IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MICHEAL ANDREW NUNEZ,
Appellant.

No. 2 CA-CR 2020-0047
Filed May 18, 2022

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NOT FOR PUBLICATION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. CR20161824002
The Honorable Michael Butler, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
By Amy Pignatella Cain, Assistant Attorney General, Tucson
Counsel for Appellee

Emily Danies, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

V Á S Q U E Z, Chief Judge:

¶1 Following a jury trial, Micheal Nunez was convicted of four counts of aggravated assault with a deadly weapon or dangerous instrument, two counts of aggravated assault of a minor under fifteen, six counts of kidnapping, five counts of armed robbery, and five counts of aggravated robbery. The trial court sentenced him to presumptive prison terms totaling 81.25 years. On appeal, Nunez argues the court erred in denying his motion to suppress the victim's pretrial identification of him because the process was unduly suggestive. He also contends there was insufficient evidence to support his conviction and the trial court's giving a jury instruction on flight.[1] For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Felix*, 237 Ariz. 280, ¶ 2 (App. 2015). Late one evening in April 2016, B.P. was at home with her father, mother, and children when she heard a vehicle that had stopped outside the house. As she opened the front door to see who it was, Nunez and another man forced their way into the house and knocked her to the floor. The men asked them "where is the weed?" and "[w]here is the marijuana[?]" and threatened to kill B.P. and her father if they did not tell them. Nunez held B.P. and her father at gunpoint and continued threatening to kill B.P.'s father if they did not tell him where the drugs were while the other man began searching the house. After Nunez joined the other man in her children's bedroom, B.P. used her father's cell phone to call 9-1-1 and then hid the phone under a

[1]While Nunez also maintains he should have been granted a mistrial because his defense counsel's performance was deficient, his argument is a claim of ineffective assistance of counsel, and we will not address it on direct appeal. *See State ex rel. Thomas v. Rayes*, 214 Ariz. 411, ¶ 20 (2007) ("[A] defendant may bring ineffective assistance of counsel claims *only* in a Rule 32 post-conviction proceeding—not before trial, at trial, or on direct review.").

couch. When Nunez returned, he took B.P.'s cell phone and her father's wallet. Then, when Nunez and the other man left the house to place the stolen items in their vehicle, B.P. was able to shut and lock the front door, preventing them from reentering the house. Nunez and the other man got in their vehicle and drove away before sheriff's deputies arrived.

¶3 Sheriff's deputies were able to track B.P.'s phone to another house where they arrested Nunez and the other man. During a search of the house, deputies found property belonging to B.P.'s family including hoverboards, identification cards, and cell phones.

¶4 Nunez was arrested and B.P. subsequently identified him in a photographic lineup. A grand jury indicted him for four counts of aggravated assault with a deadly weapon or dangerous instrument, two counts of aggravated assault of a minor under fifteen, six counts of kidnapping, six counts of armed robbery, and six counts of aggravated robbery. At trial, the court dismissed one armed robbery count and one count of aggravated robbery on the state's motion. A jury convicted Nunez on the remaining counts and found the offenses were dangerous and committed while Nunez was on parole for a prior felony conviction. He was sentenced as described above, and this appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Pretrial Identification

¶5 Nunez argues the trial court erred in denying his motion to suppress B.P.'s pretrial identification of him on the grounds it was unduly suggestive and unreliable.[2] We review a trial court's ruling on the admissibility of a pretrial identification for an abuse of discretion but review de novo the "ultimate question of the constitutionality of a pretrial identification." *State v. Smith*, 250 Ariz. 69, ¶ 44 (2020) (quoting *State v. Goudeau*, 239 Ariz. 421, ¶ 103 (2016)). In doing so, we limit our review to the evidence presented at the suppression hearing. *Goudeau*, 239 Ariz. 421, ¶ 103.

[2]Nunez also argues the pretrial identification made by B.P.'s eldest son was unreliable. But because her son was not called as a witness and his identification was not used as evidence, we do not address this argument further.

¶6 Identification procedures that are unduly suggestive and unreliable implicate a defendant's due process rights. *Sexton v. Beaudreaux*, ___ U.S. ___, 138 S. Ct. 2555, 2559 (2018). A pretrial identification is not admissible if "the method or procedure used was unduly suggestive" and unreliable with "a substantial likelihood of misidentification." *State v. Lehr*, 201 Ariz. 509, ¶ 46 (2002). When a pretrial identification is challenged, the state "must establish with clear and convincing evidence that the pretrial identification procedure was not unduly suggestive." *State v. Smith*, 146 Ariz. 491, 496 (1985).

¶7 B.P. had described Nunez after the incident, stating he was "a Hispanic male" about "five-six" or "five-seven" with "blond[e] hair." Just before showing B.P. a photographic lineup consisting of six pictures that included Nunez, the detective advised her to "[s]tudy each photo independently," and not to guess. He also noted that Nunez "may or may not be in this photo lineup" and that "facial hair and hairstyles can change." B.P. then reviewed the photographic lineup, selected Nunez's photo, and stated that she "remembered [Nunez] pretty well."

¶8 At the suppression hearing, the state argued the photographic lineup was not unduly suggestive as the detective had created a lineup with "similar looking people." Nunez argued the lineup was flawed because the bottom row of pictures that included Nunez's were brighter than the ones in the top row. The state responded that although half of the photos were lighter in color, this had not caused B.P. to select Nunez. The trial court denied Nunez's motion to suppress, finding there was clear and convincing evidence that the pretrial identification was not unduly suggestive. The court noted that the difference in brightness between the top and bottom rows of photos did not make Nunez's photo more likely to be selected. It also determined that although Nunez had dark brown hair at the time of his arrest, the detective was not required to make Nunez's hair blonde as that would have made him stand out.

¶9 On appeal, Nunez again argues the pretrial identification was unduly suggestive because it did not include photos of persons "who fit the description originally provided by [B.P.]" He maintains the lighting differences and lack of individuals with blonde hair created a "substantial likelihood of misidentification." Nunez argues the first four of the five factors under *Neil v. Biggers*, 409 U.S. 188 (1972), "indicate a high degree of unreliability and suggestive procedure in the instant case." However, we only consider the five factors under *Biggers* after a pretrial identification is found to be unduly suggestive, not before. *See State v. Phillips*, 202 Ariz.

427, ¶ 22 (2002) (if photo lineup not unduly suggestive, no need to look at *Biggers* factors because issue whether subsequent identification was independently reliable becomes moot), *superseded on other grounds by* A.R.S. § 13-751(F)(2) *as recognized in State v. Carlson*, 237 Ariz. 381 (2015); *see also United States v. Wong*, 40 F.3d 1347, 1359 (2d Cir. 1994) ("[I]f impermissibly suggestive procedures are not employed, 'independent reliability is not a constitutionally required condition of admissibility, and the reliability of the identification is simply a question for the jury.'" (quoting *Jarrett v. Headley*, 802 F.2d 34, 42 (2d Cir. 1986))).

¶10 The persons depicted in photographic lineups need not be "nearly identical," *State v. Gonzales*, 181 Ariz. 502, 509 (1995), and subtle differences such as lighting are not unduly suggestive, *State v. Strayhand*, 184 Ariz. 571, 588 (App. 1995). As the trial court correctly stated, "the purpose of the lineup is to make sure that nobody sticks out." *See State v. Alvarez*, 145 Ariz. 370, 373 (1985) ("[T]he law only requires that [lineups] depict individuals who basically resemble one another such that the suspect's photograph does not stand out."). Here, the photographic lineup depicted six Hispanic males with similar faces, the same hair color, and only minor variations in hairstyle. The brightness and lighter backgrounds of the bottom three pictures did not specifically highlight Nunez's photo and were not unduly suggestive. Additionally, before B.P. was shown the photos, she was warned that Nunez may not be pictured and that hairstyles may have changed. Because nothing in the record here suggests the lineup procedure or photographs were unduly suggestive, the court did not abuse its discretion in denying Nunez's motion to suppress.

Jury Instruction

¶11 Nunez maintains the trial court erred in providing a jury instruction on flight because there was insufficient evidence to support the instruction. We review a court's decision on jury instructions for abuse of discretion, but we review de novo whether the evidence supports the instruction. *State v. Almeida*, 238 Ariz. 77, ¶ 9 (App. 2015).

¶12 A flight instruction is appropriate if the state presents evidence of flight or concealment "after a crime from which jurors can infer a defendant's consciousness of guilt." *State v. Solis*, 236 Ariz. 285, ¶ 7 (App. 2014); *State v. Smith*, 113 Ariz. 298, 300 (1976) (evidence of concealment "must support the inference that the accused utilized the element of concealment or attempted concealment"). Here, the state presented evidence that Nunez had concealed himself in the bedroom of a house for more than five hours while multiple armored law enforcement vehicles

surrounded the house and commands were made loudly and constantly over a public address system. When gas was deployed into his bedroom, Nunez retreated into the bathroom briefly before coming out of the house.

¶13 Nunez contends this evidence is insufficient to support an inference of concealment and points to his own testimony at trial that he had been asleep and only awoke after gas was released in his room. However, because the "slightest evidence" can support a jury instruction, *Almeida*, 238 Ariz. 77, ¶ 9 (quoting *State v. King*, 225 Ariz. 87, ¶ 14 (2010)), Nunez's delay in coming out of the house is sufficient for a jury to infer he had concealed himself, particularly if the jury did not believe Nunez's explanation. Thus, because there was sufficient evidence supporting the jury instruction on flight, the trial court did not abuse its discretion.

Sufficiency of the Evidence

¶14 Nunez contends the trial court erred in denying his motion for a judgment of acquittal because there was insufficient evidence to establish his guilt. Sufficiency of evidence claims are reviewed de novo and reversal is only appropriate "where there is no substantial evidence to support a conviction." *State v. Rodriguez*, 251 Ariz. 90, ¶ 16 (App. 2021). Substantial evidence is that which a reasonable juror could accept as sufficient to support a conclusion of guilt beyond a reasonable doubt. *State v. Fulminante*, 193 Ariz. 485, ¶ 24 (1999). "Both direct and circumstantial evidence should be considered in determining whether substantial evidence supports a conviction." *State v. West*, 226 Ariz. 559, ¶ 16 (2011). Arizona law makes no distinction between the weight assigned to direct and circumstantial evidence, and "[a] conviction may be sustained on circumstantial evidence alone." *State v. Green*, 111 Ariz. 444, 446 (1975).

¶15 Nunez argues the state failed to establish his participation in the crimes he was charged with because there was no evidence that he had entered B.P.'s home, possessed a weapon, or handled the stolen property. Although Nunez concedes his palm print and DNA evidence place him at B.P.'s home, he contends it is insufficient to establish his guilt. However, B.P. identified Nunez as the one who had forced his way into her house, held her and her father at gunpoint, threatened to kill them, and seized her cell phone and her father's wallet. She also testified that Nunez and his accomplice took the family's personal belongings from their house. Some of that property was also found hidden at the house where Nunez was located and arrested.

¶16 In challenging B.P.'s testimony as unreliable, Nunez is essentially asking us to reweigh the evidence and assess B.P.'s credibility, which we will not do. *See State v. Brock*, 248 Ariz. 583, ¶ 22 (App. 2020) (appellate court does not "reweigh conflicting evidence nor assess the credibility of witnesses"). Relying on *State v. Mathers*, 165 Ariz. 64 (1990), Nunez contends the evidence only established that he was present and left the jury to speculate about his role in the crimes. However, *Mathers* is distinguishable because unlike this case, there was no physical evidence connecting Mathers to the crime scene and neither of the victims were able to identify him. *Id.* at 69-70. Because here, there was ample circumstantial and direct evidence upon which a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," the trial court did not err in denying Nunez's motion for a judgment of acquittal. *Brock*, 248 Ariz. 583, ¶ 22.

Disposition

¶17 For the foregoing reasons, we affirm Nunez's convictions and sentences.