

Not Reported in P.3d, 2009 WL 616448 (Ariz.App. Div. 1)

Briefs and Other Related Documents

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Court of Appeals of Arizona,

Division 1, Department D.

STATE of Arizona, Appellee,

v.

Jarvis Jermaine NEAL, Appellant.

Nos. 1 CA-CR 07-0824, 1 CA-CR 07-0825, 1 CA-CR 07-0826.

Jan. 29, 2009.

Appeal from the Superior Court in Maricopa County; Cause No. CR2005-0313170-001 SE; CR2006-131784-003 SE; and CR2004-124473-001 SE; The Honorable Connie Countes, Judge. AFFIRMED

Terry Goddard, Attorney General By Kent E. Cattani, Chief Counsel, Criminal Appeals/Capital Litigation Section, Phoenix, Attorneys for Appellee.

James Haas, Maricopa County Public Defender By Spencer D. Heffel, Deputy Public Defender, Phoenix, Attorney for Appellant.

Jarvis Jermaine Neal, Hinton, OK, Appellant in propria person.

MEMORANDUM DECISION

OROZCO, Judge.

*1 ¶ 1 Jarvis Jermaine Neal (Defendant) appeals his convictions for armed robbery, a class two felony; aggravated assault, a class three felony; and misconduct involving weapons, a class four felony. The jury found that the armed robbery and aggravated assault were dangerous felonies.

¶ 2 Defendant's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), advising this court that after a search of the entire appellate record, he found no arguable question of law that was not frivolous. Defendant was afforded the opportunity to file a supplemental brief in propria persona, and he did so through counsel, raising six issues on appeal.

¶ 3 Our obligation in this appeal is to review “the entire record for reversible error.” *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App.1999). We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 (2003), 13-4031 (2001), and - 4033.A.1 (2001). Finding no reversible error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶ 4 At approximately 11:00 p.m. on May 15, 2006, J.K., an employee of the Easy Market at 2115 S. McClintock in Tempe, was washing the floor outside the store with a “power washer.” He observed three men across the street talking to each other. One of the three men, whom J.K. recognized as a regular customer, went into the store briefly and came back out. J.K. then went inside the store to tell his coworker he could go home for the night. Before the coworker could leave, the other

two men from outside the store ran into the store. The men told the employees, “get down,” and then one of them shot J.K.FN1 Defendant then was heard instructing J.K.'s coworker to put money into Defendant's pocket. When it was over, the victim called 9-1-1.

FN1. J.K. identified Defendant at trial as the man who shot him. The regular customer was later identified as Justin Hamilton (Hamilton). The third man was wearing a dark-colored mask. His identity is unknown.

¶ 5 Defendant's pre-trial motions to suppress evidence mostly were denied. FN2 The judge also denied Defendant's motion to sever the weapons charge from the armed robbery and aggravated assault. The jury found Defendant guilty of all charges. By virtue of the guilty verdicts, Defendant also was found guilty of violating the terms of his probation for two criminal convictions in 2004 and 2005 that have been consolidated in this appeal.FN3

FN2. The court granted a motion to suppress a statement Defendant made to the police before he was read his rights, an admission that there was a gun in his apartment. The remainder of the motions were denied.

FN3. Defendant pleaded guilty in both cases to theft of means of transportation.

DISCUSSION

¶ 6 When reviewing the record, “we view the evidence in the light most favorable to supporting the verdict.” State v. Torres-Soto, 187 Ariz. 144, 145, 927 P.2d 804, 805 (App.1996).

A. Voluntariness of Confession

¶ 7 The first issue raised by Defendant in his Supplemental Brief is his contention that his confession was made “under duress due to the length of time and questioning by the detectives [and] because of the mental and physical condition [he] was in.”

¶ 8 Defendant's counsel filed a pre-trial Motion to Determine Voluntariness of Statements/Suppress Statements. When a question is raised as to the voluntariness of a confession, it must be resolved by the judge outside the presence of the jury. *State v. Owen*, 96 Ariz. 274, 277, 394 P.2d 206, 208 (1964). If the judge determines it was voluntary, it may be admitted. *Id.* However, evidence tending to contradict the voluntary nature of the confession also may be admitted at trial, and the jury may choose to reject the confession as involuntary, despite the judge's decision to admit it. *Id.* This court will not upset the trial court's determination of voluntariness of a confession absent a showing of clear error. *State v. Osbond*, 128 Ariz. 76, 78, 623 P.2d 1232, 1234 (1981).

*2 ¶ 9 In this case, a voluntariness hearing was held, in conjunction with hearings on other evidentiary matters. Defendant's counsel relied on *United States v. Harrison*, 34 F.3d 886 (9th Cir.1994), in which the Ninth Circuit Court of Appeals held that when police threaten to go to prosecutors or judges and tell them the suspect did not co-operate, such a confession is coerced and involuntary. *Id.* at 892. This court has similarly held that while it is permissible for detectives to tell a suspect his cooperation would be communicated to a prosecutor, telling a suspect that refusing to confess “would make it harder” on him is not. *State v. Strayhand*, 184 Ariz. 571, 579-80, 911 P.2d 577, 585-86 (App.1995).

¶ 10 In *Strayhand*, detectives interrogated the suspect about some robberies, and he denied being involved. Statements made by the detectives to attempt to persuade the suspect to change his story and confess included: “I will ask for a lot of jail time because you're not going to cooperate with me and I'm not going to help you,” “we can make it real uncomfortable, no cooperation” and “I'm going to go ahead and file it and my recommendation is you're uncooperative ... I get to go in and say you were uncooperative and didn't want to help me ...” *Id.* at 576-77, 911 P.2d at 582-83. This court held that the defendant's will was overborne and the confession was therefore involuntary. *Id.* at 582, 911 P.2d at 588.

¶ 11 Here, the statements made by police to which Defendant's counsel objected included, “Before you go down the path of not being able to set things straight and

us going to the prosecutor and saying hey, [']he wants to beat around the bush and all this craziness,['] then you are looking at other things,” “When this story comes out, ultimately, who will you be insulting is the person who [,] who reviewing the case—who is the prosecutor” and “If Jarvis didn't tell us everything, then that is something we are going to have to report.”

¶ 12 Tempe Police Department Detective Trent L. (Detective L.) testified that such statements were designed to communicate that “[t] he prosecutor was going to indeed review the case, and that the evidence as it sat” did not include Defendant's version “as to what happened inside the store that evening.” Defendant testified he believed that if he did not confess, “the punishment was going to be harsher.” The trial court and this court reviewed a recording of the interrogation and concluded that “there was no conduct on the part of the police that served to overcome the defendant's will or there were no promises, no threats, no coercions, no force.”

¶ 13 The recording revealed that after Detective L. made his comments about going to the prosecutor and telling him that Defendant “wants to beat around the bush,” Defendant told Detective L. that Hamilton borrowed his gun to commit the crime.FN4 After Detective L. told Defendant that his story would be “insulting” to the prosecutor, Defendant still stuck by his story that he only loaned one of the perpetrators his gun. He went into detail about how he purchased the gun, from whom, and how he later returned it to the seller. About an hour into the interview, the detectives left the room and told Defendant to think things over. About 15 minutes later, the detectives returned with water for Defendant, and questioning resumed. Defendant continued to stick to his story. Detective L. then explained to Defendant that police knew he was in Tempe near the crime scene moments before the crime because a call had been placed on Defendant's cell phone accessing a nearby cell tower. He showed Defendant his cell phone records, including the time and date of the call and the code for the Tempe cell phone tower. Detective L. also continued to show Defendant a photo-lineup that included Defendant's picture, claiming that several witnesses put him at the scene of the crime. Finally, Detective L. summarized, “All this stuff puts you there.” The detective acknowledged that the crime must have been scary for Defendant, and he asked him to “think about [] the other people that were inside that store with you guys that night; it was probably a scary proposition for them, too.” This was the turning point in the interview; at that moment, Defendant began to admit his direct involvement. This was about ninety minutes into the interview.

FN4. This was not a situation in which Defendant was invoking his right to remain silent. Rather, Defendant offered police an alternative explanation as to why a gun he owned was used in the robbery.

*3 ¶ 14 Although Detective L. made veiled threats about the prosecutor early in the interview, these comments did not appear to persuade Defendant to confess. It appeared from the recording that it was when he became convinced police had substantial evidence placing him at the scene of the crime, that Defendant made the decision to confess. Based on the nature of the discussion immediately preceding the confession, it does not appear that fear of the prosecutor holding non-cooperation against him motivated Defendant's confession. Defendant began confessing approximately ninety minutes into the interview, which is not an extensive amount of time to be interrogated. He was provided and ate a bag of potato chips, and he seemed coherent and alert throughout the interview.

¶ 15 Additionally, the jury in this case was properly instructed on the requirement of voluntariness:

You must not consider any statements made by the defendant to a law enforcement officer unless you determine beyond a reasonable doubt that the defendant made the statements voluntarily.

A defendant's statement was not voluntary if it resulted from the defendant's will being overcome by a law enforcement officer's use of any sort of violence, coercion or threats or by any direct or implied promise, however slight.

¶ 16 Defendant's counsel also reminded the jurors of their duty to determine whether Defendant's statements to police were voluntary. The judge and the jury both considered the evidence on the subject of voluntariness and concluded Defendant's confession was voluntary. We find no error.

B. Evidence Seized from the Apartment

¶ 17 Defendant asserts that the evidence taken pursuant to a search warrant from the apartment where he was staying was seized illegally because his name was not on the apartment lease, he was not a permanent guest at the apartment and some of the evidence seized was not listed on the search warrant.

¶ 18 Whether an individual is a temporary guest or a permanent resident of a place to be searched is a relevant inquiry when the search is conducted without a search warrant. See, e.g., *Perez v. Simmons*, 884 F.2d 1136 (9th Cir.1989). Here, however, police had a search warrant to search the apartment where Defendant was staying.

¶ 19 “Pursuant to a valid search warrant, seizure may be made of items listed in the warrant as well as items not listed but related to the crime and bearing evidentiary value.” *State v. Tosatto*, 107 Ariz. 231, 234, 485 P.2d 556, 559 (1971). In this case, police had a warrant to search for a silver or chrome handgun, ammunition, a Cricket cell phone, a black hooded jacket, journals, illegal drugs and any information identifying the occupants of the apartment. Other items police seized that were admitted into evidence included a dark-colored ski mask, a toy silver gun, a “beanie-style mask you can put on your whole head,” a blue hooded jacket and approximately \$262 in cash. Since the victim told police that one of the robbers wore a mask, it was reasonable for police to believe the masks seized were related to the crime. Therefore, the masks were lawfully seized and properly admitted into evidence. Because money was stolen from the Easy Market, the same was true for the cash. A blue hooded jacket and a toy silver gun were similar enough to the items listed on the warrant for police to reasonably believe they may have been related to the crime as well.

*4 ¶ 20 Defendant's Counsel filed a motion to suppress the evidence seized from the apartment. He asserted there was no probable cause to issue the warrant because a false statement was included in the affidavit used to obtain the warrant, and without that false statement, the remainder of the affidavit's content was insufficient to establish probable cause. Specifically, Defendant asserted that Detective L.'s statement that the victim “advised that Neal looked like the subject who shot him, however[,] he was unable to 100 percent say he was the subject involved,” was false. The victim actually said “looking like this guy” and “looks a bit like him, but I don't think so.” Defendant's counsel also asserted that a statement in the affidavit attributed to Defendant, that there was a gun in the apartment, was obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966).FN5

FN5. This statement was suppressed at trial. See footnote 2, *supra*, and paragraph 32, *infra*.

¶ 21 The trial court concluded the warrant nevertheless was supported by interviews with a codefendant, which constituted probable cause. The affidavit of Detective L. stated that he interviewed Hamilton, who identified “Gutta” as one of the two men inside the store during the robbery. The victim identified Hamilton as the regular customer who was with the robbers outside the store, but was not inside the store during the robbery. A court order of the phone number supplied by Hamilton for Gutta revealed that the phone belonged to Defendant at the address on the warrant. Hamilton identified Defendant as “Gutta” from a photo.

¶ 22 “[I]f, after excising from an affidavit that information which was [not properly before the court], facts remain sufficient to justify the magistrate's finding of probable cause, the warrant will be sustained.” *State v. Diffenderfer*, 120 Ariz. 404, 405, 586 P.2d 653, 654 (App.1978). Even if an affidavit contains untruthful statements, probable cause can be established by the affidavit's remaining contents. *State v. Poland*, 132 Ariz. 269, 279, 645 P.2d 784, 794 (1982).

¶ 23 “We review a trial court's denial of a suppression motion for an abuse of discretion.” *State v. Ossana*, 199 Ariz. 459, 461, ¶ 7, 18 P.3d 1258, 1260 (App.2001). A trial court's ruling on a motion to suppress should not be reversed on appeal absent clear error. *State v. Gulbrandson*, 184 Ariz. 46, 57, 906 P.2d 579, 590 (1995). A magistrate's finding of probable cause to issue a search warrant likewise is reviewed for clear error. *United States v. Wright*, 215 F.3d 1020, 1025 (9th Cir.2000).

¶ 24 “Probable cause exists if ‘it would be reasonable to seek the evidence in the place indicated in the affidavit.’ “ *United States v. Wong*, 334 F.3d 831, 836 (9th Cir.2003) (quoting *United States v. Peacock*, 761 F.2d 1313, 1315 (9th Cir.1985)). The totality of the circumstances supporting the issuance of a warrant is based upon, among other things, the basis of the informant's knowledge. *United States v. Nielsen*, 371 F.3d 574, 580 (9th Cir.2004). Although a codefendant's statement is not necessarily inherently reliable, the court also may consider the fact that the statement was against the declarant's interest when made. *Id.* at 579-80.

*5 ¶ 25 In this case, Hamilton admitted being near the crime scene and fleeing when he heard a gun shot coming from the area of the store. He admitted sharing in the proceeds of the robbery. His statement was against interest, and he had first-hand knowledge of the events. Therefore, the court found probable cause to support the warrant based on the interview with Hamilton. We find no error.

C. Photo Line-up

¶ 26 Defendant argues that a photo-lineup identification of him by the victim was tainted because the detective selected photographs based upon “his own judgment” rather than “the description given to him by the victim” of his assailant.

¶ 27 Defendant's counsel filed a pre-trial Motion to Preclude Use of the Photographic Lineup/In Court Identification and Request for Dessureault Hearing. (Pursuant to *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969), if a proposed in-court identification is challenged, the trial judge must immediately hold a hearing in the jury's absence to determine from clear and convincing evidence whether it contained unduly suggestive circumstances, and the burden is on the prosecution to establish, from all circumstances surrounding any pretrial identification, that it was not unduly suggestive.)

¶ 28 In the Motion to Preclude, Defendant asserted that the photographic lineup was unduly suggestive and that any subsequent in-court identification of Defendant by the victim would be tainted by the prior identification. Prior to the photographic lineup, the victim told police his assailant had a goatee. Defendant's counsel asserted that Defendant's “picture was more prominent, and his facial hair was significantly different than the other photographs” in the lineup.

¶ 29 The Dessureault hearing was held and the court, after examining the photographs in the lineup, determined that none of the photographs, including the one of the Defendant, showed an individual with a goatee. The trial court also found that the police adequately admonished the victim about the fact that facial hair and hairstyles are easily changed. Therefore, the trial court concluded the lineup was not unduly suggestive.

¶ 30 Reviewing courts will not disturb a trial court's decision to admit identification evidence based on mere subtle differences among photographs in a photo lineup. *State v. Dixon*, 153 Ariz. 151, 154, 735 P.2d 761, 764 (1987). Specifically dealing with facial hair, the Arizona Supreme Court in *State v. Via* held that a photo lineup was not unduly suggestive where the defendant was the only subject with “the beginnings of a full beard.” 146 Ariz. 108, 119, 704 P.2d 238, 249 (1985). Similarly, in *State v. Money*, the court held that an in-person lineup was not unduly suggestive despite minor differences in height, weight and hair length, and where only the defendant had a mustache. 110 Ariz. 18, 21-23, 514 P.2d 1014, 1017-19 (1973). So

long as there is a “basic resemblance” between the defendant and the other persons pictured, a photographic lineup will not be held to be unduly suggestive. *State v. Strong*, 185 Ariz. 248, 251, 914 P.2d 1340, 1343 (App.1995). Therefore, the trial court did not err in finding the photo lineup was not unduly suggestive.

D. Report of In-home Interview with Victim

*6 ¶ 31 Defendant argues that the only evidence of what the victim told the detective during an interview in his home is the police report, since the victim on the stand could not remember making “most” of the statements recorded in the report. Presumably, this is a hearsay objection.

¶ 32 When the victim testified for the prosecution, he actually did remember making most, although not all, of the statements attributed to him in the report. To the extent the victim did not remember what he said, the Arizona Rules of Evidence allow for an exception to the rule excluding hearsay for public records, such as police reports. Ariz. R. Evid. 803.8. Additionally, the victim testified at trial and was fully available for cross examination regarding the statements attributed to him in the police report. Ariz. R. Evid. 801.d.1. The statements of the victim as contained in the police report were therefore properly admitted.

E. Fifth Amendment

¶ 33 The Defendant asserts that the statements he made to the arresting officers were made in violation of his rights under the Fifth Amendment to the United States Constitution. If the defendant is referring to the statement he made when in custody, but before his Miranda rights were read to him-that there was a gun in the apartment-the court ordered that statement suppressed. With respect to the statements made by Defendant at the police station, Defendant had been read his rights and said he understood them. The confession was voluntary, as outlined above in Section A. Therefore, there was no violation of Defendant's Fifth Amendment right against self-incrimination.

F. Contradictory Statements by Victim

¶ 34 Lastly, Defendant asserts that the “victim made contradicting statements throughout trial.” It is the exclusive responsibility of the jury to determine the credibility of the witnesses. *State v. Pieck*, 111 Ariz. 318, 320, 529 P.2d 217, 219 (1974). In this case, the judge correctly instructed the jury on this matter:

In determining the evidence, you must decide whether to believe the witnesses and their testimony. As you do this, you should consider the testimony in light of all the other evidence in this case. This means you may consider such things as the witness's ability and opportunity to observe, their manner and memory while testifying, any motive or prejudice they might have, and any inconsistent statements they may have made. (Emphasis added.)

¶ 35 The jury had the opportunity to observe the witness and was instructed properly regarding the credibility of witnesses and inconsistent statements. We therefore find no error.

CONCLUSION

¶ 36 We have read and considered counsel's brief, carefully searched the entire record for reversible error and found none. *Clark*, 196 Ariz. at 541, ¶ 49, 2 P.3d at 100. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure and substantial evidence supported the jury's finding of guilt. Defendant was present and represented by counsel at all critical stages of the proceedings. At sentencing, Defendant and his counsel were given an opportunity to speak and the court imposed a legal sentence.

*7 ¶ 37 Counsel's obligations pertaining to Defendant's representation in this appeal have ended. Counsel need do nothing more than inform Defendant of the status of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). The Defendant shall have thirty days from the date of this decision to proceed, if he so desires, with an *in propria persona* motion for reconsideration or petition for review.

¶ 38 For the foregoing reasons, Defendant's convictions and sentences are affirmed.

CONCURRING: DIANE M. JOHNSEN, Presiding Judge, and SHELDON H. WEISBERG, Judge.

Ariz.App. Div. 1,2009.

State v. Neal

Not Reported in P.3d, 2009 WL 616448 (Ariz.App. Div. 1)

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