard witness identification instruction, (2) suppress statements Cortez made to police, and (3) acquit Cortez. For the reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL HISTORY[2]

¶2 During the late morning hours in November 2012, C, an employee of a motel, heard raised, argumentative voices outside. C was in a building overlooking a space in front of the motel's single-story apartment units. Looking through a one-inch wide opening between curtains, she saw three men arguing in front of Unit 7, approximately ten or fifteen feet in front of her. A blue pick-up truck was parked next to the men. Among the three men, C recognized an occupant of Unit 7, a Caucasian, with an Hispanic man whom she had previously seen on several occasions. After watching for about five minutes, C saw the third man, whom C had not seen before. The third man, who was also Hispanic, retrieved a gun from the passenger side of the blue pick-up truck and pointed it at the other two men.

¶3 C stepped away from the window and called 911. During her 911 call, she described the man with the gun as a Hispanic male in his twenties with "longish hair," a "red bandana," "red shorts," and no shirt. C also described the blue pick-up truck, including its license plate number,

[1] We cite the current version of applicable statutes when no revisions material to this decision have since occurred.
[2] We view the evidence in the light most favorable to affirm. *State v. Powers,* 200 Ariz. 123, 124, ¶ 2 (App. 2001), *approved,* 200 Ariz. 363 (2001).

and noted that the gun she saw was big, a little bit longer than the width of her shoulder.

¶4 After about five minutes, quietly and unseen, Officer S arrived. Hidden from view, Officer S observed a man who matched the description C had provided. The man was interacting with some other people and moving between Unit 7 and a blue truck. This third man was later confirmed to be Cortez. About one minute later and as Cortez apparently became aware of police cars arriving, Cortez went into Unit 7 for a moment, came back out, and walked behind the apartment unit, observed by Officer S. Officer S testified that he did not see a gun, although he lost sight of Cortez when Cortez walked toward the back of Unit 7. Another officer later recovered a loaded "pump shotgun" with a "pistol grip" from behind Unit 7.

¶5 When Cortez re-emerged from behind Unit 7, he walked toward three approaching police officers. Officer S asked Cortez if he had any firearms and Cortez said no. Officer S then told Cortez that he matched the description of a subject with a gun. Officer S again asked if Cortez had any weapons, to which Cortez replied, "no, it was a toy gun." The police then patted down Cortez for weapons and told him to sit down on a bench. Officer S left to check Unit 7. Cortez was subsequently questioned by Officers M and G as to whether he had a weapon and for his name and date of birth. Cortez told Officer G that he had a gun, but it was a toy gun and his "little homie" had left with it.

¶6 In the meantime, unbeknownst to Cortez, C had identified Cortez in a telephonic conversation with Officer M. C also identified the gun police showed her as the gun she had observed earlier in Cortez's hands. None of the officers saw any other person matching the 911 call's description.

¶7 Officer G then placed Cortez under arrest and read him his rights as required by *Miranda v. Arizona*, 384 U.S. 436 (1966). After additional questioning, Cortez stated that (1) his little "homie" had a plastic gun, was on a bike, and had left; (2) the shotgun recovered by officers belonged to someone else; and (3) he had not walked behind Unit 7, or disposed of a weapon, just minutes earlier.

¶8 Cortez was indicted for one count of misconduct involving weapons. A jury found Cortez guilty as charged. The superior court sentenced Cortez to the presumptive term of ten years in prison and a consecutive term of community supervision.

¶9 Cortez timely appealed his conviction. This Court has jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2016), 13-4031 (2016), and -4033(A)(1) (2015).

DISCUSSION

I. The superior court erred in refusing to instruct the jury on factors of reliability of eyewitness identification testimony, but the error was harmless.

¶10 Cortez argues the superior court erred in failing to give the jury a requested instruction specifying factors the jury should consider when assessing reliability of eyewitness identification testimony (also known as the "*Dessureault* instruction"),[3] and that the error was not harmless. This Court reviews *de novo* "the question of whether a common law procedural rule with constitutional underpinnings, such as that set forth in *Dessureault,* applies to a particular factual scenario." *State v. Nottingham*, 231 Ariz. 21, 24, ¶ 4 (App. 2012).

A. The superior court erred in not giving the *Dessureault* instruction.

¶11 When the superior court denied Cortez's request for a *Dessureault* instruction, the sole reason given was that no pre-trial "*Dessureault* hearing" was conducted. Cortez argues that he was not required to request a *Dessureault* hearing prior to trial to be entitled to the identification instruction, because C's in-court identification of Cortez was tainted by unduly suggestive procedures conducted by police officers on

[3] *State v. Dessureault*, 104 Ariz. 380 (1969). The requested Revised Arizona Jury Instructions Standard Criminal 39 (identification) instruction states: "The State must prove beyond a reasonable doubt that the in-court identification of the defendant at this trial is reliable. In determining whether this in-court identification is reliable you may consider such things as: 1. The witness' opportunity to view at the time of the crime; 2. The witness' degree of attention at the time of the crime; 3. The accuracy of any descriptions the witness made prior to the pretrial identification; 4. The witness' level of certainty at the time of the pretrial identification; 5. The time between the crime and the pretrial identification; 6. Any other factor that affects the reliability of the identification. If you determine that the in-court identification of the defendant at this trial is not reliable, then you must not consider that identification."

the day of the 911 call. We agree that a pre-trial *Dessureault* hearing was not necessary to give the requested instruction.

¶12 A pre-trial *Dessureault* hearing is an opportunity for a defendant to seek a ruling excluding eyewitness identification evidence on the basis that it resulted from an unreliable identification procedure. An eyewitness identification instruction is appropriate if there is any evidence calling into question the reliability of the identification, regardless of whether there has been a pre-trial hearing. *See Nottingham*, 231 Ariz. at 26, ¶ 13 (holding that at a minimum, the cautionary *Dessureault* instruction is required "when a defendant has presented evidence that a pretrial identification has been made under suggestive circumstances that might cause the later 'eyewitness testimony [to be] of questionable reliability.'" (quoting *Perry v. New Hampshire*, 132 S. Ct. 716, 728 (2012)).

¶13 We agree with the holding in *Nottingham*. "[R]eliability is the linchpin in determining the admissibility of identification testimony. . . ." *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977); *see also Scappaticci v. Southwest Sav. & Loan Ass'n,* 135 Ariz. 456, 461 (1983) ("[T]he principle of stare decisis and the need for stability in the law in order to have an efficient and effective functioning of our judicial machinery dictate that we consider decisions of coordinate courts as highly persuasive and binding, unless we are convinced that the prior decisions are based upon clearly erroneous legal principles . . . .") (internal citation and quotation omitted).

¶14 Here, C's pre-trial identification of Cortez was attacked as a suggestive "one-man show-up," and C testified to identifying Cortez through a process of elimination during her in-court identification. Cortez presented evidence at trial that a pre-trial identification was made under suggestive circumstances, but no determination of reliability was conducted by the superior court because Cortez did not ask for one. Accordingly, the requested identification instruction should have been given to the jury. The superior court erred by denying Cortez a specific jury instruction to assist the jury in assessing the reliability of witness identification.

¶15 The State argues that general jury instructions given in this case sufficiently substituted for the specific identification instruction requested. We do not agree. General instructions, unlike specific identification jury instructions, do not "warn the jury to take care in appraising identification evidence." *Perry,* 132 S. Ct. at 728-29. General instructions on the burden of proof and the jury's role as fact-finder do not cover the specific factors enumerated in the *Dessureault* instruction in

assessing the reliability of identification evidence. *Nottingham*, 231 Ariz. at 26, ¶ 14, n.5. The identification instruction should have been given.[4]

B. The error was harmless.

¶16 We analyze a court's improper refusal to give a requested instruction for harmless error. *Rodriguez,* 192 Ariz. at 63, ¶ 27; *State v. Marshall*, 197 Ariz. 496, 505, ¶ 33 (App. 2000). "If the state can show beyond a reasonable doubt that the error did not affect the verdict, the error is harmless." *Nottingham*, 231 Ariz. at 28, ¶ 17.

¶17 At trial, evidence was presented that C's out-of-court identification of Cortez was reliable and independent of any police suggestion: (1) C recognized the other two people involved, but had not seen Cortez before; (2) C observed Cortez prior to making a 911 call for about five minutes, through a one-inch wide opening between curtains from a distance of 10-15 feet and testified that she "got a good look" at him; (3) C confirmed to police the identity of Cortez only about half an hour after her 911 call; (4) C described Cortez in sufficient detail during her 911 call and the police testified that only one person in the area, Cortez, matched that description; and (5) Cortez was found in the area where C reported seeing him. That Cortez was subsequently separated from the other witnesses and sat on a bench with a police officer standing next to him does not render C's identification of him unduly suggestive. That C identified Cortez at the scene by phone did not taint the identification, either. We have consistently held that by itself, "a 'one-man show-up' is not improper if it is conducted near the time of the crime or at the scene of the crime." *See State v. Arnold*, 26 Ariz. App. 542, 543 (App. 1976) (approving of a witness' and a victim's positive identification of defendant approximately eleven minutes after he committed an armed robbery and while he was seated in the rear of a police car parked at the scene); *see also State v. Gastelo*, 111 Ariz. 459, 461 (1975) (stating a speedy identification near the time of the crime or at the scene of the crime helps insure accuracy while the picture of the culprit is fresh in a witness' mind and although it is in effect a "one-man show-up").

[4] We note that the court instructed the jurors that, in considering witness reliability, they could consider "such factors as the witness' ability to see or hear or know the things the witness testified to." We need not decide whether this instruction would have cured the error here in not giving the cautionary instruction because we hold that the error was harmless.

¶18 Accordingly, we conclude the error did not influence the verdict.

II. The superior court did not reversibly err in denying a motion to suppress statements made to law enforcement.

¶19 Cortez moved to suppress statements he made to police prior to receiving his *Miranda* warnings. After an evidentiary hearing, the superior court concluded that (1) the initial contact between Cortez and the officers was a consensual encounter not infringing on Cortez's rights; (2) the officers' repeated questioning was intended to protect their safety or was in furtherance of proper preliminary investigation; and (3) Cortez was properly given the *Miranda* warnings.

¶20 "In reviewing the denial of a motion to suppress evidence based on an alleged Fourth Amendment violation, we defer to the trial court's factual findings, but we review *de novo* mixed questions of law and fact and the trial court's ultimate legal conclusion." *State v. Wyman*, 197 Ariz. 10, 13, ¶ 5 (App. 2000), *as corrected* (June 2, 2000). We look only at the evidence presented to the trial court during the suppression hearing. *State v. Brown*, 233 Ariz. 153, 156, ¶ 4 (App. 2013). We view the facts in the light most favorable to the trial court's ruling. *Id*.

¶21 Cortez argues he was almost immediately placed in the "functional equivalent" of custody under *Rhode Island v. Innis,* 446 U.S. 291, 301 (1980), and that he should not have been questioned beyond being asked once if he had a weapon without first having been read the *Miranda* warnings. The State argues that Cortez was not in custody when he talked to police, his answers were not a result of interrogation, the discussion was not coercive, and any error was harmless.

¶22 We conclude that the superior court did not err because some of the statements at issue were volunteered by Cortez and to the extent there was any error, it was harmless.

¶23 We cannot agree with Cortez that he should have been read his *Miranda* rights immediately after the police entered the property. Police may stop a suspect for questioning without triggering the Fourth Amendment's protection against unreasonable searches and seizures when a reasonable, articulable suspicion that criminal activity is afoot exists. *Terry v. Ohio,* 392 U.S. 1, 21 (1968); *State v. Richcreek,* 187 Ariz. 501, 505 (1997). Officer S's first question as to whether Cortez had a gun was reasonable in the context of a *Terry* investigative detention stop.

¶24 Cortez's next statement was not a result of any interrogation.[5] After he told police he did not have a gun, he then volunteered that he did have a toy gun but that his "homie" had left with it. Spontaneous admissions will not be excluded as a *Miranda* violation. "When an individual volunteers a self-incriminating statement it is admissible in evidence against him." *State v. Miller*, 123 Ariz. 491, 494 (App. 1979).

¶25 Finally, even if these statements were deemed to be a result of custodial interrogation in violation of *Miranda*, their admission was harmless, because none of these statements were unduly prejudicial to Cortez's case. Cortez did not admit he had a shotgun, only that he had a toy gun and that his homie had left with it. *See supra* ¶¶ 5, 7. His other statements denied any wrongdoing. *See supra* ¶ 7. *See State v. Montes*, 136 Ariz. 491, 497 (1983) (holding that erroneous admission of evidence in violation of *Miranda* is subject to harmless error analysis); *In re Jorge D.*, 202 Ariz. 277, 281, ¶ 18 (App. 2002) (same).

III. The superior court did not abuse its discretion in denying Cortez's motion to acquit.

¶26 A trial court's denial of a motion for judgment of acquittal is reviewed for an abuse of discretion. *State v. Carlisle,* 198 Ariz. 203, ¶ 11 (App. 2000). The denial will be reversed if there is no substantial evidence to support a conviction. *State v. Cox*, 214 Ariz. 518, 520, ¶ 8 (App. 2007). The "question of sufficiency of the evidence is one of law, subject to *de novo* review on appeal." *State v. West*, 226 Ariz. 559, 562, ¶ 15 (2011) (internal citations omitted). "Substantial evidence is more than a mere scintilla and is such proof that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Landrigan*, 176 Ariz. 1, 4 (1993) (internal quotation and citation omitted). "Criminal convictions may rest solely upon circumstantial proof." *State v. Nash*, 143 Ariz. 392, 404 (1985). Moreover, "[t]he credibility of witnesses is an issue to be resolved by the jury; as long

[5] We assume without deciding that repeated questioning about a gun becomes the equivalent of a custodial interrogation under the facts in this case. *See Innis*, 446 U.S. at 300-01 ("*Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. . . . [T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.")

as there is substantial supporting evidence, we will not disturb their determination." *State v. Soto-Fong*, 187 Ariz. 186, 200 (1996) (internal citation omitted).

¶27 Cortez requested acquittal based on the lack of credibility of C's statements and the complete lack of any direct physical evidence that he ever possessed the shotgun. The superior court did not err in denying his motion.

¶28 In addition to C's identification of Cortez discussed above, Officer S directly observed Cortez enter the unit for a moment and then walk behind the unit as soon as the police cars' sirens were audible. Although Officer S did not directly observe a large gun in Cortez's hands as Cortez was arguably disposing of it, a shotgun subsequently identified by C as the gun previously displayed by Cortez was recovered from behind Unit 7 minutes after Cortez went there. A reasonable jury could accept the evidence presented as sufficient to find Cortez guilty beyond a reasonable doubt. *See Landrigan*, 176 Ariz. at 4.

¶29 Upon independent review of the record, substantial evidence exists to support the jury's conclusion of Cortez's guilt beyond a reasonable doubt. The superior court did not abuse its discretion in denying Cortez's motion to acquit.

CONCLUSION

¶30 For the forgoing reasons, we affirm the conviction and sentence.