Circuit Court for Harford County
Case No. C-12-CR-21-000881

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 470

September Term, 2022

BRIAN SUMMERSON

v.

STATE OF MARYLAND

Berger,
Albright,
Kenney, James A., III.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Albright, J.

Filed: April 7, 2023

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

** At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Brian Summerson, Appellant, was arrested and charged, in the Circuit Court for Harford County, after he allegedly sexually assaulted and robbed a woman, L.S.[1] Prior to trial, Mr. Summerson moved to suppress L.S.'s identification of him as her attacker. That motion was denied. After proceeding by way of a bench trial, Mr. Summerson was found guilty of first-degree assault, second-degree assault, theft, and robbery.[2] Mr. Summerson was sentenced to a total term of 40 years' imprisonment, with all but 30 years suspended.

In this appeal, Mr. Summerson presents three questions, which we have rephrased for clarity.[3] They are:

1. Did the suppression court err in denying Mr. Summerson's motion to suppress?

2. Did the trial court err in admitting into evidence Mr. Summerson's cell phone and a related extraction report?

3. Did the sentencing court rely on "impermissible considerations" in sentencing Mr. Summerson?

[1] For privacy purposes, we will address the victim by her initials.

[2] The trial court acquitted Mr. Summerson of first- and second-degree rape. At sentencing, the court merged second-degree assault into first, and theft into robbery.

[3] Mr. Summerson phrased the questions as:

1. Did the trial court err in denying the motion to suppress the impermissibly suggestive and unreliable photographic identification?

2. Did the trial court err in admitting the cell phone and extraction report over Appellant's chain of custody objections?

3. Was the sentence based on impermissible considerations?

Finding no error, we affirm.

BACKGROUND

In January 2021, L.S. reported to the police that a man had robbed and sexually assaulted her. L.S. later identified Mr. Summerson as her attacker. Mr. Summerson was subsequently arrested and charged. Prior to trial, Mr. Summerson moved to suppress L.S.'s identification of him. Following a hearing, the suppression court denied the motion.

At trial, L.S. testified that, in January 2021, she was working as a prostitute to earn money. L.S. promoted her services via an online advertisement that included her cell phone number, and clients would call or text her to arrange a meeting.

L.S. testified that, in the evening hours of January 8, 2021, Mr. Summerson contacted her to arrange a meeting. The two agreed to meet at a location on Pulaski Highway in Harford County. At the time, L.S. was staying with a friend at a motel in Baltimore City. Following her conversation with Mr. Summerson, L.S. took a rideshare to the arranged location, which turned out to be a deserted stretch of road in a commercial area. There, L.S. found Mr. Summerson sitting in the driver's seat of a tractor trailer that was parked on the side of the road. L.S. exited the rideshare and entered Mr. Summerson's vehicle on the passenger side. Upon entering the vehicle, L.S. noticed a large black dog. L.S. and Mr. Summerson then talked for a while, and Mr. Summerson

eventually agreed to pay L.S. $200.00 via CashApp.[4] The two then had consensual sex on a bed located in the rear of the truck's cabin.

L.S. testified that, at some point during the sexual encounter, she got on her stomach so that she was lying face down on the bed. Mr. Summerson then got behind L.S., and L.S. assumed that the two were going to continue to have sex. According to L.S., Mr. Summerson instead "put all his weight" on top of her so that she could not move or breathe. After a few minutes, Mr. Summerson released the pressure, and L.S. was able to recover her breath. Mr. Summerson then repeated this several more times. At that moment, L.S. believed she was going to die.

L.S. testified that, eventually, Mr. Summerson got up and allowed her to move. Mr. Summerson then told L.S. that, if she wanted to leave, she needed to perform oral sex on him. L.S. agreed. Afterward, Mr. Summerson told L.S. that she needed to send him $47 and $125 back via CashApp. Again, L.S. agreed. Mr. Summerson then arranged for a rideshare to come and pick up L.S. Shortly thereafter, the rideshare arrived, and L.S. exited Mr. Summerson's vehicle, entered the rideshare, and went back to her motel.

L.S. testified that when she arrived back at the motel, she met with the police and reported the incident. L.S. was later taken to the hospital for treatment. Approximately 11 days later, L.S. went to the police station and was shown a photographic array. L.S. identified Mr. Summerson as the person who assaulted her.

[4] "CashApp" is an online platform through which individuals can exchange money electronically. https://cash.app (last visited April 7, 2023).

Taqua Boston Soden, an expert forensic sexual assault examiner, testified that she examined L.S. at the hospital following the assault. Ms. Soden testified that L.S. had suffered abrasions on her face and neck, bruising on her face, petechia on the side of her neck, and ruptured blood vessels in her eyes. Ms. Soden testified that some of L.S.'s injuries were likely caused by "compression or constriction."

Tiffany Keener, a DNA expert, testified that she examined DNA samples taken from L.S. following the assault. Ms. Keener testified that a DNA sample taken from L.S.'s vagina was eventually matched to a DNA sample obtained from Mr. Summerson.

Daytona Beach Police Detective Matthew Smith, an expert in digital forensic examination, testified that, on January 21, 2021, he performed an "extraction" on Mr. Summerson's cell phone, a process that generated a report showing the communication and browser history from Mr. Summerson's phone. That report, which was admitted into evidence over objection, showed that multiple phone calls and text messages had been sent from Mr. Summerson's phone to another cell phone just prior to the assault. The report also showed that Mr. Summerson's phone had been used to search for "escort services" on the night of the assault.

Mr. Summerson testified that he was a truck driver and that he had arrived in Harford County at about 10:00 pm on January 8, 2021, to make a delivery. Prior to making that delivery, Mr. Summerson stopped at a local convenience store, where he spotted L.S. "coming out of [a] vehicle" and "getting into [a gray SUV] with a guy and another woman in the back seat." Mr. Summerson eventually came in contact with L.S.,

and the two had a conversation. After reaching an "agreement," L.S. and Mr. Summerson got into the gray SUV, and the other two occupants got out to "give [them] privacy." Mr. Summerson and L.S. then engaged in oral and vaginal sex, for which Mr. Summerson paid L.S. $125.00.

Mr. Summerson testified that, at some point during the encounter, the unidentified man returned to the vehicle, opened the door, and brandished a knife. The unidentified man stated that he wanted Mr. Summerson's money. L.S. and the unidentified man then went through Mr. Summerson's clothes and found $121.00 in cash, which they took. Mr. Summerson was then let out of the vehicle and returned to his truck. Shortly thereafter, Mr. Summerson called L.S. on her cell phone and demanded that she return his money, and L.S. agreed to meet him at his truck. Mr. Summerson testified that, before L.S. arrived, an unidentified individual transferred money to him via CashApp. L.S. eventually arrived at Mr. Summerson's truck and gave him $321.00 in cash. Mr. Summerson then sent $200.00 to L.S. via CashApp because "she had big bills and [he] didn't want to take less cash." The two then parted ways. Mr. Summerson denied ever choking or suffocating L.S. or forcing her to perform oral sex on him.

The trial court ultimately found Mr. Summerson guilty of first-degree assault, second-degree assault, theft, and robbery. The court found Mr. Summerson not guilty of first- and second-degree rape. Mr. Summerson was sentenced to a total term of 40 years' imprisonment, with all but 30 years suspended.

This timely appeal followed. Additional facts will be supplied below.

DISCUSSION

I.

Mr. Summerson's first claim of error concerns the suppression court's denial of his motion to suppress L.S.'s identification of him as her attacker. In that motion, Mr. Summerson argued that the identification should have been suppressed as impermissibly suggestive and unreliable.

At the suppression hearing, L.S. testified that she met Mr. Summerson for the first time on the night of the attack. L.S. admitted that she had smoked marijuana and MDMA[5] earlier in the day. L.S. testified that she met Mr. Summerson on the side of the road around midnight, that Mr. Summerson's truck was parked "in the middle of nowhere," and that there was at least one streetlight nearby. L.S. testified that she entered Mr. Summerson's truck on the passenger side, that the inside of the truck was lighted by LED lights, and that she "could see him." After L.S. got in the truck, she and Mr. Summerson sat in the front of the truck and talked for "like an hour." During that conversation, L.S. was "looking at [Mr. Summerson]" and "saw his face." Mr. Summerson and L.S. then went into the back of the truck and had sex. While in the rear of the truck, Mr. Summerson tried to suffocate L.S. while L.S. was lying face down. Eventually, Mr. Summerson allowed L.S. to leave the truck. L.S. testified that the entire encounter lasted approximately two to three hours.

[5] MDMA, also known as "Ecstasy" or "Molly," is 3,4-methylenedioxy-methamphetamine. https://nida.nih.gov/publications/drugfacts/mdma-ecstasymolly (last visited April 7, 2023).

L.S. testified that, after leaving Mr. Summerson, she returned to her motel room and met her friend, who had called the police out of worry for L.S. The police arrived shortly thereafter, and L.S. reported the attack. L.S. described her attacker to the police as "broad and about six-three." L.S. also told the police that her attacker drove a truck. At some point, one of the officers showed L.S. a photograph that was displayed on the officer's cell phone. L.S. testified that, although the photograph "looked like the guy that raped me," she did not identify Mr. Summerson as her attacker.

At the motions hearing, L.S. was then shown a clip from one of the officer's body-worn cameras. The clip showed the officer displaying a picture with the name "Brian Summerson" and L.S. stating that "it was not him." L.S. was asked why she did not identify Mr. Summerson at the time. L.S. testified that she did not positively identify Mr. Summerson because she was "scared."

L.S. testified that, while she was talking with the police, her friend was on the phone talking to someone. L.S. testified that her friend had stated that she knew someone who "went through something similar to what [L.S.] went through[,]" and that "it had to have been the same person." L.S. was again shown a clip of body-worn camera footage, this showing her friend looking at Mr. Summerson's picture. L.S. was asked if she remembered her friend saying, "That's him. That's him." L.S. responded, "No."

L.S. testified that, eleven days later, she went to the Harford County Sheriff's Office and was shown a photographic array containing six pictures. L.S. identified Mr. Summerson as her attacker from that array. L.S. stated that the detective who showed her

the array never told her that she had to make an identification or that the person who had attacked her was in the array. L.S. testified that she chose Mr. Summerson's picture because she recognized him "from the truck" and because he was the person who had "suffocated" her. L.S. stated that she did not pick Mr. Summerson because she had been shown his picture before.

Copies of both photographs were admitted into evidence. In the first photograph, which was shown to L.S. in the motel room, Mr. Summerson is clean shaven, wearing a ski cap and a red sweatshirt, and the area around his profile is well-lit. In the second photograph, which was part of the photo array, only Mr. Summerson's face can be seen, and the lighting of the picture is darker. In addition, Mr. Summerson is not wearing a hat and has facial hair.

At the conclusion of the hearing, Mr. Summerson argued that the incident in the motel room, during which L.S. was shown Mr. Summerson's photograph and L.S.'s friend appeared to identify Mr. Summerson as the person who had assaulted someone else, had tainted the subsequent photographic array. Mr. Summerson also argued that L.S.'s identification from the array was not sufficiently reliable. Mr. Summerson averred that the photographic array should be suppressed.

The suppression court ultimately denied Mr. Summerson's motion. The court noted that L.S. did not identify Mr. Summerson from the photograph shown to her in the motel room. The court noted that the photograph was shown to L.S. only briefly and that the photograph did not resemble the photograph used in the photo array. The court

declared that it was not satisfied that L.S.'s friend's reaction to the photograph resulted in an identification by L.S. The court found that there was no evidence that L.S. picked Mr. Summerson's photo as a result of having been exposed to his photograph in the motel room.

Parties' contentions

Mr. Summerson now claims that the suppression court erred in denying his motion to suppress. He asserts, as he did below, that L.S.'s identification was contaminated by what transpired in the motel room and that, consequently, the identification procedure was impermissibly suggestive. Mr. Summerson argues that the photo array did not meaningfully test L.S.'s ability to identify her assailant "because she already had seen a photograph of the man who was all but confirmed to be him." Mr. Summerson also argues that the identification lacked reliability. In support, Mr. Summerson notes that L.S. was in a "dark, cramped truck" during the encounter; that she had been using marijuana and MDMA; that she could not provide a description of her attacker beyond that he was "broad and about six-three;" that she made the identification approximately two weeks after the incident; and that she provided no testimony as to her certainty in identifying the photograph.

The State argues that the photographic array was not impermissibly suggestive. The State contends that L.S.'s exposure to Mr. Summerson's photograph prior to the array was akin to a "show up" identification, which is a generally accepted procedure. The State contends that there is no indication that L.S.'s exposure to Mr. Summerson's

photograph or her friend's reaction to the photograph had any effect on L.S.'s subsequent identification. The State notes that the two photographs were dissimilar and that L.S. did not identify Mr. Summerson from the initial photograph. As to the reliability of the identification, the State highlights the fact that L.S. and Mr. Summerson were in the cabin of Mr. Summerson's truck for several hours; that the two spent at least one of those hours engaged in face-to-face communication; that the lights in the truck were on; and that L.S. testified that she got a good look at Mr. Summerson. The State argues that those factors outweigh any other factors that may negate the identification's reliability. Finally, the State argues that any error the suppression court may have made in admitting the identification was harmless because there was no dispute that Mr. Summerson and L.S. were together on the night of the incident.

Standard of Review

"Our review of a circuit court's denial of a motion to suppress evidence is limited to the record developed at the suppression hearing." *Pacheco v. State*, 465 Md. 311, 319 (2019) (citations and quotations omitted). "[W]e view the evidence presented at the [suppression] hearing, along with any reasonable inferences drawable therefrom, in a light most favorable to the prevailing party." *Davis v. State*, 426 Md. 211, 219 (2012). "We accept the suppression court's first-level findings unless they are shown to be clearly erroneous." *Brown v. State*, 452 Md. 196, 208 (2017). "We give no deference, however, to the question of whether, based on the facts, the trial court's decision was in accordance with the law." *Seal v. State*, 447 Md. 64, 70 (2016). Where a party raises a

constitutional challenge, "we must make an independent constitutional evaluation by reviewing the relevant law and applying it to the unique facts and circumstances of the case." *State v. Johnson*, 458 Md. 519, 532-33 (2018).

Analysis

The right of due process of law, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article 24 of the Maryland Declaration of Rights, "protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures." *Small v. State*, 464 Md. 68, 82-83 (2019) (citations and quotations omitted). "When an accused challenges the admissibility of an extrajudicial identification procedure on due process grounds, Maryland courts assess its admissibility using a two-step inquiry." *Id.* at 83 (internal footnote omitted).

In the first step of the inquiry, the court must determine whether the identification procedure was "impermissibly suggestive." *Montague v. State*, 244 Md. App. 24, 53 (2019). "Suggestiveness can arise during the presentation of a photo array when the manner itself of presenting the array to the witness or the makeup of the array indicates which photograph the witness should identify." *Smiley v. State*, 442 Md. 168, 180 (2015). "The impropriety of suggestive police misconduct is in giving the witness a clue about which photograph the police believe the witness should identify as the perpetrator during the procedure." *Small*, 464 Md. at 88-89. "The sin is to contaminate the test by slipping the answer to the testee." *Morales v. State*, 219 Md. App. 1, 14 (2014) (citations and

quotations omitted). That said, "it is not a Due Process violation *per se* that an identification procedure is suggestive." *Id.* Rather, "[t]he procedure must be *impermissibly* suggestive, and it is the impermissibility of the police procedure that warrants exclusion." *Id.* (emphasis in original). "The defendant bears the burden of making a *prima facie* showing of suggestiveness." *Small*, 464 Md. at 83. "If the court determines that the extrajudicial identification procedure was not suggestive, then the inquiry ends and evidence of the procedure is admissible at trial." *Id.*

If, however, the suppression court determines that the identification procedure was suggestive, the court moves to step two of the due process inquiry, in which the court "must weigh whether, under the totality of the circumstances, the identification was reliable." *Id.* at 83-84. Here, the burden is on the State to show by clear and convincing evidence that "the independent reliability in the identification outweighs the corrupting effect of the suggestive procedure." *Montague*, 244 Md. App. at 54. In assessing that evidence, the court should focus on five factors: "the witness's opportunity to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's description of the criminal, the witness's level of certainty in his or her identification, and the length of time between the crime and the identification." *Small*, 464 Md. at 84.

In addition, "[a] suppression court assessing an identification's reliability must be mindful of the fact that reliability is not a ground upon which the accused may argue for exclusion." *Small*, 464 Md. at 93. Rather, an identification's reliability may be used to

justify the admission of an identification that has been otherwise tainted by suggestive circumstances. *Id.* "Thus, where a procedure's suggestiveness creates a very substantial likelihood that the witness misidentified the culprit, evidence of the identification must be suppressed in order to preserve the accused's right to due process of law." *Id.* "Where, however, the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth." *Id.* (citations and quotations omitted).

A.

We hold that the identification procedure in the instant case was impermissibly suggestive. Immediately after the attack, the police presented Mr. Summerson's photograph to L.S. and asked her if he was the culprit. That photograph was the only photograph shown to L.S. prior to the photographic array. *See Small*, 464 Md. at 89 ("Concerns may arise when one individual's photograph is shown to a witness multiple times or somehow stands out from the other photos in the array."). Although L.S. did not positively identify Mr. Summerson at that time, she nevertheless concluded that Mr. Summerson "looked like the guy" that had attacked her. In addition, when L.S. was shown Mr. Summerson's photograph, L.S.'s friend was in the room, and the friend commented that she knew someone who "went through something similar to what [L.S.] went through." L.S.'s friend then looked at Mr. Summerson's photograph and commented: "That's him. That's him."

The facts of the instant case are similar to those faced by the Supreme Court of Maryland[6] in *Small v. State*, *supra*. There, a witness was shown a photo array that included the defendant's picture, but the witness did not identify the defendant from that array. *Id.* at 91. Sometime later, the witness was shown a second photo array that included a different picture of the defendant, and the witness positively identified the defendant from that array. *Id.* The Court ultimately held that the second photo array was impermissibly suggestive. *Id.* at 92. In so doing, the Court noted that, in the first array, the defendant's picture had been "emphasized" by the fact that the defendant was the only suspect who had a visible tattoo. *Id.* at 91. The Court also noted that, while the police used a different photo of the defendant in the second array, his was the only one that was repeated. *Id.* Finally, the Court noted that, although there was no evidence that the witness identified the defendant as a result of his previous exposure to the defendant's photograph, that fact did "not absolve this procedure of its suggestive elements." *Id.* at 91-92.

Here, like in *Small*, the police "emphasized" Mr. Summerson's photograph when they exposed L.S. to Mr. Summerson's photograph, and only his photograph, in her motel room following the attack. Even if this single photograph looked different than the one in

[6] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See*, *also*, Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland….").

the subsequent array, and even if L.S. did not remember her friend saying "That's him" twice on seeing the single photograph, L.S. saw the single photograph and heard her friend surmise (whether about the photograph or the attack of L.S.'s friend's friend) that "it had to have been the same person." We conclude that showing L.S. the single photograph under these circumstances impermissibly suggested to L.S. that she identify Mr. Summerson in the subsequent array.

B.

As discussed, our finding of suggestiveness does not end our inquiry. We must now decide whether the State showed, by clear and convincing evidence, that the reliability of L.S.'s identification outweighed the corrupting effect of the suggestive procedure.

First, it is beyond cavil that L.S. had a good opportunity to view Mr. Summerson at the time of the crime and that her degree of attention was significant. L.S. and Mr. Summerson were in an enclosed space, inside the cabin of Mr. Summerson's truck, for approximately two to three hours around the time of the assault. Although L.S. spent some of that time facing away from Mr. Summerson while Mr. Summerson was assaulting her, L.S. also spent a large portion of that time, approximately one hour, engaged in a face-to-face conversation with Mr. Summerson while the two were sitting in the front of Mr. Summerson's truck prior to the assault. L.S. testified that the inside of the cabin was illuminated by interior lighting and that she "could see his face." L.S. also

testified that, during her hour-long conversation with Mr. Summerson, she was "looking at him." Those factors weigh heavily in favor of reliability.[7]

As to the accuracy of L.S.'s description of her assailant, while she did not provide many details, the details she did provide were accurate. L.S. described her attacker as "broad and about six-three." That description comports with Mr. Summerson's physical features and weighs in favor of reliability, albeit slightly.

As to her level of certainty at the time of the identification, L.S. did not indicate to police how certain she was in her identification. On the other hand, there is nothing in the record to suggest that L.S. was uncertain in her identification. Therefore, this factor is neutral.

Finally, there was an eleven-day lapse between the assault and the identification. Such a lapse, while not insignificant, was not so great as to render the identification inadmissible. *See Neil v. Biggers*, 409 U.S. 188, 200-01 (1972) (holding that identification was reliable despite seven-month lapse between the crime and the confrontation). At best, this factor weighs slightly in favor of Mr. Summerson.

In sum, the totality of the circumstances provides a strong indicia of reliability. Only one factor, the length of time between the crime and the identification, weighs in Mr. Summerson's favor, and that weight is minimal. The sum of the other factors weighs heavily in favor of reliability. Thus, while the identification procedure was impermissibly

[7] On appeal, Mr. Summerson insists that L.S. was "high on marijuana and Molly" during the assault. Although L.S. did testify that she had used marijuana and MDMA on the day of the assault, we could find no evidence as to her level of intoxication.

suggestive, there was not a substantial likelihood that L.S. misidentified her attacker. The suppression court did not err in denying Mr. Summerson's motion to suppress the identification.

C.

Assuming, *arguendo*, that the suppression court did err in denying Mr. Summerson's motion, any error was harmless. An error is harmless when "the reviewing court is convinced, beyond a reasonable doubt, that the error in no way influenced the jury's verdict." *Gross v. State*, 481 Md. 233, 237 (2022). As the State correctly notes, identification was not at issue in this case. Mr. Summerson admitted that he had sex with L.S. on the night of the assault, and his DNA was later found in or around L.S.'s vagina. The sole question for the fact-finder, in reaching its verdict, was whether to believe L.S.'s version of events or Mr. Summerson's version of events. L.S.'s identification of Mr. Summerson, which was undisputed, could not have influenced that verdict.

II.

Mr. Summerson's next claim of error concerns the trial court's admission of his cell phone and the related extraction report prepared by Daytona Beach Police Detective Matthew Smith. At trial, Detective Smith testified that he had received the phone in conjunction with an extraction request that had been submitted by a Detective Howell, who was "the case agent for the police department." When the prosecutor moved to have the phone introduced into evidence, defense counsel objected, arguing that no chain of

custody had been established for the phone. The court overruled the objection and admitted the phone.

Detective Smith thereafter testified that he had used the phone to create an extraction report regarding the digital contents of the phone from around the time of the assault. Detective Smith testified that, after creating the report, he saved a digital copy of the report on a thumb drive, which he then gave to Detective Howell. Detective Smith testified that the digital contents of the phone, as reflected in the extraction report, could not be altered. As to the extraction report itself, Detective Smith testified that, while the report could theoretically be altered, any alteration "wouldn't have that same file path" and "wouldn't be connected to the phone at all."

Later, the State called Special Agent Charles Irvin of the Federal Bureau of Investigations to testify about the extraction report prepared by Detective Smith. Agent Irvin testified that he had originally viewed the contents of the report via a thumb drive, which had been given to him by "detectives of the Daytona Beach Police Department." Agent Irvin testified that he did not alter or modify the report in any way.

Shortly thereafter, the prosecutor moved to have the report admitted into evidence, and defense counsel objected, arguing that, like the phone, no chain of custody had been established for the report. The trial court ultimately overruled the objection and admitted the report. As discussed, the report showed that multiple phone calls and text messages had been sent from Mr. Summerson's phone to another cell phone just prior to the

assault. The report also showed that the phone had been used to search for "escort services" on the night of the assault.

Parties' contentions

Mr. Summerson now claims that the trial court erred in admitting into evidence his cell phone and the related extraction report. He argues that the court should have excluded the evidence because the State failed to establish a sufficient chain of custody. Specifically, as to the phone, Mr. Summerson argues that there was no way "to establish that the phone was ever in the condition ascribed to it by the State, *i.e.*, the condition of having been taken from [him]," nor was there "any evidence about the handling of the phone or what safekeeping measures were taken before it arrived at the police property room." As to the extraction report, Mr. Summerson argues that there was no evidence about how the report came into Agent Irvin's possession.

The State argues that the trial court acted within its discretion in determining that the chain of custody set forth at trial was sufficient to warrant the admission of the phone and extraction report. The State contends that it did not need to establish every "link" in the chain of custody in order for the evidence to be admissible. That State contends that it needed only to establish a chain of custody sufficient to "negate a reasonable possibility of tampering." The State asserts that, given the nature of the evidence in this case, the possibility of tampering was low and, consequently, the requisite showing as to the chain of custody was likewise low. Finally, the State asserts that, even if the court erred in admitting the evidence, any error was harmless because the extraction report was

partially authenticated by other evidence; because there was no dispute that Mr. Summerson was the person who had engaged in sexual intercourse with L.S. on the night of the attack; and because the contents of the phone were consistent with Mr. Summerson's testimony.

Standard of Review

We review for abuse of discretion a trial court's decision to admit evidence over a chain of custody objection. *Wheeler v. State*, 459 Md. 555, 560-61 (2018). "A trial court abuses its discretion only when no reasonable person would take the view adopted by the [court], or when the court acts without reference to any guiding rules or principles." *Easter v. State*, 223 Md. App. 65, 75 (2015) (citing *King v. State*, 407 Md. 682, 697 (2009)) (quotations omitted).

Analysis

"Maryland Rule 5-901 governs the requirements for authentication or identification as a condition precedent to the admissibility of evidence." *Wheeler*, 459 Md. at 566. That rule "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Md. Rule 5-901(a). For physical evidence, "the law requires the offering party to establish the 'chain of custody,' *i.e.*, account for its handling from the time it was seized until it is offered in evidence." *Johnson v. State*, 240 Md. App. 200, 211 (2019) (citations omitted). "This requirement ensures physical evidence has been properly identified and that it is in substantially the same condition as it was at the time of the crime." *Id.*

"When determining whether a proper chain of custody has been established courts examine whether there is a reasonable probability that no tampering occurred." *Cooper v. State*, 434 Md. 209, 227 (2013) (citations and quotations omitted). "In most cases, an adequate chain of custody is established through the testimony of key witnesses who were responsible for the safekeeping of the evidence, *i.e.*, those who can negate a possibility of tampering . . . and thus preclude a likelihood that the thing's condition was changed." *Easter*, 223 Md. App. at 75 (citations and quotations omitted). "The chain of custody need not be established beyond a reasonable doubt – the State need prove only that there is a 'reasonable probability that no tampering occurred.'" *Johnson*, 240 Md. App. at 211 (citing *Cooper*, 434 Md. at 227). "What is necessary to negate the likelihood of tampering or of change of condition will vary from case to case." *Easter*, 223 Md. App. at 75. Moreover, "gaps or weaknesses in the chain of custody generally go to the weight of the evidence and do not require exclusion of the evidence as a matter of law." *Id.*

We hold that the trial court did not abuse its discretion in admitting Mr. Summerson's phone and the related extraction report. As to the phone, the State did not need to substantiate the precise chain of custody from the time the phone was seized until the time it came into Detective Smith's possession in order to negate a possibility of tampering (or to negate the possibility that the phone admitted into evidence was different from the phone taken from Mr. Summerson). First, Mr. Summerson does not dispute that the phone was his. In any event, the evidentiary value of the phone did not

inhere in the phone's physical properties, so it was unnecessary for the State to establish that the phone was in the same physical state as the moment it was seized or that it had been taken from Mr. Summerson. In other words, the actual phone was not the evidence at issue. Rather, the evidence at issue was the *contents* of the phone, *i.e.*, the digital images, browser history, text messages, etc., from the time of the attack. So the State only needed to establish a reasonable probability that there had been no tampering with the digital contents of the phone. On that point, Detective Smith testified that those contents could not be altered. That testimony was sufficient to establish the requisite chain of custody.

As to the extraction report, the State likewise did not need to substantiate the precise chain of custody in order to negate a possibility of tampering. Detective Smith testified that, while material could be added to the report, any alteration "wouldn't have that same file path" and "wouldn't be connected to the phone at all." Detective Smith also testified that, after preparing the report, he saved a digital copy of the report onto a thumb drive, which he then gave to Detective Howell, a member of the Daytona Beach Police Department. Agent Irvin testified that he later met with "detectives of the Daytona Beach Police Department" and received the thumb drive. Agent Irvin then accessed that thumb drive and reviewed the extraction performed by Detective Smith. Agent Irvin testified that he did not alter the extraction report.

That testimony was sufficient to establish a reasonable probability that there had been no tampering with the report. Detective Howell of the Daytona Police Department

received the thumb drive containing the extraction report from Detective Smith, and Agent Irvin, the ultimate recipient of the report, retrieved that same thumb drive from the Daytona Police Department a short time later. Identifying exactly how the thumb drive got from Detective Howell to Agent Irvin was unnecessary to establish a reasonable probability that no tampering had occurred. It is reasonable to assume that no tampering with the report had occurred while the thumb drive was in the possession of the Daytona Police Department. That assumption is even more reasonable given Detective Smith's testimony that, had the report been altered, the alterations would have been reflected on the thumb drive. There is nothing in the record to suggest that the thumb drive contained any alterations.

III.

Mr. Summerson's final claim of error concerns evidence received by the sentencing court prior to imposing its sentence. At the sentencing hearing, the State indicated that it intended to reveal certain information showing that Mr. Summerson was "a very violent person." Defense counsel objected, explaining that the State was referring to several criminal cases involving Mr. Summerson that had not resulted in a conviction. The sentencing court ultimately overruled the objection and found that the evidence was permissible for sentencing purposes.

The State went on to describe seven separate allegations of criminal conduct that had been made against Mr. Summerson over the previous few years. The first alleged incident occurred in South Carolina on December 21, 2019:

> On December 21st, deputies responded to 3001 TV Road for a report of a sexual assault. When they arrived there, they met with the defendant, and she was observed to have blood on her face and her shirt. There were knots on her head. Her eyes were bloodshot, and her face was swollen. She stated that she had been raped and assaulted.
>
> When giving a statement, she stated that she had met a man on a dating app called Meet Me about five months prior. That man then picked her up along with her one-year-old child. She stated that the man was a truck driver, and he drove a black 18 wheeler semi-truck. And once he picked her up, he drove her around for a little bit, and then he began punching her and choking her.
>
> She said that he then forced her pants down and forced her to have sexual intercourse with him while he was continuing to assault her.

After reading that into the record, the State introduced into evidence pictures of the alleged victim's injuries.

The second alleged incident occurred in South Carolina on January 28, 2020:

> On January 28th, 2020, deputies responded to that same area, TV Road, in reference to a call from [the] FBI regarding a kidnapping.
>
> Upon arrival, they observed a black tractor trailer on the side of the road. They made contact with the defendant who was the driver of that tractor trailer. After securing the defendant, the victim was located inside of the cab. She had visible injuries to her face. Her face was swollen, and her eyes were red. Her clothes were ripped.
>
> Further investigation revealed that the victim's mother received a video call from the victim, indicating that she had been kidnapped. The mother observed physical injuries on her daughter, and then she spoke with … the person who had her daughter, the suspect, demanded $5,000 for the safe return of

> her daughter. The mother then responded to the local FBI, and they began monitoring ransom calls.

After reading that into the record, the State played an audio recording of the alleged ransom call. The State claimed that Mr. Summerson's voice was recognizable as the person making the ransom call.

The third alleged incident occurred in New Jersey in January 2020:

> In Jersey City, New Jersey, the victim indicated that she met the defendant online through a website called Skip the Games.
>
> * * *
>
> They met at a truck stop near Jersey City, Newark Bridge. She said he was driving a semi-truck that was black in color. The two of them had consensual sex in the bed of the truck. And at the end of the day, the victim wanted to leave. And the defendant choked her, hit her, then tied her up using yellow and brown straps.
>
> She then stated that he went through her phone and tried to text and call her friend demanding money for the safe return of her son, the victim's son. The defendant then tied her on the bed of the truck and drove across state lines. The victim indicated that she was raped twice by the defendant and was held captive for close to three days. When the defendant was asleep in the truck, she fled.

In conjunction with that allegation, the State introduced into evidence a series of text messages between Mr. Summerson and another individual, identified as "Pedro," in which the two appear to be discussing the alleged crime.

The fourth alleged incident occurred in Baltimore County on an unknown date:

> The victim stated that she met with a man who was driving a semi. They exchanged oral sex, and the man began punching and tried to choke her. She fought him off.

> The man was driving a dark semi-truck believed to be blue. She stated she had sex in the bed of the truck, and then she tried to escape the truck. However, the defendant grabbed her by her braids, ripped them from her head as she tried to get out of the truck, and he tried to pull her back inside.

The fifth alleged incident occurred in North Carolina on an unknown date:

> The victim spoke to law enforcement and she … identified this defendant via a picture. She also identified his Cash App. She stated the defendant was a client that she met on a website and that they met at a hotel in Fayetteville, North Carolina. She was reluctant to do what he asked her to do, which was something involving oral activity, and the defendant said, quote, I didn't drive all this way from Virginia not to get what I want.
>
> She then said the defendant attacked her and strangled her with his hands. Her neck was bruised, and her eyes were red for a long time after this incident. She described the defendant as big and stocky. She said she blacked out twice. And once she awakened from the first time, he choked her out again.
>
> She said she walked around the hotel property with him, looking for an ATM, and then she Cash Apped him money – his money back. The law enforcement officers, they were able to confirm the Cash App transactions. She further advised that the defendant told her he was a truck driver and that he had to pick his daughter up from school.

After reading that into the record, the State read several text messages sent between Mr. Summerson's phone and the alleged victim's phone. Those messages included details about the alleged crime, including information identifying Mr. Summerson as the culprit.

The sixth alleged incident occurred in Florida on January 11, 2021:

> Officers responded to a hotel after reporting hearing someone yell for help. When they got to the hotel, they saw the victim and this defendant sitting inside the hotel room. The officers spoke with the victim outside of the defendant's presence,

> and she said that she met the defendant on a dating app. The two of them met up at the hotel. They had consensual sex, and then she tried to leave. He asked her for one last hug. And when she went to hug him, he began to choke her with his arms and his hands. He told her he was going to kill her.
>
> She advised that she lost consciousness, and then he punched her in the face. The officers were able to observe injuries.

The State then introduced into evidence pictures of the alleged victim's injuries.

The seventh alleged incident occurred in Maryland on or around December 29, 2020:

> [The victim] stated that the defendant, whom she identified via picture, as well as his Cash App, that he – that the two of them met in Belcamp, Maryland. They had sex. He then smothered her from behind, which is identical to what happened to [L.S.]
>
> She stated that he then demanded $1,000 in exchange for her return. And she also mentioned that he was working with someone by the name of Pierre Washington. And that is noteworthy, Your Honor, because through investigations, Pierre Washington was identified as the Pedro that was in the text messages.
>
> She also stated that the defendant was in a blue tractor trailer with LED lights in the interior.

The State then introduced into evidence a text message that had been sent from the alleged victim's phone to Mr. Summerson's phone. In that message, the sender, who identifies herself as the alleged victim's mother, describes the victim's injuries, which included "blunt force trauma to her head and face, two broken ribs, her tooth was knocked out, blood clots …, and a fractured cheekbone."

After reading those allegations into the record, the State argued that the allegations against Mr. Summerson showed "exactly who he is and what he's capable of." The State argued that Mr. Summerson was "intentional in choosing his victims" and that "he knew what he was looking for." The State asserted that Mr. Summerson was "a dangerous man" who "must be kept off the streets as long as possible."

At the conclusion of the hearing, the sentencing court made the following findings:

> Let me be very clear as to what I think. I think that the defendant is a narcissistic violent sexual predator. The fact that he was acquitted of the sexual offense charges in this case is simply an application of the incredibly high standard that the State is put to in any criminal case[.]
>
> * * *
>
> Were I to have considered the other allegations that are currently pending before this defendant, I don't know how one wouldn't come to the conclusion that he is a violent sexual predator.
>
> I did not consider those other allegations because they are, in fact, allegations in arriving at my verdict in this case. But I do believe that it's appropriate to give some weight to the allegations, because either the defendant is a violent sexual predator or he has the worst luck on the face of the earth for him to be in all of these situations[.]
>
> And I realize, again, that those cases haven't been tried, but to see the evidence that's there, the recordings, the messages that would corroborate not only his behavior, but also that this would appear in any respects to be, whether you want to call it a conspiracy or something with regard to preying on women and preying on vulnerable women is specifically hard to ignore.
>
> * * *

> So, considering all of the evidence that's presented in this case and considering the PSI and the psych evaluation,[8] which does determine that Mr. Summerson is at a high risk for re-offending, and I absolutely agree that I believe that he would be a high risk for re-offending in this case.
>
> The State makes a compelling argument that we should simply sentence him and call it a day and hopefully leave the prosecution of these other cases up to other jurisdictions.
>
> I think that the sentencing guidelines in this case are egregiously below what the facts of this case call for. I can't bring myself to the conclusion that the maximum penalty and close it out is the appropriate disposition in this case. And I do that largely because of the fact that he has not been convicted of these other cases, were I to apply those other cases as if he was guilty of those. And if, in fact, he were guilty of those, then we really wouldn't be having this analysis.
>
> But given that he has not been convicted of those, it is my hope that the conviction in this case and the sentence in this case will be used in those cases as a basis for an even more substantial sentence, if and when he is convicted in those cases.

Immediately after making those comments, the sentencing court sentenced Mr. Summerson to a total term of 40 years imprisonment, with all but 30 years suspended. Mr. Summerson did not make any additional objections beyond those already mentioned.

Parties' contentions

Mr. Summerson now claims that the sentencing court twice relied on "impermissible considerations" during sentencing. First, Mr. Summerson argues that it was impermissible for the court to consider the various uncharged criminal conduct

[8] The circuit court ordered a presentence investigation of Mr. Summerson as well as a presentence psychiatric evaluation of him.

because the evidence in support of those allegations was not reliable. Second, Mr. Summerson claims that the court exhibited an "impermissible motivation" when it "bluntly declared that the sentence it imposed was to benefit prosecutors in hypothetical future trials." Mr. Summerson contends that the court's "express reliance on unreliable, uncharged and untried conduct, along with its impermissible motivations in imposing the sentence in this case, was repugnant to fundamental fairness and due process."

The State argues that the sentencing court's consideration of the untried criminal allegations against Mr. Summerson was not impermissible because the evidence offered in support of those allegations was reliable. As to Mr. Summerson's claim that the court impermissibly sentenced him to "benefit prosecutors in hypothetical future trials," the State contends that that claim is not preserved because Mr. Summerson did not object when the court made the disputed statements. The State further argues that, even if preserved, Mr. Summerson's claim is without merit because there was nothing in the disputed statements that could be considered impermissible.

Standard of Review

"We review a trial court's sentence for abuse of discretion." *Howard v. State*, 232 Md. App. 125, 175 (2017). We generally will not disturb the court's sentencing decision unless it is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State v. Wilkins*, 393 Md. 269, 279 (2006) (citations omitted).

Analysis

An appellate court may review a sentence on one of three grounds: "(1) whether the sentence constitutes cruel and unusual punishment or violates other constitutional requirements; (2) whether the [sentencing] court was motivated by ill-will, prejudice, or other impermissible considerations; and (3) whether the sentence is within statutory limits." *Sharp v. State*, 446 Md. 669, 685-86 (2016) (citations and quotations omitted). As noted, Mr. Summerson challenges his sentence on the grounds that it was motivated by impermissible considerations.

At the outset, we note that in fashioning a sentence, "[a] sentencing judge in a criminal proceeding is 'vested with virtually boundless discretion.'" *Martin v. State*, 218 Md. App. 1, 44 (2014) (citing *State v. Dopkowski*, 325 Md. 671, 679 (1992)). The judge may consider "the facts and circumstances of the crime committed and the background of the defendant, including his or her reputation, prior offenses, health, habits, mental and moral propensities, and social background." *Abdul-Maleek v. State*, 426 Md. 59, 71 (2012) (citations and quotations omitted). The judge may consider "'the evidence presented at the trial, the demeanor and veracity of the defendant gleaned from his various court appearances, as well as the data acquired from such other sources as the presentence investigation or any personal knowledge the judge may have gained from living in the same community as the offender.'" *Martin*, 218 Md. App. at 45 (citing *Johnson v. State*, 274 Md. 536, 540 (1975)).

In addition, a sentencing judge may consider allegations of criminal conduct for which a person has not been tried. *Logan v. State*, 289 Md. 460, 481 (1981). Indeed, as the Supreme Court of Maryland has explained, a sentencing judge can consider a wide variety of reliable evidence in assessing the defendant's background and the gravity of the offense, including evidence of other conduct for which the defendant was *acquitted*, as well as evidence of conduct that is not illegal, but may be opprobrious:

> While a sentencing judge's inquiry is not limited by the strict rules of evidence, … the judge may not consider evidence which possesses such a low degree of reliability that it raises a substantial possibility that his judgment may be influenced by inaccurate or false information. Consideration of such information leads to unwarranted assumption of guilt. For this reason it has been recognized that when they stand alone, bald accusations of criminal conduct for which a person either has not been tried or has been tried and acquitted may not be considered by the sentencing judge. … However, in assessing such factors as the background of the individual and the gravity of the offense, sentencing judges are permitted to consider reliable evidence of conduct which may be opprobrious although not criminal, as well as the details and circumstances of criminal conduct for which the person has not been tried. … Because an acquittal does not have the effect of conclusively establishing the untruth of all of the evidence introduced against the defendant, … a sentencing judge also may properly consider reliable evidence concerning the details and circumstances surrounding a criminal charge of which a person has been acquitted.

Henry v. State, 273 Md. 131, 147-48 (1974) (internal citations omitted).

Of course, when a sentencing judge considers evidence, it is essential that the evidence be "reliable." But "[t]o be reliable is simply to be believable." *Robson*, --- Md. App. ---, 2023 WL 2396469, at *11. So long as evidence is "legally competent to be

credited[,]" the sentencing court may consider it, even if it appears that the same evidence was not credited by a jury. *See id.* ("Evidence may be credible . . . even if nobody credits it."). As such, Maryland courts have previously found evidence reliable at sentencing in a variety of contexts, even when the evidence might not have carried the day—or perhaps even be admissible—at trial. *See, e.g.*, *Smith*, 308 Md. 162, 170-71 (1986) (testimony concerning uncharged conduct); *Logan*, 289 Md. at 480-83 (unconstitutionally obtained confessions); *Martin*, 218 Md. App. at 45-46 (letter written by the defendant); *Johnson*, 75 Md. App. at 641-42 (proffer by the investigating officer). In assessing whether evidence of prior allegations of criminal activity is sufficiently reliable, we are also mindful that "'[t]he strict rules of evidence do not apply at a sentencing proceeding.'" *Martin*, 218 Md. App. at 45 (citing *Dopkowski*, 325 Md. at 680).

A.

Against that backdrop, we hold that the sentencing court did not abuse its discretion in considering the seven allegations of criminal activity detailed by the State at the sentencing hearing. None of the proffers provided by the State was merely a "bald accusation of criminal conduct." Rather, each of the proffers contained detailed facts about the crime, and most (if not all) of those facts appear to have been derived from statements by the victims. In each of the proffers, the victim either identified Mr. Summerson as the culprit or provided facts that established a clear connection between Mr. Summerson and the proffered facts. Moreover, for all but one of the alleged incidents, the State provided additional corroborating evidence. That evidence included

photographs of some of the alleged victims' injuries, text messages discussing details of some of the alleged crimes, and an audio recording in which an individual, alleged to be Mr. Summerson, can be heard demanding a ransom from one of the victim's mothers. That additional evidence either further implicated Mr. Summerson in the respective crime or, at the very least, added credence to the victim's allegations.

On the whole, we cannot say that the disputed evidence of criminal activity had such a low degree of reliability that it raised a substantial possibility that the sentencing court's judgment might be influenced by inaccurate or false information. Moreover, the record of the sentencing hearing makes plain that the court did not give any undue weight to those allegations but instead fairly evaluated all of the evidence and sentenced Mr. Summerson reasonably under the circumstances. *See Jackson v. State*, 230 Md. App. 450, 570 (2016) (noting that, when determining whether a sentencing court may have been motivated by an impermissible consideration, an appellate court must look at the entire sentencing proceeding).

In his brief, Mr. Summerson does not cite a single case in which a Maryland court held that a sentencing court had improperly considered "unreliable" evidence regarding allegations of criminal activity that did not result in a conviction.[9] Instead, Mr. Summerson focuses his efforts on attempting to distinguish several of the aforementioned

[9] Mr. Summerson does cite two cases, *Conyers v. State*, 345 Md. 525 (1997) and *Bailey v. State*, 327 Md. 689 (1992), but those cases are inapposite. *Conyers* involved a discussion of the types of evidence that could be presented to a sentencing jury in a capital case, which, at the time, was governed by a specific statute not applicable here. *Conyers*, 345 Md. at 563-76. *Bailey* involved the reliability of hearsay evidence admitted at a probation revocation hearing. *Bailey*, 327 Md. at 696-703.

cases in which our courts held that the evidence was reliable at sentencing. He argues that because the evidence here was different from the evidence in those cases, we should hold that the evidence here was unreliable.

We are not persuaded. We could find no language in those cases (or any other Maryland case) to indicate that the cases should be limited to their facts—*i.e.*, that our determination of reliability should be limited to only the types of evidence that we have previously determined to be reliable. Mr. Summerson provides no compelling argument as to why the cases should be read narrowly.

Mr. Summerson also challenges the sentencing court's characterization of him as a "narcissistic violent sexual predator." He argues that the court could not have reached that conclusion unless it gave credence to the other allegations of criminal activity.

We reject Mr. Summerson's construction of the record. When it made that statement, the sentencing court was discussing the charges in the instant case. The court was explaining that, although it had acquitted Mr. Summerson of the two sexual offenses for which he had been charged, it had done so because of the high standard of proof in a criminal case. The court concluded that, despite those acquittals, it nevertheless believed Mr. Summerson to be a "narcissistic violent sexual predator."

Regardless, even if the sentencing court did give some credence to the allegations of criminal activity, we see nothing wrong there. As noted, the State was permitted to present reliable evidence of prior criminal conduct, and the court was well within its

discretion in considering it. Again, there is nothing in the record to suggest that the court gave undue weight to those allegations in sentencing Mr. Summerson.

B.

As to Mr. Summerson's claim that the sentencing court improperly sentenced him to "benefit prosecutors" in future cases, we agree with the State that the claim is unpreserved. "Under Maryland Rule 8-131(a), a defendant must object to preserve for appellate review an issue as to a trial court's impermissible considerations during a sentencing proceeding." *Sharp*, 446 Md. at 683. Here, Mr. Summerson did not object when the court made the disputed statements. Thus, the issue was not preserved for our review.

Assuming, *arguendo*, that the issue was preserved, we find no merit in Mr. Summerson's argument. The sentencing court did not state that it was sentencing Mr. Summerson to benefit future prosecutions. The court merely stated that it "hoped" that Mr. Summerson's convictions and sentence in the instant case would be relied upon in the future "if and when he is convicted in those cases." There is nothing impermissible in that statement.

JUDGMENTS OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.