IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

NICHOLAS A. MENDES,
Appellant.

No. 2 CA-CR 2018-0349
Filed March 3, 2020

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NOT FOR PUBLICATION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. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20173632001
The Honorable John Hinderaker, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Diane Leigh Hunt, Assistant Attorney General, Tucson
Counsel for Appellee

Emily Danies, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

E C K E R S T R O M, Judge:

¶1 Nicholas Mendes appeals from his convictions and sentences for armed robbery, kidnapping, and aggravated assault with a deadly weapon. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 "We view the evidence in the light most favorable to sustaining the convictions." *State v. Gay*, 214 Ariz. 214, ¶ 2 (App. 2007). In 2017, K.S. was walking to a Tucson bank to deposit approximately $7,500 in checks and cash, which he was carrying in an envelope in his pocket. Mendes approached him on the sidewalk, spoke to him, offered to sell him jumper cables, and pressured him to take a drink from a cup he presented. When K.S. walked away, Mendes followed him. He asked K.S. to make a phone call for him, and K.S. complied. Mendes continued following. When K.S. told Mendes that he felt uncomfortable and should maybe call the police, Mendes pulled out and opened a pocket knife, pointed it at K.S.'s chest, reached into K.S.'s pocket, and took the envelope of money. K.S. yelled for help. Mendes initially stayed nearby, offering his cup to K.S. and telling him to "take [his] medicine," but he eventually walked away.

¶3 Mendes was charged with armed robbery, kidnapping, and aggravated assault with a deadly weapon. At the conclusion of a five-day trial, a jury found him guilty as charged. The trial court sentenced him to concurrent, slightly mitigated prison terms, the longest of which is nine years. We have jurisdiction over his timely appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Motion to Suppress Pretrial Identification

¶4 Approximately one hour after the incident, K.S. provided police with a description of his assailant. He described a male who was "Hispanic, thin, about five-seven tall with light facial hair wearing a black shirt and dark blue jeans." A few hours later, Mendes was detained at a nearby fast-food restaurant. A police officer drove K.S. to the restaurant for

a one-person "show-up." K.S. identified Mendes, who was standing outside the restaurant in custody, as the man who had robbed him.

¶5 Before trial, Mendes moved to suppress the pretrial identification as unduly suggestive.[1] At a hearing held pursuant to *State v. Dessureault*, 104 Ariz. 380 (1969), the trial court found "a *prima facie* showing that the show-up may have been or arguably was unduly suggestive." But finding the testimonial evidence presented at the hearing to be credible, the court concluded that, even if the identification procedure was unduly suggestive, the state had proved that the identification was independently reliable and therefore admissible.

¶6 On appeal, Mendes contends the trial court erred in denying his motion to suppress. We review a trial court's ruling regarding the fairness and reliability of an out-of-court identification procedure for a clear abuse of discretion. *State v. Lehr*, 201 Ariz. 509, ¶ 46 (2002). In so doing, we focus exclusively on the evidence presented at the suppression hearing, *State v. Moore*, 222 Ariz. 1, ¶ 17 (2009), viewing it in the light most favorable to upholding the trial court's ruling, *State v. Goudeau*, 239 Ariz. 421, ¶ 26 (2016).

¶7 Due process requires that any pretrial identification procedure be "conducted in a manner that is fundamentally fair and secures the suspect's right to a fair trial." *Lehr*, 201 Ariz. 509, ¶ 46. The parties agree that the one-person "show-up" conducted in this case was an "inherently suggestive" procedure. However, the fact that a pretrial identification procedure is suggestive—or even "overly suggestive"—does not automatically bar the admission of the resulting identification. *Id.* Rather, if the identification is reliable despite the suggestive procedure that produced it, the identification is admissible. *Moore*, 222 Ariz. 1, ¶ 16. To determine reliability, Arizona courts consider the five factors articulated by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 199-201 (1972), which our state supreme court repeated in *Lehr*, 201 Ariz. 509, ¶ 48. *Moore*, 222 Ariz. 1, ¶ 16. These five factors are: (1) the witness's opportunity to view the criminal at the time of the crime; (2) the witness's degree of attention at the time; (3) the accuracy of the witness's prior description of

[1] Mendes also moved to preclude any in-court identification as tainted by the pretrial identification. Because we conclude the pretrial identification was properly admitted, we need not reach this issue.

the criminal; (4) the level of certainty demonstrated at the time of the identification; and (5) the time between the crime and the identification. *Id.*

¶8 Here, the trial court expressly "base[d] its decision on the five factors set forth in *State v. Lehr*," going on to explain how, for each of the five factors, the evidence presented at the suppression hearing weighed in favor of the identification's reliability. Mendes identifies no legal error, merely asserting the presence of facts he argues weigh against finding the identification reliable. But the trial court's findings are supported by the record and are not clearly erroneous, and we therefore defer to them. *See Moore*, 222 Ariz. 1, ¶ 17. We find no abuse of discretion.

Jury Misconduct

¶9 On the fourth day of trial, the court discovered that one of the jurors, S.W., had conducted independent research regarding sentencing ranges and began discussing the issue with his fellow jurors before they "shut him down." The court investigated what S.W. had said to the rest of the jury and then excused him. Then, at the suggestion of defense counsel, the court conducted individual voir dire of each remaining juror. Each juror stated that he or she could put aside the incident and decide the case based on the evidence presented at trial and the law and instructions provided by the court, without regard to possible punishment. Afterwards, Mendes moved for a mistrial, which the court denied based upon "the unequivocal answers given by the jurors."

¶10 On appeal, Mendes contends the trial court abused its discretion in denying the motion for mistrial based on jury misconduct, in violation of his right to an impartial jury under the United States and Arizona constitutions. In particular, he contends: "The jurors considered the extrinsic evidence of punishment ranges to help them make their decision on finding Mr. Mendes guilty rather than using the proper evidence." But, as the state points out, this is pure speculation; there is no evidence to support the conclusion that, despite their individual, unequivocal statements to the court that they would not consider punishment, the jurors nevertheless did so. *See State v. Hall*, 204 Ariz. 442, ¶¶ 16-17 (2003) (defendant must show not only that jury received extrinsic evidence, but also considered it).

¶11 We will not second-guess the trial court based on such "guesswork," *State v. Doerr*, 193 Ariz. 56, ¶ 18 (1998), particularly because the judge was in the best position to assess the demeanor of the jurors he individually polled, *see id.* ¶ 23; *see also State v. Tison*, 129 Ariz. 526, 535

(1981) ("Unless there are objective indications of jurors' prejudice, we will not presume its existence."). We therefore find no abuse of discretion in the trial court's determination that a mistrial was not warranted in these circumstances. *See State v. Adamson*, 136 Ariz. 250, 262 (1983) (mistrial "the most dramatic remedy for trial error," which "should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted," and denial of mistrial "will not be disturbed" absent abuse of discretion).

Disposition

¶12 Because we reject both of Mendes's claims, we affirm his convictions and sentences.