Circuit Court for St. Mary's County
Case No. 18-K-10-000193

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 163

September Term, 2023

STATE OF MARYLAND

v.

RICHARD A. EDWARDS

Nazarian,
Albright,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: December 28, 2023

After trial before a jury in the Circuit Court for St. Mary's County, Richard Edwards was convicted of first-degree attempted rape, third-degree sexual offense, and second-degree assault. About ten years later, Mr. Edwards filed a petition for post-conviction relief, arguing that his trial attorney's failure to pursue a motion to suppress the victim's photo array identification of Mr. Edwards constituted ineffective assistance of counsel. The circuit court reversed Mr. Edwards's convictions and granted him a new trial on the ground that counsel's failure to move to suppress constituted deficient performance that prejudiced Mr. Edwards's defense. The State filed an application for leave to appeal, which was granted. We reverse the judgment of the circuit court.

I. BACKGROUND

A. The Incident.

On the evening of February 12, 2010, L[1] went to a bar in Mechanicsville to meet some of her friends. She arrived at about 9:00 p.m. and stayed until the bar closed at 2:00 a.m. When L left the bar, she went to her car. She decided to call her friend to pick her up. While waiting for her friend to arrive, L locked her car doors and called another friend to pass the time.

As L was talking on the phone, a man approached her car. He knocked on the door, identifying himself as a "security guy" for the bar. He claimed that he wanted to make sure that L had a safe ride home. L responded that her friend was coming to pick her up and the man walked away.

[1] We will refer to the victim by a random initial to protect her privacy.

A few minutes later, though, the same man came back, this time with a cigarette in his hand and asking to borrow a lighter. L put her window down and gave him her lighter. The man responded that it was windy and asked if he could use L's door to shield the wind to light his cigarette. L agreed. The man walked to the passenger side door and crouched down to light the cigarette. Once he lit his cigarette, he entered L's car and sat down. L told him repeatedly to get out of her car, but he did not comply.

L told the man that she was going back in the bar to use the bathroom, and he responded that the bar was closed and wouldn't let her in. L replied, "well, I'm gonna go check." She ended her phone call, opened her door, and started to get out of the car. The man got out of the car at the same time. He walked around to L, pulled her pants down, and pushed her into the driver's seat. At that point, the man held L down and began to kiss her neck. Then he put his fingers in her vagina and attempted to have sexual intercourse with her.

Although the man took L's keys and threw them at one point, L managed to retrieve them and start the ignition. She "gunned it" and the man fell out of the car. As L drove to the front of the bar, the man ran toward the back. L honked her horn continuously until bouncers came out. She told the bouncers that someone tried to rape her and the police were called.

B. Identification Of The Perpetrator.

When the police arrived, L described the perpetrator as a white male with a medium build who weighed about 200 pounds. She also stated that he was about 5'9" in height and

was wearing a light denim shirt and jeans. She said that the perpetrator "was in his late thirties or early forties with dark brown hair and brown high set eyes."

L explained that she had the opportunity to get a good look at the perpetrator because "[h]e was in [her] face quite a bit" during the attack, which lasted for about fifteen to twenty minutes. She also stated that she saw the perpetrator watching her dance in the bar earlier that night and commented to her friend that he "look[ed] like a creeper . . . ." L acknowledged at trial that she had four beers and a shot while she was at the bar, but testified that her judgment and ability to observe her surroundings were not affected. Moreover, one of the police officers who responded to the scene testified that L did not appear to be intoxicated.

On the night of the incident, L also gave a description of the perpetrator to one of the bar's bouncers, James Dougherty. Mr. Dougherty testified that after L described her attacker, he "knew right away who it was." Mr. Dougherty identified Mr. Edwards at trial as the person who he believed fit the description. He explained that the average age of people in the bar that night was twenty-five and Mr. Edwards was the only patron who appeared to be in his mid-forties as L described. Mr. Dougherty also testified that he remembered having an altercation with Mr. Edwards near closing time during which he asked Mr. Edwards to finish his drink and leave the bar. Mr. Edwards told him, "I bought this, I'm drinking this, then I will leave." Mr. Dougherty responded by "push[ing] him out the door."

L also gave a description of the perpetrator to the bar owners, Victoria and Brian Adkins. Based on her description on the night of the incident, the Adkinses concluded that the perpetrator was a man they knew as "Ricky." At trial, they both identified Mr. Edwards as "Ricky." The Adkinses testified that they knew Mr. Edwards as both an occasional patron of their bar and as a person who did dry wall repair work in their home. They also testified that they saw Mr. Edwards at their bar on the night of the attack and that he was wearing a denim shirt.

At the time of the incident, though, Victoria Adkins did not know Mr. Edwards's last name; she "just knew him as Ricky." And Brian Adkins testified that he "believed [Mr. Edwards's] last name was Wathen," so he gave that name to police. The police then found records of two residents of St. Mary's County named Richard Wathen and included a photo of each of the men in separate photo arrays. The police showed both arrays to L. She noted that the arrays contained a couple of photos that looked "a little similar" to her attacker, but she did not identify anyone positively as the perpetrator.

Then the police contacted Mr. Adkins again and obtained a different name: Richard Edwards. They created a third photo array that included a photo of Mr. Edwards. The police showed this photo array to L and she identified Mr. Edwards as the perpetrator. This photo array identification occurred about three weeks after the incident. The police noted during the identification that L stated, "I think it's him, because of his eyes," and she pointed to Mr. Edwards's photo, stating, "I remember those eyes" and "[i]t's him." Five days later, the police showed the same photo array to the Adkinses, who also identified Mr. Edwards

as the suspect. And a few weeks before the trial, the police showed the photo array to Mr. Dougherty, who identified Mr. Edwards as the suspect as well.

At trial, L identified Mr. Edwards as the person who attacked her. Mr. Edwards testified in his own defense. He acknowledged that he was at the bar on the night of the incident and that his car was parked in a location "[p]retty much" consistent with the direction L said he ran, but he denied having any contact with L. Mr. Edwards also pointed out to the jury that he weighed 155 pounds, had green eyes, and a rotten tooth. The jury found Mr. Edwards guilty of first-degree attempted rape, third-degree sexual offense, and second-degree assault.

C. Procedural History.

The court sentenced Mr. Edwards to life in prison for the attempted rape conviction and ten years' incarceration for the sexual offense conviction; the assault conviction merged into the sex offense conviction. Mr. Edwards appealed, and this Court affirmed his convictions in an unreported opinion. *Edwards v. State*, No. 790, Sept. Term 2011 (Md. App. June 11, 2012).

On April 14, 2021, about ten years after the trial, Mr. Edwards filed a Petition for Post-Conviction Relief. In his petition, Mr. Edwards argued, among other things, that his trial attorney had rendered ineffective assistance by failing to litigate a motion to suppress L's photo array identification of him.[2] He contended that the photo array was

[2] Mr. Edwards argued that his trial counsel moved to suppress the photo array identification initially on the basis that the identification was "obtained by an unnecessarily suggestive police photo array procedure," but then withdrew the motion.

impermissibly suggestive because the photo of him used in the array "was so faded and distinct in appearance from the other photos that it stood out glaringly to any objective viewer." He argued further that his counsel's failure to litigate the motion constituted deficient performance and that the deficiency was prejudicial because the motion to suppress "would have likely succeeded" in excluding the photo array, which "was the critical evidence against [him]."

At the hearing on Mr. Edwards's petition, the circuit court found that "there's no question that the photo array has an extraordinarily faded photograph . . . ," and that it saw no reason why trial counsel would not have pursued the motion to suppress the array. The court agreed that that the photo array was central to Mr. Edwards's conviction because "all the evidence does without the photo array is put [Mr. Edwards] in the bar." The court granted Mr. Edwards a new trial, reasoning that "it [was] ineffective assistance of counsel not to have followed through on suppression of the photo array."

II. DISCUSSION

The State raises one question on appeal: did the post-conviction court err in concluding that Mr. Edwards's trial counsel was ineffective for not pursuing a motion to suppress the victim's photo array identification of Mr. Edwards.[3] We hold that it did.

[3] The State phrased the Question Presented as: "Did the post-conviction court err in concluding that Edwards' trial counsel was ineffective for not moving to suppress a photo array in which the victim identified Edwards as the perpetrator?"

Mr. Edwards phrased the Question Presented as: "Did the post-conviction court correctly determine that trial counsel was ineffective for failing to litigate a suppression motion regarding the complaining witness' out-of-court identification of Mr. Edwards based on an obviously flawed photo array?"

Despite the faded quality of Mr. Edwards's photograph, the array was not unduly suggestive and L's identification of Mr. Edwards was reliable. Mr. Edwards's trial counsel, therefore, did not act deficiently in declining to pursue a motion to suppress the array. And even if waiving the motion constituted deficient performance, Mr. Edwards cannot demonstrate that the decision prejudiced his defense because suppression of the array would not create "a substantial or significant possibility" of a different verdict considering all the other evidence pointing to Mr. Edwards's guilt. The post-conviction court erred in granting him a new trial.

We review a post-conviction court's findings on ineffective assistance of counsel as a mixed question of law and fact. *Newton v. State*, 455 Md. 341, 351 (2017) (*citing Harris v. State*, 303 Md. 685, 698 (1985)). "'We will not disturb the factual findings of the post-conviction court unless they are clearly erroneous.'" *State v. Sanmartin Prado*, 448 Md. 664, 679 (2016) (*quoting State v. Jones*, 138 Md. App. 178, 209 (2001), *aff'd*, 379 Md. 704 (2004)). But "[w]e 're-weigh' the facts in light of the law to determine whether a constitutional violation has occurred." *Newton*, 455 Md. at 352; *Sanmartin Prado*, 448 Md. at 679 ("'[A] reviewing court must make an independent analysis to determine the ultimate mixed question of law and fact, namely, was there a violation of a constitutional right as claimed.'" (*quoting Jones*, 138 Md. App. at 209)).

The State argues that the post-conviction court erred in finding that Mr. Edwards's trial counsel provided ineffective assistance when counsel failed to litigate a motion to suppress L's photo array identification. The State maintains that moving to suppress the

photo array would have been "a losing argument" because the photo array was not unduly suggestive and because L's identification of Mr. Edwards was reliable, and the right to effective assistance of counsel does not require attorneys to pursue non-meritorious arguments. In addition, the State argues that Mr. Edwards was not prejudiced by counsel's decision because the motion to suppress would have failed; and even if the motion had succeeded, the other evidence against Mr. Edwards was "sufficiently strong that [Mr.] Edwards could not show the outcome would have been different . . . ."

Mr. Edwards responds that the post-conviction court determined correctly that trial counsel was ineffective for failing to litigate a motion to suppress the photo array identification. He contends that "the photo array was unduly suggestive because the included picture of [him] was noticeably faded as compared to the other photos." Mr. Edwards also contends that L's description of the perpetrator "bore little similarity to Mr. Edwards'[s] appearance" and, therefore, that the identification was unreliable. He argues that he was prejudiced by his trial counsel's failure to pursue a suppression motion because the photo array identification "was the key piece of evidence against [him]," and without it, there was a substantial possibility that the jury's verdict would have been different.

"The federal Sixth Amendment and Article 21 of the Maryland Declaration of Rights guarantee all criminal defendants the right to the assistance of counsel." *State v. Armstead*, 235 Md. App. 392, 407 (2018) (*citing Duval v. State*, 399 Md. 210, 220–21 (2007)). The right to assistance of counsel does not guarantee merely that "a lawyer [will be] present at trial alongside the accused," but "it envisions counsel's playing a role that is

critical to the ability of the adversarial system to produce just results." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). In *Strickland v. Washington*, the Supreme Court established a two-prong test for evaluating claims of ineffective assistance of counsel. 466 U.S. at 687. To demonstrate that counsel was constitutionally ineffective, "the defendant must show: (1) that his or her counsel's performance was deficient, and (2) that he or she suffered prejudice because of the deficient performance." *Bailey v. State*, 464 Md. 685, 703 (2019).

The deficiency prong "is only satisfied where, given the facts known at the time, counsel's 'choice was so patently unreasonable that no competent attorney would have made it.'" *State v. Borchardt*, 396 Md. 586, 623 (2007) (*quoting Knight v. Spencer*, 447 F.3d 6, 15 (1st Cir. 2006)). "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S 86, 105 (2011) (*quoting Strickland*, 466 U.S. at 690). Moreover, the defendant must prove that trial counsel's actions were "'not pursued as a form of trial strategy.'" *Newton*, 455 Md. at 355 (*quoting Coleman v. State*, 434 Md. 320, 331 (2013)). "'A strategic trial decision is one that is founded upon adequate investigation and preparation.'" *Wallace v. State*, 475 Md. 639, 655–56 (2021) (*quoting State v. Syed*, 463 Md. 60, 75 (2019)).

In assessing whether an attorney's performance was unreasonable, "'all of the circumstances surrounding counsel's performance must be considered.'" *Newton*, 455 Md. at 355 (*quoting Mosley v. State*, 378 Md. 548, 557 (2003)). Additionally, "every effort

[must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 355 (cleaned up) (*citing Strickland*, 466 U.S. at 689). And courts assessing an attorney's performance should presume that the attorney's conduct was reasonable:

> Because it is tempting for both a defendant and a court to second-guess a counsel's conduct after conviction, courts must be highly deferential when they scrutinize counsel's performance. Reviewing courts must thus assume, until proven otherwise, that counsel's conduct fell within a broad range of reasonable professional judgment, and that counsel's conduct derived not from error but from trial strategy.

Armstead, 235 Md. App. at 409–10 (*quoting Mosley*, 378 Md. at 557–58).

To establish "prejudice" under the second prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The Supreme Court of Maryland has interpreted the "reasonable probability" standard to require "'a substantial or significant possibility that the verdict of the trier of fact would have been affected.'" *Sanmartin Prado*, 448 Md. at 682 (*quoting Coleman*, 434 Md. at 331). In addition to evaluating whether the outcome of the proceeding would have been different, we consider "'whether the result of the proceeding was fundamentally unfair or unreliable.'" *Oken v. State*, 343 Md. 256, 284 (1996) (*quoting Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993)). We also "consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. If the State offers strong evidence of a defendant's guilt

at trial, it is unlikely that the defendant can prove that his or her trial counsel's performance prejudiced him or her. *Ramirez v. State*, 464 Md. 532, 577 (2019).

To analyze whether Mr. Edwards's trial attorney's performance constituted ineffective assistance of counsel under the *Strickland* test, we must examine the law governing the suppression of photo array identifications. The Due Process Clause "protects against identifications that are 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" *Greene v. State*, 469 Md. 156, 169 (2020) (*quoting Simmons v. United States*, 390 U.S. 377, 384 (1968)). A photo array is suggestive when it "giv[es] the witness a clue about which photograph the police believe the witness should identify as the perpetrator . . . ." *Small v. State*, 464 Md. 68, 88 (2019); *see also Smiley v. State*, 442 Md. 168, 180 (2015) ("'The sin is to contaminate the test by slipping the answer to the testee.'" (*quoting Conyers v. State*, 115 Md. App. 114, 121 (1997))). The defendant carries the burden of establishing impermissible suggestiveness, and as this Court noted previously, this threshold is "a hard furrow to plow." *Smiley v. State*, 216 Md. App. 1, 33 (2014). We apply the facts to the law independently to determine whether an identification was so suggestive that it violated a defendant's due process rights. *Small*, 464 Md. at 88.[4]

If the trial court determines that the photo array was not suggestive, the inquiry ends

[4] Different appellate opinions have characterized the "unduly suggestive" analysis as both a factual and a legal question, *see State v. Hailes*, 217 Md. App. 212, 264 (2014), *aff'd*, 442 Md. 488 (2015), but in this context it's a constitutional determination that requires an independent weighing of the facts in light of the law.

and the identification is admissible at trial. *Id.* at 83. But "[i]f a prima facie showing is made that the identification was impermissibly suggestive, then the burden shifts to the State to show, under a totality of the circumstances, that it was reliable." *Smiley*, 442 Md. at 180. The State must "show that the identification was reliable by clear and convincing evidence." *Small*, 464 Md. at 84. And the reliability inquiry "is not an additional ground for exclusion but is, rather, a limitation on exclusion." *Conyers*, 115 Md. App. at 120.

When assessing the reliability of an identification, courts consider five factors relating to a witness's ability to perceive and pick out the suspect accurately:

> (i) the opportunity of the witness to view the criminal at the time of the crime;
>
> (ii) the witness' degree of attention;
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> (iii) the accuracy of the witness' prior description of the criminal;
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> (iv) the level of certainty demonstrated by the witness at the confrontation; and
>
> (v) the length of time between the crime and the confrontation.

Small, 464 Md. at 92. The critical inquiry is "whether under the 'totality of the circumstances' the identification is reliable even though the confrontation procedure was suggestive." *Neil v. Biggers*, 409 U.S. 188, 199 (1972).

A. Mr. Edwards's Trial Counsel Was Not Deficient In Deciding Not To Litigate A Motion To Suppress L's Photo Array Identification.

We begin our analysis by assessing whether Mr. Edwards's trial counsel acted deficiently under the first prong of the *Strickland* test. Mr. Edwards maintains that waiver of a motion to suppress L's photo array identification constituted deficient performance "[b]ecause of the unduly suggestive nature of the photo array." Mr. Edwards's only

argument for why the array was unduly suggestive is that his photo "was noticeably faded as compared to the other photos." The post-conviction court found that Mr. Edwards's photo was "extraordinarily faded," and we will not disturb that finding. But the fact that Mr. Edwards's photo was faded doesn't compel the conclusion that the array was unduly suggestive. *See McGrier v. State*, 125 Md. App. 759, 766 (1999) (photographic array was not unduly suggestive even though defendant's photo was the only computer-generated digital photograph and "had a different texture" than the other photos); *United States v. Saint Louis*, 889 F.3d 145, 152 (4th Cir. 2018) (photographic array was not unduly suggestive although defendant's photo "was darker and blurrier than the others"); *United States v. Johnson*, 820 F.2d 1065, 1073 (9th Cir. 1987) (photo of defendant was not impermissibly suggestive even though it was "hazier than the other photos").

Mr. Edwards argues that the faded quality of his photograph was likely to cause an observer's eye to be "immediately drawn" to it, and he cites to *United States v. Saunders*, 501 F.3d 384 (4th Cir. 2007), to argue that a photograph is unduly suggestive where the photo "so noticeably stands out from the others that it draws the observer's eye to that photograph." But *Saunders* is less about the lighting than about other characteristics of the photo. The court determined there that the defendant's photo "stood out sharply" from other photos in an array where "[t]he dark background and lack of lighting in [the defendant's] photo gave him a menacing countenance that was lacking in the men in the other five photos," and recognized that "there may be differences in background and lighting among the various photos in an array, and such differences do not automatically

create impermissible suggestiveness." *Id.* at 390. Mr. Edwards doesn't suggest that the lighting of his photograph gave him a "menacing countenance" as observed in *Saunders*; he argues only that his photo was lighter and less clear. Although Mr. Edwards is right that his photo was faded compared to the others, the photos did not differ in a way that would implicate due process concerns.

The "critical identification factor" when conducting photo array identifications is whether the individuals depicted in the photos have "similar features" to each other. *McGrier*, 125 Md. App. at 766. The filler photos show men of a similar age, build, and complexion to Mr. Edwards. Each of the men has a similar hairstyle and each photo depicts only the men's faces and shoulders. *See United States v. Bautista*, 23 F.3d 726, 731 (2d Cir. 1994) (recognizing that the defendant's photo was "slightly brighter and slightly more close-up than the others" but concluding that these differences did not render the array unduly suggestive when "[e]ach photograph depicts a man in a frontal mug-shot," "[e]ach is in color," "[e]ach of the men depicted is roughly the same age and coloring," and "each of the men depicted sport[ed] a mustache"). Mr. Edwards doesn't claim that the features of the men in the filler photos were dissimilar to his own; he complains only of a difference in lighting. Under the totality of the circumstances, the difference in lighting quality hardly "giv[es] the witness a clue about which photograph the police believe the witness should identify . . . ." *Small*, 464 Md. at 88. The photo of Mr. Edwards was not unduly suggestive, and Mr. Edwards has not overcome the presumption that his trial counsel's decision to waive the motion to suppress "fell within a broad range of reasonable professional

judgment . . . .” *Armstead*, 235 Md. App. at 409–10 (*quoting Mosley*, 378 Md. at 557–58).

But even assuming that Mr. Edwards’s photo was impermissibly suggestive, the array would have been admissible because L’s identification of Mr. Edwards was reliable. When assessing an identification’s reliability, the first two factors we consider are the witness’s “opportunity to view” the perpetrator at the time of the crime and the witness’s “degree of attention.” *Small*, 464 Md. at 92. Here, both factors weigh in favor of reliability. L testified that that she saw the attacker for about fifteen to twenty minutes during the incident, and she explained that she was able to get a good look at him because “[h]e was in [her] face quite a bit.” Mr. Edwards points to the fact that L consumed four beers and a shot on the night of the attack as evidence that her observational ability was affected. But the police officer responding to the scene did not find that L appeared intoxicated, and L testified that her ability to observe her surroundings was not affected.

We also note that L saw the attacker in the bar earlier that night, commenting to a friend that he “look[ed] like a creeper . . . .” L’s observation of the perpetrator before the attack bolsters the reliability of her identification because an “identification, based on a prior familiarity with the criminal, has a high degree of reliability and is less likely to be influenced by a suggestive identification procedure.” *Bonner v. State*, 43 Md. App. 518, 522 (1979) (confirming the reliability of an out-of-court identification where the victim saw the perpetrator two weeks before the incident when the perpetrator was in a fight with another person).

The third reliability factor is the “accuracy” of the witness’s prior description. *Small*,

464 Md. at 92. Mr. Edwards contends that L's description of the assailant "bore little similarity" to his appearance. He emphasizes that he has green eyes and weighed about 155 pounds at the time of the incident, which conflicts with the fact that L described the perpetrator as having brown eyes and weighing 200 pounds. But although L got these details wrong, she described several others accurately. L described the perpetrator as a white male who was in his "late thirties or early forties," and Mr. Edwards is a white male who was forty years old at the time of the incident. L reported further that her attacker was about 5'9" tall, and Mr. Edwards testified that he is 5' 10" tall. And L told the responding officers that the perpetrator was wearing a denim shirt, and the bar owners testified that they saw Mr. Edwards wearing a denim shirt in their bar on the night of the attack.

The fourth reliability factor is the witness's "level of certainty" during the identification. *Id.* at 92. During the photo array identification, L pointed to Mr. Edwards's photo and said, "I remember those eyes" and "[i]t's him." L did not express any hesitation before or after identifying Mr. Edwards from the array, and as the post-conviction court acknowledged, "[t]here is no evidence that [L] felt anything less than sure." Mr. Edwards contends that L's "description of the perpetrator's eye color as brown on the night of the incident cannot be reconciled with her statement 'I remember those eyes' when making the identification." But L's remark during the identification focused on Mr. Edwards's eyes, not his eye color specifically. L also had been presented earlier with two photo array identifications that did not include Mr. Edwards, and she did not identify any one as the perpetrator. The fact that L made no identifications from the previous photo arrays

indicates that she had a high "level of certainty" when identifying Mr. Edwards; it shows that "[h]er record for reliability was thus a good one, as she had previously resisted whatever suggestiveness inheres in a [photo array identification]." *Biggers*, 409 U.S. at 201.

The fifth factor relating to the reliability of an identification is the "length of time" between the crime and the identification. *Small*, 464 Md. at 92. L identified Mr. Edwards from the photo array about three weeks after the attack, a delay that does not weigh against reliability. *See McGrier*, 125 Md. App. at 766–67 (deeming identification reliable where identification occurred between two and three weeks after crime); *People v. Simmons*, 66 N.E.3d 360, 375 (Ill. App. Ct. 2016) (identifications occurring one to two weeks after the crime constituted a "relatively short time [that] favors the State").

Under the facts of this case, the State could have presented clear and convincing evidence that L's identification of Mr. Edwards was reliable, and Mr. Edwards's trial counsel's suppression motion would have lacked merit. And under *Strickland*, a decision to waive non-meritorious arguments is not deficient performance. *Schmitt v. State*, 140 Md. App. 1, 16 (2001) ("If counsel would not have prevailed on the legal issue in any event . . . then the less than sterling effort would not under *Strickland v. Washington* have constituted a deficient performance."). Moreover, the decision to waive a suppression motion was not "'so patently unreasonable that no competent attorney would have made it.'" *Borchardt*, 396 Md. at 623 (*quoting Knight*, 447 F.3d at 15). Mr. Edwards's trial counsel was not, therefore, constitutionally deficient in waiving a motion to suppress the identification.

B. The Waiver Of A Motion To Suppress L's Photo Array Identification Did Not Prejudice Mr. Edwards's Defense.

Even if we were to assume that Mr. Edwards's trial counsel was deficient in deciding not to pursue a motion to suppress L's photo array identification, though, he has not established prejudice. Mr. Edwards argues that he was prejudiced by trial counsel's decision not to seek suppression of the photo array identification because "[L's] out-of-court identification was the key piece of evidence against [him]." And he contends that there is a "substantial probability" that the jury's verdict would be different without L's out-of-court identification because "the other evidence was circumstantial and did no more than place Mr. Edwards in the bar that night." We disagree.

Even if L's photo array identification had been excluded, L's initial description of the perpetrator would have remained admissible. On the night of the incident, L described her attacker as a white male in his late thirties or early forties who was about 5'9" tall and wearing a denim shirt. This description aligned with Mr. Edwards's appearance: he is a 5'10" white male and was forty years old at the time of the incident. The bar owners testified that they saw him wearing a denim shirt in their bar on the night of the attack. L also testified that she saw her attacker "look[ing] like a creeper" earlier that night in the bar and identified Mr. Edwards at trial as the "creeper" she saw. And the jury heard testimony from Mr. Edwards that his car was parked in a location "[p]retty much" consistent with the direction L said he ran.

In addition to L's description, the jury heard evidence that L's description led the owners of the bar and the bar's bouncer all to conclude on the night of the assault that Mr.

Edwards was the perpetrator. The bar owners, Brian and Victoria Adkins, both testified that L's description of the perpetrator matched a man they knew as "Ricky." And although they did not know his last name at the time, the Adkinses identified Mr. Edwards as "Ricky" at trial. The Adkinses concluded that Mr. Edwards matched L's description long before viewing Mr. Edwards in a photo array or seeing Mr. Edwards at trial. Their determination that Mr. Edwards's appearance corresponded to L's description stemmed from their direct observations of Mr. Edwards, who had completed repair work in their home and occasionally patronized their bar.

Similarly, after L described the perpetrator to the bar's bouncer, James Dougherty, he "knew right away who it was" based on his previous encounters with Mr. Edwards. Mr. Dougherty testified that Mr. Edwards was the only bar patron in the age group that L described. And he remembered having an altercation with Mr. Edwards at the bar near closing time. Like the Adkinses, Mr. Dougherty identified Mr. Edwards without seeing him in a photo array or at trial; he identified Mr. Edwards based on how his observations of Mr. Edwards's appearance at the bar aligned with the description L provided. And contrary to Mr. Edwards's assertion that the Adkinses' and Mr. Dougherty's identifications "did no more than place [him] in the bar that night," the identifications served as circumstantial evidence that he was the perpetrator that L described.

Moreover, the Adkinses, Mr. Dougherty, and L all identified Mr. Edwards in court. Each witness testified about a prior experience with Mr. Edwards that allowed them to observe and identify him accurately. Mr. Edwards counters that in-court identifications are

inherently suggestive and have little evidentiary value, but it's up to the jury decide how much weight to attribute to the identifications. And considering the fact that L did not identify anyone in the first two photo arrays (which would still have been admissible even if the array including Mr. Edwards wasn't), the jury would have been more likely to find her in-court identification of Mr. Edwards credible.

Given the totality of the circumstances, Mr. Edwards cannot establish "a substantial or significant possibility" that the verdict would have been different if L's photo array identification had been suppressed. Contrary to the post-conviction court's conclusion that the photo array was "the only thing to tie [Mr. Edwards] into this crime," multiple pieces of evidence tied him to the attack, including multiple testifying witnesses who identified Mr. Edwards as the perpetrator based on L's initial description alone. Mr. Edwards failed to demonstrate prejudice, as required under the second prong of *Strickland*, and the post-conviction court erred in granting him a new trial on the basis of ineffective assistance of counsel.

JUDGMENT OF THE CIRCUIT COURT FOR ST. MARY'S COUNTY REVERSED. APPELLEE TO PAY COSTS.