UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1890

September Term, 2015

MACK S. GALLOWAY

v.

STATE OF MARYLAND

Woodward, C.J.,
Eyler, Deborah S.,
Nazarian,

JJ.

Opinion by Woodward, C.J.

Filed: August 1, 2017

After the State tried Mack S. Galloway, appellant, for armed robbery and thirty-three related charges, a jury in the Circuit Court for Anne Arundel County convicted him of a single charge, theft of property valued under $1,000.[1] Challenging that conviction, appellant presents four questions for our review:

> 1. Did the trial court abuse its discretion when it refused to allow [appellant]'s expert witness on eyewitness identification to testify via Skype at a pre-trial motions hearing, and did the trial court thereafter abuse its discretion when it ruled that [appellant]'s expert witness on eyewitness identification could not testify at trial?
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> 2. Did the trial court abuse its discretion when it refused to give a jury instruction on cross-racial identification?
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> 3. Did the trial court err and/or abuse its discretion when it refused to allow defense counsel to introduce a prior consistent statement?
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> 4. Did the trial court abuse its discretion when it permitted the State to make prejudicial remarks in closing argument?

For the reasons that follow, we shall affirm the judgment of the circuit court.

BACKGROUND

The charges against appellant stemmed from events at a private house party in Odenton. The prosecution theory was that appellant and several companions came to the

[1] Appellant was charged with five of each of the following offenses, corresponding to five robbery victims: robbery with a dangerous weapon, robbery, first-degree assault, second-degree assault, reckless endangerment, and theft. In addition, he was charged with four firearms offenses. The trial court granted judgments of acquittal on all counts except the firearms offenses and those relating to one victim, Sean Dolan. The jury convicted appellant of theft, but acquitted him of robbery, first-degree assault, and second-degree assault, and was unable to reach a verdict on the reckless endangerment charge, which was later nol prossed. Appellant was sentenced to eighteen months' incarceration.

party, then stole, at gunpoint, cash and valuables from five individuals, with appellant going through the pockets of one victim who later identified him from a police "mugbook." At trial, the victim, to the prosecutor's surprise, testified that appellant was with the individuals who committed the robberies but that he was not the person who took items from his pockets. Defense counsel, asserting a mistaken identification defense, disputed that appellant was ever at the party.

The Robbery

On the evening of May 16, 2014, in the dimly lit basement of a single family home at 620 Cadbury Drive, a large group of teens gathered, talking and listening to music. According to the victim, Sean Dolan, appellant came into the basement with about twenty guys Dolan did not know. After a time, the members of that group went upstairs. Minutes later, several of them returned, some wearing masks, one carrying a pump-action shotgun, and at least one other holding a handgun. The party guests were directed to get on the floor.

While Dolan was on the floor, one assailant pointed the shotgun to his head while another went through his pockets, stealing his spare change, cell phone, and phone charger. Four other victims had phones and money stolen as well.

After the party host's grandmother came in, the group of robbers ran out. Police were called at 10:24 p.m. Victims and witnesses agreed that the assailants were strangers, that they were all young African-American males, and that a dark Honda vehicle was seen leaving after the robbery. But due to the masks and dark conditions, Dolan was the only person who reported that he saw the unmasked face of one of the robbers.

Approximately forty-five minutes after the robbery, police officers were patrolling the Meade Village neighborhood, about eight miles from the Odenton robbery. At 11:18 p.m., they spotted a dark Honda Accord matching the description of the vehicle at the robbery, parked on a residential street. Officers encountered four occupants, including appellant, and found a pump action shotgun in the trunk of the vehicle. In addition, the driver of the vehicle, while cuffed and seated on a sidewalk, was observed "tossing a mask from behind his back over to the curb and which landed on the ground."

None of the items taken in the robbery were found in the vehicle or on its occupants. Although the driver was charged with a weapons offense, appellant, a passenger, was released without charges. Police never recovered any of the stolen property or the handguns reportedly used during the robbery; nor did they link the shotgun found in the trunk to the robbery.

The Identification

Eleven days after the robbery, Dolan picked out appellant's photograph in a police "mugbook." According to the detective who conducted the identification, Dolan stated that appellant was the individual who "ran people's pockets" during the robbery.

Appellant was charged with a total of thirty-four offenses, four relating to the firearms and thirty relating to the five victims, including armed robbery, robbery, assault, reckless endangerment, and theft. After several delays, trial was scheduled for September 15, 2015.

Before trial, appellant moved to suppress evidence of Dolan's mugbook identification on the ground that it resulted from an unduly suggestive procedure. After a

hearing on July 10 and August 10, 2015, the suppression court denied that motion, ruling that the mugbook identification was not unduly suggestive.

Defense counsel then contacted an expert regarding the reliability of eyewitness identification generally and Dolan's mugbook identification specifically. On September 9, 2015, appellant moved to postpone the trial until October 29, 2015, explaining that he wished to present expert testimony by Nancy Steblay, Ph.D., whose written report was attached to the motion. After appellant waived his right to be tried within 180 days, the court set a motions hearing date of October 14, 2015, and rescheduled trial to October 29.

On September 16, 2015, appellant filed a Notice of Expert Witness, again attaching the report prepared by Dr. Steblay based on her review of the suppression hearing transcripts, police file, and other documents. On September 23, 2015, the State moved to exclude Dr. Steblay's testimony, arguing that "the proposed testimony is inadmissible under Rule 5-702 and 703 and *Bomas v. State*, 412 Md. 392 (2010)," because "[m]uch of the proffered testimony is simply an attempt to relitigate the identification motions hearing."

On October 13, 2015, the day before the motions hearing, appellant filed an opposition to the State's motion *in limine*. Citing cases and legal publications, defense counsel argued that the "nationwide trend is to admit eyewitness expert testimony," that courts in Maryland and elsewhere had admitted such testimony, that "information about the reliability of eyewitness identification is not within the ken of the average juror," and that cross-examination alone cannot substitute for expert testimony" given the significant "dangers of mistaken identification." Defense counsel itemized the proposed subjects of

Dr. Steblay's expert testimony, citing factors that affect the quality of a witness's memory ("cross race effect" and "weapon focus"), the impact of the eleven days between the crime and the identification on the witness's memory, and the unreliability of the identification using a mugbook without "fillers." Attached to the opposition were Dr. Steblay's full report, her curriculum vitae ("CV") a recent *New York Times* article (Rachel L. Swarns, *The Science Behind "They All Look Alike to Me*," N.Y. Times, Sept. 20, 2015), and excerpts from a Department of Justice guide on proper police procedures for handling eyewitness evidence (U.S. Dept. of Justice, *Eyewitness Evidence: A Guide for Law Enforcement*, Oct.1999).

That same day, defense counsel asked court personnel to install Skype [2] on the motion judge's computer. On the morning of the hearing, defense counsel left the prosecutor a voicemail message advising that he intended to present testimony from Dr. Steblay via Skype.

At the outset of the October 14, 2015 hearing, the motion judge advised that he had not allowed the Skype software to be installed on his computer because there had been no notice or request to present evidence via Skype. Defense counsel acknowledged the "oversight" and apologized. He asked that, if the court would not allow Skype testimony that day, the motions hearing be continued until arrangements could be made for Dr.

[2] Skype is a "real-time video conferencing program" accessible via computer. *Attorney Grievance Comm'n v. Agbaje*, 438 Md. 695, 708 (2014).

Steblay to testify via Skype or until Dr. Steblay traveled to Maryland for the October 29, 2015 trial.

The motion court refused to allow the Skype testimony and denied appellant's continuance request, ruling that the State's motion to exclude the proffered defense expert had to be heard before trial. The court then granted the State's motion to exclude Dr. Steblay's testimony. The court added that it would reconsider its ruling if, during the period remaining before trial, defense counsel was able to present Dr. Steblay's testimony either in person or in another format agreeable to the State.

Thereafter, defense counsel filed a written motion seeking, once again, to present Dr. Steblay's testimony before trial, via Skype. After the State filed an opposition, the motion judge, relying on the prior ruling, denied that motion. Trial commenced the following day.

Trial

At trial, three of the five robbery victims testified, along with another witness who was present during the robbery, recounting the events summarized above. Relevant to this appeal, Dolan testified that a couple weeks after the robbery, a police detective came to his home and asked him to look through a police mugbook to see if he recognized anyone who may have participated in the robbery or may have been involved in it. Although Dolan admitted that he picked out appellant's photo, he stated that appellant was never in his pockets. According to Dolan, appellant "wasn't the one that was in my – that was taking my stuff." Dolan testified further that appellant was present during the robbery, but went to the corner "with the group of people that had the guns," and "who was robbing

everybody." Dolan described the person who went through his pockets as someone who was wearing glasses and had dreads. Dolan stated that he was not "100 percent" certain at the time that he made the photo identification.

Anne Arundel County Detective Franklin Bilbrey testified that he visited sixteen-year-old Dolan at his home on May 27, 2014. Because no robbery suspects had been developed, he showed Dolan a looseleaf "mugbook" containing 179 photographs of "local suspects." Dolan pointed to appellant's photo and said: "That's the one who ran people's pockets, everybody's pockets." According to Detective Bilbrey, Dolan said the person with the shotgun had dreadlocks and "shades," and was threatening to kill people. The detective did not get a written statement from Dolan.

We shall add facts in our discussion of the issues raised by appellant.

DISCUSSION

I.
Exclusion of Expert Testimony Regarding Eyewitness Identification

Appellant contends that the circuit court abused its discretion in granting the State's motion to exclude expert testimony regarding eyewitness identification, without allowing him to present testimony from his expert either in person or via Skype. Arguing that "[t]he reliability of [] Dolan's identification was the only issue in the case[,]" appellant asserts that the exclusion of his proffered expert testimony regarding factors that could have affected the reliability of that identification requires reversal. For the reasons explained below, we disagree.

A.
Standards Governing Expert Testimony
Regarding Eyewitness Identification

Under Maryland Rule 5-702:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

The Court of Appeals has addressed the admissibility of expert testimony regarding eyewitness identification. In *Bloodsworth v. State*, 307 Md. 164 (1986), the Court held that the test for determining the admissibility of such expert testimony is whether the proffered evidence would provide "real appreciable help to the trier of fact in deciding the issue presented." *Id*. at 184 (citations omitted). In *Bomas*, 412 Md. at 392, the Court declined to abandon that test, and confirmed that the determination of admissibility is not subject to a *Frye-Reed* test [3] and is "'largely within the discretion of the trial court[.]'" *Id*. at 406, (quoting *Bloodsworth*, 307 Md. at 185).

[3] The standard set forth in *Frye v. United States,* 293 F.1013, 1014 (D.C. Cir. 1923), and adopted in *Reed v. State,* 283 Md. 374, 381 (1978) is as follows:

> [B]efore a scientific opinion will be received as evidence at trial, the basis of that opinion must be shown to be generally accepted as reliable within the expert's particular scientific field. Thus, according to the *Frye* standard, if a new scientific technique's validity is in controversy in the relevant scientific community, or if it is generally regarded as an experimental technique, then expert testimony based upon its validity cannot be admitted into evidence.

Thus, "[w]hether the prosecution's case rests solely on eyewitness identification or not, the probative value of expert testimony on eyewitness identification and how much such testimony can actually help the jury in the case before it must be carefully weighed by the court on a case-by-case basis." *Id*. at 419. This "flexible standard [ ] can properly gauge the state of the scientific art in relation to the specific facts of the case[,]" *id*. at 416, while affording trial judges

> the ability to determine whether proffered testimony has a credible foundation and is relevant to the facts of a given case. Rule 5-702 entrusts the trial court with the task of determining whether an expert is qualified to give testimony about an issue, whether there is a foundation for the expert's proffered testimony, and the relevance of the proffered testimony. We see no reason to shift the burden of demonstrating the Rule 5-702 elements away from the one who presents the expert to the court.

Id. at 418.

The Court expressly recognized that the well-known "perils" of mistaken eyewitness testimony "has not abated with time[.]" *Id*. at 423. "With this in mind," *id.*, the Court acknowledged

> that jurisdictions have trended toward the admissibility of expert testimony on eyewitness reliability and we recognize that scientific advances since *Bloodsworth* may assist juries in evaluating eyewitness testimony. We appreciate that scientific advances have revealed (and may continue to reveal) a novel or greater understanding of the mechanics of memory that may not be intuitive to a layperson. Thus, it is time to make clear that trial courts should recognize these scientific advances in exercising their discretion whether to admit such expert testimony in a particular case.
>
> Nonetheless, some of the factors of eyewitness identification are not beyond the ken of jurors. For example, the effects of stress or time are generally known to exacerbate memory loss and, barring a

> specific set of facts, do not require expert testimony for the layperson to understand them in the context of eyewitness testimony.

Id. at 416. In addition, the Court observed:

> Expert testimony is not the only means to educate juries about the vagaries of eyewitness testimonies and safeguard against wrongful convictions based on misidentifications. In some cases, other trial components such as cross-examination, closing arguments, and jury instructions, can provide the jury with sufficient information to evaluate the reliability of eyewitness identifications.

Id. at 418.

Most recently, in *Smiley v. State*, 442 Md. 168 (2015), the Court held that,

> if expert testimony regarding an eyewitness identification is offered, its admissibility is governed by Maryland Rule 5-702 and *Bomas v. State*, 412 Md. 392 (2010). We stated in *Bomas* that our standard . . . is "whether [the expert's] testimony will be of real appreciable help to the trier of fact in deciding the issue presented."

Id. at 184-85 (footnote omitted) (citation omitted).

The *Smiley* Court affirmed the rejection in *Bomas* of "'a standard that favor[ed] the admissibility of expert testimony on eyewitness memory identification in criminal cases,'" *id.* 185, but reiterated "that 'trial courts should recognize these scientific advances in exercising their discretion whether to admit such expert testimony in a particular case.'" *Id*. (quoting *Bomas*, 412 Md. at 403, 416). Writing for a unanimous Court in *Smiley*, Judge Battaglia declined to follow the approach advocated by the petitioner, which was based on theories and methodologies adopted by the New Jersey Supreme Court in *State v. Henderson*, 208 N.J. 208, 27 A.3d 872 (2011). *Smiley*, 442 Md. at 182-83. Although the New Jersey court appointed a special master "'to evaluate scientific and other evidence about eyewitness identifications,'" *id.* at 183, and promulgated protocols governing such

evaluations, our Court of Appeals did not follow suit, instead reaffirming the neutral case-by-case standard articulated in *Bomas*. *Id*. at 183-85.

B.
Motion Record

After his motion to suppress evidence of Dolan's mugbook identification was denied, appellant designated an expert witness to testify about factors affecting the reliability of eyewitness identification. Attached to both his Motion to Postpone the trial date, filed on September 9, 2015, and his Notice of Expert Witness, filed on September 16, 2015, was a thirteen-page report prepared by Dr. Steblay, a psychology professor with a background in eyewitness identification. Attached to the Notice of Expert Witness was Dr. Steblay's CV.

In her report, dated September 4, 2015, Dr. Steblay explained that she reviewed the "police reports," a copy of the mugbook containing 179 photos, "Anne Arundel County Eyewitness Identification Policy," and audio transcripts for the July 10 and August 10, 2015 suppression hearing regarding Dolan's identification. She was prepared to testify that Dolan, who "did not describe the offender to police," "had limited opportunity to view the culprit and encode a memory of this stranger's face," because of "[t]he high level of stress, the weapon, the cross-race factor, and the chaotic nature of the crime." Moreover, she compared the use of the mugbook to make an undocumented identification eleven days after the crime to "a multiple-choice test with no wrong answer – and no way to reveal an unreliable witness." Her report discussed these reliability factors, including supporting scientific principles, studies, and references, some of which she had authored.

With respect to cross-racial identification in general, Dr. Steblay noted that "[m]emory difficulty is particularly common for faces of another race ("the cross-race effect")" and that "[w]itnesses are 1.5 times more likely to misidentify a stranger of a different race than a stranger of their own race[.]" She made no observations specific to Dolan's identification, reflecting that the discovery materials contained no pertinent information beyond race.

With respect to mugbook identification in general, Dr. Steblay deemed this procedure, which creates an "essentially an *all-suspect* lineup" with no "filler" photos of innocent persons, "inherently dangerous for any innocent suspect who stands out by matching the description of the culprit." As for Dolan's identification, she found it significant that, although the mugbook had 179 individual photos, "a much smaller number of photos are reasonable approximations to the defendant's description/appearance, perhaps at most 6-8 preceded the position of the defendant at #71." Moreover, Dr. Steblay opined that the detective's failure to ask Dolan how confident he was about his identification, apart from violating police department policy and current "best practices," prevented the fact-finder from being able "to clearly discern the certainty of the witness at the time of the identification."

The State, in moving to preclude Dr. Steblay from testifying, argued that nothing in her proffered report "would be of real appreciable help" to the jury because much of it was "not beyond the ken of jurors," other portions were "replete with citations to articles that do not support the statement they are cited for," and her "opinions based on what she believes to be the circumstances of the crime [were] entirely inadmissible."

At the October 14, 2015 hearing on the State's motion *in limine*, which was 15 days before the scheduled trial date, defense counsel asked the trial court to take Dr. Steblay's testimony via Skype, either that day or on a later date. The motion judge refused to permit the Skype testimony because that request was made too late and without adequate justification, explaining:

> One, it is not proper to ask the tech person to install SKYPE on my computer to try and have a witness testify by SKYPE for a motion hearing. That is number one.
>
> Number two, it is not proper to have failed to file a request under either [Md. Rule] 2-513 for a telephone appearance but here I do not even see how the witness could testify by phone appearance since they are [sic] an expe[r]t but, also, it was not proper to not set up in advance a procedure to have this witness possibly testify by SKYPE so that the Court could make a decision as to whether the testimony is appropriate or not.

On the merits of the State's motion *in limine*, the motion court expressed skepticism regarding the admissibility of expert testimony on eyewitness identification. Defense counsel responded by emphasizing that the *Smiley* Court did not hold that "eyewitness expert testimony is precluded. It is just saying it is not going to adopt a new standard," thereby "leav[ing] it to the discretion of the Court to allow it." The court indicated that, having "read all the reports" and the exhibits attached to the pleadings, it did not

> know how it is appropriateness [sic] of expert testimony on the particular subject and I do not even know how your expert could have a sufficient factual basis to support the testimony based upon what you have filed. Now, you want to try and bring this witness in and have this witness testify in front of the Court and be subject to proper cross-examination by the State, you know, that is one thing.

> But, you know, the State is moving to exclude this testimony. I do not even see how under 5-702 you even meet the legal standards much less meet the evidentiary standards.

At that point, defense counsel asked "to bring in this witness live on the day of trial." The trial court denied that request, ruling that the motion had to be heard before trial. Defense counsel requested, in the alternative, both that the witness "be allowed to testify via SKYPE" the following week, and for leave to file a written motion to that effect. The court declined to admit the expert testimony, but conditioned its decision as follows:

> I have read the report by the expert. I have read Smiley. I have read the Defense response. I have read the State's motion. I have read the supporting exhibits. I have looked at the C[V]. Even if the witness was qualified to express an opinion, the Court fails to see how this is an appropriate expert testimony on the particular subject.
>
> The Court believes that this would do nothing more than distract the jury and that there would not be a sufficient factual basis to support the expert testimony. I fail to see how this could come into play in any way.
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> Smiley, in the Court's opinion[,] is directly on point. Plus, there are a plethora of unreported opinions which I cannot cite and there was an old case, I think it was Con[way v. State, 223 Md. App. 770 (2015)] where Judge Raker held that . . . a trial court did not abuse their discretion in failing to give the cross racial identification instructions. But I am not aware of one case that allows that. You might point me to something but I am not aware of one.
>
> And the Court also believes through cross-examination and with a proper jury instruction read from the pattern jury instructions the jury can very easily determine whether or not the eyewitness identification is appropriate or not.
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> Here is my problem. There might be something that the witness says which might in some way affect what I believe at this point based upon reading and reviewing and looking at[,] but you have got a trial date which is set on October 29th and this motion hearing was set sufficiently in advance of trial to deal with this issue.

Now, if you think, [defense counsel], in the next 15 days you can somehow, someway come up with a way to get this witness here to testify, I do not know. The problem you have is if a judge decides to allow this testimony however inappropriate it seems to be, I am sure the State is going to want to run out and get some expert who says that everything claimed by this person is not scientifically reliable, et cetera, et cetera, et cetera.

* * *

So, I am trying to decide if I just flat out deny this and let you go to trial and you have your appellate points and the appellate court can consider whether I have abused my discretion or made an error of law **or if I let you try in the next 15 days to see if there is some way you can get this person in and have him [sic] testify and have a full evidentiary hearing like you really should under the law** or if you actually are able to spell out under some of the recent cases that deal with SKYPE how you can have the person testify, how there can be cross-examination, how the oath is going to be administered and all of that.

You certainly are not going to do it by calling the tech person and tell them to install SKYPE on my computer at 4 o'clock the day before a hearing. That is not going to happen. . . .

So at this point in time, the Court is going to grant the State's motion to exclude the expert subject to the right of the Defense to try and have the witness present in court to lay a proper foundation under 5-701, et al. as it may relate to reconsidering the issue.

If you get the State to agree or if you get the Court to agree on a proper procedure for SKYPE, good luck. If not, motions must be heard prior to trial. *So it is excluded at this point in time*. **The State's motion is granted. I rely heavily upon Smiley but if for some reason you think you can get everything together and you want to try and have a hearing, well, State, out of an abundance of caution, if he gets everybody in the room, maybe there is something different. I do not know.**

(Emphasis added).

Two days after that hearing, on October 16, 2015, defense counsel filed a "Motion for Expert Testimony via Skype," asserting that the motion court had "provided that the Defense be given an opportunity to provide testimony from Dr. Nancy Steblay . . . in order to further elucidate the topics upon which she would testify." In written opposition, the State pointed out that the motion court merely acknowledged "the possibility that reconsideration could happen if the defense were to bring the witness to court for live testimony." On October 28, 2015, the day before trial, a different judge, citing the prior ruling, denied appellant's motion to present Dr. Steblay's expert testimony via Skype. Dr. Steblay did not testify at trial.

C.
Defense Request for Skype Testimony

In this appeal, appellant contends that the motion court abused its discretion by refusing to allow Dr. Steblay to testify at the October 14, 2015 hearing via Skype. Relying on *White v. State*, 223 Md. App. 353, 387, 393 (2015), in which we held that Skype testimony by a prosecution witness did not violate the Confrontation Clause, appellant argues that, if testimony critical to the State's case can be presented via Skype at a criminal trial, "there is no rational reason why an expert [defense] witness, whose testimony is critical and who cannot be physically present, should not be permitted to testify via Skype at a pre-trial hearing." In appellant's view, the court abused its discretion when it refused to permit Skype testimony by Dr. Steblay at the hearing, because (1) her proffered testimony was "critical" to the mistaken identification issue at the heart of his defense, (2) it "almost certainly would have provided information that was not contained in her report,"

(3) the prohibitive cost of flying her twice to Maryland constituted "a legitimate reason" to take her hearing testimony via Skype, and (4) the nature of such testimony "closely approximates in-court testimony."

Appellant also maintains that the motion court abused its discretion when it refused to continue the motion hearing so that Dr. Steblay could testify via Skype at a later date. In his view, "[s]uch a continuance would have been fair to [appellant], as it would have given him the opportunity to create a full record on which the court could rule, and it would have been fair to the State, as it would have given the prosecutor additional time to prepare her examination of the witness." Moreover, according to appellant, the case "was barely past the *Hicks* date[.]"

We conclude that the motion court did not abuse its discretion by refusing to allow Skype testimony under the circumstances of the instant case. Defense counsel provided no prior notice, either to the court or the prosecutor, that he sought to present Dr. Steblay's testimony via Skype at the October 14, 2015 motions hearing. Apparently operating on the principle that "it's better to ask forgiveness than permission," defense counsel unilaterally arranged, on the day before the motions hearing, for Skype software to be installed on the motion judge's computer. Defense counsel then waited until the morning of the hearing to leave a voicemail informing the prosecutor that he planned to present Dr. Steblay's testimony via Skype. When asked why he "blindsided" both the court and counsel, defense counsel simply acknowledged his error and apologized. He offered no explanation for his failure to provide notice of his intent to present Skype testimony.

Although there is no rule expressly governing the above described situation, it is well-established that a trial court has discretion over the manner in which evidence is presented. Under Md. Rule 5-611(a):

> (a) **Control by court.** The court shall exercise reasonable control over the mode . . . of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

In the absence of express authority to present evidence via Skype, it was hardly an abuse of discretion for the court to require defense counsel to file a request or other notice regarding his proposal. Indeed, when video-conferenced testimony has been authorized, notice has been required. For example, in a proceeding to review an administrative agency decision, video conference appearances are subject to notice and other substantive criteria.[4]

[4] Md. Rule 7-208(c) provides:

> (c) **Hearing Conducted by Video Conferencing or Other Electronic Means.** (1) Generally. Except as provided in subsection (c)(2) of this Rule, the court, on motion or on its own initiative, may allow one or more parties or attorneys to participate in a hearing by video conferencing or other electronic means. In determining whether to proceed under this section, the court shall consider:
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> (A) the availability of equipment at the court facility and at the relevant remote location necessary to permit the parties to participate meaningfully and to make an accurate and complete record of the proceeding;
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> (B) whether, in light of the issues before the court, the physical presence of a party or counsel is particularly important;
>
> (C) whether the physical presence of a party is not possible or may be accomplished only at significant cost or inconvenience;

Similarly, in federal civil trials, where "[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location[,]" "[n]otice of a desire to transmit testimony from a different location should be given as soon as the reasons are known, to enable other parties . . . to secure an advance ruling on transmission[.]" Fed. R. Civ. P. 43(a) and advisory committee note to 1996 amendment.

Even if a timely Skype hearing request had been made, we are not persuaded that it would have been an abuse of discretion to deny it. Our decision in *White,* 223 Md. App. at 353, is instructive.

In *White*, we affirmed the decisions to allow a retired serologist who had handled evidence in two different "cold cases" to give trial testimony, *id.* at 362-63, via Skype in

> (D) whether the physical presence of fewer than all parties or counsel would make the proceeding unfair; and
>
> (E) any other factors the court finds relevant.
>
> (2) Exceptions and Conditions. (A) The court may not allow participation in the hearing by video conferencing or other electronic means if (i) additional evidence will be taken at the hearing and the parties do not agree to video conferencing or other electronic means, or (ii) such a procedure is prohibited by law.
>
> (B) The court may not allow participation in the hearing by video conferencing or other electronic means on its own initiative unless it has given notice to the parties of its intention to do so and has afforded them a reasonable opportunity to object. An objection shall state specific grounds, and the court may rule on the objection without a hearing.

one case and via WebEx[5] in another. *Id*. at 401. The serologist's testimony provided an essential link in the chain of custody for DNA evidence that forensically tied the accused to both rapes. *Id.* at 386. When prosecutors learned, three days before the first trial, that the witness could not travel from Arizona, due to an acute back condition, they proposed taking her testimony via Skype. *Id.* at 387-88. After holding a test hearing to examine the witness via Skype, the trial court permitted her to testify at trial via Skype. *Id.* Two months later, in the second rape case, a different trial judge held a WebEx hearing, during which the witness testified that her condition had not improved. *Id.* at 388-89. The trial court again found the witness "reliable" and concluded that her remote video testimony was justified by "important public policy considerations of 'justly resolving criminal cases while protecting the well being of the witnesses' and resolving cold cases based on advances in science and technology." *Id*. at 389 (citation omitted).

We pointed out that "[t]he Maryland Rules do not address the use of video conferencing in criminal trials[,]" *id.* at 390 n.32, but that other rules may permit it in other contexts, such as at an initial appearance in district court, "so long as the judge thereof has approved the use of video conferencing in that county" *see* Md. Rule 4-231(d) in habeas proceedings, *see* Md. Rule 15-309(b)(2), and in judicial review of agency adjudications, *see* Md. Rule 7-208(c). *Id*. at 390 n.32. The pertinent appellate issue, however, was whether the State's presentation of Skype testimony at that criminal trial, over defense

[5] "Similar to Skype, WebEx is a web-based tool that permits parties in separate locations to engage in a real-time video conference." *White*, 223 Md. App. at 388 n.29.

objection, violated the Confrontation Clause. *Id*. at 386. The Supreme Court has established that the "Confrontation Clause reflects a 'preference' for physical face-to-face confrontation, not an absolute guarantee." *Id*. at 390 (quoting *Maryland v. Craig*, 497 U.S. 836, 849 (1990)). Following the seminal decision in *Craig*, in which the Supreme Court approved our statute permitting the use of one-way closed circuit video when a child victim testifies,[6] we pointed out the shortcomings of video appearances and held that video appearances in criminal proceedings may pass constitutional muster only in special circumstances:

> We deem two-way video testimony, although it provides some additional confrontation assurances than one-way video testimony does, nevertheless to fall short of providing the same guarantees as physical, in-court testimony. **Even the most cutting-edge technology cannot wholly replace the weight of in-court testimony, for the electronic delivery of that testimony—no matter how clearly depicted and crisply heard—is isolated from the solemn atmosphere of the courtroom and compromises human connection to emotions like fear, apprehension, or confusion.** Accordingly, we hold that the *Craig* standard applies when the State seeks to present witness testimony via two-way video conference against a defendant in a criminal proceeding. And, the issues this Court must resolve pursuant to the standard set forth in *Craig* are whether [the witness's] testimony via a two-way medium was reliable; whether the denial of Appellant's right to confront her in person furthered an important public policy; and whether the court made a sufficient finding of necessity.

White, 223 Md. App. at 392-93 (emphasis added) (footnote omitted) (citations omitted).

Applying that test, we concluded that both the Skype and WebEx methods, "absent any technological complications," adequately "provided the traditional indicia of

[6] *See* Md. Code, (1974, 2008 Repl. Vol.), § 11-303 of the Criminal Procedure Article.

reliability," by allowing the witness to be sworn under oath, to be questioned in a manner that allowed the jury to observe her demeanor, and to be cross-examined. *Id*. at 393. In evaluating whether such video-conferencing was necessary to serve an important public policy, however, we cautioned that "convenience and efficiency are not sufficiently important public policies to warrant dispensing the right to physical face-to-face confrontation[.]" *Id*. at 395. In doing so, we distinguished such "convenience" cases from those where "the need to protect the well-being of a medically infirm witness" is at stake. *Id*. at 396-98.

Ultimately, we held that "the combined public policy justifications of resolving cold cases and simultaneously protecting the physical well-being of a significant witness are sufficient under *Craig* to warrant the absence of [the forensic witness's] in-court testimony in this case." *Id*. at 398. In doing so, we "emphatically caution[ed]" that there must be "necessity—not simply convenience or expediency—in order to deny a defendant his right to physically confront his adversaries in a court of law." *Id.* Thus, "a court must render an adequate, case-specific finding based on the evidence presented that the two-way video conference is necessary to further the identified public policy." *Id*.

The Court of Appeals has since held that the use of Skype testimony may be a reasonably necessary means of presenting evidence in a civil proceeding when a foreign witness cannot be compelled by subpoena to testify in person. *See Attorney Grievance Comm'n v. Agbaje*, 438 Md. 695, 719-20 (2014) (recognizing that Md. Rule 2-513, governing telephonic testimony did not directly apply to Skype testimony and holding that

the court had good cause to allow Skype testimony in bar disciplinary hearing when the client-witness was beyond its subpoena power).

Here, because the Skype testimony was proffered by appellant, rather than by the State, we have no Confrontation Clause concerns. Nevertheless, the reliability, necessity, and policy inquiries under *Craig, White,* and *Agbaje* provide a relevant analytical framework to review a court's exercise of discretion when, as in this case, it is a criminal defendant who seeks to present Skype testimony.

As recognized in *White* and *Agbaje,* Skype may offer a sufficiently reliable platform to present testimony by a witness from a remote location. In contrast to those cases, however, appellant failed to establish that the Skype testimony was reasonably necessary, rather than merely convenient or efficient.

During the motions hearing, defense counsel only proffered that it had been an "oversight" not to request a Skype hearing for Dr. Steblay. In his post-hearing motion, defense counsel stated that "[g]iven her location in Minnesota, it simply is not possible for the Office of the Public Defender to fly her out for testimony at a motion in limine hearing prior to trial and fly her back for trial if the Court finds her testimony to be admissible." Finally, in his brief to this Court, appellant acknowledges that what made her personal appearance "impossible" was that the Public Defender's Office "could not afford to fly Dr. Steblay from her home in Minnesota for both a motions hearing and the trial."

Thus, appellant's sole reason for examining the witness via Skype stemmed from his own financial limitation. As we explained in *White*, 223 Md. App. at 396-98, there is ample precedent for using Skype, or comparable alternatives, to present real-time video

testimony when the witness has medical reasons that he or she cannot physically be present in court. But appellant cites no criminal case approving such a video "appearance," over objection, on the ground that one party cannot afford to bring its expert witness to court. Indeed, the motion court recognized that our evidentiary rules prohibit experts from testifying by telephone and specify that necessity means either an inability "to appear because of age, infirmity, or illness;" or because the "personal appearance of the witness cannot be secured by subpoena or other reasonable means;" or because the *witness* (not the party) would suffer "an undue hardship" by being required to appear in person. *See* Md. Rule 2-513(d)-(f).

In our view, affordability of expert testimony is a matter "of expediency and convenience" that, by itself, does not justify Skype testimony absent extraordinary circumstances. Even assuming *arguendo* that the financial circumstances of a criminal defendant could justify a Skype appearance by his expert witness, defense counsel in the instant case presented no evidence to support appellant's claim of financial hardship. In particular, defense counsel did not proffer that he had exhausted appellant's available resources, including those provided by the Public Defender, before requesting a Skype hearing. Instead, at the motions hearing counsel merely apologized for his "oversight" in failing to file such a request, without otherwise proffering why appellant should be permitted to present his expert via Skype over the State's objection.

Because appellant failed to establish grounds for the court to hear Dr. Steblay's testimony via Skype, the motion court did not abuse its discretion in disallowing such remote testimony, whether at the October 14, 2015 hearing or the following week. In turn,

the court did not abuse its discretion in failing to postpone or continue the hearing for that purpose.

D.
Exclusion Order

Challenging the merits of the order excluding Dr. Steblay's expert testimony, appellant contends that the motion court abused its discretion when it prohibited Dr. Steblay from testifying. Citing *Bomas*, 412 Md. at 392, and *Smiley*, 442 Md. at 168, appellant argues that Dr. Steblay "would have testified to matters 'that may not be intuitive to a layperson.'" Specifically, appellant points to Dr. Steblay's proffered testimony regarding the unreliability of both cross-racial and mugbook identifications, arguing that the court abused its discretion in excluding her testimony about those factors.

Dr. Steblay's report includes the following proffer regarding cross-racial identification:

> Memory difficulty is particularly common for faces of another race. Humans have learned to pay attention to certain facial features that help us discriminate between faces within our same race, but these cues do not work equally well for encoding and for recognizing faces of another race. Witnesses are 1.5 times more likely to misidentify a stranger of a different race than a stranger of his own race. (Meissner & Brigham, 2001).

The State maintains that this proffer suffers from a "generality" that "does not help inform the jury about the extent to which Dolan had difficulty identifying [appellant]." Citing S*mith v. State*, 158 Md. App. 673, 697-703 (2004), *rev'd on other grounds*, 388 Md. 468 (2005), which acknowledged disagreement among scientists regarding cross-racial identification, the State argues that "the complexity of the issue does not lend itself to [ ] a

blanket statement" like the one proffered by Dr. Steblay, *i.e.,* that "cross-race identifications are less accurate than own-race identifications[.]" Furthermore, the State asserts, the Court of Appeals has recognized that Dr. Steblay's theory "that people exhibit own-race bias because members of a particular race have similar facial features" has come under scholarly criticism. *See Smith*, 388 Md. at 483. Given these shortcomings, the State argues, the "proposed testimony [ ] failed to meet the requirement that the testimony be on an appropriate subject matter, based on a sufficient factual basis, and helpful to the jury."

Regarding unreliability stemming from "the use of mugbooks to make identifications," Dr. Steblay's report states:

> The mugbook is essentially an *all-suspect* lineup, a violation of proper and fair identification procedures. Even a witness with no memory whatsoever of the culprit can make a selection from a mugbook – and any selection from the mugbook will produce a 'suspect ID.' A mugbook has no fillers; every photo is a suspect. Hence, there is no mechanism in a mugbook search to protect an innocent suspect or to signal that a witness has an unreliable memory. Conversely, proper lineup procedures includes fillers for these purposes. The mugbook ID can be seen as thereby dangerous and nondiagnostic of the guilt or innocence of the accused individual (see also, Well, Cutler, & Hasel, 2009).

The State points out that Dr. Steblay's proffered testimony about the mugbook identification "ignores the fact that Detective Bilbrey did not show Dolan a photo array because he did not have a suspect in the armed robbery," and also that this Court has held this type of identification may not be "impermissibly suggestive" for suppression purposes. *See Morales v. State*, 219 Md. App. 1, 14-19 (2014) (mugbook identification that did not follow proper procedures was not impermissibly suggestive because it did not point to the defendant's photo).

Moreover, with respect to both the cross-race and mugbook identification proffers, the State repeats the challenges, which were raised in its written motion before the trial court, that call into question the accuracy of statements in those portions of her report, as follows:

> Several percentages are cited within Ms. Steblay's report that are incorrectly copied from the article she cites. On page 5 of the "Expert Report," Ms. Steblay cites *Wells, 2014* as supporting her assertion that 1 in 3 make a mistaken identification. However, the *Wells* article (attached for the Court) says "at least one third of actual eyewitnesses … are choosing a known-innocent line-up member." The one third number is an exaggeration of data directly below it – showing percentages as low as 22%.
>
> Sometimes the data in those articles was incorrectly cited from the original study. A cursory check of the data in the *Wells* chart revealed that the citation of 40% identification of fillers in the *Horry, Memon, Wright and Milne* study form 2012 is *entirely wrong.* An abstract of that article available online, and attached for the Court, reveals that the filler identification rate was 26%. The Court cannot allow a witness to testify falsely. If a quick Google search revealed that tremendous error, it is easy to imagine the rest of the report is replete with incorrect and exaggerated statistics. To grant the defense the ability to call Ms. Steblay as a witness, particularly an expert witness, would clearly mislead the jury and there is not a sufficient factual basis to support her assertions.
>
> Ms. Steblay also makes several references to assumed circumstances of the crime that she has no knowledge of, as the defense was not permitted to address the reliability prong of the *Conyers* test in the motions hearing because it could not pass the first hurdle of proving the procedure was unduly suggestive. Ms. Steblay's opinions based on what she believes to be the circumstances of the crime are entirely inadmissible.

(Emphasis in original).

In applying the "appreciable help to the trier of fact" test to the exclusion of Dr. Steblay's expert testimony, we recognize that, in the absence of clear factual error or an

error of law, such determination lies within the broad discretion of the trial court. *See Bomas*, 412 Md. at 416-17. In *Bomas*, for example, the proffered expert testimony involved

> how (1) a "trained observer" does not recall an event more accurately than a lay person; (2) confidence is not necessarily correlated with accuracy; (3) a memory tends to fade over time in a "curvilinear" fashion; (4) stress can adversely affect one's memory; and (5) the manner a photo array is presented to an eyewitness can lead to false identifications.

Id. at 420. The Court of Appeals held that the trial court did not abuse its discretion in ruling that such evidence was inadmissible because

> the topics covered by the proffered testimony were inadmissible for at least one of the following reasons: the testimony (1) lacked adequate citation to studies or data, (2) insufficiently related to the identifications at issue, and/or (3) addressed concepts that were not beyond the ken of laypersons.

Id. at 423.

Here, Dr. Steblay's thirteen-page report cited numerous factors undermining Dolan's identification. In accordance with *Bomas,* most of these were "not beyond the ken of jurors." *Bomas*, 412 Md. at 416. Specifically, Dr. Steblay's report pointed to the "presence of a gun, high stress and violence, divided attention among multiple perpetrators[,]" the short "crime duration," and "the fact that the witness and appellant did not know one another." Such factors, if they affected Dolan's identification, are based on matters of common sense within the purview of the jury. *See Smiley*, 442 Md. at 185 n.11.

In this Court, appellant tacitly concedes that the motion court did not abuse its discretion in ruling that Dr. Steblay's testimony about these factors would not be of

appreciable help to the jury, and thus was inadmissible. Yet in the trial court, appellant persistently sought to present Dr. Steblay's expert testimony on all of these factors. When the court asked defense counsel the subject matter of Dr. Steblay's testimony, counsel cited to everything in her report. Although defense counsel later mentioned the cross-race and mugbook aspects of the identification as specific factors about which her expert testimony would help the jury, defense counsel never suggested that the court limit Dr. Steblay's testimony to those two topics. Accordingly, the trial court did not abuse its discretion in failing to parse, *sua sponte*, those two factors from the longer list of topics for which Dr. Steblay's testimony would not have been of appreciable help to the jury.

Moreover, in light of defense concerns about the cost of presenting Dr. Steblay's live testimony, we cannot presume that, if the court had limited her to those two factors, defense counsel still would have elected to incur the expense of presenting Dr. Steblay's testimony at trial. Because appellant's brief nevertheless focuses solely on these two factors, we shall address whether the trial court abused its discretion in excluding Dr. Steblay based solely on her proffers regarding cross-race and mugbook identifications. In doing so, we consider only the information set forth in Dr. Steblay's written report, because such report was the only proffer of Dr. Steblay's testimony before the motion court.

With respect to the exclusion of Dr. Steblay's proffered testimony regarding cross-race identification, we are not persuaded that the motion court abused its discretion given the generalized nature of that proffer, the State's unanswered challenge to its factual and scientific predicates, and the court's concern that such late-proffered evidence would likely lead to both a "battle of the experts," which could be confusing and distracting to the jury,

and a postponement of the trial date. Dr. Steblay's proffer was premised solely on the skin color of Dolan and appellant; there was no information in the discovery record bearing on Dolan's personal history of cross-race experiences, nor was there any evidence available before trial regarding Dolan's history of making identifications or his level of confidence in his identification of appellant. Significantly, defense counsel did not refute the State's assertion that the study cited by Dr. Steblay in support of her proffer that "at least one third of actual eyewitnesses . . . are choosing a known-innocent line-up member," instead shows that those percentages may be as low as 22 percent. As the Court of Appeals has recognized, there has been disagreement among scientists and researchers on the statistical data regarding the extent to which cross-race bias results in mistaken identifications. *See, e.g., Smith v. State*, 388 Md. at 483 ("Although many scientists and researchers conducting these studies agree that some witnesses exhibit own-race bias, they disagree on the extent to which such bias affects eyewitness identification due to the variations in the statistical data showing a cross-race effect."). Similarly, Dr. Steblay's theory that witnesses are better able to identify members of their own race has been criticized. *See id.* ("A second theory called the 'ethnocentric' or 'physiognomic homogeneity' explanation hypothesiz[ing] that people exhibit own-race bias because members of a particular race have similar characteristics making it difficult to differentiate among the members . . . . also has been criticized as ignoring evidence of anthropological studies of human faces finding no difference in perceived similarities between own and other-race faces." (citation omitted)).

Under these circumstances, we cannot say that the motion court abused its discretion in (a) recognizing that Dr. Steblay lacked the factual basis and scientific support to provide

a helpful evaluation of this particular cross-race identification, and (b) anticipating a "battle of the experts" over the incidence of mistaken cross-race identifications generally. Nor did the court abuse its discretion in concluding that such a debate would be distracting and confusing to the jury.

Turning to the motion court's failure to carve out of its exclusion order the proffered testimony on mugbook identifications, defense counsel also made no effort to refute the State's contention, set forth in its motion to exclude Dr. Steblay's testimony, that "the citation of the 40% fillers in the *Horry, Memon, Wright and Milne* study [from] 2012 is *entirely wrong*" because the online "abstract of that article . . . reveals that the filler identification rate was 26%." Moreover, the court appropriately considered that much of Dr. Steblay's criticism of mugbook identifications stemmed from the premise that in-person line-ups and photo arrays are preferable identification procedures because they have innocent persons inserted as "fillers." But it is undisputed that such procedures, although they may be "best practices," were not followed in this instance, because there were no identified suspects at the time Dolan was asked to look through the mugbook. Indeed, all of that information, which was not "beyond the ken" of the jury, was brought out during Detective Bilbrey's testimony.

As for the detective's failure to follow "best practices" by not asking Dolan how certain he was about his identification of appellant's photo, such information was also covered during Dolan's testimony, and the jury did not need expert help to understand and weigh its significance. Similarly, with respect to Dr. Steblay's proffer that appellant's photo was preceded by only six to eight photos of individuals with similar physical

characteristics, the jury could review the mugbook without expert guidance.[7] Accordingly, the motion court did not abuse its discretion in concluding that the proffered challenges to the reliability of Dolan's mugbook identification could be presented through cross-examination and argument to the jury. Therefore, we conclude that the motion court did not abuse its discretion in excluding the defense expert on eyewitness and mugshot identifications.

II.
Jury Instruction on Cross-Racial Identification

Appellant contends that the trial court abused its discretion by refusing to give the following jury instruction on cross-racial identification:

> In this case, the identifying witnesses are of a different race or ethnicity than the defendant. Scientific studies have shown that it is more difficult to identify members of a different race or ethnicity than members of one's own. In addition, studies reveal that even people with no prejudice against other races and substantial contact with person[s] of other races still experience difficulty in accurately identifying members of a different race or ethnicity. Quite often people do not recognize this difficulty in themselves. You should consider this in evaluating the reliability of the witness's identification of the defendant.

We review a decision not to give a requested jury instruction for abuse of discretion. *See Cost v. State,* 417 Md. 360, 369 (2010). In doing so, we are mindful that "jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and cover adequately the issues raised by the evidence, the defendant has not been prejudiced and reversal is inappropriate." *Fleming v. State,* 373 Md. 426, 433

[7] The jury had the mugbook during its deliberations.

(2003). *See* Md. Rule 4–325(c).

The issue of when to give a cross-racial identification jury instruction has been addressed in three reported Maryland cases, none of which has held that the trial court abused its discretion in failing to give such an instruction. In *Smith*, 158 Md. App. at 704, this Court held that a cross-racial identification instruction was not required because the defendant presented no evidence suggesting that the witness lacked familiarity with the defendant's race or "that race played a part in the identification." Although the Court of Appeals reversed on the ground that the trial court must allow, when applicable, defense closing argument regarding cross-racial identification issues, the Court did not decide that it was an abuse of discretion to deny a cross-racial identification instruction. *See Smith,* 388 Md. at 470, 478. Nevertheless, the Court acknowledged the "growing body of scientific laboratory and field research concerning eyewitness cross-racial identifications . . . suggesting that some witnesses are better able to identify members of their own race, but are significantly impaired when attempting to identify individuals of another race or ethnicity." *Id*. at 478-79. And the Court recognized that "[n]umerous of these studies have shown that the own-race effect is strongest when white participants attempt to recognize black faces[,]" with one study reporting that "white subjects misidentified black faces two-to-three times more often than they misidentified white faces." *Id*. at 480.

The following year, in *Janey v. State,* 166 Md. App. 645, *cert. denied*, 392 Md. 725 (2006), we held "that the trial judge did not abuse his discretion in refusing to give the requested instruction on cross-racial identification[,]" while cautioning that our decision "should not be interpreted as holding that it is never appropriate to give such an

instruction." *Id.* at 666. And in *Tucker v. State*, 407 Md. 368, 382 (2009), the Court of Appeals held that it was an abuse of discretion to give an instruction that "[t]here is no particular reason to think that cross-racial identification applies to eyewitnesses in actual criminal cases," because that was an inaccurate statement of the law.

Citing *Janey*, appellant maintains that the requested instruction on cross-racial identification was "applicable under the facts of the case," was not covered by any other instruction, and "was an accurate reflection of this Court's and the Court of Appeals' recognition of the 'strong consensus' that 'some witnesses are more likely to misidentify members of other races than their own.'" In particular, appellant points to our reliance in *Janey* on the test adopted by the New Jersey Supreme Court, that "an instruction on cross-racial identification 'should be given only when . . . [1] identification is a critical issue in the case, and [2] an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability.'" *Janey,* 166 Md. App. at 664 (quoting *New Jersey v. Cromedy*, 158 N.J. 112, 132 727 A.2d 457, 467 (N.J. 1999)).

In *Janey*, we did not adopt that test, but rather, simply held that, if it applied to that case, in which a "foreign" witness identified the African-American defendant as the individual who requested assistance shortly after the crime,

> it would not have been reversible error for the trial judge to refuse to grant the instruction . . . because (1) [the witness's] identification . . . was not a critical issue in the case, and (2) in any event, [the witness's] identification was corroborated by Janey's childhood friend, Jones, who placed Janey at [the witness's] filling station.

Id. at 664-65. The witness, we pointed out, "candidly admitted that he was not good at identifying African Americans[,]" which "not only supported a closing argument

commenting on the unreliability of his identification testimony, it also reduced the need for the jury to question whether [the witness] *might* be among the group of persons who have more difficulty with cross-racial identification[.]" *Id*. at 664. Given that the requested instruction "would have merely confirmed that [the witness's] self-professed difficulty in recognizing African-American faces was consistent with 'the experience of many[,]'" it "could have had no significant influence on the outcome of deliberations." *Id*. at 664-65.

Nevertheless, we cautioned that "the mere fact that a witness denies any difficulty in making cross-racial identifications should not deter the trial judge from considering giving such an instruction," particularly when the identification is critical evidence and there is no evidence to corroborate it. *Id*. at 665. "Nor should the fact that no instruction on cross-racial identification appears yet in the Maryland Criminal Pattern Jury Instructions serve as the basis for an arbitrary refusal to consider granting such an instruction." *Id*. at 666.

Appellant argues that under the two-part test applied in *Janey*, the trial court abused its discretion in refusing to give the requested instruction because Dolan's cross-racial identification was both highly critical to the prosecution and uncorroborated by any other identification evidence. The State counters that the requested instruction was "inaccurate, misleading, and, in any event . . . fairly covered by the jury instructions the court gave."

We conclude that the requested instruction was misleading, in that it contains skewed language that was likely to be viewed by the jury as a judicial command to disregard or discount the cross-racial identification made by Dolan. In *Tucker*, the Court

of Appeals addressed an analogous situation involving a cross-racial instruction, given at the State's request:

> When the State offered the sentence, "There is no particular reason to think that cross-racial identification applies to eyewitnesses in actual criminal cases," it was only providing one part, one hypothesis, from the dichotomy of theories that were explained. In so doing, the State mischaracterized what we were suggesting in *Smith*—that there were commentators who both supported and denied the real-life effect of cross-racial identification—by offering only that portion of the sentence that referred to commentators who denied the cross-race effect in real life situations. The proffer was an inaccurate statement of the law, and, as a result, we hold that it was error for the trial judge to have given the instruction requested by the State.

Tucker, 407 Md. at 382.

Just as the *Tucker* instruction skewed the jury's understanding of the applicable legal standard, the instruction proposed by appellant would have told the jurors that they "should consider" that "[s]cientific studies have shown that it is more difficult to identify members of a different race or ethnicity than members of one's own," so that "even people with no prejudice against other races . . . still experience difficulty in accurately identifying members of a different race" and "[q]uite often people do not recognize this difficulty in themselves." Such language might have been appropriate for defense counsel's closing argument, but as a jury instruction, it suggested that the cross-race effect is a universal phenomenon at work in every identification involving a witness and suspect of different races or ethnicities. Because appellant's proposed instruction is an incorrect statement of Maryland law, the trial court did not abuse its discretion in refusing to give it.

III.
Exclusion of Prior Statement to Defense Investigator

Appellant next complains that "the trial court erred and/or abused its discretion when it refused to permit defense counsel to call an investigator to testify to prior consistent statements [] Dolan made." After Dolan testified at trial that appellant was not the person who "ran his pockets" during the robbery, Detective Bilbrey testified that just days after the robbery, Dolan made a prior inconsistent statement that appellant was the person who removed items from his pockets during the robbery. Defense counsel then sought to rehabilitate the credibility of Dolan's trial testimony by proffering a prior consistent statement, which was that at the suppression hearing held on July 10, 2015, Dolan told a defense investigator that appellant "was someone who was present at the party but not running anyone's pockets and that the individual who ran his pockets in fact had dreadlocks and was wearing sunglasses."

Appellant contends that the prior consistent statement by Dolan is admissible, either as substantive evidence under Rule 5-802.1(b), the hearsay exception for a prior consistent statement to rebut a charge of recent fabrication, or for impeachment purposes under Rule 5-616(c)(2), permitting rehabilitation of a "witness whose credibility has been attacked" with "evidence of the witness's prior statements that are consistent with the witness's present testimony, when their having been made detracts from the impeachment[.]"

Under Rule 5-802.1(b), a prior consistent statement falls within an exception to the rule against hearsay only if it was "made before the alleged fabrication or improper influence or motive arose[,]" because only "'[a] consistent statement that predates motive

is square rebuttal of the charge that the testimony was contrived as a consequence of that motive.'" *Holmes v. State*, 350 Md. 412, 419, 424 (1998) (quoting *Tome v. United States*, 513 U.S. 150, 158 (1995)). Although "a relevant consistent statement admitted solely for the purpose of rehabilitation is not required to meet the stringent promotive requirement of Md. Rule 5-802.1(b)," the statement must still "be relevant to diminish the impeachment of [the declarant] . . . ." *Id*. at 427.

Here, the motive to fabricate arose before July 10, 2015, when Dolan allegedly talked to the defense investigator about appellant's role in the robbery. It was undisputed that the robbers, who arrived and departed in a group, were armed. Because of the dark conditions and the masks worn by some in the group, all but one of the robbers was unknown and presumably still at large. Faced with either the imminent prospect of testifying against appellant, or the stress of having just done so, Dolan had reason to fear the consequences of pointing the finger at appellant as an active participant in the robbery. Because that motive existed before Dolan spoke with the defense investigator and before he testified at trial, his statement to the investigator cannot rebut the charge that his trial testimony was contrived as a consequence of that motive. Because the proffered statement to the investigator does not satisfy the premotive requirement, and also does not diminish the impeaching effect of Dolan's prior inconsistent statement to Detective Bilbrey, the trial court did not err or abuse its discretion in excluding that evidence.

IV.
Closing Argument

In his final assignment of error, appellant asserts that, in two separate instances, "the

trial court abused its discretion when it permitted the prosecutor to make prejudicial remarks during closing argument." We are not persuaded.

Appellant's complaint arises from the following portions of the prosecutor's closing argument:

[PROSECUTOR]:	Now let's talk about the testimony from the boys. We have Terryn, Semaj and Kendall. Compare how they testified versus the demeanor that Mr. Dolan, Sean, had. I submit to you they were a little more relaxed and why might that be? Because all they had to do was come in and tell you what happened. They did not have to come in and point the finger. [Dolan], he gave off that demeanor of I don't want to be here. And doesn't that make sense? **Because now when he is here, he is scared.**
[DEFENSE COUNSEL]:	**Objection. Objection**. . . .
	* * *
THE COURT:	Now, come up here, counsel. Let me know what the objection is.

(Whereupon, a Bench Conference followed.)

[DEFENSE COUNSEL]:	**He did not really testify that he was scared. She is saying that he was scared. . . .**
THE COURT:	**. . . [T]he objection is denied. Thank you.**

(Whereupon, the Bench Conference was concluded.)

[PPROSECUTOR]:	**[Dolan] had to come in here and point the finger at [appellant]. Somebody – where it is clear from the evidence that [appellant] has friends who have guns. That is a reason to be scared.**
[DEFENSE COUNSEL]:	**Objection.**
THE COURT:	**I will sustain it. Rely on your own memory. I am not sure that I heard anything about somebody having friends with guns but you rely on your own memory.** Go ahead, State.
[PROSECUTOR]:	. . . . The testimony that was presented was that [appellant] entered that home, entered into that basement with other folks with guns. I submit to you that is a reason for [Dolan] to be scared when he comes in here.

(Emphasis added.)

"As long as 'counsel does not make any statement of fact not fairly deducible from the evidence his argument is not improper[.]'" *Anderson v. State*, 227 Md. App. 584, 589–90 (2016) (quoting *Wilhelm v. State*, 272 Md. 404, 412 (1974)). Appellant argues that both of the highlighted statements constituted argument based on facts not in evidence, so that the trial court abused its discretion in overruling the first objection and in failing to fully cure the prejudice after sustaining the second objection. We disagree.

As the prosecutor pointed out, appellant's companions were armed, both at the party and at Meade Village. We cannot say that the trial court abused its discretion when it allowed the State to ask jurors to infer from such evidence that, when testifying that appellant was not the person who stole from him, Dolan was scared – and had good "reason

to be," given that appellant's armed accomplices remained unidentified and at large. These remarks qualify as fair comment that goes to heart of the State's argument that the jury should credit the identification that Dolan allegedly made days after the robbery, rather than his trial testimony. The trial court did not abuse its discretion in overruling the objection in the first instance and giving a limiting instruction in the second.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.