NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK
JUL 20 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee,	)	2 CA-CR 2010-0140 DEPARTMENT A
v.	)	<u>MEMORANDUM DECISION</u> Not for Publication Rule 111, Rules of the Supreme Court
CARLOS ENRIQUE NUÑEZ, Appellant.	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20090588001

Honorable Richard D. Nichols, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Kathryn A. Damstra — Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Rebecca A. McLean — Tucson
Attorneys for Appellant

H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Carlos Nuñez was found guilty of two counts of aggravated robbery and two counts of armed robbery, all dangerous-nature offenses

involving a firearm. He was sentenced to concurrent, presumptive prison terms, the longest of which are 10.5 years. On appeal, Nuñez argues the trial court erred by failing to suppress his confession, admitting identification evidence from an "unduly suggestive" lineup, and refusing to give a jury instruction for a lesser-included offense. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the evidence and all permissible inferences arising from the evidence in the light most favorable to sustaining the verdict. *See State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 914 (2005). C. and B. were parked at a carwash with their child in the backseat when Nuñez, then fifteen years old, and his accomplice ran toward B., yelling. B. grabbed one of them, and then the other pulled out a gun and fired. B. pushed away the person he had grabbed and went to get his child out of the car's backseat, where C. already was trying to unbuckle the child. Nuñez and his accomplice got into the front seat of the vehicle, and one of them pointed a gun at B. as he removed the child. The two men then drove away.

¶3 Nuñez later was arrested and confessed to taking the vehicle. C. identified Nuñez in both a pretrial photographic lineup and at trial. Nuñez was convicted and sentenced, as stated above. This appeal followed.

Right to Counsel

¶4 Nuñez argues the trial court erred by failing to suppress his confession, maintaining it was obtained in violation of his constitutional rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Specifically, Nuñez contends a police detective violated

his right to counsel by continuing to question him after he had invoked his right to counsel. He also argues that, even if his request for counsel was ambiguous, the detective violated his rights under *Miranda* by failing to clarify whether Nuñez was invoking his right to an attorney.

¶5 We review a trial court's ruling on an alleged *Miranda* violation for an abuse of discretion. *State v. Newell*, 212 Ariz. 389, n.6, 132 P.3d 833, 840 n.6 (2006). In reviewing a motion to suppress, "[w]e only consider the evidence presented at the suppression hearing" and "view that evidence in the light most favorable to upholding the trial court's ruling." *State v. Estrada*, 209 Ariz. 287, ¶ 2, 100 P.3d 452, 453 (App. 2004). We defer to the trial court's factual findings but review questions of law de novo. *Id.*

¶6 A defendant is entitled to the presence of an attorney during a custodial interrogation. *Newell*, 212 Ariz. 389, ¶ 24, 132 P.3d at 841. If a defendant unambiguously requests an attorney, officers must stop interrogating the defendant until the defendant reinitiates contact with them or his attorney is present. *Id.* ¶¶ 24-25. However, "[i]f a reasonable officer in the circumstances would have understood only that the defendant *might* want an attorney, then questioning need not cease." *Id.* ¶ 25. Although it may be good practice for officers to clarify an ambiguous statement about counsel, unless the statement is an "unambiguous or unequivocal request for counsel" officers may continue interrogating a defendant without further clarification. *See Davis v. United States*, 512 U.S. 452, 461-62 (1994); *see also Newell*, 212 Ariz. 389, ¶ 25, 132 P.3d at 841 (relying on *Davis*).

¶7 Soon after a Tucson Police detective had finished informing Nuñez of his rights, Nuñez said, "My lawyer is gonna [sic] talk with you he said." The detective then told Nuñez the attorney had not yet contacted him and asked Nuñez whether he was willing to look at some photographs and answer some questions about the past few days. Nuñez responded that he wanted to look at the photographs and, when the detective again asked whether Nuñez would answer some questions, Nuñez repeated that his lawyer had said he was going to talk to the police officers. When the detective asked whether Nuñez did not want to answer questions without an attorney, Nuñez did not respond. The detective then showed Nuñez a photograph and Nuñez answered a few questions about it. Afterward, Nuñez began to ask the detective questions about his situation and asked whether the detective was going to speak with Nuñez's lawyer. The detective told Nuñez the lawyer could not answer the detective's questions, but would just want to know what information the police had gathered, which the lawyer would receive during the disclosure process over the coming months. The detective then told Nuñez he would be prepared to be moved to jail and ended the interview.

¶8 A few minutes later, the detective returned and asked Nuñez some additional questions about a photograph. Nuñez then asked the detective if he had any more questions for him. The detective told him he had more questions, but that Nuñez had mentioned his lawyer. He then asked Nuñez what he wanted to do. Nuñez asked to go home, which the detective told him was not possible. Nuñez asked whether he could make a phone call, and the detective told him he could at the jail and ended the interview.

¶9 Five minutes later, Nuñez began calling out and the detective returned to the room. Nuñez asked the detective several questions about his situation and then said he would answer some questions. The detective explained that Nuñez could stop answering questions whenever he wanted and could choose which questions he wanted to answer. Nuñez then began answering questions and confessed to taking the car.

¶10 As detailed above, Nuñez only mentioned his attorney in order to ask whether he or she had called the detective and to tell the detective that his attorney had wanted to speak to the police. None of his statements refers to Nuñez's own wishes, even ambiguously, let alone sets forth a request for an attorney. His expressions were, at best, equivocal statements about counsel. *See McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991) (invocation of right to counsel under *Miranda* "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police*"); *State v. Ellison*, 213 Ariz. 116, ¶ 29, 140 P.3d 899, 910 (2006) (holding "I think I might want an attorney" equivocal statement); *State v. Eastlack*, 180 Ariz. 243, 250-51, 833 P.2d 999, 1006-07 (1994) (not error to find "I think I better talk to a lawyer first" ambiguous); *State v. Zinsmeyer*, 222 Ariz. 612, ¶¶ 7, 11, 218 P.3d 1069, 1075-76 (App. 2009) (holding "I think I need a lawyer" ambiguous suggestion at best). Furthermore, Nuñez's remaining silent after being advised of his right to counsel is not an unequivocal request for counsel. *See Berghuis v. Thompkins*, ___ U.S. ___, 130 S. Ct. 2250, 2259-60 (2010) (if defendant makes ambiguous statement or no statement, police not required to cease questioning or clarify). The detective was not required to clarify whether Nuñez was invoking his right

to counsel and permissibly continued to question him. *See Newell*, 212 Ariz. 389, ¶ 25, 132 P.3d at 841. The trial court did not err in finding Nuñez had never unambiguously invoked his right to counsel.

Voluntariness

¶11 Nuñez further argues that he did not knowingly and intelligently waive the *Miranda* rights and that the officer "coerced [Nuñez's] statements through misstatements of the law, implied threats, and promises." We review whether a defendant's statement was voluntary, and thus admissible, for an abuse of discretion. *Newell*, 212 Ariz. 389, ¶ 22, n.6, 132 P.3d at 840, 840 n.6.

¶12 We presume confessions made under custodial interrogation are involuntary. *State v. Jimenez*, 165 Ariz. 444, 448-49, 799 P.2d 785, 789-90 (1990). In order "to rebut that presumption, the state must show by a preponderance of the evidence that the confession was freely and voluntarily made." *Id.* And, when the defendant is a juvenile, "the 'greatest care must be taken to assure that the admission was voluntary . . . [and] not the product of ignorance of rights or of adolescent fantasy, fright or despair.'" *Id.* at 449, 799 P.2d at 790, *quoting In re Gault*, 387 U.S. 1, 55 (1967).

¶13 Voluntariness requires that a juvenile's waiver of his constitutional rights must be knowing and intelligent, as well as free from coercion. *Id.* In determining whether a confession was voluntary, we consider the totality of the circumstances. *Id.* These circumstances may include the "'juvenile's age, experience, education, background, and intelligence.'" *State v. Huerstel*, 206 Ariz. 93, ¶ 57, 75 P.3d 698, 711 (2003), *quoting Fare v. Michael C.*, 442 U.S. 707, 725 (1979). Additional circumstances

include the presence of the juvenile's parents,[1] any prior exposure to the criminal justice system, and whether the officer warned the juvenile of the possibility that the case could be transferred to adult court. *See Jimenez*, 165 Ariz. at 450-51, 799 P.2d at 791-92; *State v. Scholtz*, 164 Ariz. 187, 189, 791 P.2d 1070, 1072 (App. 1990) (listing various factors court may consider in making voluntariness finding).

¶14 A confession is not voluntary if it is "'induced by a direct or implied promise, however slight.'" *State v. Blakley*, 204 Ariz. 429, ¶ 27, 65 P.3d 77, 84 (2003), *quoting State v. Ross*, 180 Ariz. 598, 603, 886 P.2d 1354, 1359 (1994). A statement is induced if an officer made an express or implied promise and the defendant confessed in reliance on that promise. *Id.* However, advice to tell the truth without a threat or promise is permissible. *Id.*

¶15 Nuñez was almost sixteen years old and had been convicted of two prior non-juvenile felonies at the time of the interrogation. He had been waiting for less than an hour when the detective came to interview him, and the interviews lasted for less than an hour. The detective advised Nuñez of his rights under *Miranda* and told him that he might be tried as an adult. Nuñez's guardian was not present but, although Nuñez had asked whether he could make a phone call, he had not asked for his guardian or asked to call his guardian.

---

[1]Nuñez argues, based on *In re Andre M.*, 207 Ariz. 482, 88 P.3d 552 (2004), that because the "police stated no good reason to deny [him] the opportunity to have a parent present" his confession should be found involuntary. However, in *Andre M.*, the juvenile's mother tried to attend the interrogation, but an officer prevented her entry. *Id.* ¶ 4. Here, there was no evidence that Nuñez requested his guardian or that his guardian tried to attend the interrogation.

¶16 When Nuñez asked if he could go home, the detective told him he would not be able to go home that day and told him he could not promise when he might go home. Nuñez also asked if it would "make things better" if he talked, and the detective said he could not tell him whether it would make things better or worse. The detective suggested that if Nuñez was not guilty, his statements might help show that, but repeated that he could not promise him anything. The detective also told Nuñez that the police would not decide what would happen, but that, instead, it would be up to the court system to decide.

¶17 We find no abuse of discretion in the trial court's determination that Nuñez voluntarily waived his rights. The detective read Nuñez his rights under *Miranda*.[2] Nuñez had significant previous experience with the adult criminal justice system and the detective warned him this offense might also be tried in the adult system. Nothing in Nuñez's level of intelligence or background indicates he would have been unable to understand his rights. Although Nuñez's guardian was not present, Nuñez never asked to call his guardian or have his guardian present.

¶18 Additionally, the detective never promised anything or threatened Nuñez. The detective told Nuñez that speaking could help or hurt him, depending on the content. This statement is similar to advice that "it would be better for him to tell the truth" and is permissible. *Huerstel*, 206 Ariz. 93, ¶ 55, 75 P.3d at 711. The detective properly

[2]Nuñez is mistaken when he states the detective "thrust unrelated photographs in front of [him] while explaining his rights." The record reflects that the detective opened a folder with photographs and glanced inside of it as he was explaining Nuñez's rights to him.

clarified that he would not be the one to decide what would happen to Nuñez and that he could not promise him anything. *See Blakley*, 204 Ariz. 429, ¶ 28, 65 P.3d at 84.

¶19 Nuñez next contends his consent was involuntary because the detective told him the case might be transferred to adult court, when the law required an automatic transfer. Nuñez knew from the detective's statement that there was a least a possibility that his case would be heard in adult court, as his previous two cases had been. Furthermore, nothing in the record suggests the distinction between mandatory and permissive transfer made any difference to Nuñez. And, Nuñez cites to no Arizona cases for the proposition that misinforming a defendant of the law may negate consent. Instead, "'courts will tolerate some form of police gamesmanship so long as the games do not overcome a suspect's will and induce a confession not truly voluntary.'" *State v. Strayhand*, 184 Ariz. 571, 579, 911 P.2d 577, 585 (App. 1995) (officers may lie to defendant about evidence), *quoting State v. Tapia*, 159 Ariz. 284, 290, 767 P.2d 5, 11 (1988). The detective's mistake about the law did not appear to be a matter of gamesmanship, was not a promise of any kind, and still gave Nuñez sufficiently clear information to be able to make a knowing and intelligent decision. Thus, the trial court did not abuse its discretion in finding Nuñez's confession was voluntary. *See Huerstel*, 206 Ariz. 93, ¶¶ 52, 54-55, 58-59, 75 P.3d at 710-12 (confession by seventeen-year-old defendant voluntary even though juvenile denied multiple requests to call parents, lied to by officers about evidence, advised to tell truth, and had single prior police encounter involving curfew violation).

Lineup

¶20 Nuñez next contends the trial court erred by admitting evidence of a victim's pretrial identification of him because the lineup was unduly suggestive. He argues his photograph was the only one of the photographs taken after an arrest that appeared to be of a sixteen-year-old. "We review the fairness and reliability of a challenged identification for clear abuse of discretion." *State v. Lehr*, 201 Ariz. 509, ¶ 46, 38 P.3d 1172, 1183 (2002). In reviewing the court's ruling on a motion to suppress pretrial identification, we consider only the evidence presented at the suppression hearing. *State v. Moore*, 222 Ariz. 1, ¶ 17, 213 P.3d 150, 156 (2009).

¶21 A pretrial identification is admissible if the identification procedure was not unduly suggestive. *Lehr*, 201 Ariz. 509, ¶ 46, 38 P.3d at 1183. And even if the procedure was unduly suggestive, the identification still is admissible if it was reliable, not leading to a "substantial likelihood of misidentification." *Id.* Lineups are not required to be perfectly assembled, but must "depict individuals who basically resemble one another such that the suspect's photograph does not stand out." *State v. Alvarez*, 145 Ariz. 370, 372-73, 701 P.2d 1178, 1180-81 (1985) (lineup not unduly suggestive when defendant only one with several small moles on side of face). Differences between driver license photographs and booking photographs or the quality of the photographs are not necessarily unduly suggestive. *State v. Strong*, 185 Ariz. 248, 250, 914 P.2d 1340, 1342 (App. 1995).

¶22 C. described the men who robbed her as young, "16 at the most," Hispanic, very thin, five foot six inches, with dark hair and features. She said one of them had "a

little bit of facial hair" and an earring in his left ear. Officers showed C. three photographic lineups of six images each. C. identified Nuñez and also said another photograph, unrelated to the case, looked familiar.

¶23 Twelve of the photographs shown were from the Motor Vehicle Division and six of the photographs, including Nuñez's photograph, were photographs of arrested individuals. All of the men shown appear to be Hispanic, all have short dark hair, and eleven, including Nuñez, appear to have mustaches. Some of the men on the same lineup sheet with Nuñez appear to be older than sixteen, but the majority of the men in the overall lineup appear to be about sixteen years old. Given that the difference between an arrest photograph and a driver license photograph is not unduly suggestive, *see Strong*, 185 Ariz. at 250, 914 P.2d at 1342, and the individuals "basically resemble[d] one another," *Alvarez*, 145 Ariz. at 373, 701 P.2d at 1181, we cannot say the trial court clearly abused its discretion in finding the lineup was not unduly suggestive. *See Strong*, 185 Ariz. at 250, 914 P.2d at 1342. Therefore, we need not reach the question of whether the identification was reliable despite the procedure. *See Lehr*, 201 Ariz. 509, ¶ 46, 38 P.3d at 1183.

Lesser-Included Offense

¶24 Finally, Nuñez argues the trial court abused its discretion by refusing to give a jury instruction on robbery, as a lesser-included offense of armed robbery. We review for an abuse of discretion the court's denial of a request for a jury instruction on a lesser-included offense. *State v. Wall*, 212 Ariz. 1, ¶ 12, 126 P.3d 148, 150 (2006).

¶25 A defendant is entitled to a jury instruction on a lesser-included offense if the "'greater offense cannot be committed without necessarily committing the lesser offense'" and the jury reasonably could find that the evidence only supports the lesser offense. *Id.* ¶ 14, *quoting State v. Dugan*, 125 Ariz. 194, 195, 608 P.2d 771, 772 (1980). Robbery is a lesser-included offense of armed robbery. *State v. Hargrave*, 225 Ariz. 1, ¶ 34, 234 P.3d 569, 580 (2010). Armed robbery requires the additional element that the defendant or his accomplice "[i]s armed with a deadly weapon or a simulated deadly weapon" or "[u]ses or threatens to use a deadly weapon or dangerous instrument or a simulated deadly weapon." *Compare* A.R.S. § 13-1904(A) *with* A.R.S. § 13-1902(A). If the defendant has been charged as an accomplice, then the court will examine whether the defendant intended to aid the other actor. *Hargrave*, 225 Ariz. 1, ¶ 35, 234 P.3d at 580. Thus, if a defendant knew that his accomplice was armed with a weapon and continued to assist him in the robbery, he also would be liable for armed robbery. *See id.* ¶¶ 35-36.

¶26 C. identified Nuñez as the person who held the gun during the robbery. The detective who interviewed Nuñez testified that, although Nuñez denied possessing the gun, he admitted his codefendant had shown him the gun prior to going to the carwash. And the trial court instructed the jury on accomplice liability. Although Nuñez said he was scared when his codefendant fired the gun, Nuñez cites no evidence supporting his claim he was unaware his codefendant was armed. At a minimum, the evidence shows that Nuñez intentionally aided in a robbery knowing his accomplice was armed with a deadly weapon. *See* A.R.S. §§ 13-301(2), 13-1904(A)(1). Because a

reasonable jury could not have found the evidence supported finding Nuñez guilty of the lesser-included offense, the court did not abuse its discretion in refusing to give the jury instruction of robbery as a lesser-included offense of armed robbery. *See Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d at 150.

Conclusion

¶27 For the foregoing reasons, we affirm Nuñez's convictions and sentences.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge