IN THE
# ARIZONA COURT OF APPEALS
DIVISION TWO

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THE STATE OF ARIZONA,
*Appellee*,

*v.*

MARIO CAMERON HAWKINS,
*Appellant*.

No. 2 CA-CR 2016-0295
Filed September 6, 2017

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Appeal from the Superior Court in Pima County
No. CR20112894002
The Honorable Jose H. Robles, Judge Pro Tempore

**AFFIRMED**

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COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By Mariette S. Ambri, Assistant Attorney General, Tucson
*Counsel for Appellee*

Joel Feinman, Pima County Public Defender
By Michael J. Miller, Assistant Public Defender, Tucson
*Counsel for Appellant*

**MEMORANDUM DECISION**

Presiding Judge Vásquez authored the decision of the Court, in which Judge Eppich and Judge Howard[1] concurred.

V Á S Q U E Z, Presiding Judge:

**¶1** Following a jury trial, Mario Hawkins was convicted of armed robbery, aggravated robbery, and attempted robbery. On appeal, he argues the trial court erred by failing to suppress text messages downloaded from his cell phone and in failing to preclude the victim's out-of-court identification. 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. *State v. Smith*, 242 Ariz. 98, ¶ 2, 393 P.3d 159, 161 (App. 2017). On August 2, 2011, A.N. responded to an internet sales ad purporting to sell an iPhone. He called the cell phone number listed in the ad—which belonged to Hawkins—and arranged to meet the seller at the Pima Community College (PCC) campus that evening.

**¶3** A.N. had been waiting in his car when Arvin Williams, the purported seller, parked nearby in a red car. A.N. asked to see the phone, and Williams handed him an empty iPhone box. When A.N. asked about the empty box, Williams told A.N. to wait and began rummaging through the back of the car. Hawkins then approached A.N. from another area of the parking lot, pointed a gun at him, and demanded A.N. give him "the money." After A.N. handed over the cash that he had, Hawkins got into the car with Williams and the two men drove away.

[1]The Hon. Joseph W. Howard, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

**¶4** About two weeks later, A.N. saw another internet posting for the sale of an iPhone that was "[v]ery similar" to the one he had responded to on August 2. He replied and was again provided Hawkins's phone number. A.N. then contacted the PCC police department and met with a detective the next day, on August 17. Working with that detective, A.N. contacted Hawkins, and they agreed to meet at a baseball field at PCC for the sale. At the arranged time, PCC officers located Hawkins, who "matched the description," at the baseball field with an empty iPhone box. He was "the only person in the area." Williams subsequently was found nearby, sitting in a red car with a license plate bearing the partial information previously provided by A.N.

**¶5** A grand jury indicted Hawkins for armed robbery, aggravated robbery, attempted robbery, and attempted aggravated robbery, and he was tried in absentia when he failed to appear at trial. The trial court granted Hawkins's motion for a judgment of acquittal on the attempted aggravated robbery charge, and the jury found him guilty of the remaining charges. The court sentenced him to concurrent terms of imprisonment, the longest of which is seven years. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, 13-4033(A)(1).[2]

**Text Messages**

**¶6** Hawkins first argues the trial court erred by denying his motion to preclude text messages retrieved from his cell phone. He argues the state's failure to disclose before trial that text messages

[2]Hawkins's jury trial occurred in July 2012. Following the jury's verdicts, the court issued a bench warrant for Hawkins's arrest. He was apprehended in June 2016 and sentenced about seven weeks later. Although this delay would normally prevent Hawkins from filing an appeal, *see* A.R.S. § 13-4033(C), it does not appear from the record that Hawkins was given notice that he would forfeit his right to appeal by voluntarily delaying sentencing for more than ninety days. The delay in sentencing, therefore, did not prevent Hawkins from exercising his right to appeal. *See State v. Bolding*, 227 Ariz. 82, ¶ 20, 253 P.3d 279, 285 (App. 2011).

were among the items downloaded from his cell phone should have resulted in suppression of the evidence. We review a court's ruling on discovery and disclosure matters for an abuse of discretion. *State v. Bernini*, 220 Ariz. 536, ¶ 7, 207 P.3d 789, 791 (App. 2009).

**¶7** At the start of the second day of trial, Hawkins moved to preclude the state from introducing text messages and photographs retrieved from Hawkins's cell phone because the state had failed to disclose that it had obtained a search warrant for the phone and had downloaded its contents.[3] The text messages show the August 17 exchanges between A.N. and Hawkins arranging the sale of an "iPhone 4" at the PCC west campus baseball field that evening and updating one another on their location. After hearing arguments, the trial court precluded a photograph downloaded from the phone, but otherwise denied Hawkins's motion.

**¶8** Hawkins argues the state violated Rule 15.1, Ariz. R. Crim. P., and the trial court should have precluded the text messages as a sanction. *See* Ariz. R. Crim. P. 15.7. In response, the state asserts that seven months before trial Hawkins was informed that "the [s]tate had obtained photographs from an iPhone 3, and [Hawkins] was well aware that his iPhone had been seized by police." The state argues notice was sufficient, "[t]herefore, no material disclosure violation occurred, even assuming a technical violation."

**¶9** We need not decide whether the state properly disclosed the existence of the text messages because we review the trial court's decision to admit them for harmless error. *See State v. Poyson*, 198 Ariz. 70, ¶ 21, 7 P.3d 79, 86 (2000). An error is harmless if we can say, "beyond a reasonable doubt, that it did not contribute to or affect the verdict." *Id.* When overwhelming evidence of the defendant's guilt

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[3]Defense counsel explained to the trial court that the state and public defender's office had developed a practice of exchanging disclosure via email and a "disclosure sheet." Although the state provided a "disclosure sheet" identifying certain items, it did not identify text messages or a search warrant. Hawkins asserted that the items were "disclosed late or not disclosed at all." He argued the items therefore should be precluded.

is presented, the erroneous admission of evidence is harmless. *See State v. Romero*, 240 Ariz. 503, ¶ 9, 381 P.3d 297, 302 (App. 2016); *see also Poyson*, 198 Ariz. 70, ¶ 22, 7 P.3d at 86-87.

**¶10** In this case, as noted above, there was overwhelming evidence of guilt. Given the striking similarities between the two incidents, it is inconceivable that the two individuals apprehended on August 17 were not the same two persons who committed the offenses on August 2. Notably, the phone number given to A.N. in connection with both sales matched the number for the cell phone Hawkins had with him when PCC officers arrested him. And the same phone was also linked to the email address that had been used to set up the August 2 sales ad. The username portion of that email address was "mrhawkins08."

**¶11** Based on this evidence, we conclude, beyond a reasonable doubt, the admission of the text messages arranging the August 17 meeting did not contribute to or affect the verdict. *See Poyson*, 198 Ariz. 70, ¶ 21, 7 P.3d at 86. The remaining evidence overwhelmingly demonstrates Hawkins's guilt and therefore any error in the admission of the text messages was harmless. *See id.*; *see also Romero*, 240 Ariz. 503, ¶ 9, 381 P.3d at 302.

**¶12** Hawkins argues, however, the admission of the text messages prejudiced him because they bolstered A.N.'s credibility, when his testimony was otherwise "unreliable." Hawkins reasons the messages provided "confirmation . . . that [his] phone had been use[d] during the August 17 events[, which then] supported the identification of [him] as involved in the August 2 events," and "the August 2 events were evidence that [he] was intent on robbing [A.N.] rather than selling the iPhone." He thus appears to suggest that had the jury not seen the messages, it would have rejected A.N.'s testimony about the August 17 event, which would have led the jurors to similarly reject his testimony about the August 2 events.

**¶13** We find this argument unpersuasive. The detective also testified that he observed A.N. texting the number matching Hawkins's cell phone to arrange the time and place to meet for the sale, thus making the actual text messages cumulative. *See State v. Williams*, 133 Ariz. 220, 226, 650 P.2d 1202, 1208 (1982) ("[E]rroneous

admission of evidence which was entirely cumulative constitute[s] harmless error."). Additionally, the argument ignores the overwhelming evidence, as already described above, that demonstrated Hawkins's guilt.

**Pretrial Identification**

**¶14** Hawkins next argues the trial court erred by denying his motion to preclude A.N.'s pretrial identification of Hawkins. He contends the identification was unduly suggestive because it was a "one-person show-up." We review a court's ruling on a pretrial identification for an abuse of discretion, deferring to its "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). "The ultimate question of the constitutionality of a pretrial identification is, however, a mixed question of law and fact," which we review de novo. *Id.* We only consider the evidence presented at the suppression hearing. *Id*.

**¶15** "The Due Process Clause of the Fourteenth Amendment requires us to ensure that any pretrial identification procedures are conducted 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). "Unduly suggestive pretrial procedures may unfairly cause a witness to misidentify the defendant, and then to repeat the misidentification at trial." *State v. Osorio*, 187 Ariz. 579, 581, 931 P.2d 1089, 1091 (App. 1996), *quoting State v. Smith*, 146 Ariz. 491, 496, 707 P.2d 289, 294 (1985). If the trial court determines the pretrial identification was not unduly suggestive, then it does not need to further determine whether the identification was nonetheless reliable. *State v. Leyvas*, 221 Ariz. 181, ¶ 13, 211 P.3d 1165, 1169-70 (App. 2009). The state bears the burden of showing the pretrial identification was not unduly suggestive by clear and convincing evidence. *Smith*, 146 Ariz. at 496, 707 P.2d at 294.

**¶16** Several days after the August 2 incident, police officers showed A.N. between six and ten photographs of possible suspects matching the description A.N. had provided. A.N. stated he did not recognize anyone in the photographs and, indeed, none of the photographs was of Hawkins or Williams. On August 17, following

Hawkins's arrest, an officer in a patrol car took A.N. to the parking lot where the incident had occurred. A.N. testified that when they arrived, he saw two men in handcuffs standing next to a red car. The two men and the car were the same ones he had seen during the incident on August 2. Later, A.N. was inside the campus police station and, through a window, could see the area the patrol car had pulled into. When Hawkins got out of the patrol car, a detective asked A.N. "if he recognized [that] person." When A.N. responded that he did, the detective then asked "how he recognized him or where he recognized him from." A.N. stated he was the person who had robbed him on August 2. Following a *Dessureault*[4] hearing, the trial court found the showup was not unduly suggestive and denied Hawkins's motion.

**¶17** On appeal, Hawkins argues the identification was unduly suggestive because it "came through an inherently suggestive one-person show-up." Although single-person showups are "inherently suggestive," *State v. Williams*, 144 Ariz. 433, 439, 698 P.2d 678, 684 (1985), "[i]t is well established . . . that show-up identifications are not necessarily inadmissible unless other factors present would produce an unduly suggestive procedure," *State v. Skelton*, 129 Ariz. 181, 183, 629 P.2d 1017, 1019 (App. 1981); *see also Neil v. Biggers*, 409 U.S. 188, 198 (1972) ("[T]he admission of evidence of a showup without more does not violate due process."); *Stovall v. Denno*, 388 U.S. 293, 301-02 (1967) (whether showup is "unnecessarily suggestive . . . depends on the totality of the circumstances surrounding it"), *abrogated on other grounds as recognized by Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 99 (1993). Moreover, an identification obtained from an inherently or unduly suggestive lineup is nevertheless admissible if it is reliable. *See Williams*, 144 Ariz. at 439-40, 698 P.2d at 684-85 (showup identification admissible if identification reliable). The factors for determining reliability include:

> (1) the witness' opportunity to observe the suspect at the time of the crime; (2) the witness' degree of attention at that time;

[4]*State v. Dessureault*, 104 Ariz. 380, 384, 453 P.2d 951, 955 (1969).

> (3) the accuracy of any prior description given by the witness; (4) the level of certainty at the confrontation; and (5) the length of time between the crime and the identification confrontation.

*Id*. at 440, 698 P.2d at 685.

**¶18** In this case, A.N. testified he paid close attention to both men's faces during the August 2 robbery for several minutes under a "really bright" light post, and he interacted with both men. He described their race, height, general size, hairstyle, and what they were wearing to PCC officers. Several days later, he was shown six to ten photographs of persons who generally matched the suspect's description; he stated none was of his assailant. The showup occurred just fifteen days after the August 2 robbery, and A.N. immediately and unequivocally identified Hawkins. The detective did not make any statements to A.N. or ask him any questions to influence A.N.'s identification. Rather, he only asked if A.N. recognized the person and, after A.N. indicated he did, asked how. Indeed, the detective testified he kept his questions vague because he "didn't want to influence [A.N.] or . . . say anything about the robbery."

**¶19** Under the circumstances, the identification was reliable despite any suggestiveness in the showup. *See Williams*, 144 Ariz. at 439-40, 698 P.2d at 684-85 (although defendant "viewed either in the backseat of a police car or standing next to a police car in handcuffs," victim's identification sufficiently reliable to overcome suggestive showup based on observing perpetrator for "a 'couple of minutes' at a distance of approximately three to four feet" and ability to confidently identify him shortly thereafter, despite absence of evidence regarding other relevant factors); *see also State v. Hoskins*, 199 Ariz. 127, ¶¶ 11, 34, 14 P.3d 997, 1004-05, 1008 (2000) (reliable identification notwithstanding fact defendants handcuffed and flanked by uniformed officers where victims interacted with defendant for twenty minutes, provided detailed and accurate description, and were unequivocal in identification twelve hours later at showup); *Smith*, 146 Ariz. at 497-98, 707 P.2d at 295-96 (where officer assured victim of defendant's guilt, identification nonetheless reliable where victim observed defendant from parking lot, without

distraction, from time he left store until he pointed gun at her, description accurately described defendant except for his clothing, and she positively identified on third viewing at showup at police station).

**¶20** Hawkins argues, "[i]n the alternative," that the trial court erred by failing to provide "a cautionary instruction on suggestive pretrial identification." In his reply brief, Hawkins concedes he failed to raise this issue at trial, thus limiting our review to fundamental, prejudicial error. *See* Ariz. R. Crim. P. 21.3(c); *see also State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Hawkins further concedes he did not argue on appeal that such error was fundamental or prejudicial, thus forfeiting the issue altogether. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

## Disposition

**¶21** For the foregoing reasons, we affirm Hawkins's convictions and sentences.