

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Appellee,*

*v.*

RANDY SCOTT HUDGINS,  
*Appellant.*

No. 2 CA-CR 2016-0157  
Filed October 4, 2017

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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NOT FOR PUBLICATION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.

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Appeal from the Superior Court in Cochise County  
No. CR201300192  
The Honorable Wallace R. Hoggatt, Judge

**AFFIRMED**

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COUNSEL

Mark Brnovich, Arizona Attorney General  
Joseph T. Maziarz, Chief Counsel, Phoenix  
By Diane Leigh Hunt, Assistant Attorney General, and  
Katherine Herriot, a student certified pursuant to  
Rule 38(d), Ariz. R. Sup. Ct., Tucson  
*Counsel for Appellee*

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Emily Danies, Tucson  
*Counsel for Appellant*

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**MEMORANDUM DECISION**

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Eppich concurred.

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V Á S Q U E Z, Presiding Judge:

¶1 Following a jury trial, Randy Hudgins was convicted of aggravated assault, disorderly conduct, and endangerment. On appeal, he argues that the victim’s in-court identification was tainted by an unduly suggestive and unreliable pretrial identification and that the trial court erred by denying his request for a supplemental jury instruction. Because we find no error, we affirm.

**Factual and Procedural Background**

¶2 We view the facts in the light most favorable to sustaining the verdicts. *State v. Fimbres*, 222 Ariz. 293, ¶ 2, 213 P.3d 1020, 1023 (App. 2009). In October 2012, M.P. was playing “hacky sack” with a friend outside a restaurant. Hudgins drove up in a truck, and the passenger got out and “had a confrontation” with M.P.’s friend. Hudgins began yelling at M.P. from inside the truck. When M.P. approached the driver’s side door, Hudgins pointed a gun at M.P. and shot him in his right knee.

¶3 A grand jury indicted Hudgins for aggravated assault, disorderly conduct, and endangerment. A jury found him guilty of all three counts, and the trial court sentenced Hudgins to concurrent prison terms, the longest of which is 12.5 years. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, 13-4033(A)(1).

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**Discussion**

¶4 M.P. identified Hudgins at trial as the person who shot him. Hudgins argues that identification was “irretrievably tainted by an unduly suggestive and unreliable lineup identification” and thus violated his due process rights. He did not, however, raise this issue before trial nor object during trial to the admission of either the pretrial identification or the in-court identification. Hudgins has therefore forfeited review of the issue on appeal for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). He “bears the burden of proving both that the error was fundamental and that the error caused him prejudice.” *State v. Valverde*, 220 Ariz. 582, ¶ 12, 208 P.3d 233, 236 (2009).

¶5 The state argues that Hudgins has waived review of this issue entirely by failing to argue that the alleged error was both fundamental and prejudicial. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (failure to argue alleged error was fundamental waives argument for review). In his opening brief, Hudgins recites the fundamental error standard of review and, in his closing paragraph, makes the conclusory statement that “[b]ecause [his] due process right to a fair trial was violated, fundamental error occurred.” But he does not develop the argument by explaining how the alleged error “[went] to the foundation of his case, [took] away a right that is essential to his defense, and [was] of such magnitude that he could not have received a fair trial.” *Henderson*, 210 Ariz. 561, ¶ 24, 115 P.3d at 608; *see State v. Musgrove*, 223 Ariz. 164, ¶ 3, 221 P.3d 43, 45 (App. 2009) (defendant waived review of argument that unobjected-to error caused due process violation by failing to argue such error constituted fundamental, prejudicial error); *cf. State v. Stevens*, 228 Ariz. 411, ¶¶ 6, 16, 267 P.3d 1203, 1206, 1209 (App. 2012) (after finding unobjected-to error in trial constituted due process violation, court must consider whether error was fundamental and prejudicial to defendant). By failing to develop, in any meaningful way, his argument that the admission of the pretrial lineup and in-court identification constituted fundamental, prejudicial error, Hudgins has waived the issue. *See Ariz. R. Crim. P. 31.13(c)(1)(vi)* (opening brief shall include appellant’s contentions with citations to

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legal authority); *see also State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (“Failure to argue a claim on appeal constitutes waiver of that claim.”); *Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140.

¶6 Moreover, although we will not ignore fundamental error if we see it, no such error occurred. *See State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007). M.P. testified that the shooter had the word “Bug” prominently tattooed on his forehead; that M.P. was standing only two to three feet away from the shooter during the encounter and was “able to get a pretty good look” at him; and that he was “[one] hundred percent” confident in his identification of Hudgins from the photographic lineup just a few days later. These factors all establish that M.P.’s identification was reliable. *See Neil v. Biggers*, 409 U.S. 188, 199-200 (1972) (factors to consider in determining reliability include witness’s opportunity to view suspect, degree of attention, accuracy of prior description, witness’s certainty, and time between crime and confrontation); *State v. Perea*, 142 Ariz. 352, 356, 690 P.2d 71, 75 (1984) (when suspect and defendant have same unique and distinctive mark, identification is more, not less, reliable); *see also State v. Lehr*, 201 Ariz. 509, ¶¶ 46, 49, 38 P.3d 1172, 1183-84 (2002) (identification admissible if reliable, regardless of unduly suggestive circumstances).

¶7 Hudgins, however, points to discrepancies between M.P.’s testimony and that of other witnesses to support his argument that the pretrial identification was unduly suggestive and, consequently, not reliable.<sup>1</sup> There was also conflicting testimony

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<sup>1</sup>For example, the detective who interviewed M.P. did not recall if he had described the tattoo, and she had not included that detail in her initial report, but she stated she did remember M.P. provided the nickname “Bugsy.” M.P. testified at trial, however, that he had never seen Hudgins before the incident and thus presumably did not know his name or nickname. Another witness who knew Hudgins testified the only nickname she had ever heard used to refer to Hudgins was “Alabama.” And another police officer testified the description of the suspect he received the night of the shooting, before talking with the other witnesses, was that “there was a tattoo on the forehead” and “something about Bugs or Bugsy.” Contrary to Hudgins’s assertions

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about whether M.P. had been told that the person who shot him may or may not have been in the photographic lineup. Because Hudgins did not raise this issue below, however, he is essentially asking this court to reweigh the evidence and assess the credibility of witnesses, something we will not do. *See State v. Williams*, 209 Ariz. 228, ¶ 6, 99 P.3d 43, 46 (App. 2004). Moreover, regardless of the discrepancies in the various witnesses' accounts of how M.P. described the shooter, M.P. consistently testified he saw the distinctive "Bug" tattoo on the shooter's forehead, which matched Hudgins's tattoo. *See Perea*, 142 Ariz. at 356, 690 P.2d at 75. There was thus "no substantial likelihood that [Hudgins] would be misidentified." *Lehr*, 201 Ariz. 509, ¶ 48, 38 P.3d at 1183-84, quoting *State v. Via*, 146 Ariz. 108, 120, 704 P.2d 238, 250 (1985).

¶8 Furthermore, Hudgins cannot show he was prejudiced. *See Valverde*, 220 Ariz. 582, ¶ 12, 208 P.3d at 236. The trial court instructed the jury it needed to determine whether the in-court identification of Hudgins was reliable beyond a reasonable doubt and provided the jurors several factors they could consider in making that determination. *See State v. Dessureault*, 104 Ariz. 380, 384, 453 P.2d 951, 955 (1969); *see also State v. Nottingham*, 231 Ariz. 21, ¶ 13, 289 P.3d 949, 954 (App. 2012). We presume the jury followed the court's instructions. *See State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006). In addition, Hudgins cross-examined both M.P. and the detective who conducted the lineup, bringing any weaknesses in the state's identification evidence to the jury's attention. Hudgins's attorney also argued in closing that the jury should disregard the identification because the photographic lineup was unduly suggestive and M.P.'s identification was not reliable.

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that this "raise[d] an inference" that M.P. learned about the tattoo from another source and did not see it himself, these inconsistencies instead suggest that, in the over three years between the incident and Hudgins's trial, the officers' memories of the precise details regarding the events that took place that night may have faded. Ultimately, however, it was for the jury to weigh the evidence and assess the credibility of witnesses. *See State v. Williams*, 209 Ariz. 228, ¶ 6, 99 P.3d 43, 46 (App. 2004).

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¶9 We further conclude that overwhelming evidence supports the jury’s verdicts. *See Fimbres*, 222 Ariz. 293, ¶ 43, 213 P.3d at 1031-32. M.P.’s description of the shooter most notably included the very distinctive tattoo across the shooter’s forehead, which matched Hudgins’s tattoo. M.P.’s description of the shooter’s truck also matched Hudgins’s truck. And finally, Hudgins’s son testified that Hudgins told him he was involved in an altercation during which he fired his gun on the night of the incident. Under these circumstances, Hudgins cannot show he was prejudiced by the admission of M.P.’s pretrial or in-court identification. *See id.*; *see also Valverde*, 220 Ariz. 582, ¶ 12, 208 P.3d at 236.

¶10 Hudgins next argues the trial court erred by denying his request to provide “the proper jury instruction” regarding the reliability of the in-court identification. “We review a trial court’s denial of a requested instruction for an abuse of discretion and will not reverse absent a clear abuse of that discretion and resulting prejudice.” *State v. Larin*, 233 Ariz. 202, ¶ 6, 310 P.3d 990, 994 (App. 2013) (internal citation omitted).

¶11 At the state’s request, the trial court gave the standard Arizona jury instruction on identification – that it is the jury’s duty to determine whether “beyond a reasonable doubt that the in-court identification of the defendant at this trial [was] reliable.” Rev. Ariz. Jury Instr. (“RAJI”) Stand. Crim. 39; *see Dessureault*, 104 Ariz. at 384, 453 P.2d at 955. The instruction included the five *Biggers* factors the jury may consider to reach that determination, in addition to “[a]ny other factor that affects the reliability of the identification.” *See* RAJI Stand. Crim. 39; *see also Biggers*, 409 U.S. at 199-200.

¶12 Hudgins requested that the trial court provide a “supplemental” instruction, stating that Hudgins was the only person in the photographic lineup with a forehead tattoo and that more than three years had passed between M.P.’s pretrial identification of Hudgins and his in-court identification.<sup>2</sup> The court denied the

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<sup>2</sup>Hudgins initially also asked the court to instruct the jury that the detective had not properly admonished M.P. “that the suspect[']s photo may not be included in the [lineup].” After argument on his request, however, Hudgins agreed that fact was not conclusive and

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request, concluding that it would be an improper comment on the evidence. *See* Ariz. Const. art. VI, § 27 (“Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.”).

¶13 Hudgins has not explained how the trial court’s ruling was incorrect. Rather, he only contends the court was required to “instruct the jury that before returning a verdict of guilty it must be satisfied beyond a reasonable doubt that the in-court identification was independent of the previous pretrial identification,” *Dessureault*, 104 Ariz. at 384, 453 P.2d at 955, and, as we have noted, the court did so. Hudgins has therefore waived any issue regarding his request for a supplemental instruction. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *see also State v. Gurrola*, 219 Ariz. 438, n.3, 199 P.3d 693, 694 n.3 (App. 2008) (argument waived when appellant did not challenge basis for court’s ruling).

¶14 In sum, we agree with the trial court’s finding that Hudgins’s requested instruction would have been an improper comment on the evidence. And the substance of Hudgins’s requested instruction was adequately covered by the other instructions. In particular, the court instructed the jury to consider “[a]ny other factor that affects the reliability of the identification.” *See State v. Mott*, 187 Ariz. 536, 546, 931 P.2d 1046, 1056 (1997) (“A trial court is not required to give a proposed instruction when its substance is adequately covered by other instructions.”); *see also State v. Boteo-Flores*, 230 Ariz. 551, ¶ 7, 288 P.3d 111, 113 (App. 2012) (appellate court must affirm trial court if ruling “legally correct for any reason”).

**Disposition**

¶15 For the foregoing reasons, we affirm Hudgins’s convictions and sentences.

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“[t]here was actually evidence both ways,” making it a proper issue for closing argument.