IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JOSE MIGUEL TORRES,
Appellant.

No. 2 CA-CR 2015-0233
Filed March 9, 2016

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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20144214002
The Honorable Paul E. Tang, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Judge Espinosa and Judge Staring concurred.

H O W A R D, Presiding Judge:

¶1 Following a jury trial, Jose Torres was convicted of two counts each of armed robbery and aggravated robbery, and one count each of aggravated assault and kidnapping. On appeal, Torres contends the trial court abused its discretion by denying his motions to sever his trial from his co-defendant's and to sever the offenses, denying his motion for a mistrial, and denying his motion to suppress a victim's pretrial and in-court identification. He also claims the court illegally imposed consecutive sentences on the armed robbery counts. Because we find no error, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts, and we resolve all reasonable inferences against the defendant. *State v. Almaguer,* 232 Ariz. 190, ¶ 2, 303 P.3d 84, 86 (App. 2013). In the early morning hours of September 21, 2014, D.R. and V.G. were walking home from a concert when two men—Jose Torres and his then-fiancé's brother Francisco Rendon—approached them. The men, armed with guns, demanded D.R. and V.G.'s money, keys, and belongings and also searched their clothing. The men then told D.R. and V.G. to walk away and not look back. D.R. and V.G. saw the two men leave in a black car.

¶3 Approximately ten minutes later and two miles away, A.V. was approached by two men, armed with guns, who demanded her wallet and, after she gave it to them, left in a black car. Shortly thereafter, a black car pulled into a convenience store; Rendon exited and purchased cigarettes using V.G.'s credit card. Later that night, C.L. and L.T. were walking down the street when two men, armed with guns, approached them and ordered them to

"[g]et down." One of the men "ripped" L.T.'s purse off of her and "patted down [her] pockets." The other took C.L.'s wallet, keys, and cellphone. The two men told C.L. and L.T. to run.

¶4 At a photographic lineup, D.R. identified Torres as the man who robbed him, and Rendon as the man who robbed V.G. V.G. also identified Rendon in a photographic lineup as the man who robbed her.

¶5 Torres was charged with the armed robbery, aggravated robbery, aggravated assault, and kidnapping of each of the five victims. The trial court denied his motions to sever his trial from Rendon's, and to sever the offenses into separate trials. During the trial, the counts pertaining to A.V. were dismissed with prejudice. A jury found Torres guilty of the armed robbery and aggravated robbery of D.R. and V.G., and the aggravated assault and kidnapping of D.R., and not guilty on the remaining counts. The trial court sentenced Torres to enhanced, consecutive and concurrent terms of imprisonment totaling twenty-one years. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).

Motion to Sever the Offenses

¶6 Torres appears to argue the trial court erred by denying his pretrial motion to sever the offenses and have a separate trial for each robbery. The state counters, in part, by asserting that Torres cannot show prejudice. We review a ruling on a motion to sever for an abuse of discretion. *State v. Murray,* 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995).

¶7 Offenses may be joined if they are of the same or similar character. Ariz. R. Crim. P. 13.3(a)(1). But the defendant is entitled to have such joined offenses severed as a matter of right, unless the evidence of the other offenses would be admissible if tried separately. Ariz. R. Crim. P. 13.4(b). The trial court determined that evidence of each offense would be admissible in the trial of the other offenses because the crimes had a sufficiently distinct modus operandi to prove identity and that Torres did not establish that he would be prejudiced.

¶8 "When a defendant challenges a denial of severance on appeal, he 'must demonstrate compelling prejudice against which the trial court was unable to protect.'" *Murray,* 184 Ariz. at 25, 906 P.2d at 558, *quoting State v. Cruz,* 137 Ariz. 541, 544, 672 P.2d 470, 473 (1983). Our supreme court has made clear that "a defendant is not prejudiced [by the joinder of offenses] if the jury is (1) instructed to consider each offense separately, and (2) is advised that each offense must be proven beyond a reasonable doubt." *State v. Atwood,* 171 Ariz. 576, 613, 823 P.2d 593, 630 (1992), *overruled on other grounds by State v. Nordstrom,* 200 Ariz. 229, ¶ 25, 25 P.3d 717, 729 (2001); *see also State v. Prince,* 204 Ariz. 156, ¶ 17, 61 P.3d 450, 454 (2003); *State v. Comer*, 165 Ariz. 413, 419, 799 P.2d 333, 339 (1990). The jury was so instructed in this case. We presume jurors follow their instructions, and Torres has not argued otherwise. *See State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006).

¶9 Moreover, Torres contends he was prejudiced because the convenience store evidence was admitted against him but was only relevant to the theft of a credit card charge against Rendon. Torres's argument, however, pertains to the denial of the motion to sever defendants, not the motion to sever offenses. Furthermore, the counts related to A.V. were dismissed with prejudice and Torres was acquitted of any involvement of the robberies of C.L. and L.T. Torres thus has not demonstrated a "'compelling prejudice against which the trial court was unable to protect.'" *Murray,* 184 Ariz. at 25, 906 P.2d at 558, *quoting Cruz,* 137 Ariz. at 544, 672 P.2d at 473.

Motion to Sever the Defendants

¶10 Torres next argues the trial court erred in denying his motion to sever his trial from that of Rendon. We review a court's denial of a motion to sever the trials of co-defendants for an abuse of discretion, "in light of the evidence before the court at the time the motion was made." *State v. Blackman*, 201 Ariz. 527, ¶ 39, 38 P.3d 1192, 1202 (App. 2002).

¶11 Torres argues the trial court erred by denying his motion to sever pursuant to Rule 13.3(b), Ariz. R. Crim. P., because Rendon was charged with two more offenses than Torres and, it appears, because the charges against Torres and Rendon were not

part of "a common conspiracy, scheme or plan." Torres did not present any arguments related to Rule 13.3(b) to the court, either in his motions or at the hearing. Consequently, he has forfeited review of the issue for all but fundamental, prejudicial error. *See State v. Henderson,* 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). And because he has failed to argue such error occurred in his opening brief, the issue is waived. *See State v. Moreno-Medrano,* 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008); *see also State v. Fernandez,* 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (appellate court will not ignore fundamental error if found); *State v. Ruggiero,* 211 Ariz. 262, n.2, 120 P.3d 690, 695 n.2 (App. 2005) (issues raised for first time in reply brief waived).

¶12 Torres next argues his motion to sever the trials should have been granted pursuant to Rule 13.4(a), Ariz. R. Crim. P. He contends the evidence admitted against Rendon facially incriminated him, "had a harmful rub-off effect," and prejudiced him by the significant disparity in the amount of evidence introduced against Rendon as opposed to Torres.

¶13 Rule 13.4(a) provides that the trial court shall grant a motion to sever a trial when severance "is necessary to promote a fair determination of the guilt or innocence of any defendant of any offense." "The burden rests on the defendant to demonstrate that the court's failure to sever caused 'compelling prejudice against which the trial court was unable to protect.'" *State v. Tucker*, 231 Ariz. 125, ¶ 40, 290 P.3d 1248, 1264 (App. 2012), *quoting Murray,* 184 Ariz. at 25, 906 P.2d at 558. "Prejudice occurs when (1) evidence admitted against one defendant is facially incriminating to the other defendant, (2) evidence admitted against one defendant has a harmful rub-off effect on the other defendant, (3) there is significant disparity in the amount of evidence introduced against the defendants, or (4) co-defendants present antagonistic, mutually exclusive defenses or a defense that is harmful to the co-defendant." *Murray,* 184 Ariz. at 25, 906 P.2d at 558.

¶14 As to the first two *Murray* factors, Torres contends a surveillance video from a convenience store taken shortly after the robberies of D.R., V.G., and A.V., which showed Rendon arriving in a black car similar to one owned by his sister—and Torres's then-

fiancé—and using one of V.G.'s credit cards was facially incriminating and would have a harmful rub-off effect on him.[1] The surveillance video was taken approximately twenty minutes after D.R. and V.G. were robbed, and ten minutes after A.V. was robbed. D.R. and V.G.'s robbery was approximately two miles away from A.V.'s robbery, which was approximately two miles from the convenience store where the surveillance video was taken.

¶15 D.R. and V.G. described the two men as Hispanic males, A.V. described one as Hispanic and the other as Hispanic or Native American, and all three stated one assailant was taller than the other. D.R. identified Torres in a photographic lineup as the man who robbed him, and both D.R. and V.G. identified Rendon in a photographic lineup as the man who robbed V.G. D.R. and V.G. told police both men wore a black or grey long-sleeved shirt. A.V. stated one of the men wore a dark t-shirt, and the other wore a black shirt with white marking on it and dark jeans. All three victims stated the two men fled in a dark sports car.

¶16 The video shows a black car pulling up to a gas station pump at a convenience store. P.C.—Torres's then-fiancé and Rendon's sister—told detectives the car appeared to be hers. Rendon got out of the car and used V.G.'s credit card multiple times inside the store, and briefly conferred at the front of the store with a man similar in appearance to Torres, wearing a long-sleeved black shirt, dark pants, and distinctive shoes. Torres was wearing similar looking distinctive shoes and driving P.C.'s car when he was later arrested. Additionally, a long-sleeved black shirt and black jeans were found in P.C.'s car when it was searched.

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[1] In Torres's opening brief, he additionally argues D.R.'s testimony at trial and identification of Rendon in a photographic lineup was facially incriminating and had a harmful rub-off effect. He did not, however, raise this evidence as grounds for severance in his pretrial motion below, and has waived review by failing to argue fundamental, prejudicial error. *Henderson,* 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607; *Moreno-Medrano,* 218 Ariz. 349, ¶ 17, 185 P.3d at 140.

¶17 As the state pointed out at the hearing on Torres's motion below, the surveillance video was circumstantial evidence that Torres had committed the two robberies occurring just prior to the surveillance video. The evidence therefore was not evidence admitted solely against Rendon and which facially incriminated Torres; it was evidence admitted against Torres.

¶18 Nor did the evidence have a "harmful rub-off" effect because it was admitted against Torres, as well as Rendon, in an attempt to show that Torres had been involved in the robberies of D.R., V.G., and A.V. Consequently, the evidence "implicated both defendants equally." *Murray*, 184 Ariz. at 25, 906 P.2d at 558. Furthermore, the trial court properly instructed the jury to consider the evidence against each defendant separately, and Torres has not argued the jury was unable to follow its instruction. *See State v. Grannis*, 183 Ariz. 52, 58, 900 P.2d 1, 7 (1995) ("Sometimes . . . a curative jury instruction is sufficient to alleviate any risk of prejudice that might result from a joint trial."); *see also State v. Lawson*, 144 Ariz. 547, 555, 698 P.2d 1266, 1274 (1985); *Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d at 847.

¶19 Torres next argues "[t]here was a significant disparity in the amount of evidence introduced against Rendon as compared to Torres." Severance based on a significant disparity in evidence "is required only if 'the jury is unable to compartmentalize the evidence as it relates to separate defendants.'" *Grannis*, 183 Ariz. at 59, 900 P.2d at 8, *quoting United States v. Singer*, 732 F.2d 631, 635 (8th Cir. 1984).

¶20 Torres appears to contend the only evidence admitted against him was D.R.'s pretrial identification of Torres. He asserts that, conversely, a significant amount of evidence was introduced against Rendon, including the fact that D.R. and V.G. identified him in a photographic lineup as the man who robbed V.G., that Rendon admitted to being present for the robberies and using V.G. and L.T.'s credit cards shortly after their respective robberies, that Rendon's roommate used C.L.'s credit card the day after C.L.'s robbery, and that some of the victims' items were later found in Rendon's residence as well as some other items of clothing consistent with the victims' descriptions of their assailants.

¶21 Despite Torres's claim, however, a significant amount of evidence was introduced against him in addition to D.R.'s identification: Rendon and a man resembling Torres arrived at a convenience store shortly after the robberies in a car which Torres's then-fiancé stated looked like her own and matched the victims' descriptions; Rendon attempted to use V.G.'s credit card at that convenience store and Torres was wearing clothes matching D.R. and V.G's descriptions of one of the assailants; Torres was arrested wearing similar clothing and shoes as those seen in the surveillance video; and a pair of black pants and black long-sleeved shirt was found in P.C.'s car at the house where she and Torres were living. The trial court thus did not abuse its discretion in finding "no significant disparity in the amount of evidence offered against either [d]efendant."

¶22 Furthermore, based on the verdicts the jury was clearly able to compartmentalize the evidence. The jury found Torres guilty of the four counts related to D.R., the armed robbery and aggravated robbery of V.G., and he was acquitted on the remaining counts, including any involvement in the robbery of C.L. and L.T. Rendon, however, was found guilty of the robberies of V.G. and D.R., and C.L. and L.T. "[I]t is possible the disparity of evidence benefitted [Torres]; the jury may have looked more favorably upon him" because of the limited evidence of his involvement in C.L. and L.T.'s robbery. *See Tucker*, 231 Ariz. 125, ¶ 45, 290 P.3d at 1266. It thus appears "the evidence was not so disparate that the jury was incapable of compartmentalizing the evidence as it related to [Torres] and [Rendon]." *Grannis*, 183 Ariz. at 59, 900 P.2d at 8.

¶23 As to the final *Murray* factor, Torres contends his and Rendon's defenses were antagonistic and mutually exclusive. "Defenses are mutually antagonistic if 'in order to believe the core of the evidence offered on behalf of one defendant, [the jury] must disbelieve the core of the evidence offered on behalf of the co-defendant.'" *Id.*, *quoting Cruz*, 137 Ariz. at 545, 672 P.2d at 474 (alteration in *Grannis*).

¶24 Rendon asserted a defense of mere presence, and Torres asserted an alibi defense. Although Rendon had told officers that he was merely present and Torres had committed the robberies, any

statements incriminating Torres were excluded from the trial pursuant to *Bruton v. United States*, 391 U.S. 123, 126 (1968). Because those statements were properly precluded, the jury would have been able to believe that Rendon was merely present with someone other than Torres, and Torres was not present at all during the robberies. The defenses were thus not antagonistic and mutually exclusive. *See Grannis*, 183 Ariz. at 59, 900 P.2d at 8.

¶25 The *Murray* factors show that the joint trial with Rendon did not prejudice Torres. Therefore, the trial court did not err by denying his motion to sever.[2] *Blackman*, 201 Ariz. 527, ¶ 39, 38 P.3d at 1202.

¶26 Torres additionally appears to contend the joint trial prejudiced him and violated his constitutional right to present a complete defense because the trial court precluded testimony from Rendon's family explaining why they did not associate with Rendon on the basis that it was prejudicial to Rendon. *See* Ariz. R. Crim. P. 13.4(a) (court may order severance "to promote a fair determination of" defendant's guilt or innocence); *see also State v. Gilfillan*, 196 Ariz. 396, ¶ 19, 998 P.2d 1069, 1075 (App. 2000); *see also California v. Trombetta*, 467 U.S. 479, 485 (1984). Although the right to present a complete defense is a "fundamental[,] constitutional right," *State v. Abdi*, 226 Ariz. 361, ¶ 32, 248 P.3d 209, 216 (App. 2011), it is subject to evidentiary rules allowing the exclusion of evidence whose "probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Holmes v. South Carolina,* 547 U.S. 319, 326 (2006); *see also* Ariz. R. Evid. 403.

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[2]Torres also argues the trial court erred by determining that the evidence against each defendant would be admissible against the other to complete the story. The court, however, did not rely on this doctrine in its ruling, nor was it raised during the hearing. Instead, the state referred to this theory when discussing whether the evidence against Rendon would be admissible in a separate trial against Torres. Even if the court had relied on this theory, however, because the court did not err by denying the severance due to the lack of prejudice, we need not review the issue.

¶27 Torres argues this testimony was vital to his alibi defense because "the State had to show a connection between Torres and Rendon, especially considering Torres moved to Tucson approximately [six] days prior to the robberies." The state, however, was not required to make such a connection; it was only required to establish the elements of armed robbery, aggravated robbery, aggravated assault, and kidnapping—none of which require a showing that Rendon and Torres had a prior relationship. *See* A.R.S. §§ 13-1904, 13-1903, 13-1204(A)(2), 13-1304(A)(1), (B); *see also State v. Rhome*, 235 Ariz. 459, ¶ 4, 333 P.3d 786, 787 (App. 2014) (convictions must rest upon jury determination that state has proven all elements of the offenses beyond a reasonable doubt). And the state, in its opening and closing statements never suggested how Torres or Rendon met, or mentioned that Torres was engaged to Rendon's sister at the time of the robberies.

¶28 Furthermore, Torres was not precluded from presenting testimony that he was with his family during the robberies or that he had not yet met Rendon since arriving in Tucson. And, despite that claim, P.C. told the detectives that Torres had recently driven in her car with Rendon, undermining the very purpose for which Torres wanted this evidence introduced. Thus, additional testimony as to the reasons Rendon's family, and not Torres specifically, chose not to associate with Rendon was minimally probative and any relevance was outweighed by the risk of confusing the jury on a collateral issue. *See* Ariz. R. Evid. 402, 403; *see also State v. Paxson*, 203 Ariz. 38, ¶ 13, 49 P.3d 310, 313 (App. 2002) (right to present complete defense "does not extend to presenting irrelevant evidence"). This is true even if Torres had been tried separately. Torres has failed to show this preclusion prevented him from receiving "a fair determination of" his guilt or innocence, Ariz. R. Crim. P. 13.4(a), or violated his right to present a complete defense.

¶29 Torres further argues the trial court erred by not granting his renewed motion to sever after a detective testified at trial about statements made by Rendon which had been precluded pursuant to *Bruton*. Before trial, the parties agreed to sanitize any testimony relating to Rendon's statements implicating Torres. During trial, the detective testified as follows:

> [The prosecutor]: Did you ask [Rendon] about, on September 21st, whether he had been in a dark sports car, dark-colored car?
>
> [Detective]: Yes, I did.
>
> [The prosecutor]: What was his response?
>
> [Detective]: Initially I believe he denied it, but later he stated that he was, and it was a push-to-start black sporty car.

¶30 Torres argued the testimony violated *Bruton* because P.C. had earlier testified she owned a "push-start" car, and this testimony thus directly implicated Torres. The trial court agreed the statement had been precluded but, after noting "push-to-start vehicles" are not unique and P.C. had testified Torres used her vehicle on the evening of September 21, denied the motion. As already noted above, the court additionally instructed the jury to consider the evidence against each defendant separately.

¶31 Torres argues the detective "testified that Rendon basically admitted being in [P.C.'s] vehicle at the [convenience store] which violated Torres'[s] constitutional rights under *Bruton*." Although the testimony referred to portions of Rendon's interview that had been redacted pursuant to *Bruton*, the detective's actual testimony during trial did not violate *Bruton*.

¶32 *Bruton* applies "to confessions that directly implicate a co-defendant." *Blackman*, 201 Ariz. 527, ¶ 48, 38 P.3d at 1204. Rendon did not state he was with Torres at the convenience store when he was in the push-start car or that Torres was involved in the robberies, and thus did not directly implicate him. Any potential implication that Torres was with Rendon at the convenience store only occurred because P.C. earlier testified that she owned a push-start vehicle. Consequently, the testimony did not violate *Bruton*, and Torres's argument to the contrary fails. *See Richardson v. Marsh*, 481 U.S. 200, 208 (1987) (co-defendant's confession outside *Bruton* because only incriminating when "linked with evidence introduced later at trial").

¶33 Torres additionally argues the testimony was untrue and incorrectly linked "Torres to Rendon at the [convenience store], approximately [twenty] minutes after D.R. and V.G. were robbed when Rendon was using V.G.'s stolen credit card." But the detective did not testify that Rendon said he was in the push-start car the morning of September 21, which is when D.R., V.G., and A.V. were robbed. Rather, he simply stated that on September 21, Rendon had been in a "dark . . . push-to-start black sporty car." And, on cross-examination, the detective further testified that Rendon later said it was "a different night" that he was in the push-start car.

¶34 Furthermore, P.C. had already testified that Torres had borrowed her car the night of September 21 to drive Rendon to a convenience store. Consequently, the more logical inference was that Rendon was referring to the night of September 21, when P.C. had already testified Torres was with Rendon in her car, rather than the morning of September 21.

¶35 Torres claims, however, "[t]he record shows that [the detective and Rendon] were talking about the vehicle at [the convenience store] that was in the photos and the surveillance video." Although Torres does not provide any citations to support this contention, he appears to be referring to the unredacted transcript of the detective's interview with Rendon, which was admitted for the purposes of the record only. In that interview, Rendon does initially indicate Torres was in the dark push-start vehicle at the convenience store when the surveillance video was taken. But this testimony was redacted pursuant to *Bruton* and the jury never heard it.

¶36 Torres's contention that the detective's testimony at trial clearly implicated Torres in the surveillance video therefore fails because the jury only heard a reference to September 21, and did not hear the context in which Rendon's statements were originally made. Torres has thus failed to show that he was prejudiced, or that any potential prejudice was "beyond the curative powers of [the] cautionary instruction" requiring the jury to consider the evidence against each defendant separately. *Lawson*, 144 Ariz. at 555, 698 P.2d at 1274; *Murray,* 184 Ariz. at 25, 906 P.2d at 558.

Motion for Mistrial

¶37 Torres argues the trial court erred in denying his motion for a mistrial following the detective's testimony about the push-start car described above because it violated *Bruton*. We review a trial court's denial of a motion for mistrial for an abuse of discretion, bearing in mind that "[a] declaration of mistrial is the most dramatic remedy for trial error and is appropriate only when justice will be thwarted if the current jury is allowed to consider the case." *State v. Nordstrom*, 200 Ariz. 229, ¶¶ 67-68, 25 P.3d 717, 738 (2001), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239, ¶ 20, 274 P.3d 509, 513 (2012). We will not reverse a trial court's denial of a mistrial "unless there is a 'reasonable probability that the verdict would have been different had the evidence not been admitted.'" *State v. Dann*, 205 Ariz. 557, ¶ 44, 74 P.3d 231, 244 (2003), *quoting State v. Hoskins*, 199 Ariz. 127, ¶ 57, 14 P.3d 997, 1013 (2000).

¶38 "The trial court must consider two factors in determining whether to grant a motion for a mistrial based on a witness's testimony: (1) whether the testimony called to the jurors' attention matters that they would not be justified in considering in reaching their verdict and (2) the probability under the circumstances of the case that the testimony influenced the jurors." *State v. Lamar*, 205 Ariz. 431, ¶ 40, 72 P.3d 831, 839 (2003). We defer to the court's decision because it "'is in the best position to determine whether the evidence will actually affect the outcome of the trial.'" *Id.*, *quoting State v. Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d 345, 359 (2000).

¶39 Torres contends, as to the first factor, "the jurors should not have been told this statement . . . was attributed to Rendon because it was not his actual statement and it violated *Bruton*." However, as already discussed, this testimony did not violate *Bruton* because it did not directly implicate Torres. *See Blackman*, 201 Ariz. 527, ¶ 48, 38 P.3d at 1204; *see also Richardson*, 481 U.S. at 208.

¶40 Torres further argues, as to the second factor, the jury was likely influenced by the detective's testimony because he was only convicted of the robberies of D.R. and V.G. He thus appears to reason that the jurors must have believed Rendon was stating the

dark car in the surveillance video was P.C.'s push-start car, and therefore inferred that Torres was the person with him.

¶41 As described above, P.C.'s testimony had already linked Torres and Rendon to her car the night of September 21, the detective's testimony did not indicate when on September 21 Rendon said he was in the push-start car and, on cross-examination, explained that Rendon stated it was "a different night" that he was in the push-start car. Torres has thus not shown "a 'reasonable probability that the verdict would have been different had the evidence not been admitted.'" *Dann*, 205 Ariz. 557, ¶ 44, 74 P.3d at 244, *quoting Hoskins,* 199 Ariz. 127, ¶ 57, 14 P.3d at 1013. We cannot say the trial court abused its discretion in denying Torres's motion for a mistrial on the grounds that this testimony denied him any chance of a fair trial. *See Nordstrom*, 200 Ariz. 229, ¶ 68, 25 P.3d at 738.

D.R.'s Identification

¶42 Torres next argues the trial court erred by failing to suppress D.R.'s pretrial and in-court identification of Torres because the pretrial photographic lineup was unduly suggestive, and it therefore tainted the in-court identification. We will not disturb a trial court's determination that a lineup was not unduly suggestive and its resulting denial of a defendant's motion to suppress absent a "clear abuse of discretion." *State v. Phillips,* 202 Ariz. 427, ¶ 19, 46 P.3d 1048, 1054 (2002), *superseded by statute on other grounds as noted in State v. Carlson*, 237 Ariz. 381, ¶ 46, 351 P.3d 1079, 1093 (2015).

¶43 Pretrial identifications must be "conducted in a manner that is fundamentally fair and secures the suspect's right to a fair trial" to comport with due process. *State v. Lehr*, 201 Ariz. 509, ¶ 46, 38 P.3d 1172, 1183 (2002). A two-part test determines the admissibility of a pretrial 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.* A lineup is unduly suggestive if it "create[s] a substantial likelihood of misidentification by unfairly focusing attention on the person that

the police believed committed the crime." *State v. Strayhand*, 184 Ariz. 571, 588, 911 P.2d 577, 594 (App. 1995).

¶44 D.R. did not identify a suspect the first time he was shown a photographic lineup, and asked to see the photographs again. The following exchange then occurred:

> [D.R.]: There's something about, there's something about that one.
>
> [Detective]: Okay. So what number is this one? Four. I'm going to let you look at the rest of them, okay?
>
> [D.R.]: Yeah.
>
> [Detective]: Okay. And these two are, so you, let's go back to number four, I think that's the number. And do you recognize number four?
>
> [D.R.]: Yes. But I'm just, the shape of the, it's the shape of the face and the nose looks like, looks like the man who was robbing me.
>
> [Detective]: Okay. Alright. I'm going to go ahead and have you, uhm, sign and date that one. I thank you for your time. If I can get the rest of—
>
> [D.R.]: The eyes as well—
>
> [Detective]: The eyes?
>
> [D.R.]: —the eyes as well, look familiar as well.

¶45 Torres contends the detective's statement, "let's go back to number four . . . And do you recognize number four?" and subsequent request to have D.R. sign and date that photograph was unduly suggestive. He appears to reason that by having D.R. sign

and date Torres's photograph, the detective suggested that D.R. made a positive identification when, in fact, he had not.

¶46 D.R., however, first singled out photograph number four. And, after D.R. singled out number four, the detective asked him to look at the remaining photographs; the detective therefore did not "unfairly focus[]" attention on Torres's photograph. *Strayhand,* 184 Ariz. at 588, 911 P.2d at 594. D.R. then made a positive identification when he said he recognized the man in the photograph and that same man "look[ed] like the man who was robbing me." Other than Torres's conclusory statement that this procedure was unduly suggestive, nothing about this procedure appears to have "create[d] a substantial likelihood of misidentification." *Id*. The trial court did not abuse its discretion in finding the lineup was not unduly suggestive. *Phillips,* 202 Ariz. 427, ¶ 19, 46 P.3d at 1054.

¶47 Because we conclude the lineup was not unduly suggestive, we need not address Torres's additional contention the identification was unreliable. *See Lehr*, 201 Ariz. 509, ¶ 46, 38 P.3d at 1183. D.R.'s in-court identification was therefore also properly admitted. *Id.*; *see also Phillips*, 202 Ariz. 427, ¶ 22, 46 P.3d at 1055 ("Because the photographic lineup was not unduly suggestive, the issue whether out-of-court identifications tainted in-court identifications becomes moot.").

Illegal, Consecutive Sentences

¶48 Torres lastly argues the trial court illegally sentenced him to consecutive prison terms on the armed robbery counts. He contends the sentences violated A.R.S. § 13-116 and double jeopardy principles because the offenses arose out of a single incident. We review challenges to the legality of a sentence de novo. *State v. Johnson*, 210 Ariz. 438, ¶ 8, 111 P.3d 1038, 1040 (App. 2005).

¶49 The trial court ordered Torres's prison sentence for the armed robbery of V.G. to be served consecutively to the sentence for the armed robbery of D.R. All other sentences are to be served concurrently with the armed robbery sentence concerning D.R.

¶50 Torres contends his armed robbery sentences must be served concurrently under *State v. Gordon*, 161 Ariz. 308, 778 P.2d 1204 (1989). The *Gordon* test is used to determine "whether a constellation of facts constitutes a single act, which requires concurrent sentences, or multiple acts, which permit consecutive sentences." *Id.* at 312, 778 P.2d at 1208. However, as the court in *Gordon* pointed out, "a single act that harms multiple victims may be punished by consecutive sentences." *Id.* at 312 n.4, 778 P.2d at 1208 n.4; *see also State v. Riley*, 196 Ariz. 40, ¶ 21, 992 P.2d 1135, 1142 (App. 1999) ("§ 13-116 does not apply to sentences imposed for a single act that harms multiple victims"); *State v. Burdick*, 211 Ariz. 583, ¶¶ 5-6, 125 P.3d 1039, 1041 (App. 2005) (no violation of § 13-116 or double jeopardy principles where single act harms multiple victims).

¶51 Although Torres argues *Riley* is distinguishable because, factually, the defendant in that case "victimized" the three victims "individually" and "separate[ly]," numerous other cases have found that a single act which harms two victims is punishable by consecutive sentences. *See State v. Gunter*, 132 Ariz. 64, 69-70, 643 P.2d 1034, 1039-40 (App. 1982) (consecutive sentences appropriate where single act of throwing acid harmed two victims); *see also State v. Henley*, 141 Ariz. 465, 467-68, 687 P.2d 1220, 1222-23 (1984) (consecutive sentences appropriate for two counts of aggravated assault when bullet passed through first victim and struck second), *abrogated on other grounds by State v. Soliz*, 223 Ariz. 116, ¶ 17, 219 P.3d 1045, 1049 (2009); *State v. White*, 160 Ariz. 377, 379-80, 773 P.2d 482, 484-85 (App. 1989) (consecutive sentences upheld where four victims struck by same motor vehicle). Torres has not argued these other cases would be inapplicable. Torres's consecutive sentences therefore do not violate either § 13-116 or the Double Jeopardy Clauses of the United States or Arizona Constitutions.[3]

[3]Torres additionally argues the offenses were committed on the same occasion pursuant to *State v. Kelly*, 190 Ariz. 532, 950 P.2d 1153 (1997). That analysis, however, applies to a trial court's determination of whether offenses were committed on the same occasion but consolidated for trial for sentence-enhancement purposes under A.R.S. § 13-703. *Id.* ¶¶ 5-6. The court did not

Disposition

¶52 We affirm Torres's convictions and sentences.

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enhance Torres's sentence pursuant to § 13-703, and this discussion is therefore irrelevant.