IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

THOMAS ANGEL CONRAD,
Appellant.

No. 2 CA-CR 2013-0010
Filed January 16, 2014

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NOT FOR PUBLICATION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. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20120490001
The Honorable Christopher Browning, Judge
The Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART

COUNSEL

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MEMORANDUM DECISION

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

H O W A R D, Chief Judge:

¶1 After a jury trial, appellant Thomas Conrad was convicted of second-degree burglary. After finding he had two or more historical prior felony convictions, the trial court sentenced him to a mitigated, ten-year prison term. On appeal, Conrad argues the court erred in denying his motion to preclude evidence of a witness's pre-trial and in-court identifications of him. For the following reasons, we affirm Conrad's conviction and sentence.

¶2 "In reviewing the denial of a motion to suppress evidence, we consider only the evidence that was presented at the suppression hearing, which we view in the light most favorable to sustaining the trial court's ruling." *State v. Kinney*, 225 Ariz. 550, ¶ 2, 241 P.3d 914, 917 (App. 2010). At the evidentiary hearing on Conrad's motion, J.T. testified that he was looking out his front window on the morning of January 30, 2012, when he saw a man on the sidewalk approach the house across the street, walk up the driveway, and knock on the door while "insistently looking around." This drew J.T.'s attention, because he knew the people that lived across the street were not home and were "usually away from home throughout the day," and so it was "very unusual for somebody to be walking directly to that house [and] knocking on that door."

¶3 As J.T. watched, for a total of "around five minutes," the man left the front of the house; J.T. then saw through a chain-link fence that someone was approaching the same neighbor's house through the back alley. When J.T. got in his car and drove slowly through the alley, he saw the same man who had been knocking at his neighbors' front door inside that home's fenced backyard,

peering through a window. After stopping to alert another neighbor to keep "an eye out" for suspicious activity across the alley, J.T. drove back through the alley and saw the man "pushing the French doors and forcing [his] way in" to the back of the house. J.T. called 9-1-1 and provided a description of the man to the 9-1-1 operator. J.T. had not seen the man's face, but had noticed he was wearing "[l]ight colored tennis shoes, . . . baggie jeans, dark colored sweater with a hood, [and a] ball cap," and said he had described the man as being of "medium height" and "thin build" and having a "[d]ark skin color."

¶4 Less than an hour later, J.T. was driven to a street where Conrad was detained in handcuffs, and he identified Conrad as the prowler he had seen, although he noted Conrad was not wearing a sweater or baseball cap. J.T. explained,

> The police officer asked me about the identification. I told the police officer . . . that he was not wearing the baseball cap or the sweater that I had seen previously. They put a baseball cap on him, looked more like him. The build was the same. The skin color was the same, pants were the same, shoes were the same.

J.T. testified he identified Conrad from a distance of about one hundred-fifty feet—"about the same distance" between his front window and his neighbor's front door.

¶5 On cross-examination, J.T. was asked about a previous interview with defense counsel in which he had described the man he saw as "'slightly taller'" than his own height of "'5 foot 7,'" estimating "'5 foot 10, maybe, maybe even a little taller,'" and had been unable to recall, on the day of the interview, the color of the man's sweater. When asked if he had been able to identify Conrad only after a police officer placed a ball cap on Conrad's head, J.T. responded, "More definite, yes." J.T. confirmed that he had told the police that he was "pretty sure" and "fairly sure" that Conrad was the same person he had seen on his neighbor's property, based

mainly on the man's build. In re-direct examination, the state asked J.T., "Just because the person had a hat on, did that make you certain that that was the person that you had seen?" And J.T. responded, "No. The build was the same. Complexion was the same. Skin color, tennis shoes were the same color."

¶6 In a detailed, under-advisement ruling, the trial court recognized that, "although show-ups are inherently suggestive, they are not unreliable and inadmissible per s[e]," and considered whether J.T.'s identification had been reliable, despite the suggestive nature of the show-up, based on a "totality of the relevant circumstances" and considering "1. [J.T.'s] opportunity to observe the suspect; 2. The degree of [J.T.'s] attention; 3. The accuracy of [J.T.'s] prior [description]; 4. [J.T.'s] level of certainty; and, 5. The time that passed between the crime and the confrontation." The court stated it was "satisfied that the show-up was reliable and as such, the results thereof are admissible." The court also noted the state's representation at the hearing that it did not intend to elicit an in-court identification of Conrad from J.T.

¶7 On appeal, Conrad argues his conviction should be reversed because "the trial court committed legal error in denying [his] Motion to Preclude Pre-Trial and In-Trial Identification." Because no in-court identification was elicited from or provided by J.T., our review is limited to whether evidence of the identification J.T. made at the show-up was erroneously admitted.

Discussion

¶8 The United States Supreme Court "has recognized . . . a due process check on the admission of eyewitness identification, applicable when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime." *Perry v. New Hampshire*, ___ U.S. ___, 132 S. Ct. 716, 720 (2012). But

> [a]n identification infected by improper police influence . . . is not automatically excluded. Instead, the trial judge must

> screen the evidence for reliability pretrial. If there is "a very substantial likelihood of irreparable misidentification," the judge must disallow presentation of the evidence at trial. But if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth.

Id., *quoting Simmons v. United States*, 390 U.S. 377, 384 (1968).

¶9 We review a trial court's ruling on the reliability of a challenged identification for a clear abuse of discretion, *State v. Lehr*, 201 Ariz. 509, ¶ 46, 38 P.3d 1172, 1183 (2002), and "defer to a trial court's factual findings that are supported by the record and are not clearly erroneous," *State v. Moore*, 222 Ariz. 1, ¶ 17, 213 P.3d 150, 156 (2009). However, the "ultimate question of the constitutionality of a pretrial identification" is a mixed question of law and fact that we review de novo. *Id.*

Reliability of Pre-Trial Identification

¶10 Most of Conrad's argument is devoted to simple disagreement about the court's findings with respect to the five factors relevant to an identification's reliability under *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977), and *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). To the extent those arguments were raised at the hearing and addressed in the court's ruling, we see no need to restate the court's analysis here. *Cf. State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (declining to "rehash[] the trial court's correct ruling" on a petition for post-conviction relief "in a written decision"). We find reasonable evidence in the record, as set forth above, to support the court's findings that J.T. had a "reasonable opportunity to observe the suspect," and had done so with a "significant" degree of attention; that J.T.'s "description of the person at the front door of the residence and then breaking into the back of the residence was extremely consistent with the individual

at the show-up"; that J.T.'s statements that "he was 'fairly sure' and 'pretty sure'" that J.T. was the same man he had seen at his neighbor's home were "adequate . . . to provide a reasonable level of confidence"; and that "a relatively short amount of time, approximately one hour or less, passed between [J.T.'s] first observation of the suspect" and his identification of Conrad at the show-up. *See Moore*, 222 Ariz. 1, ¶ 17, 213 P.3d at 156.

¶11 Conrad points out that, in summarizing evidence received at the hearing, the trial court mistakenly stated, "It was [J.T.] who asked law enforcement if they would have the individual put on a baseball cap." Although the evidence suggested that J.T.'s comments prompted the police to put a cap on Conrad's head, there was no testimony that J.T. had expressly asked that this be done. But we cannot agree with Conrad that the court's ruling was therefore "based on a misunderstanding of a pivotal fact," and Conrad cites no authority suggesting this distinction should make a difference in our analysis. *Cf. Willis v. Garrison*, 624 F.2d 491, 494-95 (4th Cir. 1980) ("height, weight and clothing are acceptable elements of identification," especially "when the confrontation takes place shortly after the crime"; requiring suspect to don his hat and coat did not render identification inadmissible). The court was clearly aware of and considered J.T.'s testimony that his recognition of Conrad was made "more definite" after the cap was placed on Conrad's head, and concluded that this aspect of the show-up, when weighed against the countervailing factors indicating reliability, did not create a "substantial likelihood that [Conrad] would be misidentified." *State v. Via*, 146 Ariz. 108, 120, 704 P.2d 238, 250 (1985).

¶12 Conrad also argues there was no evidence to support the trial court's finding that J.T. had given a "detailed description" of the man he had seen to the 9-1-1- operator. But J.T.'s testimony supported this finding. Conrad was free to use evidence of the 9-1-1 recording to challenge J.T.'s testimony at the evidentiary hearing— as he later did at trial— but did not do so. Our review is limited to the evidence presented at the evidentiary hearing, *see Kinney*, 225 Ariz. 550, ¶ 2, 241 P.3d at 917, and reasonable evidence at the evidentiary hearing supported the trial court's findings. *See also*

State v. Williams, 144 Ariz. 433, 440, 698 P.2d 678, 685 (1985) (reliability of identification overcame suggestiveness of show-up even though witness had given no prior description of perpetrator).

¶13 The limitations of J.T.'s observations and the circumstances at the show-up present a close question, but we cannot say the trial court erred in denying Conrad's motion or that Conrad was denied due process as a result of that ruling. In reaching this conclusion, we are mindful of the court's superior opportunity to assess J.T.'s credibility. *See State v. Estrada*, 209 Ariz. 287, ¶ 22, 100 P.3d 452, 457 (App. 2004). In particular, J.T.'s somewhat equivocal statements at the show-up—that he was "pretty sure" and "fairly sure" of his identification—may have added to the court's confidence that the identification was reliable, even if the show-up had been unduly suggestive; because J.T. had never seen the prowler's face, "a more certain identification would be more suspicious." *United States v. Hawkins*, 499 F.3d 703, 710-11 (7th Cir. 2007) (witness's less than certain identification consistent with her observations of perpetrator wearing ski mask). We agree with the Seventh Circuit that, under such circumstances, "the equivocal nature of the identification affects the weight the jury might give to the [show-up] identification, not the reliability of the identification itself." *Id.*

¶14 Here, Conrad had full opportunity to cross-examine J.T. about his identification of Conrad at the show-up and did so vigorously. *See Perry*, ___ U.S. at ___, 132 S. Ct. at 728-29 (safeguards to assist jury in assessing reliability of eyewitness testimony include confrontation, cross-examination, appropriate jury instructions). At Conrad's request, the court instructed the jury on the state's burden to prove the reliability of any in-court identification beyond a reasonable doubt, as well as the five factors that might be considered to determine reliability.[1] *See id.*; *see also State v. Nottingham*, 231 Ariz.

[1]Although the trial court's instruction, as proposed and as given, referred to "in-court" identifications, and J.T.'s testimony pertained to his pre-trial, out-of-court identification, it nonetheless informed the jury about the factors identified in *Brathwaite*, 432 U.S. at 114 and *Biggers*, 409 U.S. at 199-200. Conrad has waived any

21, ¶¶ 14, 16, 289 P.3d 949, 955-56 (App. 2012) (court erred in denying requested instruction; "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").[2]

Harmless Error

¶15 Finally, although neither party has addressed the issue, we conclude reversal is not required because any error in admitting J.T.'s testimony about the show-up—if error at all—would have been harmless. *See State v. Burton*, 144 Ariz. 248, 251, 697 P.2d 331, 334 (1985) (possibly erroneous admission of identification evidence reviewed for harmless error); *see also Wray v. Johnson*, 202 F.3d 515, 525 (2d Cir. 2000) ("[T]he erroneous admission of unreliable identification testimony does not warrant relief from the conviction if the error was harmless."). "An error is harmless if it appears 'beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained.'" *State v. Dann*, 205 Ariz. 557, ¶ 18, 74 P.3d 231,

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claim of error in the instruction. *See State v. Logan*, 200 Ariz. 564, ¶ 8, 30 P.3d 631, 632 (2001) ("[W]hen a party requests an erroneous instruction, any resulting error is invited and the party waives his right to challenge the instruction on appeal.").

[2]To the extent Conrad argues the trial court erred in denying his motion because of "extra constitutional cautions that the *Nottingham* decision would seem to imply," he appears to read our decision in that case too broadly. Similarly, we reject Conrad's suggestion—made without citation to any authority—that his motion "should have been granted for deterrence purposes, given the vaunted role in American jurisprudence of evidence suppression for deterrence of law enforcement misconduct and overreaching." The Supreme Court has expressly rejected a "per se approach" that "requires exclusion of the out-of-court identification evidence, without regard to reliability, whenever it has been obtained through unnecessarily suggested confrontation procedures." *Brathwaite*, 432 U.S. at 110, 113-14.

239 (2003), *quoting Chapman v. California*, 386 U.S. 18, 24 (1967) (alteration in *Dann*).

¶16 In this case, evidence at trial established that a Tucson Police Department sergeant had responded to J.T.'s 9-1-1 call and, while surveying the back of the house J.T. had described, he had seen a man whose "feet were just touching the ground" outside a back window when the man "took off running." The man had matched the general description J.T. had provided, and the sergeant chased him on foot for "quite a distance" before the man was stopped by other officers and identified himself as Thomas Conrad.

¶17 M.S., who lived in the house across the street from J.T., walked through the house and reported that, since he had left that morning, the french doors had been forced open and "[a]ll of the rooms had been ransacked," with several items belonging to his family found in a large duffel bag that had been moved to the master bedroom. M.S. confirmed that he had not given Conrad permission to enter the home or touch the family's belongings. Conrad was advised of his rights pursuant to *Miranda*[3] and agreed to answer a detective's questions.

¶18 During the recorded interview, Conrad first complained that he had been struck in the face by one of the officers who apprehended him. But he also admitted that he had entered M.S.'s house from the back and had moved items from the home into a duffel bag in the master bedroom. Conrad said it had been "a stupid mistake" to go into the house and stated he "didn't take anything" before leaving the house and running when he realized the police had arrived. The sergeant who had chased Conrad from M.S.'s property, and who had seen Conrad's face several times while he was running, identified Conrad in the field and at trial.

¶19 In light of all of the other evidence presented against Conrad, we see little consequence from J.T.'s testimony that he had been "fairly certain" or "pretty sure" at the show-up that Conrad

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

was the man he had seen on his neighbor's property that morning, based on Conrad's build, complexion, and clothing. We are confident that admission of J.T.'s somewhat equivocal identification did not contribute to the jury's verdict; thus, if admission of the testimony was error at all, it was harmless error. *See Dann*, 205 Ariz. 557, ¶ 18, 74 P.3d at 239.

Criminal Restitution Order

¶20 Although Conrad has not raised the issue on appeal, we find fundamental error in the trial court's sentencing minute entry, which directs that the "fines, fees, assessments, and/or restitution" imposed be "reduced to a Criminal Restitution Order" (CRO). When Conrad was sentenced in 2012, A.R.S. § 13-805 did not permit the entry of a CRO at sentencing. *See* 2011 Ariz. Sess. Laws, ch. 99, § 4, and ch. 263, § 1. This court has determined that, under the former § 13-805(A), "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).

Disposition

¶21 For the foregoing reasons, we vacate the CRO imposed at sentencing but otherwise affirm Conrad's conviction and sentence.