Circuit Court for Carroll County
Case No. 06-K-18-048801

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 76

September Term, 2022

SCOTT E. DYER

v.

STATE OF MARYLAND

Wells, C.J.,
Berger,
Albright,

JJ.

Opinion by Albright, J.

Filed: December 12, 2023

Appellant Scott E. Dyer was indicted by the grand jury in Carroll County, Maryland, for robbery, second-degree assault, theft under $1,500, unauthorized credit card use under $1,500, conspiracy to commit robbery, and conspiracy to commit unauthorized credit card use under $1,500, all alleged to have occurred on December 9, 2017. Following a three-day trial, the jury returned guilty verdicts on all counts,[1] and the court sentenced Mr. Dyer to 25 years without parole as a subsequent offender, as well as other concurrent sentences.[2] Mr. Dyer's timely appeal followed.

On appeal, Mr. Dyer presents two issues, which we have reordered:

1. Whether the Circuit Court Erred By Denying [Mr.] Dyer's Motion To Suppress The Impermissibly Suggestive Pre-Trial Identifications[.]
2. Whether The Circuit Court Abused its Discretion Regarding [Mr.] Dyer's Expressed Dissatisfaction With Counsel[.]

For the reasons that follow, we will affirm the judgments of the circuit court.

BACKGROUND

Mr. Dyer's trial on the above charges occurred twice: first, in 2019, and second, in 2021, after the pandemic had started. The first trial ended in a mistrial when a family emergency meant that Mr. Dyer's appointed lawyer could not continue with the trial.

[1] Excluding Count 4, unauthorized use of credit card under $1,500, which the State entered *nolle prosequi* prior to trial.

[2] The court merged Counts II and III, second-degree assault and theft, respectively, with Count I, robbery, for which the court imposed a 25-year sentence without the possibility of parole. The court imposed a 15-year sentence for Count V, conspiracy to commit robbery, and one year for Count VI, conspiring to use the credit card of another, each to run concurrent with the sentence for Count I, robbery.

About nine months later, another lawyer was appointed to represent Mr. Dyer, and that lawyer represented him at the second trial and the sentencing that followed.

About six months before the first trial, a circuit court judge denied the motion to suppress. Another circuit judge presided over Mr. Dyer's second trial (and sentencing). Prior to the second trial, the second judge permitted Mr. Dyer to re-argue the suppression motion that the first judge had denied.

Below, we summarize what happened on December 9, 2017, based on the evidence adduced at the second trial. We then turn to Mr. Dyer's challenge to the circuit court's denial of his suppression motion, detailing what happened during both suppression hearings. Then, we take up Mr. Dyer's challenges to how the second judge addressed his concerns about the efficacy of Mr. Dyer's second lawyer, summarizing those parts of the second trial, post-verdict proceedings, and sentencing during which Mr. Dyer expressed his concerns and what the second judge said and did about them. Because Mr. Dyer does not challenge the sufficiency of the trial evidence, we do not provide a full recounting of all of the trial evidence. *See Washington v. State*, 190 Md. App. 168, 171 (2010). However, we supplement the following facts as needed in discussing our conclusion that error in the suppression rulings, if there was any, was harmless.

THE CRIMES

On the evening of December 9, 2017, the victim, Ms. A.,[3] parked her car at the

[3] To protect the privacy of the victim, we refer to her as "Ms. A." We intend no disrespect in doing so.

Cranberry Square Shopping Center to do some Christmas shopping. When Ms. A. exited the store, she walked toward her car on the sidewalk outside the building. When she got to her car, she opened the back door to put her bags in the backseat. As she opened the door, she heard quick footsteps coming from her right side, and out of the corner of her eye, she saw a person with a hood up over a ski mask rapidly approaching. As the hooded person approached Ms. A., he said, "Sorry about this," before he attacked her. A struggle followed. Less than a minute later, Ms. A. was tackled to the ground, and her purse, credit cards, approximately $300, and her shopping bag were stolen. Ms. A. stood, started screaming, and chased her assailant for a short distance before giving up.

But Ms. A. was not the only person giving chase.

As Ernest Trimper turned his vehicle into the parking lot, he saw an individual standing approximately six feet tall, wearing a black hooded sweatshirt, dark pants, and a ski mask. When Mr. Trimper exited the store, he saw the individual walking around the parking lot. As Mr. Trimper backed out of his parking spot, he saw Ms. A. walking through the parking lot toward her car. Within seconds of seeing her, Mr. Trimper noticed the man in the hooded sweatshirt following her. Mr. Trimper then saw the man picking up his pace before attacking Ms. A.

After checking that Ms. A. was okay, Mr. Trimper started to follow the robber in his car. At some point, the robber darted out in front of Mr. Trimper's car, and Mr. Trimper hit the robber and knocked him to the ground. The robber got back on his feet and continued escaping. From a half-car length's distance, Mr. Trimper saw that the

robber had on a solid black jacket and stood at least six feet tall.

Mr. Trimper continued to follow the robber in his car until the robber cut through some trees into another parking lot. As Mr. Trimper drove to that lot, a Ford F150 without its headlights on traveling at a high rate of speed exited and drove 60 to 80 feet in the wrong direction up the road. Suspecting the truck was involved in the robbery, Mr. Trimper followed it. At some point, he was close enough to record the truck's license plate number and see three people inside. Mr. Trimper returned to the crime scene, spoke with police officers at the scene, and gave them the tag number he wrote down.

Earlier that evening, Brett Goldberger went to a restaurant in the Cranberry Square Shopping Center. As he walked toward the restaurant door, he heard what sounded like a woman screaming behind him. When he turned to look in that direction, he saw a man briskly walking away. Standing about 50 feet away, Mr. Goldberger saw that the man had a hood on, stood approximately 6' 4" tall, wore dark pants, a black or dark winter coat, and had boots on. Sensing something was not right, Mr. Goldberger chased the man as he ran through the trees and into the other parking lot. Mr. Goldberger observed the man enter a truck before it took off from the parking lot and up the road.

Mary Walker was working at the Giant in the Cranberry Square Shopping Center during the relevant time. At around 6:30 pm, she went outside the front of the store where she observed someone with a "[v]ery prominent" nose, "[v]ery tall and lanky; long legs" and at least "6-foot-2," wearing a dark jacket and "maybe a sweatshirt with a hood and jeans or dark pants" standing in a well-lit area approximately fifteen feet away. Ms.

Walker, who had originally gone outside to investigate an unrelated concern, found nothing else out of the ordinary and returned inside.

When the police arrived, Ms. A. described to them what happened. While speaking to the police, Ms. A. also contacted her bank to cancel her stolen credit cards; the bank told her credit charges were already appearing. The credit charges were from two gas stations, the first eight minutes away from the crime scene and the second three minutes farther.

Detective Todd Rutledge, who led the police investigation, discovered surveillance footage showing Mr. Dyer and another individual, Craig Mattatall, using Ms. A.'s credit card at the second gas station. Detective Rutledge also traced the tag number Mr. Trimper gave to Mr. Mattatall. Detective Rutledge tracked down Mr. Mattatall and his girlfriend, Elizabeth Meeks, who was also present during the crimes. Mr. Mattatall and Ms. Meeks both said that Mr. Dyer committed the robbery.

Detective Rutledge then downloaded four pictures—one front-facing view and one back-facing view of Mr. Mattatall and Mr. Dyer—from the gas station surveillance footage. When presenting the photos to the witnesses, Detective Rutledge displayed the two photos of Mr. Mattatall first and then the two photos of Mr. Dyer separately. The photo set of each suspect consisted of one photo that showed the suspect walking into the store and one photo that showed the suspect walking out of the store. Each photo showed the full body of the suspects, including their clothing; each photo also showed a view of some nearby objects, including a shelf of clothes right next to the door. In the bottom

lefthand corner, each photo also included the following text:

[05] CAM 5

[DATE] [TIME]

[352x240]

Detective Rutledge presented these pictures to Mr. Trimper, Mr. Goldberger, and Ms. Walker. The witnesses said the picture of Mr. Dyer looked consistent with the robber, and they signed the back of Mr. Dyer's photo.

DENIAL OF MR. DYER'S SUPPRESSION MOTION

Mr. Dyer here contends that the pre-trial photographic identifications by Mr. Trimper, Mr. Goldberger, and Ms. Walker should have been excluded because the "photo array" Detective Rutledge used was impermissibly suggestive. We conclude that the photos and procedure were not impermissibly suggestive, and even if the photos were suggestive, the identifications had sufficient indicia of reliability so that the likelihood of misidentification was not increased. Moreover, any error in not suppressing these out-of-court identifications was harmless. We explain.

In his pretrial suppression motion, Mr. Dyer sought suppression of the eyewitnesses' out-of-court identifications of him as well as any in-court identifications of

him that the State might offer at trial.[4] Specifically, Mr. Dyer argued that by using two photographs only, and asking eyewitnesses to identify which one was the suspect, rather than a standard six-photo array, the police "orchestrated" an identification procedure that was "unnecessarily and impermissibly suggestive, and unreliable."[5]

At the suppression hearing, Mr. Dyer proffered[6] to the court that Detective Rutledge had the witnesses sign the pictures in question and did not use the "standard photo array of six[,]" which the "experts tend to agree . . . is better[.]" According to Mr. Dyer, showing two pictures "gives the witnesses a selfish choice as to who[m] to pick." Mr. Dyer also contended that the witnesses knew the date of the incident, and Detective Rutledge showed them "download[ed] pictures that have the precise date on the picture." Doing so, according to Mr. Dyer, was:

> in and of itself, . . . without saying a word, impermissibly suggestive to these witnesses because now they [had] the date reflected on the pictures. It is akin to saying, I know it was him or I know it was them and it is the same date, a little bit later in time, and therefore people are going to be skewed to be wanting to pick one or the other[.]

[4] Mr. Dyer's argument as to the in-court identifications is that they were tainted by the out-of-court identifications. Because we find no error vis-a-vis the out-of-court identifications, we do not separately address the in-court identifications.

[5] Mr. Dyer's suppression motion first appeared as part of an omnibus motion. The day before the first suppression hearing, Mr. Dyer supplemented his suppression motion with the argument outlined above.

[6] At the start of the hearing, Mr. Dyer's counsel and the State's attorney both made statements that appear to have been a mix of opening statement and proffer. Neither party objected to proceeding in this way. The statements were materially similar to Detective Rutledge's testimony.

Mr. Dyer argued that instead, Detective Rutledge "could have done a proper photo array. He could have removed the time stamp. He could have done everything proper to remove the suggestiveness of those photos, but he didn't."

The State responded with its own proffer, contending that while photo arrays frequently have "the standard pack of six photos[,]" the discussion as to what is better, whether "it is six photos, or if it is eight photos, or if it is one at a time, or if it is a whole pack of six at a time" is an issue "more properly brought up for weight versus admissibility." According to the State, using a standard photo array under the circumstances was not feasible. A photo array consisting of a "bunch of people's faces would have been completely useless because," here, no witness had seen the face of the assailant, who was wearing a mask. The State argued instead that the procedure law enforcement implemented was appropriate because the witnesses could

> . . . get a good view of [the assailant's] clothing. . . . [T]hat evening the Defendant and Codefendants went to an Exxon station and tried to use the stolen credit card which was garnered during the robbery. That is where those pictures were taken.
>
> At no other time or no other place did the Detective have a picture of the Defendant wearing the clothing that he wore that the witnesses would have seen. That was the basis for why there [was] no [standard photo] array.
>
> * * *
>
> [W]hen [Detective Rutledge] showed the pictures[,] he did not point out, hey, it is this guy. And that is, generally speaking[,] what the case law says[:] . . . the sin i[s] to point out to the testee who the person is. Not that there was some … suggestibility, but it was that irreparable that [the police] were

> pointing out who it was. And the fact that there were two pictures does not, in and of itself, rise to that level.

After these arguments, Mr. Dyer called one witness, Detective Rutledge. Mr. Dyer questioned Detective Rutledge about the process he used to present the photographs to the witnesses. Detective Rutledge testified that he showed only the four photographs, two of each suspect, to the witnesses. Detective Rutledge explained that he repeated the same procedure for each witness, showing the photograph of Mr. Mattatall first and Mr. Dyer second. Detective Rutledge did not instruct the witnesses on whether they should look at the person's height or physique, but "[s]ome of them did take that into note, but [he] specifically was looking at clothing at that point[.]"

Detective Rutledge first recalled his interview with Ms. Walker. When he interviewed Ms. Walker, he told her that he "had pictures of people that may or may not be related [to] the crime and may or may not be a suspect." Detective Rutledge also testified that he told Ms. Walker that he wanted her to focus on "the clothing to see if the clothing may have matched the suspect['s.]"

Detective Rutledge also provided an account of Mr. Trimper's viewing of the photos. Detective Rutledge explained to Mr. Trimper that he "had some photos [he] wanted to show him that may or may not be the subject, and . . . look at the clothing to see if he recognized any of the clothing from that evening." Detective Rutledge displayed the photographs in the same fashion as he did with Ms. Walker. Mr. Trimper said that he could not say definitively whether either man in the images was the robber. However, he "indicate[d] that the jacket that [Mr. Dyer] was wearing, along with [his] height[] and

physique matched" the robber, but the grey hood did not match. Mr. Trimper still signed the picture of Mr. Dyer because "the jacket and clothing was consistent besides the hood."

Detective Rutledge's procedure for exhibiting the photographs to Mr. Goldberger mirrored the other identifications, but Mr. Goldberger positively identified Mr. Dyer as the assailant. Detective Rutledge said he showed Mr. Goldberger the two pictures of Mr. Mattatall first and then the two pictures of Mr. Dyer. He told him "[the s]ame thing [he] told all the other ones, that . . . [a] suspect may or may not be in the photographs. I want him to focus on the clothing, see if he recognizes any clothing from that night that the suspect was wearing." Mr. Goldberger then affirmatively stated he believed it was Mr. Dyer.

The State's cross-examination of Detective Rutledge focused on two aspects of the witness identifications: the procedure implemented and the veracity of each identification. Detective Rutledge testified that he did not use a "typical six-pack photo array" because the robber wore a mask. Thus, there were no available avenues for identifying the robber other than the surveillance photographs showing the suspects' clothing, height, and physique. Detective Rutledge further testified that when he presented the pictures, he did not insinuate that the suspect was in the photograph.

Detective Rutledge explained that Mr. Trimper described the robber as "approximately six feet tall with a thin build, [wearing] a black hooded shirt, with a black mask and dark pants." According to Detective Rutledge, Mr. Trimper was confident in

his identification because he got a good look at the robber when he inadvertently struck him with his car.

Regarding Mr. Goldberger, Detective Rutledge said Mr. Goldberger distinguished the individual in the first photograph—Mr. Mattatall—from the robber based on their respective clothing. Mr. Goldberger told Detective Rutledge that the robber was wearing boots, and Mr. Mattatall was not. Additionally, though the robber was "wearing dark clothing," which matched Mr. Mattatall's hooded sweatshirt, Mr. Mattatall's pants did not match. When Mr. Goldberger viewed the images of Mr. Dyer, he viewed both the front and back at the same time, and "[h]e immediately said that that is him." He said that the "grey shirt, dark pants, jeans, and boots all match[ed] what the [robber] was wearing."

Detective Rutledge also addressed the date and time stamps on the photos. He told the court that he did not point those out to any of the witnesses, and none of the witnesses mentioned it to him.

The circuit court denied Mr. Dyer's motion to suppress the witness identifications, finding that the identification procedure was not impermissibly suggestive. The court explained that it would be preferable for the time stamps to not be on the images, but their presence was not enough to find the images impermissibly suggestive. Rather, showing the photos to determine whether the witnesses recognized the clothing, height, and physique of the individuals was "a reasonable approach to be taken under the circumstances." It explained that it might be different if the surveillance photos were taken from the parking lot where the robbery occurred; here, it was significant that they

were taken from a gas station, "not any of the areas in question where the witnesses observed . . . the assailant at the time." Since the court found that Mr. Dyer did not meet his burden of proving the procedure was impermissibly suggestive, it said its inquiry could end there. However, the court explained that even if the photographs were impermissibly suggestive, the identifications were likely sufficiently reliable that they could still be admitted.

Prior to the second trial, Mr. Dyer presented essentially the same arguments as in the first suppression hearing: that the photos were impermissibly suggestive because of the inclusion of only two individuals and the inclusion of the date and time stamp. Mr. Dyer presented no additional evidence compared to the first suppression hearing. The trial court denied Mr. Dyer's attempt to suppress the identifications, agreeing with the suppression court's findings and reasoning.

Discussion

Because we are asked to review the admission of the photos at the suppression hearings, we only review the record from those suppression hearings. *Small v. State*, 464 Md. 68, 88 (2019). We view the evidence and the inferences drawn in the light most favorable to the prevailing party—in this case, the State. *Greene v. State*, 469 Md. 156, 165 (2020). "We accept the suppression hearing court's factual findings and determinations of credibility of testimony unless they are clearly erroneous[,]" and we review legal conclusions *de novo*. *Small*, 464 Md. at 88.

Regardless of the method, pre-trial identification procedures must meet the same

standard. To ensure the protection of the defendant's due process rights pursuant to the Fifth Amendment of the U.S. Constitution, as applied to the states through the Fourteenth Amendment, and Article Twenty-Four of the Maryland Constitution, a pre-trial identification procedure must not be so impermissibly suggestive that it creates a very substantial likelihood of misidentification. *See Neil v. Biggers*, 409 U.S. 188, 198 (1972) (citing *Simmons v. United States*, 390 U.S. 377, 384 (1968)). The likelihood of misidentification is what "violates a defendant's right to due process" and can be "the basis of the exclusion of evidence." *See Neil*, 409 U.S. at 198. Courts generally split this standard into two steps. *See Small*, 464 Md. at 88-89, 92.

Under the first step, the court determines whether the identification procedure is impermissibly suggestive. *See Smiley v. State*, 442 Md. 168, 180 (2015) (explaining the first step). So long as the procedure is not impermissibly suggestive, the identification will stand. *Id.* The procedure does not need to be perfect. *See Neil*, 409 U.S. at 199 (concluding that while "the police did not exhaust all possibilities in seeking persons physically comparable to respondent," the evidence did not have to be excluded); *Barrow v. State*, 59 Md. App. 169, 191 (1984) (saying the police procedure could have been better but upholding the identification nonetheless). Rather, this Court has previously stated that "[t]he sin is to contaminate the test by slipping the answer to the testee." *Conyers v. State*, 115 Md. App. 114, 121, (1997), *cert. denied*, 346 Md. 371, (1997); *see, e.g.*, *Foster v. California*, 394 U.S. 440, 443 (1969) (holding that the "suggestive elements" made identification "virtually inevitable" and "so undermined the reliability of

the eyewitness identification as to violate due process."). Nor is it enough for suppression that the procedure be simply suggestive; instead, it must be impermissibly so. *Morales v. State*, 219 Md. App. 1, 14 (2014).

Under the second step, even if the procedure is impermissibly suggestive, the court will uphold the identification if, under the totality of the circumstances, it is reliable and does not result in a substantial likelihood of misidentification. *See Smiley*, 442 Md. at 180 (explaining the second step); *Small*, 464 Md. at 92 (assessing the reliability of the identification to determine the likelihood of misidentification). While the presence of suggestiveness will necessarily increase the likelihood of misidentification, the overall reliability of the identification may cure that increase if it outweighs "the corrupting effect of the police-arranged suggestive circumstances." *Small*, 464 Md. at 93; *see also Neil*, 409 U.S. at 198 (describing the interplay between suggestiveness and reliability). The Supreme Court of the United States has set forth various factors to consider when assessing the reliability of an identification:

> the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by witness at confrontation, and the length of time between the crime and the confrontation.

Neil, 409 U.S. at 199-200.

Here, we conclude that the pre-trial identification procedures Detective Rutledge employed were not impermissibly suggestive. First, the inclusion of only two individuals in the array does not make the procedure impermissibly suggestive. *Manson v.*

Brathwaite, 432 U.S. 98, 116 (1977) (holding that the use of a single photograph was not per se impermissibly suggestive). Detective Rutledge explained to each witness that the suspect may or may not be in the photos, and he only asked if the witnesses recognized any clothing from the night of the robbery. Further, the photos were taken from a gas station and not the crime scene, meaning the witnesses would have no reason to believe that the photos were connected to the crime. Thus, Detective Rutledge did not "slip[] the answer to the testee." *Conyers v. State*, 115 Md. App. 114, 121 (1997) (holding that to qualify as impermissibly suggestive, the police must have fed the witness clues).

Furthermore, using photos of two individuals was necessary. *Cf. Manson*, 432 U.S. at 109 (emphasizing that the procedure was "unnecessarily" suggestive). Mr. Mattatall and Ms. Meeks alleged that Mr. Dyer committed the robbery. Detective Rutledge also had the pictures showing Mr. Mattatall and Mr. Dyer at the gas station with the stolen credit card and with Mr. Dyer wearing similar clothes to previous witness descriptions. Detective Rutledge thus needed a way to confirm that it was Mr. Dyer and not Mr. Mattatall who had committed the robbery. Also, because the robber wore a mask, the only features witnesses could identify would be his height, physique, and clothes, and the surveillance pictures were the only ones that showed what Mr. Dyer and Mr. Mattatall were wearing that night and their relative heights and builds.

Second, regarding the date and time stamps, the presence of these stamps on the photos does not prompt us to conclude that they were impermissibly suggestive. The time stamp showed the wrong time, so if witnesses did remember the time of the incident, they

might have assumed that the pictures did not depict the robber. Further, the date and time were in the middle of three lines of numbers. If the witnesses were asked to look at the clothes of the person in the picture, they likely would not decipher a string of numbers in the bottom lefthand corner instead. Detective Rutledge also did not point out the date and time stamps or tell any of the witnesses that the photos were from the night of the robbery. We agree with the suppression court that although it would have been better to eliminate the time and date from the photos, an identification procedure need not be perfect to withstand a test of suggestiveness. *See Barrow v. State*, 59 Md. App. 169, 191 (1984) (affirming the admission of the pre-trial identification even though the procedure could have been better).

Even if the identification procedure was impermissibly suggestive, the out-of-court identifications that resulted were reliable when tested against the *Neil v. Biggers* "factors." Under the first factor, the witnesses all had a sufficient opportunity to view the robber at the time of the crime. Mr. Trimper even hit the suspect with his vehicle, at which point the suspect stood up, right in front of Mr. Trimper's car. Mr. Goldberger also chased the suspect for a few hundred feet, so he had time and a good perspective to view the suspect's clothing, height, and physique. It was nighttime, so dark out, but the suppression hearing judge took judicial notice of the fact that it was a well-lit parking lot, unlike the poorly lit lot in *Rustin v. State*, 46 Md. App. 28, 33 (1980). The witnesses' viewing times fall short of the amount of viewing time in *Neil v. Biggers*, where the witness was with the suspect for up to half an hour. *Cf.* 409 U.S. at 200. However, here, it

was sufficient to obtain good views and be able to recall the robber's clothing, height, and physique. Therefore, opportunity to view the suspect at the time of the crime weighs slightly in favor of reliability.

Under the second factor, the witnesses had a high degree of attention when viewing the suspect. Mr. Trimper had witnessed the crime, and both he and Mr. Goldberger chased after the suspect. They were likely highly alert and would have been focused on the robber. It is possible that they were instead focused on the chase, but this possibility can be rebutted by Mr. Trimper having had the attention to get the tag number of the truck. Thus, the witnesses' degree of attention weighs in favor of reliability.

Under the third factor, while there were small variations between the witnesses' descriptions of the robber and what Mr. Dyer looked like, they generally coincided regarding clothing, height, and physique. All the witnesses described the robber as wearing dark clothing: dark pants, dark boots, and a dark jacket. They also all described him as tall and thin. Further, the witnesses stated any inaccuracies. For example, Mr. Trimper, upon viewing the photographs, stated that Mr. Dyer was wearing a grey hoodie and the robber was not. Staying consistent with their prior descriptions and indicating inaccuracies suggests the witnesses were not swayed by any suggestiveness. *See Small v. State*, 464 Md. at 101 (stating that the witness was apparently not susceptible to the suggestive elements of the first photo array because he did not make a positive identification during that one). Thus, the accuracy of the prior descriptions generally weighs in favor of reliability.

Under the fourth factor, each witness's level of certainty varied. Neither Mr. Trimper nor Ms. Walker made a positive identification. However, as soon as Mr. Goldberger saw Mr. Dyer's photo, he immediately identified him as the robber, as Detective Rutledge was laying the photo down. Mr. Trimper and Ms. Walker were not certain, but they explained their lack of certainty at trial and what they thought was inconsistent, so the jury had the opportunity to weigh their lack of certainty. Thus, while Mr. Trimper's and Ms. Walker's certainty may be neutral, Mr. Goldberger's level of certainty weighs strongly in favor of reliability.

Under the fifth factor, for each witness, there was a time lapse of a few weeks between the crime and the identification. A few weeks is nowhere near the quick turnaround of only a few hours in *Small v. State*, 464 Md. at 99, but it is shorter than the two-month gap in *Rustin v. State*, 46 Md. App. at 36. Furthermore, in *Neil v. Biggers*, the U.S. Supreme Court pointed out that while a seven-month lapse would have been "a seriously negative factor in most cases . . . , the testimony is undisputed that the victim made no previous identification at any of the showups, lineups, or photographic showings. Her record for reliability was thus a good one, as she had previously resisted whatever suggestiveness inheres in a showup." 409 U.S. at 201. Similarly, in the present case, this was the first time the witnesses made identifications. While this was also their first time seeing the photo array, in contrast to the witness in *Neil v. Biggers*, they were not predisposed to any evidence or "answer[s.]" *See Conyers*, 115 Md. App. at 121 ("[t]he sin is to contaminate the test by slipping the answer to the testee."). Therefore, the

lapse of time weighs only slightly against reliability. When viewed under the totality of the circumstances, the witness identifications were reliable, even if there had been some suggestiveness in the identification procedure.

Finally, we conclude, given the other evidence in this case, that if there was any error in failing to suppress the out-of-court identifications, it was harmless. For an error to be harmless, a reviewing court must find "that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict." *Dorsey v. State*, 276 Md. 638, 659 (1976) (holding that introducing evidence of the detective's arrest-conviction record was not harmless error); *see also Dionas v. State*, 436 Md. 97, 109 (2013) ("harmless error factors must be considered with a focus on the effect of erroneously admitted, or excluded, evidence on the jury."). In assessing harmlessness, the primary question we analyze is "whether the trial court's [purported] error was unimportant in relation to everything else the jury considered in reaching its verdict." *Dionas*, 436 Md. at 118. Doing so is "a multi-factored exercise[,]" that includes considering the jury's perspective of the overall strength of the State's case, *see Paydar v. State*, 243 Md. App. 441, 458 (2019); the "length of jury deliberations" and other jury behavior, *see Dionas*, 436 Md. at 112; and "the nature, and the effect, of the purported error upon the jury[,]" *id.* at 110.

Considering the overwhelming evidence, the out-of-court identifications were "unimportant to everything else the jury considered in reaching its verdict." *See Dionas*, 436 Md. at 118. The surveillance footage showed Mr. Dyer at the gas station where Ms.

A.'s credit card was used. Detective Rutledge said the gas station manager "was actually able to pull up the transaction receipts from that incident that showed [Ms. A.'s] credit card number on the receipt." According to Detective Rutledge's testimony about the gas station surveillance footage:

> [DETECTIVE RUTLEDGE:] [Mr. Dyer and Mr. Mattatall] walked into the gas station where Mr. Mattatall uses the stolen credit card to purchase cigarettes.
>
> [PROSECUTOR:] And what does Mr. Dyer do?
>
> [DETECTIVE RUTLEDGE:] Mr. Dyer is seen on camera counting a bunch of money in his hand. And then he goes to the counter to attempt to purchase something but never actually completes the purchase.

In that footage, Mr. Dyer is wearing the same clothes as the witnesses initially described the robber wearing: "boots[,] . . . dark pants[,] . . . a winter black coat," and "a hooded sweatshirt." He is also wearing the same clothes as the robber is wearing in the Giant surveillance video. According to Detective Rutledge, in the gas station surveillance video "we have Mr. Dyer wearing a dark colored jacket which is consistent with the video from Giant. Dark colored pants, jeans in this case which is consistent with the video from Giant. And brown boots which is also consistent with the video from Giant."

Ms. Meeks and Mr. Mattatall also testified that Mr. Dyer committed the robbery. Ms. Meeks testified during trial that "Scott Dyer said he would do whatever it took to get high, and that was including robbing somebody." Ms. Meek also testified that she, Mr. Mattatall, and Mr. Dyer had developed the plan to rob somebody. They drove to the Cranberry Square Shopping Center and Mr. Dyer got out of the car and walked away into

the parking lot. Then, he came back "frantic and he was yelling go, go, go." When asked, "Who was the person who actually physically committed the robbery that evening?" Ms. Meeks said, "Mr. Dyer."

Mr. Mattatall corroborated Ms. Meeks's testimony. Further, he said Mr. Dyer came up with the idea to rob somebody. He testified, "[Mr. Dyer] kind of jokingly says we need to get some money. We should rob somebody." Mr. Mattatall also testified that after Mr. Dyer ran back to the car saying "go, go, go," Mr. Mattatall drove away. While driving, they "found out that he did rob somebody and that he had a purse and that he was checking through it." When asked, "Who was the person who actually physically committed the robbery?" Mr. Mattatall said, "Mr. Dyer."

The jury could see for itself that Mr. Dyer's clothing, height, and physique in the surveillance footage matched the witnesses' prior recollections. Therefore, even if the admission of the out-of-court identifications was error, such error was harmless.

MR. DYER'S COMPLAINTS ABOUT HIS SECOND LAWYER

Mr. Dyer contends that the circuit court abused its discretion by not inquiring into his reasons for his dissatisfaction with counsel. He argues that the circuit court was aware of Mr. Dyer's complaints at trial and at the March 2022 sentencing hearing. He also states that these complaints were significant and not vague. Further, he asserts that the circuit court never conducted an inquiry into the matter but simply referred the matter to counsel. Mr. Dyer contends that this was an abuse of discretion. Because we conclude

that Mr. Dyer did not actually ask to discharge his lawyer, the circuit court did not have occasion to decide whether to allow him to do so. Accordingly, we see no abuse of discretion in how the circuit court addressed Mr. Dyer's complaints about his lawyer.

If a defendant requests to discharge counsel after meaningful trial proceedings have begun,[7] a circuit court " . . . 'must conduct an inquiry to assess whether the defendant's reason for dismissal justifies any resulting disruption[.]'" *State v. Hardy*, 415 Md. 612, 628 (2010) (quoting *State v. Brown*, 342 Md. 404, 428 (1996)). Once a defendant requests to discharge counsel, the circuit court must first provide a forum for the defendant to explain his reasons for the request. *See Hardy*, 415 Md. at 628; *Brown*, 342 Md. at 428. The court then has broad discretion to decide whether to allow the

[7] By contrast, if a defendant requests to discharge counsel before meaningful trial proceedings have begun, Rule 4-215(e) applies. It provides:

> **(e) Discharge of Counsel--Waiver.** If a defendant requests permission to discharge an attorney whose appearance has been entered, the court shall permit the defendant to explain the reasons for the request. If the court finds that there is a meritorious reason for the defendant's request, the court shall permit the discharge of counsel; continue the action if necessary; and advise the defendant that if new counsel does not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds no meritorious reason for the defendant's request, the court may not permit the discharge of counsel without first informing the defendant that the trial will proceed as scheduled with the defendant unrepresented by counsel if the defendant discharges counsel and does not have new counsel. If the court permits the defendant to discharge counsel, it shall comply with subsections (a)(1)-(4) of this Rule if the docket or file does not reflect prior compliance.

Md. Rule 4-215(e).

discharge, upon the defendant's demonstration of good cause. *Brown*, 342 Md. at 428.

In exercising its discretion, the circuit court should consider six factors. These are (1) the merit of the reason for discharge; (2) the quality of counsel's representation prior to the request; (3) the disruptive effect, if any, that discharge would have on the proceedings; (4) the timing of the request; (5) the complexity and stage of the proceedings; and (6) any prior requests by the defendant to discharge counsel. *Hardy*, 415 Md. at 629 (quoting *Brown*, 342 Md. at 428). Circuit courts "abuse their discretion when they fail to allow a defendant any opportunity to explain his or her request at all, thus making it impossible to consider the six factors in *Brown*." *Hardy*, 415 Md. at 630.

Here, all of Mr. Dyer's complaints about this second lawyer arose after meaningful trial proceedings began, and had they ended in Mr. Dyer actually asking to discharge his second lawyer, we would have reviewed how the second judge addressed Mr. Dyer's request in light of the *Brown* factors. But, Mr. Dyer did not ask to discharge his second lawyer. Indeed, at the end of the first day of the second trial, Mr. Dyer addressed the court about why certain witnesses had not been subpoenaed. Mr. Dyer said:

> I have and it's - - I've been through this umpteen times. I'm not literate to the Court. I asked for certain witnesses to be here. I was told that you said it was hearsay because they're not here. And that is part of my defense. They're the ones that said it wasn't me, it didn't look like me. Why wouldn't they be here to tell the jury that?
>
> Okay? That's making no sense to me. I'm facing 25 years. I'm not spending the rest of my life because [current defense counsel] doesn't have two people that [former defense counsel] had on the list as part of witnesses. [The prosecutor is] not using them because they say it's not me.

The court explained that it could not comment on the defense counsel's trial strategy or why certain witnesses were not included. However, it assured Mr. Dyer that his comments had been noted for the record. It said he should speak with defense counsel and if he still had concerns after that discussion, the court would revisit the issue.

The following day, after the court allowed Mr. Dyer time to speak with his counsel, counsel informed the court that she and Mr. Dyer had spoken about her trial strategy and cleared up his confusion and concerns. The court then spoke with Mr. Dyer to ensure there was something on the record about his discussion with counsel. The court specifically said to Mr. Dyer that it wanted to make sure all his concerns had been addressed. Mr. Dyer said that he and his counsel had discussed her trial strategy, and he realized she was simply "going about it a different way." The court then assured Mr. Dyer that he was "allowed to express [his] concerns, so [it] . . . wanted to make sure that after speaking with Counsel, [his] concerns [had] been addressed now about her trial strategy." Mr. Dyer responded, "Yes, ma'am."

While Mr. Dyer continued to voice complaints about this second lawyer after the verdict, he did not ask to discharge her. In one written motion to the circuit court,[8] Mr. Dyer repeated his complaint about the absence of witnesses who, he contended, would have provided exculpatory evidence. He added that his lawyer had failed to raise the fact

[8] Mr. Dyer's first filing was a letter to the circuit court judge; his second filing was a Motion for Appropriate Relief. The judge treated both filings as motions.

that during the trial, a flash drive with exhibits on it had left the courtroom, and as a result, the chain of custody had been broken, and the flash drive should have been excluded. He also argued that his counsel was ineffective for not filing a timely motion for a new trial.[9]

In his second motion, Mr. Dyer reasserted some of these claims and requested the court vacate the guilty verdict, declare a mistrial, throw out the flash drive exhibit, dismiss the case due to lack of evidence, and/or rule counsel ineffective during trial. He also claimed his counsel had been ineffective for not advising him about the flash drive issue or objecting on the record.

Sentencing, and a hearing on the new trial motion that Mr. Dyer's second lawyer had filed on his behalf, were scheduled for March 2022. Prior to taking up these matters, the circuit court revisited the complaints about his second lawyer that Mr. Dyer had raised in his post-verdict written motions.

Ultimately, on hearing the circuit court's explanation that an ineffective-assistance-of-counsel claim had to be made after sentencing, i.e., post conviction, Mr. Dyer decided not to seek to discharge his second lawyer and to withdraw his claim that she had been ineffective. At the start of the hearing, the circuit court explained that

[9] Mr. Dyer's second lawyer did file a motion for a new trial. That motion asserted that a witness's testimony should have been admitted for impeachment purposes, rather than excluded as hearsay. The motion also argued the flash drive exhibit was improperly removed from the courtroom, violating Maryland law.

defense counsel could not represent Mr. Dyer during his motion for a new trial if he maintained his ineffective assistance of counsel claim.

> [THE COURT]: . . . So what happens at a post-conviction hearing is that [your counsel] is the State's witness and she has to testify about what she did, what she didn't do, why she did it because there are certain things that are—need to be shown for you to prevail on that ground.
>
> And so she can't proceed both today as your attorney for arguing your motion or arguing your motion for new trial and your sentencing hearing, and also be a witness for the State in a post-conviction where you are saying she was ineffective.

The circuit court then assured Mr. Dyer that he could consult with his second lawyer during the hearing on the new trial motion and bring to the circuit court's attention anything he felt his second lawyer missed.

> [THE COURT]: You can consult with her throughout the entire time.
>
> [MR. DYER]: Thank you very much.
>
> [THE COURT]: And then if there is something you want to tell me, I will let you do that.
>
> [MR. DYER]: I appreciate it.
>
> [THE COURT]: I would suggest that before you say anything you consult with [counsel], but ultimately, the decision will be yours.

The circuit court also explained to Mr. Dyer that he could withdraw the ineffective assistance of counsel claim and refile it later, and that he would be able to discuss most of his reasons for the ineffective assistance of counsel claim on the record while arguing for a new trial.

> [THE COURT]: . . . Most of the reasons that you are claiming that she was ineffective are also the subject of the motion for new trial.
>
> [MR. DYER]: Correct.
>
> [THE COURT]: So we are going to talk about them today. And then if you are not satisfied and there is a - - there will be a judgment and there will be a sentence and you will be advised of your appeal rights at that point.

Finally,[10] the court asked Mr. Dyer whether he wanted to withdraw his ineffective assistance of counsel claim and whether he wanted his second lawyer to represent him. To both questions, Mr. Dyer said he did.

> [THE COURT]: . . . Do you want her to represent you for the—to argue the motion for new trial?
>
> [MR. DYER]: Yes.
>
> * * *
>
> [THE COURT]: . . . I guess what I am asking is, do you want to withdraw [the ineffective assistance of counsel claim] for today?
>
> [MR. DYER]: I will withdraw it for today.

During the ensuing motion for a new trial, Mr. Dyer explained his reasons for requesting a new trial, many of which were the same as his reasons for filing his ineffective assistance of counsel claim. The court denied the motion for a new trial and

[10] The court told Mr. Dyer that if he resubmitted his ineffective assistance of counsel claim after being sentenced, he would be assigned a Public Defender from their appeals division for that claim. The court then made sure that Mr. Dyer was put on the list for the Public Defender's appeals division for that reason.

sentenced Mr. Dyer to a total of 25 years without the possibility of parole.

During the second trial, and at the hearing on Mr. Dyer's new trial motion and sentencing, the circuit court provided Mr. Dyer with multiple opportunities to express his concerns on the record. Furthermore, Mr. Dyer never requested to discharge counsel. Mr. Dyer urges that the circuit court should have inferred his desire to discharge counsel because Maryland law does not require the defendant to assert his complaints in any specific manner; however, based on Mr. Dyer's statements, the court could not have "reasonably conclude[d]" that Mr. Dyer wished to discharge his counsel. *Snead v.* State, 286 Md. 122, 127 (1979); *accord State v. Hardy*, 415 Md. at 622. Mr. Dyer never "notif[ied] the circuit court in any manner of the desire to seek different counsel." *See Wood v. State*, 209 Md. App. 246, 288 (2012). Therefore, the circuit court properly ensured the protection of Mr. Dyer's rights and did not abuse its discretion.

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