

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
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: 08/30/2011  
RUTH A. WILLINGHAM,  
CLERK  
BY: DLL

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 10-0645  
)  
Appellee, ) DEPARTMENT C  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
DONALD KRISKE, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-155103-001 DT

The Honorable Pamela Hearn Svoboda, Judge *Pro Tem*

**AFFIRMED**

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Thomas C. Horne, Arizona Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel  
Criminal Appeals/Capital Litigation Section  
Craig W. Soland, Assistant Attorney General  
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix  
By Terry J. Reid, Deputy Public Defender  
Attorney for Appellant

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D O W N I E, Judge

¶1 Donald Kriske ("Defendant") appeals his convictions for forgery and taking the identity of another. For the following reasons, we affirm.

#### **FACTS AND PROCEDURAL HISTORY**

¶2 Officer Mann responded to a Kmart store regarding a shoplifting offense in July 2006. A female suspect had allegedly put a liquor bottle in her purse and then given it to a male. The male suspect had no identification, but identified himself as "Kenneth Kriske" and gave Officer Mann an address and social security number. The officer cited him for shoplifting, listing his name on the citation as Kenneth Francis Kriske, and describing him as six feet tall, 210 pounds, with hazel eyes and brown hair. The man signed the citation.

¶3 In January 2009, defendant's brother, Kenneth Kriske, applied for a job and learned there was a warrant for his arrest relating to a shoplifting charge. He contacted the police. Officer Mann went to Kenneth's home and realized he was not the man she had cited for shoplifting in 2006. Kenneth showed Officer Mann a photograph of his brother, Donald Kriske, and said he believed his brother had been using his identity. Thereafter, Detective Cano presented Officer Mann with a photographic line-up containing two pictures: one of defendant and the other of Kenneth. Officer Mann identified defendant as the man she had cited for shoplifting.

¶4 In August 2009, defendant was indicted on one count of taking the identity of another and one count of forgery. Defendant challenged Officer Mann's identification of him and requested a *Dessureault*<sup>1</sup> hearing. At the ensuing hearing, Officer Mann identified defendant as the individual she had cited for shoplifting. She testified that her 2006 interview of him lasted five to ten minutes,<sup>2</sup> during which she had an unobstructed view. When she later met Kenneth Kriske, she knew right away he was not the person she had cited. Officer Mann had little memory of the photographic line-up. Detective Cano could not recall how quickly Officer Mann identified defendant, but believed she did so without hesitation, as the brothers "don't look anything alike."

¶5 The court denied defendant's motion to preclude Officer Mann's identification. After a jury trial, defendant was convicted as charged. Defendant timely appealed. He contends the trial court abused its discretion "when it found that [Officer Mann's] proposed in-court identification was reliable and not tainted by a prior unduly suggestive identification." We have jurisdiction pursuant to Article 6,

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<sup>1</sup> *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969).

<sup>2</sup> During cross examination, Officer Mann testified the encounter lasted between ten and twenty minutes. At trial, she testified the interview lasted between twenty and thirty minutes.

Section 9 of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, and -4033(A)(1).

#### DISCUSSION

¶16 We review the "fairness and reliability of a challenged identification for clear abuse of discretion." *State v. Lehr*, 201 Ariz. 509, 520, ¶ 46, 38 P.3d 1172, 1183 (2002). "The ultimate question of the constitutionality of a pretrial identification is, however, a mixed question of law and fact." *State v. Moore*, 222 Ariz. 1, 7, ¶ 17, 213 P.3d 150, 156 (2009).

¶17 Pretrial identifications must be conducted "in a fundamentally fair manner" to comport with a defendant's right to due process under the Fourteenth Amendment. *State v. Nordstrom*, 200 Ariz. 229, 241, ¶ 23, 25 P.3d 717, 729 (2001) (citing *Stovall v. Denno*, 388 U.S. 293, 297-98 (1967)). "[T]he primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.'" *Neil v. Biggers*, 409 U.S. 188, 198 (1972) (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)). "The mere fact that a pretrial identification procedure is overly suggestive, however, does not bar the admission of an identification." *State v. Lehr*, 201 Ariz. at 520, ¶ 46, 38 P.3d at 1183. Rather, "the question is whether the identification is reliable in spite of any suggestiveness." *Id.*

¶18 Courts use a two-part test in determining the admissibility of an identification: "(1) whether the method or procedure used was unduly suggestive, and (2) even if unduly suggestive, whether it led to a substantial likelihood of misidentification, i.e., whether it was reliable." *Id.* Relevant factors include: (1) the witness's opportunity to observe the suspect at the time of the crime; (2) the degree of attention of the witness; (3) the accuracy of a witness's prior description of the criminal; (4) the witness's level of certainty at the confrontation; and (5) the amount of time that passed between the crime and the confrontation. *Biggers*, 409 U.S. at 199-200; see also *State v. Hicks*, 133 Ariz. 64, 68, 649 P.2d 267, 271 (1982).

¶19 For purposes of this appeal, we assume that the photographic line-up was unduly suggestive. We then turn to the *Biggers* factors to determine whether it led to a substantial likelihood of misidentification. Officer Mann observed the male shoplifting suspect for a minimum of five to ten minutes. Defendant conceded below that she was able to observe that individual for a "significant amount of time." The officer's view was unobstructed; the cited individual was not wearing a hat, hood, or sunglasses.

¶10 There was no specific testimony about Officer Mann's "degree of attention." *Biggers*, 409 U.S. at 199-200. Appellate

courts, though, have noted that police officers are trained observers. See *State v. Williams*, 144 Ariz. 433, 440, 698 P.2d 678, 685 (1985) (commenting that a police officer is trained in observation). Additionally, the accuracy and depth of Officer Mann's physical description of the suspect upon issuing the citation reflect a high degree of attention. As for the accuracy of that description, a 2008 Department of Transportation, Motor Vehicle Division ("MVD") description of defendant listed him as six feet tall, 218 pounds, with hazel eyes.

¶11 In terms of the "level of certainty . . . at the confrontation," *Biggers*, 409 U.S. at 199-200, Officer Mann testified that, upon meeting Kenneth, she was sure he was not the person she had cited. Detective Cano did not recall any hesitation by Officer Mann when he showed her photographs of the brothers. A witness' unhesitating selection of a suspect's photograph may indicate a high degree of certainty in the identification. See *State v. Alvarez*, 145 Ariz. 370, 372, 701 P.2d 1178, 1180 (1985).

¶12 The most significant factor in defendant's favor is the amount of time that elapsed between the shoplifting offense and Officer Mann's identification.<sup>3</sup> But, as previously noted,

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<sup>3</sup> It is unclear exactly when the photographic line-up took place. At trial, Officer Mann initially testified the

whether a pretrial identification is reliable depends on the "totality of the circumstances." *Biggers*, 409 U.S. at 199. Though the time lapse here is substantial, in balancing the factors, the trial court could have reasonably concluded that the strength of the other factors was sufficient to offset the time gap.<sup>4</sup>

**CONCLUSION**

¶13 For the reasons stated, we affirm defendant's sentences and convictions.

/s/

MARGARET H. DOWNIE, Judge

CONCURRING:

/s/

MAURICE PORTLEY, Presiding Judge

/s/

MICHAEL J. BROWN, Judge

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photographic line-up occurred in January 2009, but later agreed it might have happened as late as June 2009.

<sup>4</sup> Additionally, the court instructed the jury that the State must prove the reliability of Officer Mann's in-court identification beyond a reasonable doubt.