IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

ALONZO FERGUSON, *Appellant*.

No. 1 CA-CR 20-0117
FILED 6-22-2021

Appeal from the Superior Court in Maricopa County
No. CR2017-000923-001
The Honorable Suzanne E. Cohen, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joshua C. Smith
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Jeffrey L. Force
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Kent E. Cattani delivered the decision of the Court, in which Judge Samuel A. Thumma and Chief Judge Peter B. Swann joined.

C A T T A N I, Judge:

¶1 Alonzo Ferguson appeals his convictions and sentences for first-degree murder, attempted armed robbery, and conspiracy to commit armed robbery. Ferguson challenges (1) the superior court's ruling permitting a co-conspirator to identify him at trial and (2) the admission of evidence obtained from a telephonic wiretap. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 In April 2014, Ferguson, Lonnie Smith, Aaron Williams, Roosevelt Johnson, and Alfredo Joe robbed an armored truck in Phoenix. On the morning of the robbery, Ferguson and Smith picked up Williams in Mesa and drove to a bank in Phoenix, where they met up with the other two men. Ferguson explained to Smith and Williams that the plan was to rob security guards who were on their way to refill an ATM. Ferguson then provided a rifle for Williams to use. Shortly thereafter, two armed security guards arrived at the bank in an armored truck. One of the guards, B.T., got out of the truck to refill the ATM while the driver remained inside. As B.T. started to refill the ATM, Williams and Smith ran toward him, with one of them yelling "give me [the] money." B.T. turned around, and Williams suddenly fired the rifle at him. The shot passed through B.T.'s clothing but did not injure him. B.T. immediately returned fire, fatally shooting Smith. Security cameras captured the attack.

¶3 After the shooting, Ferguson, Johnson, and Williams fled. Williams ran to a car he thought belonged to Joe. When Williams realized he had gone to the wrong car, he dropped the rifle in a panic. He soon found Joe's car, and they drove to a nearby parking lot, where Williams discarded his clothes, including a pair of gloves.

¶4 Joe called Ferguson as they were driving, and the group met at a shopping center a few miles away. Ferguson and Williams talked about what went wrong in the robbery, and Ferguson said the guard "got [Smith]

good." Ferguson then drove Williams back to Mesa. Police officers found Smith's cell phone and discovered the discarded rifle in the alley. DNA testing revealed Ferguson's DNA on the rifle and the magazine. Officers also found Williams's discarded clothing. Williams's DNA was on the gloves.

¶5 Detectives examined Smith's cell phone and discovered that Smith had called Ferguson multiple times. Additionally, call records and cell site location information showed that Ferguson's phone had been transported from Mesa to Phoenix where the robbery occurred and back that day, that Smith and Williams had been on the phone for six minutes while the robbery was in progress, and that Ferguson's phone was connected to Smith's phone when Smith was shot.

¶6 In June 2014, the superior court authorized the State to conduct a wiretap on the phones belonging to Ferguson and other suspects. The detectives decided to "tickle the wire" to spur the group to talk about the robbery by detaining someone (T.W.) who had been involved in earlier discussions about the robbery with the co-conspirators. Officers interviewed T.W., telling him he was a person of interest in the robbery investigation. After being released, T.W. called Johnson to arrange a meeting. Undercover detectives listened to the call and followed Johnson to the meeting. After the meeting, Johnson called Ferguson and told him the police had questioned T.W. Johnson and Ferguson did not discuss the robbery, but Ferguson asked if the police mentioned his name, and Johnson said the officers had not asked about him or anyone else in the group.

¶7 The State charged Ferguson with first-degree felony murder, attempted armed robbery, conspiracy to commit armed robbery, and misconduct involving weapons. After being arrested, Ferguson denied any involvement with the robbery. He did not have an explanation for why his DNA was on the rifle. The superior court later dismissed the misconduct involving weapons charge at the State's request, and a jury convicted Ferguson of the other offenses as charged. The court sentenced Ferguson to concurrent terms of imprisonment, the longest of which is natural life. Ferguson timely appealed, and we have jurisdiction under A.R.S. § 13-4033(A)(1).

DISCUSSION

I. Admission of Identification Evidence.

¶8 Ferguson contends the superior court violated his due process rights by allowing Williams to identify him at trial.

A. Additional Factual Background.

¶9 In January 2015, the police questioned Williams after learning his DNA was on the gloves left at the scene of the robbery. Police officers showed Williams a photograph of Ferguson, but Williams said he did not recognize him. In April 2016, Williams was in jail facing unrelated felony charges. The police again interviewed Williams, and this time, he recounted details of the robbery. A few weeks later, Williams identified Ferguson from a photographic lineup as the person who had picked him up the morning of the robbery and later drove him back home.

¶10 Before trial, Ferguson filed a motion to preclude Williams's identification. The superior court held a hearing under *State v. Dessureault*, 104 Ariz. 380 (1969). At the hearing, Williams testified that on the morning of the robbery, Smith introduced him to a "[l]ight-skinned African American" male who was "a little bit taller, [and] skinny"—ostensibly descriptors of Ferguson. Williams testified that he had never met the man and did not learn his name. According to Williams, on the day of the robbery, the man drove them from Mesa to Phoenix, gave him an assault rifle, met him at a shopping center after the robbery, then drove him back to Mesa. Weeks later, the man showed up at Williams's girlfriend's house and instructed him not to say anything about the robbery to the police. Williams testified that he was "pretty confident" in his identification of the photo of Ferguson in the photographic lineup. Williams also stated that he had lied in the January 2015 interview when he told police he did not recognize Ferguson or any of the other suspects. He denied that seeing the photo of Ferguson in the January 2015 interview influenced his later identification in the lineup, even though the same photograph had been used.

¶11 In a written ruling, the superior court first found that "on its face[,] showing [Williams] first a single photo and then showing line ups including the same defendant's photo [was] unduly suggestive." Applying the factors set forth in *Neil v. Biggers*, 409 U.S. 188 (1972), however, the court concluded that Williams's identification was sufficiently reliable and thus allowed the State to introduce an in-court identification.

¶12 After the superior court ruled, Ferguson's counsel informed the court of an incident that had occurred when the deputies were transporting Williams to the *Dessureault* hearing. In violation of the court's order, deputies had walked Williams past the codefendants' holding cells. The court held a hearing at which the parties reviewed a video of the incident. The superior court concluded that nothing in the video affected

its ruling. The court noted that Williams did not have the "capability of getting a good look" at the defendants when walking by the cells, nor did he glance in their direction during a "pretty quick walk."

¶13 On the day of jury selection, Ferguson again moved to exclude an in-court identification by Williams. Defense counsel explained that he had recently reviewed a video of his pretrial interview of Williams. At the beginning of the video, before defense counsel arrived, the prosecutor mentioned to Williams that "the light-skinned guy is the only one left" for trial. Defense counsel contended that the prosecutor's use of the phrase "light-skinned guy" was unduly suggestive, given that it was the same phrase by which Williams had referred to Ferguson throughout the case. After an evidentiary hearing, the superior court denied the motion, noting that the challenged statement did not have an "impact" on Williams, primarily because Williams stated he did not remember what was said at the meeting with the prosecutor, and the prosecutor's statement was "pretty innocuous" and not "focused."

B. Analysis.

¶14 A "criminal defendant's due process rights include the right to a fair identification procedure." *State v. Leyvas*, 221 Ariz. 181, 185, ¶ 10 (App. 2009) (citation omitted). "Due process is not violated so long as there is 'no substantial likelihood that [the defendant] would be misidentified.'" *State v. Lehr*, 201 Ariz. 509, 521, ¶ 48 (2002) (alteration in original and citation omitted). "We review the fairness and reliability of a challenged identification for clear abuse of discretion." *Id.* at 520, ¶ 46. Although we defer to the superior court's factual findings that are supported by the record, we review de novo the "ultimate question of the constitutionality of a pretrial identification." *State v. Moore*, 222 Ariz. 1, 7, ¶ 17 (2009). In reviewing the court's ruling, we consider only the evidence presented at the suppression hearing. *Id.*

¶15 If a witness's pretrial identification of a defendant was produced by an inherently suggestive procedure, the court must determine whether that identification (and thus any subsequent in-court identification) was nevertheless reliable. *State v. Rojo-Valenzeula*, 237 Ariz. 448, 450–51, ¶ 7 (2015). To evaluate reliability, courts consider several factors: (1) the witness's opportunity to view the criminal at the time of the offense, (2) the witness's degree of attention at that time, (3) the accuracy of the witness's prior description of the criminal, (4) the witness's level of certainty at the viewing, and (5) the amount of time elapsed between the crime and the identification. *Biggers*, 409 U.S. at 199–200.

¶16 As the superior court found here, the detective's act of showing Williams a single photograph of Ferguson during the initial interview was inherently suggestive. *See State v. Williams*, 144 Ariz. 433, 439 (1985). But the record also supports the superior court's finding of reliability under *Biggers*.

¶17 First, Williams did not simply witness the commission of a crime. He was a co-conspirator and spent an extended amount of time traveling with Ferguson on the day of the robbery, then again on another day. *See Biggers*, 409 U.S. at 199; *see also State v. Ware*, 113 Ariz. 337, 339 (1976) (reasoning that the first factor weighed in favor of reliability when the witness saw the defendant's face in a well-lit store for three minutes). Second, Williams clearly described the events of the robbery in his hearing testimony, including the rides with Ferguson, thus demonstrating his high degree of attention. *See Biggers*, 409 U.S. at 199. Third, Williams accurately described Ferguson's appearance. *See id.* And fourth, Williams was confident when he identified Ferguson in the photographic lineup, and he testified that he was not influenced by seeing the photograph 15 months earlier. *See id.*; *see also State v. Alvarez*, 145 Ariz. 370, 372 (1985). Although the State concedes the fifth factor (timing) weighs against reliability, given that two years elapsed between the crime and the photographic lineup, this factor is not dispositive. *See Biggers*, 409 U.S. at 199–200.

¶18 The record thus supports the superior court's conclusion that Williams's pretrial identification was reliable. Accordingly, the court did not err by permitting Williams's in-court identification. *See Lehr*, 201 Ariz. at 521, ¶ 52.

II. Denial of Motion to Suppress Wiretap Evidence.

¶19 Citing the Ninth Circuit Court of Appeals' decision in *Villa v. Maricopa County*, 865 F.3d 1224 (9th Cir. 2017), Ferguson contends the superior court erred when it denied his motion to suppress evidence obtained through a wiretap. We will uphold the denial of a suppression motion absent a clear abuse of discretion. *State v. Guillory*, 199 Ariz. 462, 465, ¶ 9 (App. 2001). Ferguson asserts that the State did not substantially comply with federal law because Maricopa County Attorney William Montgomery did not file an affidavit concurrently with the wiretap application avowing he had personally reviewed the materials supporting the application to determine that they satisfied the requirements of A.R.S. § 13-3010(A). Ferguson further contends that an affidavit Montgomery filed after the fact did not cure the defect in the wiretap application. Additionally, Ferguson argues that the superior court improperly quashed

subpoenas issued to Montgomery and several deputy county attorneys named in the applications.

A. Application of *Villa*.

¶20 A wiretap is an "extraordinary investigative device." *United States v. Giordano*, 416 U.S. 505, 527 (1974). The United States Congress "spelled out 'in elaborate and generally restrictive detail' the process by which wiretaps may be applied for and authorized." *State v. Salazar*, 231 Ariz. 535, 536, ¶ 5 (App. 2013) (citation omitted). Any state law governing the application for and authorization of a wiretap must comply with federal law. 18 U.S.C. § 2516(2); *State v. Verdugo*, 180 Ariz. 180, 183 (App. 1993) (noting that a state is "free to adopt more restrictive legislation, or no legislation at all, but not less restrictive legislation") (citation omitted).

¶21 Unlike the federal statute that allows only a "principal prosecuting attorney" to apply for a wiretap, *see* 18 U.S.C. § 2516(2), Arizona law permits the attorney general or a county attorney to authorize a subordinate prosecuting attorney to apply for a wiretap. A.R.S. § 13-3010(A). But "when a wiretap application is filed by a state, substantial rather than literal compliance with Title III is required." *Villa*, 865 F.3d at 1234 (referring to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq.). To ensure substantial compliance with federal law, the Ninth Circuit held in *Villa* that the principal prosecuting attorney (here, the elected county attorney) must indicate that he or she is personally familiar with the facts and circumstances of the case and that he or she has personally made the judgment that the wiretap application was justified. *Id.* It is not enough simply to certify "that he or she is generally aware of the criminal investigation, that he or she authorizes a deputy to seek wiretaps, and that his or her deputy has been authorized to review and present to the court the evidence in support of the wiretaps." *Id.*

¶22 Here, in June 2014, the Maricopa County Attorney signed a notarized document authorizing several deputy county attorneys to apply on his behalf for a wiretap to intercept the calls of the suspects in this case. A few days later, one of the designated deputies submitted a wiretap application to a superior court judge, who granted the application. In October 2017, before the suppression hearing, the State filed an affidavit from the county attorney attesting in part that he (1) had "personally reviewed the facts and circumstances of the particular Application, including the sworn affidavit" provided by the investigating officers, (2) determined probable cause supported the request, and (3) had unsuccessfully tried to use other investigative procedures.

¶23 The superior court reasoned that the 2014 application was defective under *Villa* because the county attorney had failed to indicate, at the time the application was made, that he had personal knowledge of the investigation and had reviewed the application. The court noted, however, that unlike in *Villa*, the after-the-fact affidavit provided the requisite detail and cured the defect. Accordingly, the court denied the suppression motion.

¶24 We agree that *Villa* does not compel suppression here. The *Villa* court analyzed—and found deficient—procedures in which the principal prosecuting attorney only affirmed general background knowledge about the criminal investigation at issue. 865 F.3d at 1233–34 (requiring more than "general[] aware[ness] of the criminal investigation," and instead requiring that the principal prosecuting attorney "personally review[] the supporting affidavits or otherwise learn[] their contents" to support a wiretap application); *see also Verdugo*, 180 Ariz. at 183–84. In contrast, here, the after-the-fact affidavit established that the Maricopa County Attorney had personally reviewed and authorized the wiretap application, after determining it satisfied the requirements of § 13-3010(A).

¶25 Ferguson contends that the after-the-fact affidavit submitted here was insufficient because the avowals were not made when the wiretap application was initially presented to a judge. But the *Villa* court did not reject the affidavit in that case on the basis that it was an after-the-fact submission; rather, the court rejected the affidavit because it was substantively deficient. 865 F.3d at 1234. In fact, the court explicitly considered the after-the-fact affidavit in reaching its determination, implicitly suggesting the affidavit would have sufficed had it contained the required averments. *See id.*

¶26 In analogous circumstances, the First Circuit has expressly approved the use of after-the-fact affidavits to establish that the principal prosecuting attorney had personally reviewed and authorized a wiretap application at the time it was made, even when such avowals were absent from the wiretap application itself. *United States v. Lyons*, 740 F.3d 702, 721–22 (1st Cir. 2014). The court there also distinguished between the substantive requirement that a principal prosecuting attorney in fact review and approve a wiretap application, *see* 18 U.S.C. § 2516, and the procedural requirements governing the form and contents of such applications, *see* 18 U.S.C. § 2518. *Lyons*, 740 F.3d at 722–23. As the court observed, "[n]othing in section 2518 requires that a wiretap application itself contain proof that it has been reviewed by the principal prosecuting attorney." *Id*. Here too, the county attorney's after-the-fact affidavit confirming that he personally

reviewed and approved the wiretap application before submission meets the substantive requirement even though the certification did not appear on the face of the application. Accordingly, the superior court did not err by denying Ferguson's motion to suppress the wiretap evidence.

B. Subpoenas.

¶27 Ferguson argues the superior court violated his right of confrontation by quashing subpoenas he had issued to County Attorney Montgomery and several deputy county attorneys in connection with his wiretap challenge. We review the superior court's decision to quash a subpoena for abuse of discretion. *Phx. Newspapers, Inc. v. Reinstein*, 240 Ariz. 442, 445–46, ¶ 10 (App. 2016). A person seeking to call a prosecutor as a witness must demonstrate a compelling need for the testimony. *State v. Tuzon*, 118 Ariz. 205, 208 (1978). "[F]or the most part, confrontation clause rights are trial rights that do not afford criminal defendants a right to pretrial discovery." *State v. Connor*, 215 Ariz. 553, 562, ¶ 28 (App. 2007) (emphasis and quotation omitted).

¶28 Before the hearing on the suppression motion, Ferguson issued subpoenas to compel the testimony of Montgomery and the deputy county attorneys named in the designation letter. Counsel for the proposed witnesses moved to quash the subpoenas, arguing Ferguson failed to show a compelling need for their testimony. At oral argument on the motion to quash, Ferguson asserted that he intended to use Montgomery's testimony to explore the timing of the assertions in the affidavit and to suggest that Montgomery had not reviewed the documents as he attested.

¶29 The superior court did not err by concluding that there was no compelling need for County Attorney Montgomery or the deputy county attorneys to testify. Ferguson failed to identify any specific line of questioning that he would pursue, and he failed to explain why the anticipated testimony would vary materially from the affidavits. *See* Ariz. R. Evid. 103(a)(2); *State v. Jessen*, 134 Ariz. 458, 462 (1982) (rejecting request to depose prosecutor when the "defendant assert[ed] only that he was entitled to explore the prosecutor's recollection to determine whether any favorable evidence could be obtained"); *see also Lyons*, 740 F.3d at 722 ("Certainly [the defendant] point[ed] to no evidence he could have sought to introduce or discover at an evidentiary hearing which could have contradicted [the District Attorney's] version of events. Nor does he point even to a question he might have asked."). As such, the superior court did not err by quashing the subpoena. *Cf. Lyons*, 740 F.3d at 722.

CONCLUSION

¶30 For the foregoing reasons, we affirm Ferguson's convictions and sentences.

AMY M. WOOD • Clerk of the Court
FILED: AA