IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

STATE OF ARIZONA,
Appellee,

v.

VICTOR LEE LOBATO,
Appellant.

No. 2 CA-2012-0038
Filed December 11, 2013

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Court 111(c); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20101166001
The Honorable Jose H. Robles, Judge Pro Tempore

AFFIRMED

COUNSEL

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz, Section Chief Counsel, Phoenix and
Joseph L. Parkhurst, Assistant Attorney General, Tucson
Counsel for Appellee

Law Offices of Christopher L. Scileppi, P.L.L.C., Tucson
By Christopher L. Scileppi
Counsel for Appellant

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Howard concurred.

M I L L E R, Judge:

¶1 Victor Lobato was convicted after a jury trial of two counts of armed robbery and two counts of aggravated assault. Lobato appeals from his convictions and sentences and claims his due process rights were violated when the trial court admitted an in-court identification without first holding a hearing to determine its reliability. He also contends that the prosecutor engaged in misconduct and committed a disclosure violation. For the reasons set forth below, we affirm Lobato's convictions and sentences, but vacate the criminal restitution order entered at sentencing.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the jury's verdicts. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). We also include pertinent procedural matters relevant to Lobato's arguments on appeal.

¶3 In March 2010, Lobato entered a hair salon wearing a baseball cap, surgical mask, and blue gloves. He approached the customer counter, laid a gun on the countertop, and demanded money from two salon employees, A.S. and E.W. A.S. and E.W. gave Lobato money from the cash drawers, and he exited the salon. Lobato was observed from the parking lot by a third hair salon employee, K.L.

¶4 During the state's opening statement, the prosecutor explained only K.L. was able to identify Lobato from a photo lineup. At trial, however, the prosecutor asked E.W. whether the person who had robbed her was in the courtroom. E.W. answered, "Yes," and proceeded to identify Lobato. E.W. indicated that she had not

been shown a photographic lineup because she "was not there when [the police] brought the lineup." The prosecutor clarified that E.W. had never seen a photographic lineup, to which she answered: "No. I was shown some MySpace[1] pictures." E.W. also conceded that her in-court identification may have been tainted by seeing Lobato seated at the defense table, stating, "It could be tainted, but looking at him, I know that those are the eyes I saw through—between the mask and the hat that day."

¶5 On cross-examination, E.W. testified that it had not been police officers but rather the prosecutor who showed her the MySpace photographs of Lobato during a pretrial meeting. E.W. also indicated she understood at the time that the individual in the photographs shown to her were of the defendant in this case.

¶6 The following trial day, Lobato filed a motion for a mistrial and, in the alternative, a motion to strike testimony and request for a limiting jury instruction. In his motion, Lobato contended that the prosecutor's having shown E.W. the photographs was unduly suggestive and that the procedures used had tainted the identification to the degree that it was unreliable. The trial court denied Lobato's motion for mistrial as well as his motion to strike E.W.'s in-court identification, but granted a curative jury instruction, to which both of the parties stipulated.

¶7 The jury found Lobato guilty of armed robbery and aggravated assault against A.S. and E.W. The trial court imposed partially aggravated and presumptive sentences of imprisonment, to run concurrent with each other, the longest of which was 10.5 years. Lobato timely appealed his convictions and sentences.

In-court Identification

¶8 Lobato first argues the trial court committed reversible error when it denied his motion for a mistrial because the court failed to hold a hearing pursuant to *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969). He also asserts the court abused its discretion when it denied his motion to strike the tainted in-court

[1]MySpace is a social networking website.

identification and contends the alleged errors violated his due process rights.[2]

¶9 We review the denial of a motion for a mistrial for an abuse of discretion. *State v. Bible*, 175 Ariz. 549, 598, 858 P.2d 1152, 1201 (1993). We also review a trial court's ruling on an in-court identification for an abuse of discretion. *State v. Leyvas*, 221 Ariz. 181, ¶ 9, 211 P.3d 1165, 1168 (App. 2009). And "[w]e will not reverse a conviction based on the erroneous admission of evidence without a 'reasonable probability' that the verdict would have been different had the evidence not been admitted." *State v. Hoskins*, 199 Ariz. 127, ¶ 57, 14 P.3d 997, 1012-13 (2000).

¶10 The Due Process Clause of the Fourteenth Amendment requires the state to conduct pretrial identification procedures in a manner that is "fundamentally fair and secures the suspect's right to a fair trial." *State v. Lehr*, 201 Ariz. 509, ¶ 46, 38 P.3d 1172, 1183 (2002). The presentation of identification evidence that is tainted by unduly suggestive procedures and creates "'a substantial likelihood of misidentification' violates a defendant's right to due process." *State v. Nottingham*, 231 Ariz. 21, ¶ 5, 289 P.3d 949, 952 (App. 2012), *quoting Lehr*, 201 Ariz. 509, ¶ 46, 38 P.3d at 1183. In particular, due process concerns arise "when evidence lacking in foundation reaches the jury under circumstances that do not afford a defendant an opportunity to point out its weaknesses." *State v. Nordstrom*, 200 Ariz. 229, ¶ 26, 25 P.3d 717, 729 (2001), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012).

¶11 In *Dessureault*, our supreme court addressed these due process concerns and established a process for challenging pretrial identification procedures that are "significantly suggestive[,] and as

---

[2]Although Lobato separates his due process argument from his contention that the trial court erred in failing to hold a *Dessureault* hearing, we address these arguments together. A *Dessureault* hearing is a procedure our supreme court developed to ensure an in-court identification comports with due process. *See Dessureault*, 104 Ariz. at 383-84, 453 P.2d at 954-55; *State v. Nottingham*, 231 Ariz. 21, ¶¶ 5-6, 289 P.3d 949, 952 (App. 2012).

such materially increase[] the dangers inherent in eye witness identification." 104 Ariz. at 383-84, 453 P.2d at 954-55; *see also Leyvas*, 221 Ariz. 181, ¶ 12, 211 P.3d at 1169. That process consists of three steps. *Dessureault*, 104 Ariz. at 384, 453 P.2d at 955. First, when an in-court identification is challenged, "the trial judge must immediately hold a hearing in the absence of the jury to determine from clear and convincing evidence whether it contained unduly suggestive circumstances." *Id.*; *see also Nottingham*, 231 Ariz. 21, ¶ 6, 289 P.3d at 952. Second, the in-court identification must be precluded if the trial judge concludes the pretrial identification was unduly suggestive and would taint any subsequent in-court identification of the suspect. *Id.* Third, if requested, the court is required to give a cautionary instruction should the court conclude "the pretrial identification process was suggestive but not sufficiently so to justify preclusion in light of the circumstances of the case." *Nottingham*, 231 Ariz. 21, ¶ 6, 289 P.3d at 952; *accord Dessureault*, 104 Ariz. at 384, 453 P.2d at 955.

¶12 We first address whether the trial court was required to hold a hearing pursuant to *Dessureault*. The record establishes that E.W. made an in-court identification after having viewed MySpace photographs of Lobato. The prosecutor showed E.W. the images before trial, and E.W. understood at the time that the photographs were of the defendant. This pretrial procedure was revealed for the first time during E.W.'s testimony, and Lobato subsequently challenged the in-court identification at trial. Accordingly, the trial court was required to hold a hearing to determine whether the in-court identification was tainted as a result of the prosecutor's showing E.W. the MySpace photographs. *See Dessureault*, 104 Ariz. at 384, 453 P.2d at 955; *Leyvas*, 221 Ariz. 181, ¶ 12, 211 P.3d at 1169.

¶13 Having determined the trial court erred when it declined to hold a *Dessureault* hearing, we next examine whether the court also erred in admitting E.W.'s in-court identification. *See State v. Lang*, 107 Ariz. 400, 401, 389 P.2d 37, 38 (1971) (reviewing court "called upon to decide": (1) whether pretrial identification procedure was unduly suggestive; (2) if so, whether in-court identification was unreliable; and, (3) if so, whether it was harmless error). Where, as here, an in-court identification is challenged at the

trial level, meaningful appellate review requires us to determine from the record whether the in-court identification was tainted by the prior identification procedures. *Dessureault*, 104 Ariz. at 384-85, 453 P.2d at 954-55. There is a two-part test for determining admissibility: "(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." *Lehr*, 201 Ariz. 509, ¶ 46, 38 P.3d at 1183; *see also State v. Price*, 213 Ariz. 550, ¶ 4, 145 P.3d 647, 648-49 (App. 2006) (determining pretrial identification procedure suggestive, but identification otherwise reliable), *vacated in part on other grounds State v. Price*, 217 Ariz. 182, 171 P.3d 1223 (2007). When the pretrial procedure is so overly suggestive so as to make the in-court identification unreliable, the testimony must be excluded. *See Lehr*, 201 Ariz. 509, ¶ 46, 38 P.3d at 1183.

¶14 The prosecutor showed E.W. specific photographs of an individual E.W. understood to be the defendant standing trial. E.W. had not previously identified Lobato in a photographic lineup. "The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." *See Stovall v. Denno*, 388 U.S. 293, 302 (1967), *overruled on other grounds by Griffith v. Kentucky*, 479 U.S. 314 (1987). Indeed, our supreme court has repeatedly determined that "[s]ingle person identifications are inherently suggestive." *State v. Cañez*, 202 Ariz. 133, ¶ 47, 42 P.3d 564, 581 (2002); *see also State v. Williams*, 144 Ariz. 433, 441, 698 P.2d 678, 686 (1985) (concluding "one-man show-ups are inherently suggestive"); *State v. Ware*, 113 Ariz. 337, 339, 554 P.2d 1264, 1266 (1976) (single photographic show-up "unduly suggestive"). The prosecutor's actions in the instant case were akin to a single-person identification. Thus, we conclude the pretrial procedure was unduly suggestive.

¶15 The fact that a pretrial identification procedure was overly suggestive, however, does not preclude the admission of identification testimony. *Lehr*, 201 Ariz. 509, ¶ 46, 38 P.3d at 1183; *see also Lang*, 107 Ariz. at 404, 489 P.2d at 41; *Price*, 213 Ariz. 550, ¶ 4, 145 P.3d at 648-49. "'If the court finds that the pretrial identification procedure was unduly suggestive, it must next address the question

whether the identification is nevertheless reliable.'" *Id.* ¶ 48, *quoting State v. Smith*, 146 Ariz. 491, 496-97, 707 P.2d 289, 294-95 (1985). A defendant's due process rights are not violated when there is "no substantial likelihood that [the defendant] would be misidentified." *State v. Via*, 146 Ariz. 108, 120, 704 P.2d 238, 250 (1985). The factors to be considered in evaluating the likelihood of misidentification include:

> the opportunity of the witness to view the criminal at the time of the crime, the witness'[s] degree of attention, the accuracy of [her] description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

Manson v. Brathwaite, 432 U.S. 98, 114 (1977), *citing Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). We therefore apply these factors to E.W.'s in-court identification.

¶16 E.W. testified that she was only briefly able to observe the robber before he pulled a surgical mask over his face. E.W. was never shown a photographic lineup following the robbery and one year and nine months passed between the date of the crime and the in-court identification. Given the suggestive nature of the pretrial procedure, the length of time between the crime and the confrontation, as well as E.W.'s limited ability to view the robber during the crime, we conclude there was substantial likelihood of misidentification, rendering the in-court identification unreliable and thus inadmissible.

¶17 Having determined the trial court erred in admitting E.W.'s tainted in-court identification, we next address whether such error was harmless. *See Lang*, 107 Ariz. at 404-05, 489 P.2d at 41-42. "[I]f it can be determined from the record on clear and convincing evidence that the in-court identification was not tainted by the prior identification procedures or from evidence beyond a reasonable doubt that it was harmless, and there is otherwise no error, the

conviction will be affirmed." *Dessureault*, 104 Ariz. at 384, 453 P.2d at 955; *see also State v. Bible*, 175 Ariz. at 588, 858 P.2d at 1191 ("When an issue is raised but erroneously ruled on by the trial court, this court reviews for harmless error."). To determine whether error is harmless, we consider whether the tainted evidence supports a fact otherwise established by existing evidence. *See State v. Bass*, 198 Ariz. 571, ¶ 40, 12 P.3d 796, 806 (2000).

¶18 In the instant case, other admissible evidence established the identification of Lobato as the robber of the salon. Another salon employee, K.L., was in the parking lot at the time of the incident, and testified to seeing a tall, skinny man wearing teal gloves, a baseball cap, but no mask, get into an automobile. He had picked Lobato out of a photographic lineup following the incident and identified Lobato in court. K.L. testified that he was one "[h]undred percent sure" of his identification. K.L.'s in-court identification was admitted after a *Dessureault* hearing during which the trial court had found that it was neither tainted nor unreliable.

¶19 K.L. also gave a description of Lobato's vehicle, testifying that it appeared to be an older-model, white sedan, either a Buick or Oldsmobile, and that there was a bumper sticker "on the left rear corner." Photographs of Lobato's white 1992 Buick LeSabre matched K.L.'s testimony.

¶20 In addition, the salon's robber was described by three separate eyewitnesses as having worn blue gloves during the offense. Police recovered a pair of blue gloves from a garbage can at the residence where Lobato was staying. The other resident living at the address testified the blue gloves did not belong to him, and DNA[3] swabbed from the inside of the gloves matched Lobato. Thus, there was substantial evidence presented to identify Lobato as the salon robber.

¶21 Moreover, the parties stipulated to a curative jury instruction, specifically tailored to address E.W.'s in-court identification of Lobato. *See Nottingham*, 231 Ariz. 21, ¶ 14, 289 P.3d

[3]Deoxyribonucleic acid.

at 955 (concluding "that 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 identification testimony into question"). Further, Lobato conducted a thorough cross-examination of E.W. *See State v. Sustaita*, 119 Ariz. 583, 590, 583 P.2d 239, 246 (1978) (opportunity for cross-examination cured potential error). During cross-examination, E.W. acknowledged that the MySpace pictures may have influenced her in-court identification. Lobato was also able to point out to the jury that it had been one year and nine months since E.W. had originally seen the robber, that E.W. never told police she could make an identification, that she was not shown a proper lineup with multiple subjects, and that she knew at the time that the individual in the MySpace photographs was the defendant.

¶22 In sum, we determine the trial court erred by failing to hold a *Dessureault* hearing and by admitting an unreliable in-court identification. However, the curative jury instruction, combined with K.L.'s admissible in-court identification, and the overwhelming extrinsic evidence against Lobato, rendered the trial court's error harmless beyond a reasonable doubt. *See Lang*, 107 Ariz. at 404-05, 489 P.2d at 41-42 (error admitting testimony concerning unduly suggestive photographic identification harmless where strong extrinsic evidence and accomplice established defendant perpetrated robbery); *see also United States v. Hamilton*, 420 F.2d 1292, 1294 n.11 (D.C. Cir. 1969) ("extrinsic evidence of guilt is so strong as to have warranted affirmance even if there had been an error in admitting the identification testimony"); *State v. Dann*, 205 Ariz. 557, ¶ 46, 74 P.3d 231, 244 (2003) (court's curative instruction, combined with overwhelming evidence, rendered error in admission of improper testimony harmless); *State v. Brown*, 185 N.W.2d 323, 327 (Wis. 1971) (admission of in-court identification tainted by unlawful out-of-court identification constituted harmless error where identification was merely corroborative of strong and admissible in-court identification by another witness), *overruled on other grounds by State v. Walker*, 453 N.W.2d 127 (Wis. 1990).

¶23 To the extent that Lobato appears to contend his due process rights were violated apart from the trial court's failure to

comport with the *Dessureault* process, he raises such a claim for the first time on appeal. Accordingly, Lobato has forfeited the right to seek relief on this ground absent fundamental error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Additionally, because Lobato does not argue that any error was fundamental and prejudicial, he has waived our review of his claim. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (concluding argument waived because defendant "d[id] not argue the alleged error was fundamental").

¶24 In any event, we find Lobato's due process argument unavailing. Due process concerns are generally not implicated where, as here, the defendant is afforded an opportunity to point out weaknesses in the allegedly tainted in-court identification. *See Nordstrom*, 200 Ariz. 229, ¶ 26, 25 P.3d at 729-30. Given that E.W.'s in-court identification was effectively impeached, that the identification was merely corroborative of K.L.'s strong and admissible in-court identification, and that other substantial evidence established Lobato as the robber, we conclude Lobato's due process rights were not violated. *See id*. (admission of identification testimony tainted by media did not violate defendant's due process rights where defendant thoroughly cross-examined eyewitness about inconsistencies in her description); *Dann*, 205 Ariz. 557, ¶ 46, 74 P.3d at 244 (admission of improper witness statement harmless error where limiting instruction given and overwhelming evidence supported the verdict).

Disclosure Violation

¶25 Lobato alleges the same facts as set forth in his *Dessureault* claim and argues that the trial court erred in denying his second motion for a mistrial based on the state's failure to disclose E.W.'s pretrial identification of Lobato. Although Lobato "raises with this Court his argument in his December 12, 2011 motion for mistrial," a legal argument may not be incorporated into an appellate brief in this fashion; rather, it must be developed in the body of the opening brief as provided by Rule 31.13(c)(1)(vi), Ariz. R. Crim. P. *See State v. Walden*, 183 Ariz. 595, 605, 905 P.2d 974, 984 (1995) (holding "[a]rgument must be in the body of the brief" and striking text in appendix), *overruled on other grounds by State v. Ives*,

187 Ariz. 102, 927 P.2d 762 (1996). Because Lobato has failed to adequately develop his argument on appeal, his disclosure violation claim is waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) ("opening briefs must present significant arguments, supported by authority"; failure to argue a claim constitutes abandonment and waiver).

¶26 In any event, assuming arguendo that the prosecutor committed a disclosure violation under Rule 15.1, Ariz. R. Crim. P., the trial court did not err in denying Lobato's motion for a mistrial. *See State v. Bracy*, 145 Ariz. 520, 529, 703 P.2d 464, 473 (1985) ("not every Rule 15.1 violation will cause a reversal"). The record reflects that the alleged disclosure violation was not motivated by bad faith or willfulness. *See State v. Armstrong*, 208 Ariz. 345, ¶¶ 41-42, 93 P.3d 1061, 1070 (2004) (in assessing appropriate sanction for disclosure violation, courts consider, inter alia, whether violation was done willfully or in bad faith). The prosecutor averred he had forgotten about the MySpace photographs, and he took "personal" and "professional responsibility" for this oversight. The trial judge and Lobato's counsel both stated that they did not think the disclosure violation was intentional. Moreover, the prosecutor's opening statement appeared to reflect his belief that only K.L. would be able to identify Lobato. He also stipulated to a curative instruction and told the jurors in closing argument that they could "get rid of" E.W.'s in-court identification altogether. Thus, we conclude the prosecutor's disclosure violation was not done willfully or in bad faith.

¶27 Accordingly, the trial court did not err in denying Lobato's second motion for a mistrial.

Prosecutorial Misconduct

¶28 Lobato asserts that the prosecutor's showing E.W. the MySpace photographs before trial combined with his asking E.W. to make an in-court identification amounted to prosecutorial misconduct. Because Lobato raises his claim of prosecutorial misconduct for the first time on appeal, we review for fundamental error. *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. Again, Lobato does not argue on appeal that the error is fundamental, however,

and because we find no error, fundamental or otherwise, the argument is waived. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140; *State v. Brown*, 233 Ariz. 153, ¶ 11, 310 P.3d 29, 34 (App. 2013) (fundamental error argument waived on appeal).

Criminal Restitution Order

¶29 Although Lobato has not raised the issue on appeal, we find fundamental error associated with the criminal restitution order (CRO). *See* A.R.S. § 13-805.[4] In the sentencing minute entry, the trial court ordered that "all fines, fees, assessments and/or restitution are reduced to a Criminal Restitution Order, with no interest, penalties or collection fees to accrue while [Lobato] is in the Department of Corrections." The trial court's imposition of the CRO before the expiration of Lobato's sentence "'constitute[d] an illegal sentence, which is necessarily fundamental, reversible error.'" *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013), *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009). This remains true even though the court ordered that the imposition of interest be delayed until after Lobato's release. *See id.* ¶ 5.

Conclusion

¶30 For the foregoing reasons, we affirm Lobato's convictions and sentences, but vacate the CRO.

[4]Section 13-805 has been amended three times since the date of the crimes. *See* 2012 Ariz. Sess. Laws, ch. 269, § 1; 2011 Ariz. Sess. Laws, ch. 263, § 1 and ch. 99, § 4. We apply the version in effect at the time of the crimes. *See* 2005 Ariz. Sess. Laws. ch. 260, § 6; *State v. Lopez*, 231 Ariz. 561 n.1, 298 P.3d 909, 910 n.1 (App. 2013).