IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

LLOYD JAMES DARON, JR., *Appellant*.

No. 1 CA-CR 16-0445
FILED 12-21-2017

Appeal from the Superior Court in Maricopa County
No. CR2015-144027-001
The Honorable Joan M. Sinclair, Judge

AFFIRMED AS MODIFIED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Elizabeth B. N. Garcia
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Lawrence Blieden
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Kenton D. Jones delivered the decision of the Court, in which Judge Jon W. Thompson and Judge Thomas C. Kleinschmidt[1] joined.

J O N E S, Judge:

¶1 Lloyd James Daron, Jr., appeals his convictions and sentences for burglary in the second degree and criminal trespass in the first degree. For the following reasons, we affirm Daron's convictions and affirm his sentences as modified.

FACTS[2] AND PROCEDURAL HISTORY

¶2 In September 2015, the victim was returning home from lunch around 11:30 a.m. when he turned onto his street and saw his dogs running loose. Arriving at his house, the victim saw his front door open and an unknown red bicycle in his laundry room. As the victim was looking at the bike, he was surprised by a man, who told him not to touch his bike. The victim confronted the man, demanding to know why the bike was in his laundry room. The man claimed he was painting sidewalks and tried to leave with his bike. The victim, realizing his home had been burglarized, tried to stop the man and grabbed the bike. The man pushed the victim off and hit him in the chest. As the man rode away on the bike, the victim yelled for help and called the police.

¶3 When the police arrived, the victim provided a description of Daron — an African-American male, thirty-five years old, muscular, around five feet eleven inches tall, wearing glasses and a white sleeveless shirt. Twenty to thirty minutes later, an officer asked the victim to identify a suspect the officer believed to be the burglar. The officer drove the victim to the location where Daron was detained. Daron was near two police

[1] The Honorable Thomas C. Kleinschmidt, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article 6, Section 3, of the Arizona Constitution.

[2] We view the facts in the light most favorable to sustaining the verdicts. *See State v. Payne*, 233 Ariz. 484, 509, ¶ 93 (2013) (citing *State v. Stroud*, 209 Ariz. 410, 411, ¶ 6 (2005)).

officers, and as the police car drove slowly by, the victim immediately identified Daron as the man who had burglarized his home. The victim felt confident in his identification because he recognized the man's face, body shape, glasses, and shirt.

¶4 During the commotion, two witnesses were outside smoking across the street from the victim's house, heard the victim shout for help, saw an African-American man push and elbow the victim, and watched the man ride away on what they thought to be a stolen bike. The witnesses got into a truck and followed the fleeing bicyclist. They drove down a different street than the bicyclist to catch up with him, losing sight of him for ten to fifteen seconds. When they regained a visual, one of the witnesses testified he knew it was the same person because: (1) the bike and bags on the bike were identical, (2) the bicyclist's route would have only allowed the bicyclist to end up where the witnesses regained sight of him, and (3) the witnesses only lost sight of the bicyclist for a short period of time.

¶5 The bicyclist turned into an alley, and the witnesses followed from about five to ten feet behind him. One witness testified he was "close enough that when [the bicyclist] looked back [the witness] was able to see him." The bicyclist then jumped over a wall and disappeared from the witnesses' sight. After returning to the victim's house, the witnesses each provided descriptions of the fleeing bicyclist to police. The first witness described the bicyclist as an African-American male, about six feet tall, roughly 180 pounds with a muscular build, wearing a hat, shorts, shirt, and gloves. The second witness described the bicyclist as a tall, African-American male in his thirties wearing a baseball hat, shorts, and a white shirt.

¶6 Daron was apprehended by police when a second victim found Daron in his laundry room and yelled to the police patrolling nearby. Twenty minutes to an hour after the witnesses returned to victim's home, the police officers asked each witness to do a drive-by identification to confirm or deny the identity of a suspect. At separate times, a police officer drove the two witnesses by Daron while he was standing near two other police officers. The police car was approximately five to ten feet away from the suspect and going roughly five to ten miles per hour. After the victim made his identification and before the first witness left for his, the victim told the witness, "yes, that's him." The first witness said, "as soon as I saw him, I knew that was the person I had seen that day," and was "[one] hundred percent sure" of his identification. He also described the drive-by identification as, "[w]hen I looked at the person, I saw in the face, it was the same face I had seen. It was the eyes were just distinctive to me."

¶7 The second witness was "pretty sure" Daron was the bicyclist, but thought the man's clothing had changed from shorts to pants. He did not feel "one hundred percent certain" at the time of the drive-by. However, at trial, the second witness said during the drive-by he recognized Daron as the bicyclist because of his facial features.

¶8 Before trial, Daron moved to preclude the pre-trial identifications. After holding an evidentiary hearing on the matter, the trial court determined the pretrial identifications were reliable and therefore admissible. At trial, the victim and both witnesses testified on behalf of the State and identified Daron as the burglar and fleeing bicyclist. In court, the State presented evidence of a pair of gloves found in the second victim's laundry room that did not belong to the second victim. And, a forensic technician testified a backpack found at the victim's home was packed and contained what appeared to be valuable items from inside the home. The State argued Daron was in the victim's home packing up items in duffle bags when the victim interrupted him. The State did not have any fingerprint or DNA evidence placing Daron at the scene but argued he was wearing gloves until he discarded them at the second victim's house.

¶9 The jury found Daron guilty of burglary in the second degree, with aggravating factors as found by the jury (Count 1), and criminal trespass in the first degree (Count 2). Daron was sentenced to thirteen years' imprisonment and given credit for 263 days of presentence incarceration as to Count 1. He also received a 180-day sentence for Count 2, which was offset by the time he served presentence. Daron timely appealed, and this Court has jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A)(1).

DISCUSSION

I. Reliability of Pre-trial Identification

¶10 We review the fairness and reliability of a challenged identification for clear abuse of discretion. *State v. Moore*, 222 Ariz. 1, 7, ¶ 17 (2009) (citing *State v. Lehr*, 201 Ariz. 509, 520, ¶ 46 (2002)). In the course of our review, we give deference to the trial court's factual findings so long as they are supported by the record and not clearly erroneous. *Id.* (citing *State v. Grell*, 212 Ariz. 516, 528, ¶ 58 (2006)). "If the court finds that the pretrial identification procedure was unduly suggestive, it must next address the question whether the identification is nevertheless reliable." *State v. Smith,* 146 Ariz. 491, 496-97 (1985) (citing

Manson v. Brathwaite, 432 U.S. 98, 114 (1977), and *State v. Tresize*, 127 Ariz. 571, 574 (1980)).

A. *Biggers* Analysis

¶11 "A 'one-man show-up' is inherently suggestive," but remains admissible if reliable. *State v. Williams*, 144 Ariz. 433, 439-40 (1985) (citing *State v. Hicks*, 133 Ariz. 64, 67-68 (1982)). To assess reliability, courts evaluate five factors enumerated in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972): (1) the opportunity of the witness to view the suspect at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the suspect, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. *Lehr*, 201 Ariz. at 521, ¶ 48 (citing *Brathwaite*, 432 U.S. at 114).

¶12 Here, each witness made a positive identification of Daron as the burglar in a "one-man show-up." Turning to the first factor, each witness had an opportunity to view Daron during daylight at the time of the crime, and the victim even conversed face-to-face with him. The other two witnesses were five to ten feet behind Daron, focused upon not losing track of him during their pursuit, during which time Daron turned around to face them at least once.

¶13 When assessing a witness's degree of attention, we often examine the circumstances of why or how the witness saw the suspect and if the witness was merely a casual observer. *See State v. Hooper*, 145 Ariz. 538, 544 (1985) (citing *State v. Ware*, 113 Ariz. 337, 339 (1976)); *see also State v. Trujillo*, 120 Ariz. 527, 530 (1978) (finding the witness's pre-trial identification of defendant reliable, in part, because even though she only saw defendant for a very short time, her attention was "immediately drawn" to him). Here, each witness, as the matter progressed and they were drawn into the incident, was concentrating specifically upon Daron because of the attention-grabbing events: his intrusion into the victim's home, the commotion from his interaction with the victim, the presumed bicycle theft, and the subsequent chase. The witnesses were not merely casual observers, but instead had reason to give a high degree of particularized attention to Daron throughout the course of his activities. The high degree of attention is further evidenced by the fact that all witnesses recognized the suspect's face, his bald head, glasses, and eyes. *See Biggers*, 409 U.S. at 200-01 (finding the victim's recognition of the suspect's face a key factor in determining the reliability of her identification).

¶14 When examining a witness's description of defendant prior to making an identification, our case law finds a description reliable if it is "substantially correct" even if not "entirely accurate." *State v. Fierro*, 166 Ariz. 539, 546 (1990). The witnesses' descriptions of the burglar were fairly consistent with each other and as compared to Daron. Each description contained the physical characteristics of a tall, muscular, African-American male. Although some discrepancies existed in the estimated ages provided and the articles of clothing the burglar-bicyclist wore, we do not take issue with these minor discrepancies.

¶15 When assessing the witness's confidence in his identification, we have found that a jury is capable of comparing conflicting evidence, assessing the credibility of a witness, and determining the appropriate weight to give the testimony of a less-than-positive identification. *State v. Nieto*, 118 Ariz. 603, 606 (App. 1978) (citing *State v. Dutton*, 83 Ariz. 193, 198 (1957)). On this record, the victim and the first witness were entirely confident in their identifications. Only the second witness felt less confident — at the time of the identification he "was not one hundred percent sure." But at trial, the second witness said he recognized the suspect's face at the time of the drive-by. Following our case law, we find the jury can determine the appropriate weight to give the second witness's testimony. *Id*. Therefore, the second witness's less-certain identification does not weigh heavily against the reliability of the pre-trial identifications.

¶16 Under *State v. Hicks*, a "one-man show-up" identification was reasonable when it occurred within an hour of the crime. *Hicks*, 133 Ariz. at 68. All three identifications of Daron occurred less than an hour after the crime was committed. Under the *Biggers* analysis, we find the identifications reliable, and the trial court did not err when it ruled the pre-trial identifications were admissible.

B. Suggestive Identifications

¶17 The victim made two disclosures at trial about the pre-trial identifications that bear upon the level of suggestiveness. First, before the victim identified the suspect, an officer told him she thought she had detained the person who burglarized his house. Then, the victim testified at trial that he told the first witness "yes, that's him" prior to the first witness making his own identification of Daron.

¶18 The reliability of a pre-trial identification is based upon the totality of the circumstances. *Moore*, 222 Ariz. at 9, ¶ 29 (citing *Biggers,* 409 U.S. at 199). We have previously found an identification reliable even when

the police: (1) allowed the witnesses to first identify the suspect's vehicle, and (2) told the witnesses that they had found a watchband belonging to one of the witnesses in the suspect's vehicle. *State v. Armijo*, 26 Ariz. App. 521, 522-23 (1976). Although these actions were extremely suggestive, after weighing the *Biggers* factors, we still found the pre-trial identification reliable given the lengthy period of time and brightly lit conditions under which the witnesses were able to observe the burglar and the relatively short period of time between their observations and the identification. *Id.* at 524. Although the victim's disclosures in the immediate case increase the inherent suggestiveness of the one-man show-up, after reviewing the *Biggers* factors we are satisfied that the pretrial identifications were still reliable and therefore admissible. Accordingly, we cannot say the trial court abused its discretion.

II. *Sua Sponte* Review by Trial Court

¶19 Before trial, the court held a hearing to determine the reliability of the witnesses' identifications and found each admissible under the five-factor *Biggers* analysis. *See State v. Dessureault*, 104 Ariz. 380, 384 (1969) (setting forth a procedure for evaluating the reliability of identifications). Daron asserts that the victim's testimony at trial revealed two suggestive statements which were not disclosed at the pre-trial hearing, and "should have alerted the trial court" to revisit the pre-trial identification reliability.

¶20 Because Daron did not raise this issue at trial, we review for fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19 (2005) (citing *State v. Bible*, 175 Ariz. 549, 572 (1993)). The scope of fundamental error review is limited to "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Hunter*, 142 Ariz. 88, 90 (1984) (citing *State v. Libberton*, 141 Ariz. 132, 138 (1984)); *see also State v. Gendron*, 168 Ariz. 153, 155 (1991) (defining fundamental error as that which is "clear, egregious, and curable only via a new trial").

¶21 Under this standard, Daron does not prove the trial court committed fundamental error by failing to revisit the issue of pre-trial identification reliability. Even if erroneous, the error did not undermine the entire case so as to warrant a new trial. Based upon the strength of the *Biggers* factors, the court found the identifications reliable and the information revealed at trial did not unhinge that analysis. See *supra* ¶¶ 11-16. Daron's testimony about the officer's prejudicial statement and his

communication with the first witness was different at trial than at the pre-trial hearing, but the jury, as the fact-finder, resolves "[a]ny conflicts or other weaknesses" in a witness's testimony. *See State v. Leyvas*, 221 Ariz. 181, 189, ¶ 29 (App. 2009) (citations omitted). Accordingly, we do not find fundamental error.

III. Admission of Prior Convictions

¶22 Daron argues the trial court erred when it failed to do a full colloquy warning of the consequences of admitting to prior convictions. Generally, when a defendant stipulates to his prior convictions for purposes of sentence enhancement, the court is required to conduct a plea-type colloquy in accordance with Arizona Rules of Criminal Procedure 17.2 and 17.3 before accepting the stipulation. *See* Ariz. R. Crim. P. 17.6; *State v. Gonzales*, 233 Ariz. 455, 457-58, ¶ 8 (App. 2013) (citing *State v. Morales*, 215 Ariz. 59, 61, ¶¶ 7-9 (2007)).

¶23 During the sentencing hearing, the trial court conducted a plea-type colloquy pursuant to the State's request. The court reviewed Daron's right not to stipulate and thereby require the State to prove the alleged prior convictions. The court also confirmed Daron "knowingly, willingly and voluntarily" stipulated to the priors while also confirming he had consulted his attorney and was not under the influence of drugs or alcohol. The court did not list each alleged prior conviction, its date, or underlying offense. And, the court failed to review the constitutional rights Daron would yield, and the increased sentencing range he would be subject to, as a result of stipulating to prior convictions.

¶24 Daron did not object to the incomplete colloquy at trial, so we review for fundamental error. *Henderson*, 210 Ariz. at 567, ¶ 19 (citing *Bible*, 175 Ariz. at 572). Under this standard of review, the defendant bears the burden to prove that a less-than-complete colloquy is both a fundamental error and the error caused him prejudice. *Morales*, 215 Ariz. at 61, ¶ 10 (citing *Henderson*, 210 Ariz. at 567, ¶ 20). Our supreme court has concluded that prejudice must be established by showing the defendant would not have admitted the fact of the prior conviction had the colloquy been given. *Id.* at 62, ¶ 11 (citing *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004)).

¶25 Here, Daron does not claim he would have declined to stipulate had the trial court given a complete colloquy. Rather, the record reflects that he would still have stipulated to the prior convictions had a complete colloquy been given. During a pre-trial status conference, the

State specifically advised that an increased sentencing range of eleven to twenty-five years would be imposed if he decided to stipulate to his prior convictions. The State posited:

> [I]f the Defendant were to proceed to trial, and was convicted, and the State is able to prove at least two of his prior felony convictions, and that he was on a release for community supervision at the time of this offense, he would face on Count 1 a range between 11.25 and 25 years.

¶26 Finally, even if Daron had not stipulated after hearing a complete colloquy, there is evidence on the record that shows the State could have sufficiently proved the alleged prior convictions. Specifically, the Arizona Department of Corrections Automated Summary Reports (redacted and un-redacted) were offered and admitted into evidence. The un-redacted report contains specific identifying information of Daron (i.e. his photo, date of birth, and a physical description), and lists multiple prior convictions from 1990 through 2010. Daron did not prove the incomplete colloquy caused him prejudice, and we find no fundamental error.

IV. Presentence Incarceration Credit

¶27 Daron contends he did not receive appropriate presentence incarceration credit, and the State concedes error.

¶28 "All time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment for such offense shall be credited against the term of imprisonment." A.R.S. § 13-712(B). Failure to give full credit constitutes fundamental error. *State v. Cofield*, 210 Ariz. 84, 86, ¶ 10 (App. 2005) (citing *State v. Ritch*, 160 Ariz. 495, 498 (App. 1989)).

¶29 At sentencing, Daron received 263 days' presentence incarceration credit. Because 2016 was a leap year and Daron was incarcerated on the day of arrest, he should have received 265 days' credit. We modify his sentence accordingly. *See* Ariz. R. Crim. P. 31.17(b); *State v. Stevens*, 173 Ariz. 494, 496 (App. 1992) (modifying sentence to reflect correct presentence incarceration credit) (citing A.R.S. § 13-4037).

CONCLUSION

¶30 We affirm Daron's convictions and affirm his sentences as modified.