UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2346

September Term, 2015

JASON KYLE TIBBS

v.

STATE OF MARYLAND

Meredith,
Leahy,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: January 9, 2017

Jason Kyle Tibbs, ("Appellant"), was charged in a fifteen-count criminal information in the Circuit Court for Dorchester County, Maryland, for the attempted armed robbery and assault of Phillip Brooks, James Brode, and Victoria Diehle. Appellant was charged after Diehle discovered a photograph of Appellant on Facebook and identified him to the police as the assailant, using that photograph.

On August 18, 2015, after the trial court denied Appellant's motion to suppress the identification evidence, Appellant was tried by a jury. The jury convicted Appellant of armed robbery of Brooks and Brode, first-degree assault of Brooks and Brode, second-degree assault of Diehle, reckless endangerment of Brooks and Brode, use of a firearm in the commission of a felony or crime of violence, and possession of a handgun. The sentencing court ultimately merged the counts of first-degree assault, reckless endangerment, and possession of a handgun, but imposed a total of 50 years' imprisonment for the outstanding convictions, which included a 20-year sentence for the use of a firearm in the commission of a felony or crime of violence conviction, to be served consecutively to the two armed robbery sentences.

Appellant timely appealed to this Court and presents the following questions for our review:

> 1. "Did the trial court err in denying Appellant's motion to suppress identification evidence?"
>
> 2. "Is Appellant entitled to resentencing where the State erroneously argued that the law required that the sentences for armed robbery and use of a firearm be imposed to run consecutively?"

We affirm. We hold that under the circumstances presented in this case, the trial court correctly concluded that there was "no real misconduct on the part of the police," and therefore, the Due Process Clause did not require a preliminary judicial inquiry into the reliability of the eyewitness identifications. Further, Appellant is not entitled to resentencing because we discern no error by the sentencing court.

BACKGROUND

A. Suppression Hearing

At a hearing on Appellant's motion to suppress held on August 17, 2015, the following evidence was adduced through the testimony of Victoria Diehle, James Brode, and Detective Ed Howard.

On the evening of October 1, 2014, at around 7:00 p.m., Victoria Diehle, James Brode, Phillip Kyle Brooks, and Caleb Frampton decided to take advantage of free passes they had to go to the movies in Cambridge, Maryland. As Brode was driving the group to the theater in Brooks's car, a man approached them at a stop sign located at the intersection of High Street and Douglas Street. Diehle and Brode described the man as Caucasian and heavyset, in his thirties with red hair and red facial hair. He approached the right front passenger, Brooks, and demanded the group's wallets in a calm tone of voice while holding a gun to Brooks's neck. Diehle testified that, after members of the group showed him that their wallets were empty, the man became "a little angry" and told them to "get out of there."

Describing this encounter further, the witnesses testified that, although it was just starting to get dark outside, the area was illuminated by street lights and the headlights of the car. Diehle agreed she was "dazed" by this confrontation, but maintained that she was staring at the red-haired man the entire time. Brode also testified that his view was "one hundred percent clear" and that he was "making sure" to stare in the direction of the man during this initial encounter.

The group decided to continue on to the movies. Diehle testified as to why they continued to the theater and did not call the police at this point:

> A lot of -- me and those individuals we go through a lot so we don't usually just call the -- involving the police with anything. We've seen a lot. We've seen people shot on our streets. We live in the bad part of town so it's nothing []new to us. And none of us were hurt. None of us, you know, were injured so we didn't really see that it was really that important.

After the movie, they returned to Brode's house on High Street and went across the street to a neighbor's house. As they were outside talking to the neighbor, the same red-haired man from the earlier encounter—with another man—approached them again. However, the red-haired man seemed, according to Diehle, "a little more hysterical, more agitated." In fact, he was hostile and yelling at Brooks, again demanding money from him. Diehle and Brode believed the man must have thought Brooks was someone else.

A "fight" then ensued, in which the red-haired man was assisted by his unidentified accomplice, whom Diehle described as a "black heavyset muscular male." Diehle testified this second man "went after" Brooks while the red-haired man "went after" Brode. Both

Brode and Brooks were hit during this incident. In fact, Brooks was struck on his ear and lip with a bottle, ultimately requiring a visit to the hospital and thirty-six stitches.

This second encounter occurred around midnight, and lasted anywhere from fifteen to twenty minutes, according to Diehle. Diehle further testified she could see "perfectly fine" because of all the nearby porch and street lights. Brode testified that there was least one street light nearby and that he was only standing about three feet away from the red-haired man as the red-haired man was attacking Brooks. In fact, Diehle testified that, at one point, she stood within six inches of this man, and was close enough to smell alcohol about his person. After the prosecutor asked her whether her view was obstructed during this encounter, specifically, "[w]as there anything between those six inches between you and he," Diehle simply replied, "[h]ostility."

After the second encounter, Brode, Brooks, and Diehle traveled to the hospital for medical treatment. The police became involved when Corporal Jeff Smith, who did not testify at trial, met with Brooks at the hospital and filled out a police report concerning the group's two violent encounters that evening. Detective Ed Howard testified that he was assigned the case the following morning.

Diehle heard from a number of friends that the red-haired man was named "Jason Tibbs." Diehle looked up that name on Facebook and found a picture that she testified "[l]ooked almost like an identical match." Diehle went to the police station the day after the encounters and spoke with Detective Howard. After Detective Howard showed Diehle a photo array, she saw someone she thought looked like the assailant but asked the

Detective if she could look at the picture on her phone, and then showed the Facebook photograph to Detective Howard.[1] When asked why she had shown the detective what was on her phone, Diehle said "[b]ecause I wanted to be sure that I wasn't going to identify somebody that wasn't the same person." The Facebook photo was admitted into evidence at the motions hearing.

On cross-examination, Diehle clarified that the second encounter with Appellant happened in her own neighborhood. Diehle continued that, when she returned from the hospital after the incident, her neighbors came over to check on her and her friends to see if they were okay, and they started talking about who they thought was the attacker, indicating that it was a person named "Jason Tibbs." Diehle testified:

> [APPELLANT'S COUNSEL:] And you say these people indicated to you that it was Jason Tibbs?
>
> [DIEHLE:] Yes, sir.
>
> [APPELLANT'S COUNSEL:] And what did you then do?
>
> [DIEHLE:] I look[ed] it up. I looked at Facebook before anybody said anything. I didn't really see anything except for a picture that looked identical. People started saying names. I seen the names it kind of matched. I mean there is not very many redheaded people I know around here. And it's kind of weird that a lot of people give the same name and it happens to look like the same person.

[1] Testimony at the suppression hearing is equivocal as to whether Diehle identified someone in Detective Howard's original photo array. Diehle testified that she identified someone in Detective Howard's original photo array as the assailant, whereas Detective Howard testified that Diehle did not identify anyone in the photo array. Appellant lodges no argument concerning this inconsistency. Regardless, the testimony is unambiguous that Diehle showed Detective Howard the photo of Appellant that she had retrieved from Facebook and identified the person in that photo as the assailant.

> [APPELLANT'S COUNSEL:] And as a result of this you looked up that photograph on Facebook?
>
> [DIEHLE:] Yes, sir.
>
> [APPELLANT'S COUNSEL:] Okay. And were you a hundred percent positive that that's the individual?
>
> [DIEHLE:] It's almost an identical match unless there was a DNA test.
>
> [APPELLANT'S COUNSEL:] Sorry. You say you're not a hundred percent positive?
>
> [DIEHLE:] I mean I could look at it, look at the person they look the exact same, same eyes, same hair, same body structure. I mean I might not know the person in person but I'm pretty sure I can identify somebody by looking at them in a picture.
>
> [APPELLANT'S COUNSEL:] You're pretty sure?
>
> [DIEHLE:] I'm one hundred percent sure.

Diehle then testified that the photograph that she chose in Detective Howard's photo array was of an individual with "very short hair," while the Facebook photo she found was of a person with "longer hair." She continued:

> The photo that he had showed me I wasn't really sure it [] was the same person, but when I showed him the photo that I had it had looked like the individual that had approached us the night before. And when I showed him that and I seen the names it was pretty obvious at that point.

Detective Howard interviewed Brode at the police station the same day of Diehle's interview. When asked during the hearing about Tibbs's Facebook photo, Brode confirmed that Detective Howard had showed him that photograph during his interview and that it was a photograph of the same person that was involved in the incidents. He testified that Diehle showed him the photograph before they went to the police station. Brode testified

that they "made sure everything was identical, you know, like facial features and, you know, what he was wearing which was that and everything matched up." Brode, as well as Diehle, also agreed they had never seen Appellant before the day of this incident.

Detective Howard testified at the hearing as well. Howard testified, without objection, that Phillip Kyle Brooks told Corporal Jeff Smith, while Brooks was being treated at the nearby hospital for injuries sustained during the altercation, that he was assaulted at the corner of Douglas Street and High Street in Cambridge by an African-American male and a white male "in his 30's with a red beard and hair."[2] According to Corporal Smith's report, at the second encounter, the white male demanded money, and then Brooks was assaulted with a liquor bottle. Additionally, Brooks had advised that there was an another encounter, earlier that same evening, during which the white male put a gun to Brooks's neck and demanded money.

Detective Howard testified that, based on this information, he reviewed the police photo database and "compiled a photo lineup comprised of six separate pictures in six separate manilla folders." None of those photos were of Appellant. Both Brooks and Brode failed to identify anyone in the original photo lineup. It was after that when Diehle told Detective Howard that she knew that the assailant was named "Jason Tibbs" and that she had found a Facebook photo of him, which was stored on her cellphone. Detective Howard saw that photo, obtained a copy, and then had it printed out. Detective Howard testified that the photo was of Appellant, Jason Tibbs.

[2] Neither Corporal Smith nor Brooks testified at the motions hearing.

Detective Howard then testified as follows regarding the second interview he had with Brooks at the police station, after his first interview when he showed Brooks the photo array that did not include Appellant:

> Prior to showing Mr. Brooks that photo[,] I indicated to him that Ms. Diehle advised that they knew who had assaulted them that evening. Mr. Brooks indicated in fact that . . . he was in fear for his life and the safety of his family. At which time he said, you know, Jason Tibbs had assaulted him. After he had given his full name I showed him the printout that Detective Curran[3] had obtained. And he indicated without hesitation that that was the subject.

Detective Howard then took the "same approach" with Brode:

> I told him, you know, that through conversations with the other two I was advised that he also knew the name of the person who had assaulted the three of them that night. At which time he also indicated that he did and gave the name of Jason Tibbs. I again showed the same photo at which time he indicated that, yes, that was the person that had assaulted them.

On cross-examination, Detective Howard confirmed that he showed the Appellant's Facebook photograph individually in one-on-one interviews with Brooks and Brode. However, he also testified that they both identified appellant as Jason Tibbs before he displayed the photograph.

After testimony concluded, defense counsel argued, *inter alia*, that the identification was impermissibly suggestive because only one photograph, apparently obtained after a "self investigation" by Diehle after "some kind of street gossip," was presented to the witnesses, and that there were no exigent circumstances justifying this procedure.[4] The

[3] Detective Curran's first name is not included in the record.

[4] Counsel also argued the identification procedures employed by Detective Howard failed to follow a written policy as required under the Public Safety Article, but that

State responded by primarily arguing that the identification was reliable. Apparently addressing whether the identification was impermissibly suggestive, the State also argued as follows:

> The fact that she went on Facebook is interesting in terms of the last case I think on this, In Re: Mat[t]hew S., where an Officer does what many officers have historically have done is to pull the high school yearbook and take a look. Facebook is arguably sort of the high school yearbook of the present. And for her to do her own research doesn't somehow defeat the identification that all three of these people made and made independently after giving the Officer and giving his Honor their prior observations, consistent observations of what their assailant looked like.

The court denied the motion to suppress, making the following pertinent findings:

> In this particular situation we have a Police Officer who when he understands that the description, the basic description is a white male, red hair, red facial hair is out there, and he does that by reading the report of Corporal Smith. He prepares a photographic array of individuals with that basic characteristic in preparation to meet with the witnesses and victims of this particular crime. But before he gets to that point the witnesses and victims with respect to this crime who I note are not State agents they are private citizens. They were not known to the Police Department other than in that context prior to -- I guess they weren't known by Officer Howard at all. They do a little investigation on their own. And they identify who they think the perpetrator is and essentially deliver that unexpectedly to Officer Howard who then embarks upon a method whereby he interviews each of the witnesses separately. From two of the witnesses who were not forthcoming out of fear that he had them admit that they knew who it was. They gave them a name and after the name he showed them a picture that had been pulled from Facebook, a picture that was readily available to the public in this particular situation.

After discussing the law on identifications, the court then stated that if police show a victim a single photograph "of the person that they have identified by name certainly

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argument is not being pursued on appeal.

there is suggestiveness in that. But the inquiry does not end for the Court at that point." The court then addressed the reliability of the identifications and found: (1) "there were two opportunities to view the perpetrator both relatively lengthy, both fairly close up. . ."; (2) there was nothing between the victims and appellant at the time of the encounter, "only hostility" according to Diehle, who was "clearly focused" during the encounter; (3) the victim's description was "pretty accurate"; and, (4) Diehle was "very confident that the person she saw that robbed them is the person identified as Jason Tibbs by Facebook in this case." The court concluded:

> So in evaluating all of the circumstances in this case, the way this case shook out the Court finds that there is no real misconduct on the part of the police. The identification was apparently made prior [to] these young individuals coming to the Police Department and they just merely confirmed that by showing the photo to the police who then decided to confirm that themselves. There is not much different than if somebody said Joe Blow robbed me, I saw Joe Blow rob me. And he said is the Joe Blow you're talking about and I showed them a picture.
>
> So for those reasons the motion to suppress the identification is denied. Certainly you can [deal] with identification at the trial of this matter if it gets that far.

B. Trial

Corporal Jeff Smith, Victoria Diehle, James Brode, and Phillip Brooks testified for the State during Appellant's one-day trial on August 18, 2015. The jury heard testimony from these witnesses that recounted substantially the same facts that were related during the suppression hearing.

The witnesses clarified that during the second encounter, while Appellant and his accomplice attacked Diehle, Brode and Brooks, the fourth member of the group, Frampton,

watched the incident from the safety of the neighbor's porch. Diehle also testified that she saw a gun tucked into Appellant's pants, but Brooks testified that Appellant's friend possessed the gun. In any event, during the fight, Diehle was pistol whipped, although it was not entirely clear by whom. Meanwhile, Appellant hit Brooks with his fist and also punched Brode repeatedly. In addition, the unidentified African-American male struck Brooks with a liquor bottle.

All three victims sustained injuries as a result of the unprovoked assault. Brooks had a puncture wound to his lip and lacerations to his left ear and required medical treatment at Dorchester General Hospital. Additionally, Diehle's face became swollen, purple, and red from her injuries, and Brode was also treated at the hospital for a "minor concussion."

Diehle also clarified that the next day, just within hours of the assault, she spoke to other people in the neighborhood and learned that the primary assailant was named "Jason Tibbs." Then Diehle found a picture on Facebook "that looked an awful lot like him." Diehle also testified, apparently for the first time, that Appellant's name and photograph were on a list of residents living in Cambridge. Diehle testified that she showed this photograph to Brode and Brooks and also gave the photograph to the police.

All three victims identified Appellant in the courtroom at trial.

After the State rested, the defense presented a brief case. Ace Tibbs, Appellant's brother, testified that Appellant receives a Social Security disability check on the 1st of every month and that it would be unlikely that Appellant would attempt to rob anyone on

October 1, because it was the time of the month during which he would have had money. Tamara Wilson, Appellant's girlfriend, testified that she was in the midst of a high risk pregnancy during that time, and that it was unlikely that he would have attempted to rob anyone because he would have been by her side. In addition, she testified that Appellant did not own or possess a gun.

Noni Ferrare also testified that she lived on Douglas Street, where the fight occurred, and that she knew Diehle, Brode, Brooks, and Appellant. She testified that she was there that night and that she did not see any altercation, any gun, or any bottle.

After the court granted a motion for judgment of acquittal on the counts charging Appellant with attempted armed robbery and first-degree assault of Diehle, the jury convicted Appellant of armed robbery of Brooks and Brode; first-degree assault of Brooks and Brode; second-degree assault of Brooks, Brode, and Diehle; reckless endangerment of Brooks and Brode; use of a firearm in a crime of violence; and wearing, carrying, and transporting a handgun.[5] Appellant was thereafter sentenced to fifteen years' imprisonment for the armed robbery of Brooks, a consecutive fifteen years for the armed robbery of Brode, a concurrent ten years for the second-degree assault of Diehle, and a

[5] Appellant was charged with three counts of attempted armed robbery in violation of Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL"), Section 3-403, and the jury was instructed accordingly, the verdict, commitment record and docket entries all indicate that appellant was convicted of two counts of armed robbery. We note that Crim. Law § 3-403 prohibits both armed robbery and attempted armed robbery without distinguishing between the two.

consecutive twenty years—the first five years without possibility of parole—for the use of a firearm in a crime of violence, with the remaining counts merged.

We shall include additional detail in the following discussion.

DISCUSSION

I.

Appellant contends that the trial court erred in denying his motion to suppress because "[a]ll agreed that Detective Howard ultimately utilized a highly suggestive means of obtaining identifications," and that the only question is whether the identifications were reliable. The State disputes Appellant's assertion that there was a concession on the suggestiveness issue, responding that the identification was admissible because it was actually orchestrated by a non-state actor. The State also maintains that the identification met the standards for reliability and that the motion was properly denied. We agree with the State.[6]

In reviewing a motion to suppress an extra-judicial identification:

> "'[W]e look only to the record of the suppression hearing and do not consider the evidence admitted at trial.'" We accept the findings of fact and credibility determinations of the circuit court unless they are clearly erroneous, and we examine the evidence and inferences reasonably drawn from the evidence in the light most favorable to the party prevailing before the circuit court, in this case the State. We review the trial court's conclusions of law *de novo* and make our own independent assessment by applying the law to the facts of the case.

[6] To the extent that Appellant contends the identification was based on hearsay, other than counsel's reference to "street gossip," these grounds were not presented to the motions court and are not properly before us now. *See Joyner v. State*, 208 Md. App. 500, 519 (2012) (declining to review an issue first raised on appeal).

Wallace v. State, 219 Md. App. 234, 243-44 (2014) (internal citations and quotation marks omitted).

There is a two-part test that is applied when a party challenges an extrajudicial identification:

> The admissibility of an extrajudicial identification is determined in a two-step inquiry. *(Gregory) Jones* [*v. State*], 310 Md. [569,] 577, 530 A.2d [743,] 747 [(1987)]. 'The first question is whether the identification procedure was impermissibly suggestive.' *Id.* If the procedure is not impermissibly suggestive, then the inquiry ends. If, however, the procedure is determined to be impermissibly suggestive, then the second step is triggered, and the court must determine 'whether, under the totality of circumstances, the identification was reliable.' *Id.* If a *prima facie* showing is made that the identification was impermissibly suggestive, then the burden shifts to the State to show, under a totality of the circumstances, that it was reliable. *(Kevin) Jones v. State*, 395 Md. 97, 111, 909 A.2d 650, 658 (2006).

Smiley v. State, 442 Md. 168, 180 (2015).

As this Court has stated, "[d]ue process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures." *James v. State*, 191 Md. App. 233, 251-52 (2010) (internal quotation marks omitted) (quoting *Webster v. State*, 299 Md. 581, 599-600 (1989)). Further, "[d]ue process principles apply to remedy the unfairness resulting from the admission of evidence that is based on an identification procedure that was 'unnecessarily suggestive' and conducive to misidentification at trial." *Id.* at 252 (citing *Neil v. Biggers*, 409 U.S. 188, 197-98 (1972)) (other citations omitted); *see also Perry v. New Hampshire*, 132 S. Ct. 716, 724 (2012) (citing *Manson v. Brathwaite*, 432 U.S. 98, 107, 109 (1977); *Biggers*, 409 U.S. at 198) ("The Court emphasized, first, that due process

concerns arise only when *law enforcement officers* use an identification procedure that is both suggestive and unnecessary." (emphasis added)).

In *Perry*, the Supreme Court ultimately held that "the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." 132 S. Ct. at 730; *see also Wood v. State*, 196 Md. App. 146, 161 (2010) ("Reliability thus does not even become an issue for a suppression hearing until impermissible suggestiveness has been shown. The quality of the lifeboat does not become an issue until the torpedo of impermissible suggestiveness hits the ship"). Pertinent to our discussion, the Supreme Court also reaffirmed that the unnecessarily suggestive circumstances surrounding the identification must be the result of "improper law enforcement activity." *Perry*, 132 S. Ct. at 721.

In that case, Perry was stopped in a residential parking lot after police responded to a call that a man was breaking into cars. *Id.* An eyewitness was asked to provide a description of the alleged thief, and the witness pointed to Perry. *Id.* at 722. The issue on appeal was whether this spontaneous identification by the eyewitness amounted to an impermissible show-up that was unnecessarily suggestive. *Id.* at 720-21. The Court stated that, "[a]s our case law makes clear, what triggers due process concerns is police use of an unnecessarily suggestive identification procedure, whether or not they intended the arranged procedure to be suggestive." *Id.* at 721 n.1. And, this framework "turn[s] on the

presence of state action and aim[s] to deter police from rigging identification procedures[.]" *Id.* at 721.[7]

Similarly, Maryland courts have consistently held that state action is a prerequisite to claims raising a deprivation of constitutional rights. *See, e.g.*, *Pitsenberger v. Pitsenberger*, 287 Md. 20, 27-28 (1980) ("The first prerequisite to raising a due process argument is that the action complained of must constitute 'state' action"); *see also State v. Collins*, 367 Md. 700, 711-12 (2002) (observing, in a Fourth Amendment case, that "when a private party acts for his or her own purpose without police instigation or participation and obtains evidence, if the party later gives the seized evidence to the police, there is no State action"); *Paige v. State*, 226 Md. App. 93, 112-115 (2015) (concluding that, because Macy's loss prevention agents were not state actors under the Fifth Amendment, appellant

[7] We note that, in explaining its holding, the Court also rejected a proposal to always screen cases for reliability whenever there are any "suggestive circumstances." *Perry*, 132 S. Ct. at 727. The Court observed that "[e]xternal suggestion is hardly the only factor that casts doubt on the trustworthiness of an eyewitness' testimony." *Id.* Further:

> Most eyewitness identifications involve some element of suggestion. Indeed, all in-court identifications do. Out-of-court identifications volunteered by witnesses are also likely to involve suggestive circumstances. For example, suppose a witness identifies the defendant to police officers after seeing a photograph of the defendant in the press captioned "theft suspect," or hearing a radio report implicating the defendant in the crime. Or suppose the witness knew that the defendant ran with the wrong crowd and saw him on the day and in the vicinity of the crime. Any of these circumstances might have "suggested" to the witness that the defendant was the person the witness observed committing the crime.

Id.

was not subject to custodial interrogation under *Miranda v. Arizona*, 384 U.S. 436 (1966) when she admitted to shoplifting).

The victim/witness Diehle in this case acted as her own investigator when, independently, she sought out a photograph of her assailant from Facebook. Courts in other states have determined that this is not the equivalent of "state action." For instance, in *Goode v. State*, Jason Terry offered to sell marijuana on the streets of Milford, Delaware to two unknown individuals. 136 A.3d 303, 306-07 (Del. 2016). One of those individuals shot Terry during the course of the encounter. *Id.* at 307. While he was recuperating in the hospital, Terry's cousin, Raye Boone showed him a photograph of Jhavon Goode that she found on Facebook. *Id.* Terry identified Goode as his assailant. *Id.*

Before his trial, Goode moved to suppress the extra-judicial identification, but that motion was denied because, according to the trial court, "an identification based on a photograph supplied by non-state actors, such as friends or relatives, would be admissible, even if it might not be admissible if orchestrated by the police." *Id.* at 307. The Supreme Court of Delaware affirmed. *Id.* at 315. Relying on *Perry*, *supra*, the Delaware court held that "the Due Process Clause does not require a preliminary inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by a state actor." *Id.* at 309. Further, the Court stated that "Terry identified Goode based on the photograph his cousin found on Facebook. The police were not involved in the identification, which ends the constitutional inquiry." *Id.* at 311. The Court explained:

> We follow the Supreme Court, and the majority rule, and hold that some state actor must be involved in procuring a suggestive identification before requiring the trial court to undertake a preliminary due process analysis. As the Court noted in *Perry*, its prior cases in the identification area dealt with remedies "when the police use an unnecessarily suggestive identification procedure." In addition to concerns about the reliability of the identification, deterring police misconduct when undertaking identifications motivated the Court's due process analysis. Such policy considerations are absent when private actors stage the identification. We also recognize the inefficiency in a trial setting of requiring a preliminary due process analysis for private identifications, which would require "judicial preview . . . of most, if not all, eyewitness identifications." As the Supreme Court observed in *Perry*, a defendant still has the necessary tools and procedural protections to counter unfair or unreliable identification procedures.

Id. at 310 (footnotes omitted).

And, in *State v. Gaines*, Gaines argued that his trial counsel was ineffective for not moving to suppress his extra-judicial identification when the victims obtained his photograph from Facebook. 62 N.E.3d 708, 712 (Ohio Ct. App. 2016). In that case, on the evening of December 13, 2014, Marquel Baker, Tegan Mason and Desmond Coker were driving a vehicle in the parking lot of the Highland Homes apartment complex in Warren, Ohio, when they were approached by an individual holding a gun. *Id.* at 709. That man recognized Coker and ordered him out of the car. *Id.* at 710. After Coker got out, the driver of the car, Baker, drove away from the scene but was shot as he fled. *Id.*

At the hospital where Baker was being treated, Mason described the assailant, indicating that he knew Coker. *Id.* Baker's brother looked through Coker's "friends" on Facebook and showed Mason a profile picture of a man named "Kjango Gaines." *Id.* Both Mason and Baker identified Gaines, and Baker further indicated that he knew Gaines from middle school. *Id.*

Mason went to the Warren City Police Department with Gaines's name and description and told Detective Wayne Mackey that she identified him from his Facebook profile picture. *Id.* Detective Mackey knew Gaines from a prior encounter and then prepared a photo array containing Gaines's photograph. *Id.* That array was then given to Detective Mackey's sergeant, who did not know that Gaines was the suspect. *Id.* That sergeant then showed the array to the victims, without Detective Mackey being present in the room, and the victims Baker and Mason both identified Gaines as their assailant. *Id.*

On appeal, Gaines argued that trial counsel was ineffective for not arguing that the out-of-court identifications should have been suppressed because "they were tainted by the victims initially identifying him from his Facebook profile picture." *Id*. at 711. After discussing *Perry*, *supra*, the Ohio Court of Appeals disagreed. *Id.* at 711-12. The court stated that "appellant's Facebook photo was not provided to the victims by law enforcement and was not used in the photo array. Thus, the identification of appellant through the Facebook photo was not subject to suppression. This argument is not well taken." *Id*. at 712. *See also State v. Johnson*, 94 A.3d 1173, 1182 (Conn. 2014) (observing, in a case where it was argued that the victim's discovery on MySpace of a photograph of the man who shot him violated his due process rights under the Connecticut Constitution, that even "when an identification is rendered potentially unreliable by unduly suggestive private conduct, evidentiary rules ordinarily provide sufficient protection against the admission of unreliable evidence and an unfair trial" (footnote omitted)).

Returning to the case on appeal, we observe that it was not the case that the police suggested a suspect to the witnesses. Instead, Diehle, one of the victims, performed her own investigation, which admittedly involved discussing the case with neighbors, and found a photograph of Appellant on Facebook. As the trial court correctly pointed out, the victims were "not State agents" and the "[i]dentification was apparently made prior [to] these young individuals coming to the Police Department and they just merely confirmed that by showing the photo to the police who then decided to confirm that themselves." We determine that the trial court correctly concluded that there was "no real misconduct on the part of the police," and therefore, the Due Process Clause did not require a preliminary judicial inquiry into the reliability of the eyewitness identifications. *Perry*, *supra* 132 S. Ct. at 730.

II.

Appellant also challenges his sentence on the grounds that the prosecutor misinformed the court that his sentence for use of a handgun in commission of a crime of violence had to be imposed consecutively to his other sentences. Appellant argues that there was no evidence that he had a prior use conviction that mandated a consecutive sentence, as argued by the prosecutor, and that this case should be remanded for resentencing. The State responds that the prosecutor did not misinform the court because, in addition to the recommendation of a mandated consecutive sentence, the prosecutor "did refer to a prior conviction involving use of a handgun in the commission of a crime[.]"

This issue concerns Section 4-204 of the Criminal Law Article, which provides, in pertinent part:

> (b) *Prohibited.* — A person may not use a firearm in the commission of a crime of violence, as defined in § 5-101 of the Public Safety Article, or any felony, whether the firearm is operable or inoperable at the time of the crime.
> (c) *Penalty.* — (1)(i) A person who violates this section is guilty of a misdemeanor and, in addition to any other penalty imposed for the crime of violence or felony, shall be sentenced to imprisonment for not less than 5 years and not exceeding 20 years.
>
> (ii) The court may not impose less than the minimum sentence of 5 years and, except as otherwise provided in § 4-305 of the Correctional Services Article, the person is not eligible for parole in less than 5 years.
>
> (2) For each subsequent violation, the sentence shall be consecutive to and not concurrent with any other sentence imposed for the crime of violence or felony.

Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("Crim. Law"), § 4-204.

At the sentencing hearing, the State discussed Appellant's record:

> We note the finding of delinquency at seventeen and a half. As a juvenile assault in which there was a report of gun by the victim and certainly ammunition found by the police at the age of seventeen and a half. When the Defendant was twenty-three there was a burglary charge as to a convenience store and a handgun possession conviction from this Court and subsequently a violation of probation arising from the probation meted out in that case. There was an assault as well at the age of twenty-three. The same year over in Delaware the Defendant was convicted of a burglary, a third degree burglary and what Delaware classifies a felony, theft of a firearm. That probation ended in the Agent's writing here unimproved with money owed. And today we end up sentencing the Defendant for two armed robberies and they were involving a gun. So we have incidents as a juvenile Maryland, Delaware and again here in Maryland in the Douglas Street area this Defendant with a gun.

The prosecutor then asked the court to exceed the recommended guidelines of eight (8) to twenty-three (23) years in this case, due to the use of a gun in the underlying offense. Then, pertinent to our discussion, the prosecutor stated the following:

> As to the handgun in use of a felony we note that the Court is not permitted with all due respect to run that sentence concurrent with the underlying felonies. We note that the Court has to impose a mandatory minimum of five years in that count.

After hearing from defense counsel, the Appellant, and the Appellant's mother, the court observed that it had, seventeen years earlier, sentenced Appellant in an unrelated case, noting "[t]he Court had great concern for your future at that point and hoped that perhaps early intervention would assist." But, the court continued, "[u]nfortunately it didn't happen as your mom indicated that things were pretty good when you first got home and then they sort of began a downward spiral." This included subsequent "touches with the law," including some that included handguns. Recognizing that Appellant had some "difficult issues," the court noted "you just seem to not be able to help yourself even given the opportunity to do so." The court then sentenced Appellant as follows:

> All right. What the Court is going to do count one is the armed robbery and the Court understands what's going on with you. The Court is sympathetic, but the Court also knows the testimony is you stuck a gun in somebody's neck. And I don't want anybody sticking a gun in my neck, but I certainly don't want somebody that has difficulty in their actions sticking their actions -- sticking a gun in my neck.

The court then sentenced Appellant to fifteen years for armed robbery of Phillip Brooks, with credit for time served, and a consecutive sentence of fifteen years for armed robbery of James Richard Brode. Appellant also received ten years, concurrent, for second

degree assault of Victoria Taylor Diehle. With all other counts merged, the court then sentenced Appellant on the use of a handgun conviction as follows:

> As to the use of a firearm in the commission of a crime of violence or felony the sentence of the Court is twenty years to the Division of Correction. That sentence is consecutive to the sentence in counts one and two. The Court notes that there is a five year minimum mandatory where there is no parole eligibility so five years must be served before there is parole eligibility.

In our review of a circuit court's imposition of sentence,

> [w]e begin with the recognition that "a trial judge has 'very broad discretion in sentencing.'" *Jones v. State*, 414 Md. 686, 693, 997 A.2d 131, 134-35 (2010) (quoting *Jackson v. State*, 364 Md. 192, 199, 772 A.2d 273, 277 (2001)). This Court, therefore, will only review a sentence on three grounds: "(1) whether the sentence constitutes cruel and unusual punishment or violates other constitutional requirements; (2) whether the sentencing judge was motivated by ill-will, prejudice or other impermissible considerations; and (3) whether the sentence is within statutory limits." *Jackson*, 364 Md. at 200, 772 A.2d at 277 (quoting *Gary v. State*, 341 Md. 513, 516, 671 A.2d 495, 496 (1996)) (internal quotation mark omitted).

Abdul-Maleek v. State, 426 Md. 59, 71 (2012) (emphasis omitted); *accord Cruz-Quintanilla v. State*, 228 Md. App. 64, 68 (2016).

The issue presented concerns the imposition of a consecutive sentence on the use of a handgun conviction. It is well settled that "a judge may, in the exercise of his discretion, impose consecutive sentences for distinct violations of the law, thus preventing duly convicted offenders from escaping punishment for the commission of their criminal acts." *Kaylor v. State*, 285 Md. 66, 71 (1979); *accord Parker v. State*, 193 Md. App. 469, 490 (2010); *see also Malee v. State*, 147 Md. App. 320, 334 (citing *Kaylor*, 285 Md. at 69) (stating that, in *Kaylor*, "the Court of Appeals placed an unequivocal seal of approval on

the discretionary decision of a sentencing judge to impose consecutive sentences for multiple convictions").

Appellant does not contest that the court *could* have imposed a consecutive sentence. Instead, and recognizing that this issue was not preserved, Appellant simply cites *Abdul-Maleek*, and asks us to review the issue because "it is entirely *possible* that the trial court was influenced by [the prosecutor's] assertion in running appellant's sentence for use of a firearm consecutive to the remaining sentences." (Emphasis added).

In *Abdul-Maleek*, the Court observed that Maryland Rule 8-131 permits an appellate court to consider issues deemed to have been waived for failure to make a contemporaneous objection. 426 Md. at 68-69. The Court noted that this discretion should be exercised with caution, and only after we consider whether our exercise of this discretion will work unfair prejudice to either of the parties and/or promote the orderly administration of justice. *Id.* at 70. After a review of the circumstances, the *Abdul-Maleek* Court decided to review the sentence imposed based on the fact that the trial judge commented on appellant's exercise of his right to a *de novo* appeal during sentencing. *Id.* at 63, 70.

In contrast to the questionable circumstances presented in *Abdul-Maleek*, we are not persuaded that review under Rule 8-131 is warranted here. Nonetheless, we proceed with a brief analysis to demonstrate why Appellant would not prevail even if the issue were preserved.

The threshold issue is whether Appellant was subject to a consecutive sentence. To decide that issue, we look at the plain meaning of Crim. Law 4-204(c)(2) which provides

that the sentence for "each subsequent violation, shall be consecutive to and not concurrent with any other sentence imposed for the crime of violence or felony." This means that each subsequent violation of Crim. Law 4-204(b), i.e., each subsequent "use" violation—requires a consecutive sentence. *See Twigg v. State*, 447 Md. 1, 24 (2016) (citing *Harrison-Solomon v. State*, 442 Md. 254, 265 (2015)) ("If the statutory language is unambiguous and consistent with the purpose of the statute, our review ceases and we apply the normal and plain meaning of the statute"). It is clear, however, that Crim. Law § 4-204(c) not only mandates that a judge impose a consecutive sentence for each subsequent "use" violation, but also leaves the door open for a judge to impose consecutive sentences in the absence of a "use" violation because subsection (c)(1)(i) provides that "[a] person who violates this section is guilty of a misdemeanor and, in addition to any other penalty imposed for the crime of violence or felony, shall be sentenced to imprisonment for not less than 5 years and not exceeding 20 years." Thus, a prior "use" violation is a sufficient condition for a mandatory consecutive sentence, but *not* a necessary condition for a consecutive sentence. As stated *supra*, the court may, in its discretion, impose consecutive sentences, even in a situation when it is not statutorily required to do so. *See Kaylor*, 285 Md. at 71.

Appellant asserts that "[t]he State's recitation of Appellant's record, and Appellate counsel's inquiry into the matter reflect no prior conviction for use of a firearm." The State contests this representation, noting that the prosecutor informed the court at sentencing that Appellant had a "handgun possession conviction" from the Circuit Court for Dorchester

County when Appellant was twenty-three years old. The State also made a similar observation of a "handgun on person" prior conviction at a pretrial hearing.

Handgun "possession" crimes, generally, are in a different category than "use" crimes. *Compare* Crim. Law § 4-204 (use of a handgun or antique firearm in commission of a crime) *with* Crim. Law § 4-203 (wearing, carrying, or transporting handgun) *and* Maryland Code (2003, 2011 Repl. Vol., 2015 Supp.), Public Safety Article ("PS"), § 5-133 (restrictions on possession of regulated firearms). While Appellant's pre-sentence investigation, included with the record on appeal, reflects several "use" *charges*, as opposed to *convictions*, Appellant's prior handgun-related conviction was for wearing, carrying and transporting a handgun, *i.e.*, a possession crime. Thus, Appellant's prior record did not meet the threshold requirement under Crim. Law 4-204 (c)(2), and the *prosecutor's* analysis of that subsection was incorrect.

We are not, however, persuaded that resentencing is required. Indeed, this same issue was decided in *Carpenter v. State*, where this Court held:

> We agree that the challenged argument was incorrect. *See* Md. Code (2002, 2007 Supp.), Section 4-204 of the Criminal Law Article ("CL"). But, there is no evidence that the court's determination of Carpenter's sentences "was motivated by" the incorrect argument. *Jones*, 414 Md. at 693, 997 A.2d 131. Moreover, the sentence for use of a handgun in the commission of a crime of violence or felony does not offend the Constitution and is within statutory limits. *See Malee v. State*, 147 Md. App. 320, 335, 809 A.2d 1 (2002) (a "court has a power to impose whatever sentence it deems fit as long as it does not offend the Constitution and is within statutory limits as to maximum and minimum penalties," including "the determination of whether a sentence will be consecutive or concurrent" (internal citation and emphasis omitted)). Hence, the court did not err in sentencing Carpenter for use of a handgun in the commission of a crime of violence or felony.

Carpenter, 196 Md. App. 212, 233-34 (2010) (footnotes omitted). Thus, the Court noted that it was within the statutory limit to impose a consecutive sentence for the violation of Crim. Law § 4-204.

The sentencing court in this case did not say it was required to impose a consecutive sentence, nor did it intimate that it was doing so in reliance on the State's recommendation. As an appellate court, we are concerned with error by the trial court, not error by a prosecutor. As we have recently stated:

> It is a basic precept that our function as an appellate court is to review the rulings of *the trial court* for error. *Cason v. State*, 140 Md. App. 379, 400 (2001) (appellate court function is to "review decisions, rulings, and actions of the [trial] court"). Our function is not to review conduct of counsel, the parties, or witnesses for error. We focus on the rulings of the court, some of which may be made in response to conduct of the lawyers, parties, or witnesses. *DeLuca v. State*, 78 Md. App. 395, 397-98 (1989) ("Only the judge can commit error" and counsel's, parties', or witnesses' "conduct can do no more than serve as the predicate for possible judicial error.'") (quoting *Ball v. State*, 57 Md. App. 338, 359 (1984)).

Walls v. State, 228 Md. App. 646, 668 (2016) (emphasis in original); *see also Braun v. Ford Motor Co.*, 32 Md. App. 545, 546 (1976) ("error in a trial court may be committed only by a judge, and only when he rules, or, in rare instances, fails to rule, on a question raised before him in the course of a trial, or in pre-trial or post-trial proceedings"). Discerning no trial court error, we conclude this issue is meritless.

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.