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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. WILLIAM FRIAS, Appellant.	)	2 CA-CR 2012-0436 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20103631001

Honorable Michael O. Miller, Judge

AFFIRMED IN PART; VACATED IN PART

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H O W A R D, Chief Judge.

¶1 After a jury trial, appellant William Frias was convicted of fleeing from a law enforcement vehicle. On appeal, Frias argues the trial court erred by denying his

request for a *Dessureault*[1] jury instruction and by allowing opinion testimony as to the credibility of a witness. For the following reasons, we affirm Frias's conviction and sentence but vacate a criminal restitution order imposed as part of his sentence.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the conviction. *See State v. Sarullo*, 219 Ariz. 431, ¶ 2, 199 P.3d 686, 688 (App. 2008). In October 2010, Pasqua Yaqui police officers Kevin Wells and Clinton Baker responded to a call from a convenience store reporting that a car involved in a "beer run" earlier that day had returned. When they arrived at the scene, the car had left but employees were standing outside and pointing to a car pulled over on the side of the road not far from the store. Wells and Baker began a traffic stop of the car, but it sped off, instigating a high speed chase with the officers. The officers eventually stopped their pursuit for safety reasons. Wells and Baker returned to the convenience store, where an employee stated she recognized the driver and knew his last name was Frias. The police later conducted a photographic lineup in which the employee identified Frias as the driver of the car.

¶3 Frias was charged with and convicted of one count of fleeing a law enforcement vehicle. He was sentenced to a presumptive term of 2.25 years imprisonment. Frias appeals. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).

[1]*State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969).

Dessureault Instruction

¶4 Frias first argues the trial court erred in refusing his request for a jury instruction pursuant to *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969). Frias argues the pretrial photographic lineup was unduly suggestive because he was the only person with a facial tattoo. He also argues that under *State v. Nottingham*, 231 Ariz. 21, 289 P.3d 949 (App. 2012), a *Dessureault* hearing and finding of suggestiveness are not required for a defendant to be entitled to a *Dessureault* instruction.

¶5 At trial, the employee who identified Frias in the photographic lineup could not identify him in court, and even went so far as to question whether the person she had originally identified was, in fact, the defendant sitting in the courtroom. Neither of the police officers could identify Frias as the driver nor give any descriptive information about the driver. However, they did testify that the employee had told them the suspect's name was Frias and later identified him in a photographic line-up. Frias requested a *Dessureault* instruction in order to "set[] out some factors that the jury can look at when making a determination about whether or not to accept or not accept an identification." The court denied Frias's request because there had been no pretrial evidentiary hearing and no showing the pretrial procedures used by the police were unduly suggestive. No in-court identification occurred, and Frias does not argue the officers' or employee's testimony constituted an in-court identification.

¶6 Because Frias did not argue at trial that the pretrial photographic lineup was unduly suggestive or that a pre-trial *Dessureault* hearing was unnecessary, he has forfeited the right to seek relief for all but fundamental, prejudicial error. *See State v.*

Lopez, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008) ("[A]n objection on one ground does not preserve the issue [for appeal] on another ground."); *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object to alleged error in trial court results in forfeiture of review for all but fundamental, prejudicial error). A fundamental error is "'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.'" *Id.* ¶ 19, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). The defendant has the burden to show both that the error was fundamental and that it caused him prejudice. *Id.* ¶ 20. We will affirm the trial court's ruling if it was legally correct for any reason. *State v. Cañez*, 202 Ariz. 133, ¶ 51, 42 P.3d 564, 582 (2002).

¶7 The *Dessureault* instruction Frias requested provides that "[t]he State must prove beyond a reasonable doubt that the in-court identification of the defendant . . . is reliable." State Bar of Arizona, *Revised Arizona Jury Instructions (Criminal)* Std. 39 (2010). The instruction further provides a list of factors the jury should consider when weighing the reliability of that in-court identification. *Id.* A defendant may request this instruction when an "in-court identification" is being challenged because of an unduly suggestive pretrial identification procedure. *Dessureault*, 104 Ariz. at 384, 453 P.2d at 955. This court recently concluded that a formal hearing and finding that the pretrial identification procedure was unduly suggestive are unnecessary and that a *Dessureault* instruction is required if a defendant shows that the reliability of an in-court identification is questionable due to suggestive pretrial identification procedures. *State v. Nottingham*,

231 Ariz. 21, ¶¶ 13-14, 289 P.3d 949, 954-55 (App. 2012). Thus, while a showing of unduly suggestive pretrial procedures is a central component of the *Dessureault* instruction, the instruction itself is only necessary once an in-court identification occurs.

¶8 Frias appears to argue, however, that even in the absence of an in-court identification a defendant is entitled to a *Dessureault* instruction when the basis of the defense is identity and the "defendant has presented evidence that a pretrial identification has been made under suggestive circumstances." This assertion is not supported by *Dessureault* or *Nottingham*. Moreover, Frias's requested *Dessureault* instruction pertained to an in-court identification that never was made. A trial court's refusal to give an instruction for lack of a factual basis is proper and within its discretion. *State v. Cookus*, 115 Ariz. 99, 103, 563 P.2d 898, 902 (1977); *State v. Caruthers*, 110 Ariz. 345, 347, 519 P.2d 44, 46 (1974) ("Instructions which are clearly not supported by the evidence are improper."). Additionally, the trial court generally has no duty to modify jury instructions sua sponte. *See State v. Barnett*, 142 Ariz. 592, 595, 691 P.2d 683, 686 (1984) (no fundamental error where trial court failed to define sua sponte term "intentionally" as used in jury instruction); *see also People v. Abilez*, 161 P.3d 58, 92 (Cal. 2007) ("[T]rial court [not] under a sua sponte duty to modify the instruction for defendant's benefit."). Absent an in-court identification, Frias was not entitled to the *Dessureault* instruction. *See Nottingham*, 231 Ariz. 21, ¶ 14, 289 P.3d at 954-55; *Dessureault*, 104 Ariz. at 383-84, 453 P.2d at 954-55.

¶9 And even if the law were as Frias claims, he has failed to establish that the pretrial identification here was made under unduly suggestive circumstances. The trial

court expressly found "the pretrial identification procedures utilized by the police were [not] unduly suggestive" based on the evidence presented at trial. Our supreme court has ruled that a visible and unique facial feature, including a small facial tattoo visible on only one individual in a photographic lineup, does not constitute a "suggestive circumstance" and in fact makes an identification more, not less, reliable. *State v. Perea*, 142 Ariz. 352, 355-56, 690 P.2d 71, 74-75 (1984) (lineup not unduly suggestive where only defendant had small facial tattoo); *State v. Alvarez*, 145 Ariz. 370, 372-73, 701 P.2d 1178, 1180-81 (1985) (fact that only defendant had facial moles like those described by victim did not make lineup unduly suggestive).

¶10 Frias's tattoo was small and barely visible in the photograph. We see little, if anything, to distinguish this case from *Perea* and *Alvarez.* Because there was no in-court identification or evidence that the pretrial lineup was unduly suggestive, the trial court did not err, fundamentally or otherwise, in refusing to give the *Dessureault* instruction to the jury.

¶11 Moreover, Frias has not shown he was prejudiced by the trial court's ruling. *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607 (defendant must show prejudice in fundamental error review). The jury was instructed on its duty to determine the credibility of the witnesses and the weight to give the evidence presented, and was informed the state had the burden to prove the defendant guilty beyond a reasonable doubt. We presume the jury followed the court's instructions in weighing the evidence. *See State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006). And Frias had the opportunity to confront and cross-examine the employee who made the pretrial

identification and both police officers, fairly bringing the weakness of the state's identification evidence before the jury. Additionally, Frias's attorney argued in opening and closing argument that the state would not meet and had not met its burden of proving Frias was the one who had committed the crime.

¶12 Thus, in the absence of an unduly suggestive pretrial identification, Frias received procedural protections sufficient to safeguard his rights. *See Perry v. New Hampshire*, ___ U.S. ___, ___, 132 S. Ct. 716, 721 (2012) ("When no improper law enforcement activity is involved, . . . it suffices to test reliability through the rights and opportunities generally designed for that purpose," such as "vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt."). Accordingly, the trial court did not err.

Witness Vouching

¶13 Frias next argues that the trial court erred by not striking, sua sponte, Baker's statement that he had found the employee who identified Frias "credible." Frias argues this was improper expert opinion testimony on the credibility of the witness and invaded the province of the jury. Because Frias did not object to the testimony at trial, we review only for fundamental, prejudicial error. *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. In order to show fundamental error, Frias must first show that the trial court erred. *Id.* ¶ 23.

¶14 We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *State v. Bennett*, 216 Ariz. 15, ¶ 4, 162 P.3d 654, 656 (App. 2007).

Witnesses usually are prohibited from testifying as to the truthfulness of another witness's statement. *State v. Martinez*, 230 Ariz. 382, ¶ 11, 284 P.3d 893, 896 (App. 2012). But they may give opinion testimony based on their rational perception that will aid the jury in understanding their testimony or in determining a fact or issue. *State v. Doerr*, 193 Ariz. 56, ¶ 26, 969 P.2d 1168, 1175 (1998), *citing* Ariz. R. Evid. 701. Therefore, if the defense implies an officer was less than diligent in his investigation, that officer may testify as to the reasons he chose to forgo certain avenues of investigation, even when that explanation implicates the credibility of another witness. *Martinez*, 230 Ariz. 382, ¶¶ 13-14, 284 P.3d at 896-97.

¶15 Frias spent a significant portion of his cross-examination of the officers emphasizing that the officers did not check the gas station's surveillance cameras to verify the identity of the driver, suggesting they were less than diligent in their investigation. Baker then testified on redirect he had not pursued video surveillance evidence of the crime because he believed the employee's identification of Frias, she appeared "credible," and she provided a "good witness statement."

¶16 Baker's testimony on redirect therefore was necessary to explain his failure to request and view the surveillance video and could have aided the jury in understanding his testimony. Accordingly, the testimony was proper opinion testimony and did not invade the province of the jury. The trial court therefore did not err fundamentally or otherwise by allowing the testimony. *See Martinez*, 230 Ariz. 382, ¶¶ 13-14, 284 P.3d at 896-97; *see also State v. Morales*, 198 Ariz. 372, ¶ 15, 10 P.3d 630, 634 (App. 2000)

(asking if another witness was "lying" will rarely amount to fundamental error). We thus reject this argument.

Criminal Restitution Order

¶17 Although neither party has raised this issue, the sentencing minute entry provides that the "fines, fees, and/or assessments" the court had imposed were "reduced to a Criminal Restitution Order [CRO]." But as this court has determined, based on A.R.S. § 13-805(C), "the imposition of a CRO before the defendant's probation or sentence has expired 'constitutes 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). Therefore, because this portion of the sentencing minute entry is not authorized by statute, the CRO must be vacated.

Conclusion

¶18 For the foregoing reasons, we vacate the CRO but otherwise affirm Frias's conviction and sentence.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge