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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JOSE ANGEL MARTINEZ, Appellant.	2 CA-CR 2008-0189 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20074355

Honorable Gus Aragón, Judge

AFFIRMED

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B R A M M E R, Judge.

¶1 Appellant Jose Martinez appeals from his convictions of armed robbery, attempted armed robbery, and two counts of aggravated assault. He contends the trial court abused its discretion in denying his motions to suppress evidence of the victims' pretrial identifications of him, made from a photographic lineup, and evidence obtained during searches, made pursuant to a search warrant, of his mother's apartment and father's car. He also argues the court abused its discretion in denying his motion for judgment of acquittal on all charges against him based on insufficient evidence. Last, he asserts the court abused its discretion in refusing to instruct the jury on theft and attempted theft as lesser-included offenses of armed robbery and attempted armed robbery. We affirm.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining Martinez's convictions. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On the evening of October 17, 2007, Martinez was a passenger in a car driven by his cousin, Jesus Ramirez. When Ramirez stopped near an intersection, Martinez got out of the car and walked towards two teenagers, A. and D., who had been walking down the street to a nearby hot dog stand. Martinez brandished a knife and demanded that A. and D. empty their pockets. A. handed Martinez money, which Martinez refused. Martinez then demanded that D. give him his necklace and jacket, and D. complied. Martinez took D.'s jacket and necklace and got back in Ramirez's car, which Ramirez then drove away.

¶3 A grand jury indicted Martinez on charges of aggravated assault of A. and D., armed robbery of D., and attempted armed robbery of A. After a three-day trial, a jury found him guilty as charged and found all of the offenses had been dangerous in nature. The trial court sentenced him to concurrent, mitigated terms of imprisonment, the longest of which is seven years. This appeal followed.

Discussion

Motion to suppress: photographic line-up

¶4 Before trial, Martinez moved to suppress evidence that A. and D. had identified him in a photographic lineup because, he asserted, the lineup was "unduly suggestive and unreliable." At a hearing held pursuant to *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969), Tucson Police Department detective Robert Gamez testified he had created two groups of six photographs from which A. and D. had identified Martinez. Gamez stated he had created the groups by using Martinez's booking photograph, Ramirez's photograph, and photographs of ten other young men. Gamez explained that he had shown A. and D. all the photographs, requesting that A. and D. identify the person who had accosted them. They selected Martinez's photograph.

¶5 When selecting photographs of other men to include, Gamez stated he had attempted to find photographs of men sharing Martinez's skin color, "race, age, hair style, [and] facial hair" style. He had also looked for photographs with similar "background coloring." Gamez testified he had found the other photographs using a database that identified subjects matching the desired characteristics Gamez had entered, and that the other

men depicted, including Ramirez, were "all Hispanic, all male, all [with] very black hair," and all within five years of Martinez's age. Nonetheless, Gamez admitted that four of the other men had "more significant" facial hair than Martinez and that Martinez "look[ed] a little bit younger" than five of the men. After hearing this testimony and argument by the parties, the trial court denied Martinez's motion, finding the photographic lineup was not unduly suggestive because, "whatever differences [exist among the photographs], whether it be hair or any other differences, [they] are very insignificant."

¶6 Martinez contends the trial court abused its discretion in denying his motion to suppress this identification evidence. Before admitting evidence of a defendant's pretrial identification, a trial court is required to determine whether the identification procedure was unduly suggestive and, if so, whether the identification was nonetheless reliable based on the totality of the circumstances. *See State v. Dixon*, 153 Ariz. 151, 154, 735 P.2d 761, 764 (1987); *Dessureault*, 104 Ariz. at 384, 453 P.2d at 955. A lineup is unduly suggestive if it "create[s] a substantial likelihood of misidentification by unfairly focusing attention on the person that the police believed committed the crime." *State v. Strayhand*, 184 Ariz. 571, 588, 911 P.2d 577, 594 (App. 1995). However, "[t]here is no requirement that the accused be surrounded by nearly identical persons." *State v. Gonzales*, 181 Ariz. 502, 509, 892 P.2d 838, 845 (1995). "Rather, the law only requires that [the lineup] depict individuals who basically resemble one another such that the suspect's photograph does not stand out." *State v. Alvarez*, 145 Ariz. 370, 373, 701 P.2d 1178, 1181 (1985). "[S]ubtle differences" in appearance are insufficient to render a lineup unduly suggestive. *Dixon*, 153 Ariz. at 154,

735 P.2d at 764. We will not disturb a trial court's determination that a lineup was not unduly suggestive and its resulting denial of a defendant's motion to suppress absent a "clear abuse of discretion." *State v. Phillips*, 202 Ariz. 427, ¶ 19, 46 P.3d 1048, 1054 (2002).

¶7 Martinez asserts that, because "several of the men looked noticeably older" and had "significant[ly more] facial hair" than him, his photograph "st[oo]d out in an improperly suggestive manner." He further contends that, despite the suggestive nature of the lineup, the state "took no steps to establish that the identification was reliable under the totality of the circumstances." But the record does not support Martinez's suggestion that the age differences between the men in the photographs were dramatic. Although several of the men looked slightly older than Martinez, Gamez testified all the men's ages were within five years of Martinez's. And, despite the fact some of the men had more prominent facial hair than Martinez had, each was of the same race as Martinez and had similar skin color, hair style and hair color to Martinez. Because Martinez points to, and the record shows, only subtle differences in the individuals' appearances, we cannot say the trial court abused its discretion in finding the lineup was not unduly suggestive and denying Martinez's motion on that basis. *See Dixon*, 153 Ariz. at 154, 735 P.2d at 764 (lineup not unduly suggestive when depicted all "males of similar ages," of same race, and with similar hair color to defendant); *see also Gonzales*, 181 Ariz. at 509, 892 P.2d at 845 ("[D]ifferent facial . . . hair thickness [will not] render a lineup impermissibly suggestive."); *State v. Via*, 146 Ariz. 108, 119, 704 P.2d 238, 249 (1985) (lineup not unduly suggestive despite fact defendant only subject with "the beginnings of a full beard"); *compare to State v. Henderson*, 116 Ariz. 310, 314-15, 569 P.2d

252, 256-57 (App. 1977) (lineup unduly suggestive where defendant twelve to sixteen years older than all others in lineup).

Motion to suppress: search warrant

¶8 Martinez next contends the trial court abused its discretion in denying his motion to suppress evidence obtained during the searches of his mother's apartment and father's car where police found D.'s necklace and a knife. He contends no probable cause supported the warrant to search either location, and that, because law enforcement officers did not execute the warrant until two weeks after they had obtained it, the warrant was invalid for "staleness." A search warrant is presumed valid, and "it is the defendant's burden to prove otherwise." *State v. Crowley*, 202 Ariz. 80, ¶ 7, 41 P.3d 618, 621 (App. 2002). "A warrant is supported by probable cause if the supporting affidavit contains facts from which a reasonably prudent person could conclude that the items sought are related to criminal activity and are likely to be found at the place described." *State v. Prince*, 160 Ariz. 268, 272, 772 P.2d 1121, 1125 (1989). In determining whether probable cause existed to support a contested warrant, the trial court must defer to the magistrate's decision, upholding it when "the totality of the circumstances indicates a substantial basis" for issuing a warrant. *State v. Hyde*, 186 Ariz. 252, 272, 921 P.2d 655, 675 (1996); *see also Illinois v. Gates*, 462 U.S. 213, 236 (1983) ("[A]fter-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review."). We will not disturb the trial court's denial of Martinez's motion to suppress absent an abuse of discretion. *See Crowley*, 202 Ariz. 80, ¶ 7, 41 P.3d at 621.

¶9 At the suppression hearing, Gamez testified A. and D. had told investigating officers that a young man wielding a knife had approached them as they were walking down the street, had demanded they empty their pockets and give him D.'s jacket and necklace, and had taken D.'s necklace and jacket.[1] A. and D. also gave the officers the license plate number of the vehicle in which their assailant had ridden away. When the officers located the owner of that vehicle, she told them that her boyfriend, Ramirez, had been using it. After the officers located Ramirez, he confirmed A.'s and D.'s story, identified Martinez as the person who took the victim's property, admitted having driven Martinez from the scene, and informed the officers that Martinez was living "between" his mother's apartment and girlfriend's house. Later that day, officers arrested Martinez, who told them he "was using" his father's car. Gamez testified this information was then used to obtain a search warrant for Martinez's mother's apartment and his father's car.

¶10 Martinez fails to explain why these facts did not support an inference that relevant evidence was reasonably likely to be found at the locations in question. To the extent he suggests otherwise, we disagree. *See Gates*, 462 U.S. at 238 (probable cause supports warrant if "there is a fair probability that . . . evidence of a crime will be found in a particular place"); *Prince*, 160 Ariz. at 272, 772 P.2d at 1125 (probable cause existed to search defendant's known residences for weapons used in crime); *State v. Watson*, 113 Ariz. 218, 220, 550 P.2d 89, 91 (1976) (noting "magistrate [i]s entitled to render a judgment based on

[1]Although Martinez objected below to Gamez's testimony on the basis that much of it was hearsay, Martinez does not argue on appeal that the trial court abused its discretion in admitting this testimony.

the common sense reading of the entire affidavit" and finding probable cause supported warrant to search known residence and associated vehicles of accused drug dealer).

¶11 Martinez asserts the warrant was "stale[]" because officers executed it two weeks after having obtained it and had "no evidence of continuous criminal activity." But the record shows officers executed the search warrant on October 31, 2007—the same day they spoke to Ramirez, arrested Martinez, requested the warrant, and obtained it. We do not agree with Martinez's suggestion that the factual basis supporting the warrant was stale because it concerned a crime that had occurred two weeks earlier, making it unreasonable to conclude that evidence of the crime would remain in either Martinez's mother's apartment or his father's car. *See generally State v. Smith*, 122 Ariz. 58, 60, 593 P.2d 281, 283 (1979) (depending on type of crime and items sought, passage of time may render factual basis stale, eliminating probable cause).

¶12 As the state notes, the passage of two weeks was not a sufficiently lengthy period to render the officers' information stale because the items they sought—Martinez's knife and D.'s stolen property—were not of a type Martinez would be likely to discard immediately after the crime. *See State v. Kasold*, 110 Ariz. 563, 565-66, 521 P.2d 995, 997-98 (1974) (information defendant possessed victims' pictures not stale after five months because defendant not likely to have already discarded them; noting alcohol and drugs more likely disposed of quickly, rendering old information stale); *State v. Kelly*, 130 Ariz. 375, 377, 636 P.2d 153, 155 (App. 1981) ("[U]nlike contraband such as narcotics, weapons are of a nature as not to be disposed of quickly."). Accordingly, we cannot conclude the trial court

abused its discretion in finding probable cause supported the warrant to search Martinez's mother's apartment and his father's car, and in denying Martinez's motion to suppress the evidence discovered therein. *See Hyde*, 186 Ariz. at 272, 921 P.2d at 675; *Prince*, 160 Ariz. at 272, 772 P.2d at 1125.

Judgment of acquittal

¶13 Martinez contends the trial court abused its discretion in denying his motion for judgment of acquittal of all four charges against him. A judgment of acquittal is appropriate only when "there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). Evidence may be direct or circumstantial, but if reasonable minds can differ on inferences to be drawn therefrom, the evidence must be considered substantial and the case submitted to the jury. *See State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004); *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993). On appeal, we review the denial of a motion for a judgment of acquittal for an abuse of the trial court's discretion and will only reverse if there are no probative facts to support the conviction. *See State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 32, 154 P.3d 1046, 1056 (App. 2007). That is, we will reverse only if it "clearly appear[s] that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶14 A person commits robbery if, while taking another's property from his person or immediate presence against his will, "such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such

person taking or retaining property." A.R.S. § 13-1902(A). A defendant commits armed robbery if he, while committing robbery, is armed with, uses, or threatens to use a deadly weapon. A.R.S. § 13-1904. And, he commits attempted armed robbery if he does "anything which . . . is any step in a course of conduct planned to culminate in" armed robbery. A.R.S. § 13-1001(A)(2). Aggravated assault requires that a person "[i]ntentionally plac[e] another person in reasonable apprehension of imminent physical injury" using a deadly weapon or dangerous instrument. A.R.S. § 13-1203(A)(2); *see* A.R.S. § 13-1204(A)(2).

¶15 Martinez first contends insufficient evidence supported the jury's conclusion that he had threatened or used force against A. and D. But he overlooks D.'s testimony that Martinez approached him and A. wielding a knife, "sw[ung] his arm" at them, and demanded they "empty out [their] pockets" and give him D.'s necklace and jacket—testimony A. corroborated. This evidence was sufficient to support the jury's conclusion that Martinez had threatened A. and D. The trial court did not abuse its discretion by denying Martinez's motion for judgment of acquittal of the armed robbery and attempted armed robbery charges on that basis. *See Paris-Sheldon*, 214 Ariz. 500, ¶ 32, 154 P.3d at 1056; §§ 13-1902(A), 13-1904 and 13-1001(A)(2).

¶16 Martinez next argues there was insufficient evidence to support the jury's conclusion that he had committed aggravated assault of A. and D. because "there was no testimony indicating that either alleged victim was in reasonable apprehension of physical injury" or "supporting [his] alleged intent to create such apprehension." But, as the state notes, both A. and D. testified Martinez's actions had "scared" them. A. also testified that,

during the encounter, he "was concentrating" on Martinez's knife in case Martinez attempted to stab him. *See State v. Sands*, 145 Ariz. 269, 275, 700 P.2d 1369, 1375 (App. 1985) (victims' testimony that defendant's firing gun caused them "fear that another shot might injure them" evidence of reasonable apprehension of imminent physical injury). In addition to that direct evidence, A.'s and D.'s testimony that Martinez had brandished a knife and pointed it at them while making his demands was also circumstantial evidence from which the jury could infer A. and D. were apprehensive of imminent physical injury. *See State v. Valdez*, 160 Ariz. 9, 11, 770 P.2d 313, 315 (1989) (victim's testimony that he actually had been apprehensive not required; knife held to victim's neck and cut on neck sufficient circumstantial evidence of fear and apprehension) *overruled on other grounds by Krone v. Hothman*, 181 Ariz. 364, 890 P.2d 1149 (1995); *State v. Garza*, 196 Ariz. 210, ¶ 4, 994 P.2d 1025, 1026 (App. 1999) (victim need not testify apprehensive of physical injury; reasonable apprehension may be established by circumstantial evidence); *State v. Bolman*, 474 S.E.2d 721, 722 (Ga. Ct. App. 1996) (presence of deadly weapon normally places victim in reasonable apprehension). And, that same circumstantial evidence could also support a jury's reasonable conclusion that Martinez had intended to place A. and. D. in apprehension of imminent physical injury. *See State v. Price*, 218 Ariz. 311, ¶ 23, 183 P.3d 1279, 1284 (App. 2008) (noting fact defendant drew gun during robbery evidence of intent to place victims in reasonable apprehension of imminent physical injury, supporting aggravated assault charge); *see also State v. Edgar*, 126 Ariz. 206, 209, 613 P.2d 1262, 1265 (1980) ("It is well settled that criminal intent may be proved by circumstantial evidence."). Based on the evidence,

therefore, the trial court did not abuse its discretion in denying Martinez's motion for judgment of acquittal of the aggravated assault charges. *See Paris-Sheldon*, 214 Ariz. 500, ¶ 32, 154 P.3d at 1056; *see also* §§ 13-1203(A)(2), 13-1204(A)(2).

Lesser-included offense instructions

¶17 At trial, Martinez requested that the trial court instruct the jury on all lesser-included offenses of armed robbery and attempted armed robbery. The court granted Martinez's request in part, instructing the jury on robbery and attempted robbery. Martinez now contends the court abused its discretion in failing also to instruct the jury, pursuant to his request, that theft and attempted theft were lesser-included offenses of the armed robbery and attempted armed robbery charges.

¶18 Rule 23.3, Ariz. R. Crim. P., requires trial courts to instruct the jury on all offenses "necessarily included in the offense charged." "[A]n offense is 'necessarily included,' and so requires that a jury instruction be given, only when it is lesser included *and* the evidence is sufficient to support giving the instruction." *State v. Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d 148, 150 (2006); *see also State v. Miranda*, 198 Ariz. 426, ¶ 9, 10 P.3d 1213, 1215 (App. 2000). "In other words, if the facts of the case as presented at trial are such that a jury could reasonably find that only the elements of a lesser offense have been proved, the defendant is entitled to have the judge instruct the jury on the lesser-included offense." *Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d at 150. We review the trial court's refusal to give a jury instruction for an abuse of discretion. *State v. Hurley*, 197 Ariz. 400, ¶ 9, 4 P.3d 455, 457 (App. 2000).

¶19 As previously noted, a person commits robbery "if[,] in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property." § 13-1902(A). To prove a defendant committed armed robbery, the state is additionally required to show that, "in the course of committing robbery," the defendant was armed with, used, or threatened to use a deadly weapon. § 13-1904. A person commits theft if, "without lawful authority" to do so, he "[c]ontrols [the] property of another with the intent to deprive the other person of such property." A.R.S. § 13-1802(A)(1). Thus, "the main difference between the crimes of theft and robbery lies in the use or threat of force." *State v. Tramble*, 144 Ariz. 48, 52, 695 P.2d 737, 741 (1985). And, if a defendant does "anything which . . . is any step in a course of conduct planned to culminate in commission of an offense," he commits attempt. § 13-1001(A)(2).

¶20 Martinez asserts, and the state concedes, that theft and attempted theft are lesser-included offenses of armed robbery and attempted armed robbery, respectively. *See Wall*, 212 Ariz. 1, ¶ 15, 126 P.3d at 151 (attempted theft lesser-included offense of attempted robbery); *State v. Celaya*, 135 Ariz. 248, 252, 660 P.2d 849, 853 (1983) (theft lesser-included offense of robbery). But, no theft or attempted theft instruction was warranted here because the evidence did not permit a jury to find Martinez had committed those crimes. *See Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d at 150.

¶21 The evidence showed that Martinez walked up to A. and D., took out a knife, "came towards [A.] . . . swinging his arm," told both of them to "empty out [their] pockets," and told D. to give him his necklace and jacket. A. offered Martinez money, which Martinez rejected, D. gave Martinez his necklace and jacket, and Martinez left with D.'s property. Martinez suggests the jury could have found he did not threaten A. and D. because Ramirez testified he did not see Martinez with a knife or hear Martinez threaten A. or D., who, Ramirez stated, behaved as if they knew Martinez when he approached them. Martinez reasons that, based on this evidence, the jury could have concluded he had merely committed theft of D.'s property and attempted theft of A.'s property.

¶22 But, as previously noted, theft and attempted theft require evidence that the defendant took or attempted to take another's property "without lawful authority" to do so. § 13-1802(A); *see* § 13-1001(A)(2). Evidence that Martinez had threatened A. and D. with a knife was the only evidence from which the jury could infer Martinez took, or attempted to take, their property in an unlawful manner. Thus, the evidence did not support a conclusion that Martinez had committed theft or attempted theft. *See* §§ 13-1802(A), 13-1001(A)(2). Rather, as the state correctly observes, the evidence only supported the alternative conclusions that: (1) A. and D. had offered Martinez their property under threat of force, possibly involving a knife, and Martinez, therefore, committed armed robbery and attempted armed robbery or robbery and attempted robbery; or (2) A. and D. had willingly given Martinez their property and, thus, no crime had occurred. A defendant is not entitled to a lesser-included offense instruction where, as here, "the evidence is such that he is either guilty of [the greater]

crime[s] charged or not guilty at all." *State v. King*, 166 Ariz. 342, 343, 802 P.2d 1041, 1042 (App. 1990); *see also State v. Leon*, 104 Ariz. 297, 300, 451 P.2d 878, 881 (1969). Accordingly, the trial court did not abuse its discretion in denying Martinez's requested instructions on theft and attempted theft.

Disposition

¶23 For the foregoing reasons, we affirm Martinez's convictions and sentences.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge