

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

BRUCE HOWARD BRAGGS,
Appellant.

No. 2 CA-CR 2019-0297
Filed November 20, 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NOT FOR PUBLICATION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. CR20160666001
The Honorable Deborah Bernini, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Michael T. O'Toole, Acting Section Chief Counsel
By Karen Moody, Assistant Attorney General, Tucson
Counsel for Appellee

Emily Danies, Tucson
Counsel for Appellant

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MEMORANDUM DECISION

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

E P P I C H, Presiding Judge:

¶1 Bruce Howard Braggs appeals from his convictions for aggravated driving under the influence, arguing that the trial court erred in admitting evidence of a pretrial out-of-court show-up identification. For the following reasons, we affirm.

Factual and Procedural Background

¶2 “We view the facts in the light most favorable to sustaining the jury’s verdict.” *State v. Murray*, 247 Ariz. 447, ¶ 2 (App. 2019). On a February 2016 afternoon, Braggs drove a vehicle into a tree causing it to fall onto a vehicle parked in an adjacent school parking lot. Two school employees—F.G. and J.W.—were notified of the crash, went out to the parking lot, and saw Braggs in the driver’s seat of the vehicle with a female passenger. J.W. saw Braggs attempting to back the vehicle out. After Braggs was unable to move the vehicle, he moved quickly through it. F.G. then approached Braggs and told him not to leave. Braggs and the female passenger nevertheless left and walked towards a nearby convenience store.

¶3 J.W. followed Braggs for a bit but then went back to the school to get his car keys. Within about three minutes, J.W. got into his car and again located Braggs, who was walking out of the convenience store and heading further away from the crash scene. J.W. called 9-1-1, gave the operator a description of Braggs, and continued following him from a distance for approximately ten minutes—during which time J.W. saw Braggs briefly meet up with the female passenger. Witnesses at the scene of the crash also showed police a photo and a video taken of Braggs.

¶4 A police officer found Braggs walking down the street near the area where J.W. had last seen him. The officer stopped Braggs because he matched the appearance of the person in the photo. Braggs had an odor of intoxicants coming from his breath, red eyes, and had urinated on himself. While waiting for a show-up identification to be conducted, Braggs voluntarily told an officer, without prompting, that “he was the

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driver” and that “his vehicle didn’t stop and that he hit the tree.” Another officer then conducted the show-up identification by separately driving F.G. and J.W. near Braggs to see if they could identify him. Both identified Braggs, while he was handcuffed, as the man they had seen in the driver’s seat of the vehicle.

¶5 After a two-day trial, a jury found Braggs guilty of four counts of aggravated driving under the influence. The trial court sentenced him to four concurrent eight-year prison terms. Braggs now appeals, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).¹

Discussion

¶6 For the first time on appeal, Braggs argues that the trial court erred and violated his due process rights by allowing evidence of the show-up identification because that identification procedure was unduly suggestive and unreliable. As Braggs concedes, because he did not object to this evidence at trial, we review for fundamental error only. *See State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005). To show fundamental error, the defendant must first show that an error was committed. *State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018).

¶7 The Due Process Clause of the Fourteenth Amendment requires courts to ensure that “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 (2002) (citing *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977)). Unduly suggestive pretrial identification procedures are concerning because they may cause a witness to unfairly misidentify a defendant. *State v. Smith*, 146 Ariz. 491, 496 (1985). However, the fact that a pretrial identification procedure is unduly suggestive will not necessarily bar the admission of the identification. *Lehr*, 201 Ariz. 509, ¶ 46. If there is an unduly suggestive procedure, the analysis turns on “whether the identification is reliable in spite of any suggestiveness.” *Id.* Testimony related to an unduly suggestive identification procedure will be admissible if it is reliable enough to avoid a substantial likelihood of misidentification. *See id.* Under such

¹Braggs timely filed a delayed notice of appeal after the trial court granted his motion for a delayed appeal pursuant to Rule 32.1(f), Ariz. R. Crim. P.

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circumstances, it is up to the jury to decide the weight and credibility of the identification. *See State v. Rojo-Valenzuela*, 237 Ariz. 448, ¶¶ 8-11 (2015).

¶8 Arizona courts consider the following factors to determine the likelihood of misidentification: (1) “the opportunity of the witness to view the criminal at the time of the crime,” (2) “the witness’ degree of attention,” (3) “the accuracy of his prior description of the criminal,” (4) “the level of certainty demonstrated at the confrontation,” and (5) “the time between the crime and the confrontation.” *Lehr*, 201 Ariz. 509, ¶ 48 (quoting *Brathwaite*, 432 U.S. at 114). Not every factor must be independently satisfied because we look at the totality of the circumstances. *See State v. Williams*, 144 Ariz. 433, 440 (1985) (citing *Neil v. Biggers*, 409 U.S. 188, 199-201 (1972)). We review de novo whether a pretrial identification is constitutional because it is a mixed question of fact and law. *State v. Moore*, 222 Ariz. 1, ¶ 17 (2009).

¶9 Assuming without deciding that the show-up identification in this case was unduly suggestive, we must determine whether the record establishes that the identification was sufficiently reliable.² In so doing, we consider each of the *Lehr* factors.

¶10 First, both witnesses had an adequate opportunity to view Braggs in the middle of the afternoon. They described seeing Braggs sitting in the driver’s seat of the vehicle, “scrambling” through the vehicle, and then walking towards a convenience store. F.G. testified she was “close enough” to Braggs for him to hear her. J.W. testified he had followed Braggs for approximately “ten minutes” after Braggs had left the crash scene and, although J.W. lost sight of Braggs for a bit, he was close enough to see Braggs and describe him to the 9-1-1 operator. *See State v. Fierro*, 166 Ariz. 539, 546-47 (1990) (six-minute observation can be adequate to establish reliability of witness identification). Braggs cites no authority, nor have we found any, for the proposition that an identification is unreliable simply because the witnesses did not actually see the suspect commit the crime.³

²Although we normally review the trial court’s ruling on a pretrial identification for an abuse of discretion and defer to the factual findings made by the court at a suppression hearing, *see Moore*, 222 Ariz. 1, ¶ 17, we cannot do so in this case because Braggs did not file a pretrial motion challenging the identification procedure or requesting a hearing.

³For purposes of our analysis, we do not consider whether Braggs’ post-accident efforts to move the vehicle, which were seen by J.W., were alone sufficient to establish actual physical control of the vehicle. *See A.R.S.*

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Indeed, caselaw suggests otherwise. *See, e.g., State v. Hoskins*, 199 Ariz. 127, ¶¶ 1-2, 6-11, 34 (2000) (reliable identification when witnesses first saw defendant hours after various crimes had occurred); *State v. Hicks*, 133 Ariz. 64, 67-68 (1982) (reliable identification when witnesses saw defendant with gun after shooting occurred).

¶11 Further, there was good reason for the witnesses to have focused their attention on Braggs: a tree had fallen onto an employee's car. F.G. and J.W. were not merely casual observers, they were attentive to Braggs because he walked away from the crash scene after being in the driver's seat of the vehicle that appeared to have felled the tree. *See State v. Hooper*, 145 Ariz. 538, 544 (witness identification more reliable when witness is focused on suspect rather than just a mere casual observer).

¶12 Braggs argues that F.G. and J.W. "gave vague descriptions" of him to police because neither of them identified his race, height, or weight before the show-up identification. He therefore argues that was no accurate prior description. Neither witness was thoroughly questioned at trial about the description they gave to the 9-1-1 operator. F.G. only testified that she told the operator that the driver was a male. J.W. only testified that he told the operator that Braggs was wearing jeans and a dark shirt.⁴ Braggs met this description. Even if these descriptions are vague, a lack of evidence on one factor does not render an identification unreliable. *See Williams*, 144 Ariz. at 440 (show-up identification reliable based on totality of circumstances even though no evidence introduced regarding prior description given to police).

¶13 The record also suggests the witnesses could identify Braggs with some measure of certainty. J.W. testified he was "[a] hundred percent" certain that Braggs was the man he had seen in the driver's seat of the vehicle and walking away from the crash scene. F.G. testified she was able to identify Braggs during the show-up identification and defense counsel declined to further probe her level of certainty in that identification.

¶14 Finally, the show-up identification occurred within an hour of when the employees witnessed Braggs in the driver's seat of a vehicle

§ 28-1383(A) (prohibiting driving or being in actual physical control while under the influence).

⁴J.W. also testified at trial that the person he had seen in the driver's seat of the vehicle was a "black male" but the record is silent on whether this description was given to the 9-1-1 operator.

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that had crashed. Although Braggs suggests a show-up identification needs to happen immediately after police come in contact with a suspect to be reliable, Arizona caselaw suggests otherwise. *See Hicks*, 133 Ariz. at 68 (show-up identification occurring hour after crime was reliable); *Hoskins*, 199 Ariz. 127, ¶ 34 (show-up identification occurring almost twelve hours after witnesses encountered defendant was reliable).

¶15 Based on the totality of the circumstances, the show-up identification was sufficiently reliable because there was no “substantial likelihood of misidentification.” *See Lehr*, 201 Ariz. 509, ¶ 46. Thus, Braggs has not shown that any error occurred, much less fundamental error. *See Escalante*, 245 Ariz. 135, ¶ 21.

¶16 Moreover, even if we assume there was an error, Braggs has not shown he was prejudiced. *See id.* (defendant must establish prejudice occurred when arguing “error went to the foundation of the case”). Proving prejudice “requires a showing that without the error, a reasonable jury could have plausibly and intelligently returned a different verdict.” *Id.* ¶ 31. Although Braggs claims the state’s only evidence to identify him came from the show-up identification, the record belies that argument. A police officer testified that Braggs admitted being the driver involved in the crash before the show-up identification was conducted, and that he stopped Braggs because Braggs resembled the person in the photo taken by a witness. At trial, Braggs also had the opportunity to cross-examine both witnesses who identified him during the show-up identification and the officer who stopped him, thereby bringing any weaknesses in the state’s identification evidence to the jury’s attention. Under these circumstances, Braggs cannot show he was prejudiced by the admission of the show-up identification.

Disposition

¶17 For the foregoing reasons, we affirm Braggs’ convictions and sentences.