Circuit Court for Montgomery County
Case No. 131856C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0363

September Term, 2020

EDWARD JONES

v.

STATE OF MARYLAND

Friedman,
Wells,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: November 10, 2020

This case was tried by a jury in the Circuit Court for Montgomery County on January 22-24, 2019. The jury convicted Edward Jones, appellant, of attempted carjacking, accessory after the fact to attempted second-degree murder, and illegal possession of regulated firearm.[1] On March 15, 2019, the court sentenced Jones to a total sentence of 35 years. Jones filed a timely appeal, raising five issues for our review:

1. Did the court err in denying [Jones'] motion to suppress the show-up identification?

2. Did the court abuse its discretion in permitting the State to "refresh" the recollection of a State's witness with his prior written statement?

3. Was the evidence sufficient to sustain the convictions for attempted carjacking and accessory after the fact to attempted second-degree murder?

4. Did the court abuse its discretion in denying [Jones'] motion for a new trial?

5. Is the sentence for attempted carjacking illegal?

For the reasons that follow, we answer all questions in the negative and affirm the judgment of the circuit court.

Specifically, we hold the court properly denied the motion to suppress the show-up identification, that the circuit court acted within its discretion by permitting the prosecutor to refresh a witness's recollection, and that the evidence was sufficient to

[1] This was a retrial. At the first trial, the jury acquitted Jones of attempted kidnapping, possession with intent to distribute a controlled dangerous substance and carrying a firearm during a drug trafficking crime. A mistrial was declared following the jury's failure to reach a verdict on the counts on which Jones was retried.

convict Jones of attempted carjacking and accessory after the fact to attempted second-degree murder.

BACKGROUND

Sergeant Peter Muollo of the Montgomery County Police Department, while on duty April 26, 2017, was driving in the area of Colesville Road and Dale Drive when two cars passed his vehicle on the left, in the "oncoming traffic lanes," and then stopped at a red light. The two cars turned; Sgt. Muollo followed and conducted a traffic stop. When he pulled over one of the vehicles, Sgt. Muollo testified, three people got out of one of the vehicles and told him someone had shot at their car. All three were "kind of frantically screaming" at him, Sgt. Muollo said. According to Sgt. Muollo, "[i]t was conveyed to me that the vehicle in the front, the black Dodge Challenger, had been shot at." Sgt. Muollo saw bullet holes in the hood, in the windshield and on the driver's seat. The driver of the car had been shot and was bleeding from the shoulder and chest. He said he was told the shots had been fired from a champagne-colored Cadillac Escalade. Sgt. Muollo went looking for the Cadillac Escalade. A "citizen" waived him down and advised him "that a subject in a white tee shirt had just ran through a yard carrying a backpack onto Pershing Drive." A second person also provided a description of a suspect.

Around the same time, Katherine Brent, a high-school student, was walking home with a friend in downtown Silver Spring when she witnessed a Cadillac Escalade speed through a residential neighborhood. She witnessed the vehicle slow down and a man

jumped out before the vehicle drove off. The man ran through the backyards carrying a backpack; the entire episode lasted two to three seconds. Shortly after, police vehicles sped by chasing the man. Describing him as a "[b]lack," person who "had a bag, white shirt, dark jeans . . . a white shirt and black jeans," Brent said that she saw numerous police cars nearby and approached them to tell officers what she had seen.

Sgt. Muollo turned his patrol car onto Pershing Drive and observed a "blue and white Volkswagen . . . in the middle of the street" with its doors open. Sgt. Muollo observed a person get "out of the driver's door, walk[] around to the passenger door and close[] the passenger door" and "then walk[] back" and get in the driver's seat. Sgt. Muollo saw "a black male in a white tee shirt walking towards this vehicle." That person matched the descriptions given to Sgt. Muollo. Sgt. Muollo called for additional units while his cruiser was "pretty much blocking that vehicle [Volkswagen] from being able to move forward."

Sgt. Muollo approached the Volkswagen and instructed the "subject with the white tee shirt" that he was going to pat him down. The subject initially was compliant. Sgt. Muollo then asked the subject to place his hands on the top of the car, at which time the officer noticed the suspect's hand bleeding. The subject initially complied and started to place his hands on the hood of the vehicle, but then took off running. Sgt. Muollo called for a backup and stayed with the vehicle to speak to the owner of the Volkswagen who spoke Spanish and a little English, prompting Sgt. Muollo to call for a translator.

Sgt. Muollo walked over to an "area of the port-o-john" where he initially saw the subject coming from and discovered a backpack "closer to the bushes like more concealed." Sgt. Muollo opened the backpack and found in it a "silver handgun, 45-caliber . . ." The handgun "had the magazine inside and the hammer was cocked back." The magazine was empty and there was a round in the chamber.

The man in the white t-shirt subsequently was detained. Sgt. Muollo went to where he was being held and identified him as the person he previously encountered at the Volkswagen. Sgt. Muollo also identified him in court as Jones.

Montgomery County Police Corporal Jason Halko had responded to Sgt. Muollo's call for assistance. Cpl. Halko started to chase the suspect on foot. He lost sight of him when the suspect jumped a fence but saw him when he was apprehended by other officers who found the suspect trying to conceal himself in a backyard. Cpl. Halko identified Jones in court as the suspect he had been chasing.

Olman Adalid Iscoa Doblado testified that he was doing construction work at a home in the same neighborhood when a black man carrying a "white shirt" and carrying a backpack approached him and asked to use his phone. Doblado testified: "I went out with some tools, and I put them in the van. And the person came, and he asked me to use my telephone to make a phone call. And I let, I gave it to him. And I, he called someone. I don't know who." The man also asked for a ride, but Doblado declined his request. When Doblado gave the person the phone, Doblado said he then "went back [inside the house] to bring more tools." When Doblado returned, he saw the man get into

the car driven by his co-worker, Juan Carlos Amaya Caballero, who was doing carpentry work with Doblado April 16 at 424 Pershing Drive. When police arrived, Doblado said, the man got out of the car with the backpack and tossed the backpack near a portable toilet.

Caballero, who testified he was doing carpentry work with Doblado, said he was preparing to leave work for the day in his Volkswagen. After he got into his car, a man (later identified as Jones) he had never seen before got into the passenger seat of his car carrying a backpack. The person was speaking "very fast" and "looked nervous." Caballero did not know what the backpack contained. Caballero, who said he only spoke a little English, acknowledged telling police he was scared because Jones was black. Jones used the words "kill" and "go," but Caballero was confused about what Jones meant. He testified that the man got out of the car, leaving the door open, and Caballero closed it. He said the man returned, got back into the car but did not say anything. He said the officers confronted the man in his car and the man initially complied with their instructions, but then fled. Caballero testified that the backpack recovered by officers looked like the one the man was carrying.

On redirect examination, Caballero testified that the person said, "go many times." On cross-examination, Caballero admitted the person who got in the car did not make a threatening gesture. Caballero also acknowledged that he previously testified that he was not sure if the person who got in the car, whom he had difficulty understanding, said someone wanted to hurt him. Caballero also agreed that he previously testified that the

person said something "like kill." On redirect examination, Caballero was shown his written statement and testified that the person who got in the car looked "concerned, aggressive." On recross, Caballero admitted that he previously had testified that he was afraid because the person was "African American."

While speaking to officers, Brent, the high-school student, again saw the same man who had jumped out of the car running across the street. She pointed him out and, she said, "about five police officers went chasing after him." Officers eventually caught a man later identified as Jones. After police apprehended Jones, they brought Brent to the scene of the arrest - about 30 to 45 minutes from the time Brent first contacted police.

According to Brent, the officer "said that they caught the guy that I pointed out to them, and then once we passed, he asked, is this the guy that you saw?" Brent identified him as the person she saw jump out of the Cadillac Escalade. Testifying at the suppression hearing, Brent said it caught her attention when she witnessed someone jump out of the car around "4:00 or 5:00" in the afternoon. On cross-examination, Brent testified that she saw the person for only two seconds when he jumped out of the car and she did not see any tattoos on him. Brent testified she saw the suspect twice before the show-up identification, each time for about two seconds (the first time, two to three seconds). The person she saw was African American, "[m]edium to dark" complexion, with "[s]hort hair," wearing "[b]lack jeans and a white shirt." Asked by the prosecutor whether she had any doubts that the person she identified was the "same person that [she]

had previously seen in the Cadillac and then also running down the street," Brent answered no.

Another Montgomery County Police Officer, Wayne Cummings, testified that he responded on April 26, 2017 to a call of shots fired involving two vehicles. Officer Cummings confirmed that he took "a girl named Katie [Brent] to a show-up identification." According to Officer Cummings, Brent "informed the police that she had seen an individual that had jumped from an SUV that was involved in the shooting." Officer Cummings testified: "I advised her that the police had detained someone and I wanted her to look at him and see if it's possibly the person that she saw jump out of the vehicle. I told her it may be the individual that jumped out of the vehicle, it may not be." Officer Cummings could not recall whether he slowed the car down or stopped, but Brent identified Jones as the man she saw. According to Officer Cummings, Brent "seemed pretty positive . . . it was not a question in her mind" and "it was pretty much a 'for sure' identification." The officer could not recall whether the suspect was in handcuffs but did confirm he was surrounded by police officers. Brent testified, however, that Jones was handcuffed and that there were police officers around him.

On cross-examination, Sgt. Muollo confirmed that he did not witness any shooting, and that he could not determine when the bullet holes in the vehicle were caused. Sgt. Muollo also testified that he did not observe the subject with a bag, observe him make any threats to the Caballero, the Volkswagen driver, or see him brandish a weapon.

Douglas Purcifull, a defense witness, testified that he was in his garage when he noticed a "very large police presence" in his neighborhood. When Purcifull went outside, he said, he saw "someone running across the street from my driveway." Purcifull described the person as an African American male, with "a green backpack on their back." Purcifull estimated that the person was in his "late-teens or 20s," but at a prior hearing, Purcifull testified that the person "was about 16 years old." Purcifull returned to his garage and then, "some period of time" after, "[I] saw out of the back of my garage a person at the back of my yard crossing from one direction to the other and scaling the fence of my neighbor's property." This person was not carrying a backpack and was "wearing black pants and white shirt." Purcifull assumed that the two persons he saw were different individuals.

Officer Sean Pierce, assigned to the K-9 Unit , brought his "firearms detection K-9" to the scene. Officer Pierce did not locate any evidentiary items with his dog. A homeowner, however, located a shell casing. Officer Charles Wigle was dispatched to the scene and recovered two shell casings on Belvedere Boulevard. Montgomery County Police Detective Raymond Collins, who was assigned to the case, submitted the shell casings and handgun for firearms examination as well as fingerprint and DNA examination. Detective Collins also confirmed that the Cadillac Escalade was stopped within 10 minutes of the recovery of evidence and of a suspect. The occupants of the Cadillac Escalade were removed from the vehicle; the driver was named Jeremy Smith. The following stipulations were entered into evidence:

> [T]he 45-caliber gun recovered from the bag was test-fired and the casings from the 45-caliber gun matched casings from the shooting on April 26, 2017; the casings and gun were tested for fingerprints, and no comparison of any person was able to be made; gunshot residue was found on Jeremy Smith but not on Jones; and Jones previously was convicted of a crime that disqualified him from possessing a regulated firearm.

DISCUSSION

I. Show-up Identification

Prior to trial, Jones filed a motion to suppress the show-up identification. The circuit court denied Jones' motion. The court determined that there was no evidence that police did anything to create an impermissibly suggestive identification procedure, stating that the show-up was not "overly suggestive" and that it was "properly conducted." The court also ruled the identification was reliable.

On appeal, Jones argues that the court erred in denying his motion to suppress the show-up identification. Jones further argues that the show-up identification procedure was inherently suggestive, leading to an unreliable identification. The State responds that the identification was not impermissibly suggestive, and the circuit court rightly denied Jones' suppression motion because the show-up identification was properly conducted, reliable, and was not an unduly suggestive procedure.

In reviewing a denial of a motion to suppress, this Court has noted that "'we confine ourselves to what occurred at the suppression hearing[,]"and "[w]e view the evidence and inferences that may be reasonably drawn therefrom in a light most favorable to the prevailing party on the motion[.]'" *Lindsey v. State*, 226 Md. App. 253,

262 (2015) (quoting *Gonzales v. State*, 429 Md. 632, 647 (2012)), *cert. denied*, 447 Md. 299 (for2016). "[We] will uphold the motion court's finding unless they are clearly erroneous. We must make an independent constitutional evaluation, however, by reviewing the relevant law and applying it to the unique facts and circumstances of the case." *Thomas v. State*, 213 Md. App. 388, 416 (2013) (quoting *In re Matthew S.*, 199 Md. App. 436, 447 (2011)).

A pretrial identification will be excluded as a violation of due process only if it "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384 (1968). In evaluating the admissibility of an extrajudicial identification, the courts follow a two-step inquiry: (1) whether the identification process was impermissibly suggestive, and (2) whether, under the totality of the circumstances, the identification was reliable. *Jones v. State*, 395 Md. 97, 109 (2006).[2] If the answer is "no" to the first step (if the procedure is not impermissibly suggestive), the inquiry stops there, and both the extra-judicial and the in-court identification are admissible at trial. If the answer is yes to the first step, the court proceeds to the second step. *Id.* If a *prima facie* showing is made that the

[2] On appeal, this Court will review "the evidence and inferences that may be reasonably drawn therefrom in a light most favorable to the prevailing party on the motion," and uphold the motion court's factual findings unless clearly erroneous, but will "make an independent constitutional evaluation, however, by reviewing the relevant law and applying it to the unique facts and circumstances of the case." *In re Matthew S.*, 199 Md. App. at 447.

identification was impermissibly suggestive, then the burden shifts to the State to show, under a totality of the circumstances, that it was reliable.

Importantly, the "[t]he accused . . . bears the initial burden of showing that the procedure employed to obtain the identification was unduly suggestive." *In re Matthew S.*, 199 Md. App. at 447 (quoting *James v. State*, 191 Md. App. 233, 252 (2010)). If the defendant shows that the identification procedure was impermissibly suggestive, "[t]he State has the burden to show, 'by clear and convincing evidence, that the independent reliability in the identification outweighs the corrupting effect of the suggestive procedure.'" *Id.* (quoting *Thomas v. State*, 139 Md. App. 188, 208 (2001)). In undertaking this review, we will uphold the motions court's factual findings, unless they are clearly erroneous, and we review *de novo* the constitutionality of the identification procedure. *Id.* (citing *Gatewood v. State*, 158 Md. App. 458, 475-76 (2004), *aff'd* 388 Md. 526 (2005)).

A. Show-up identification was not impermissibly suggestive.

One type of extra-judicial identification is a show-up, in which a victim is presented with a single potential suspect. This type of procedure is permissible and may be justified "by the police's need to assess quickly whether they had the culprit, in which case the search could be concluded, or whether the culprit was still at large, in which case the suspect in custody could be released and the search could be continued while the trail was still fresh." *In re D.M.*, 228 Md. App. 451, 474 (2016).

Although by "its very nature," a "one-on-one show-up is suggestive, just as 99 out of every 100 judicial or in-court identifications are suggestive . . .," the fact of "mere suggestiveness does not call for exclusion" of the identification. *Turner v. State*, 184 Md. App. 175, 180 (2009). In order to suppress a show-up identification, however, the procedure "must be not only suggestive, but *impermissibly* suggestive." *Id.* (emphasis in original). Contrary to Jones' position, show-up identifications are not *per se* unduly suggestive. Indeed, "[m]any self-evidently suggestive one-on-one show-ups shortly after a crime has occurred are deemed to be permissibly suggestive, and therefore unoffending, because of the exigent need to take quick action before the trail goes cold." *Id.* (citing *Billinger v. State*, 9 Md. App. 628, 636-37 (1970)). That is why the standard for a show-up identification is *impermissibly* suggestive, not just merely "suggestive." *Id.* This Court has recognized that a jury "is perfectly capable of weighing the pluses and minuses of such an identification." *Id.* The Court of Appeals has noted that prompt show-up identifications "fostered 'the desirable objectives of fresh, accurate identification which in some instances may lead to the immediate release of an innocent suspect and at the same time enable the police to resume the search for the fleeing culprit while the trail is fresh.'" *Foster v. State*, 272 Md. 273, 290 (1974) (quoting *Bates v. United States*, 405 F.2d 1104, 1106 (1968)).

In the case at bar, we are not persuaded that the circuit court committed any error in denying Jones' motion. Jones contends that the show-up was impermissibly suggestive because Brent testified that the officer told her "they caught the guy;" Jones

was handcuffed and surrounded by multiple police officers; and he was the only black male in handcuffs at the scene. The State responds that under similar facts, this Court has rejected the suggestion that such a show-up is impermissibly suggestive. *Anderson v. State*, 78 Md. App. 471 (1989) (holding that under these circumstances, in which the witness was transported to the scene in patrol car where he was exposed to radio traffic describing suspect, and at scene, suspect was face down on ground by "at least ten armed policeman," "typify the very nature of the one-on-one show-up at or near a crime scene in the immediate aftermath of a crime."). *Id.* "The reliability that is gained through the immediacy of the identification far outweighs the peripheral suggestiveness of the circumstances." *Id.*

Jones argues in support of his position that one of the witnesses, Brent, was told that "they caught the guy," and while that was her actual testimony, Brent did not remember whether the officer told her that the person "might or might not" be the person she saw. "Impermissible suggestiveness exists where the police, in effect, repeatedly say to the witness: 'This is the man.'" *Matthew S.*, 199 Md. App. at 448 (quoting *McDuffie v. State*, 115 Md. App. 359, 367 (1997)). Stated another way, "'[t]o do something impermissibly suggestive is . . . to feed the witness clues as to which identification to make. THE SIN IS TO CONTAMINATE THE TEST BY SLIPPING THE ANSWER TO THE TESTEE. All other improprieties are beside the point.'" *Id.* (emphasis omitted) (quoting *Conyers v. State*, 115 Md. App. 114, 121 (1997)).

In this case, Officer Cummings remembered telling Brent that it "might or might not" be the person she saw jump out of the vehicle earlier. Officer Cummings testified: "I advised her that the police had detained someone and I wanted her to look at him and see if it's possibly the person that she saw jump out of the vehicle. I told her it may be the individual that jumped out of the vehicle, it may not be." In reaching its ruling, the circuit court found both witnesses to be credible, but specifically referenced the officer's statement that he told Brent it might or might not be the correct person. According to Officer Cummings, Brent "seemed pretty positive . . . it was not a question in her mind" and it "was pretty much a 'for sure' identification." Thus, we agree with the State in that Brent expressed certainty about her identification and felt no pressure from Cummings to identify Jones.

The State further contends that even assuming that the officer did tell Brent that they "caught the guy," that sole circumstance of commentary alone did not create an *impermissibly* suggestive show-up. As we observed earlier, impermissible suggestiveness exists where "police repeatedly said to the witness, *'This* is the man.'" *Mendes v. State*, 146 Md. App. 23, 37 (2002) (emphasis in original) (quoting *McDuffie v. State*, 115 Md. App. 359, 366-67 (1997)). Here, Officer Cummings' instruction that it "may or may not" be the right person was different than stating "*This* is the man."

Jones relies on *United States v. Brownlee*, 454 F.3d 131 (3d Cir. 2006), a carjacking case. In *Brownlee*, the Court held that the show-up procedure utilized by the police to identify a suspect following a carjacking was unnecessarily suggestive, although

it ultimately concluded that the identification was reliable. The *Brownlee* Court relied on several factors: (1) the defendant was in handcuffs and near a police car when he was identified; (2) the show-up was conducted next to the stolen car; (3) the defendant was the only "suspect" presented to any of the eyewitnesses; (4) all four witnesses made their identifications while exposed to the influence of other bystanders or other eyewitnesses; and (5) there was no apparent reason why Brownlee and the eyewitnesses could not have been taken to the police station for a less suggestive line-up or photo array. *Id.* at 138. Jones compares *Brownlee* to the facts and circumstances here and insists that the time frame in his case is even more supportive of a finding that the show-up was impermissibly suggestive. *Id.* at 136. We disagree.

Brownlee is distinguishable in several respects. Additional facts and circumstances exist in *Brownlee* that are not present in this case. In *Brownlee*, there were four eyewitnesses who made their identification in front of one another and had time together in which to discuss the incident, increasing the likelihood that one person's identification would make the others less likely to reach a contrary conclusion. Here, Brent made her identification in the presence of a single police officer, and she did not give any indication she was aware of a specific crime of which Jones was accused. Thus, there was no exposure to the suggestive influence of others, contrary to what occurred in *Brownlee*. In addition, the identification in *Brownlee* also took place near a stolen vehicle in a case involving a carjacking, thus suggesting that the person had been caught in the act. *Id.* (observing it "creates the impression the police had caught him in the

stolen Jeep"). By contrast, nothing in the record indicates the show-up took place at the scene of any of the crimes Jones was suspected of committing, or that he may have been caught red-handed.

Jones also contends that there was no reason why he could not have been taken to the police station, along with the teenage witness, for a "less-suggestive line-up or photo array." He notes that approximately 30 to 45 minutes occurred between when Brent saw someone jump out of the Cadillac and the time of the identification, seeming to suggest that the police officers unnecessarily delayed the bringing of the eyewitness to the scene. Jones does not acknowledge, however, that the delay of 30 to 45 minutes occurred chiefly due to his own flight and attempted concealment from officers. The record does not suggest that, once Jones was apprehended, officers delayed in bringing Brent to the scene for the show-up. As noted previously, *supra*, the identification – done quickly following apprehension and close in time to the criminal incidents being investigated – allowed police to immediately confirm whether they had apprehended the right individual or whether there was still a suspect (believed to have been involved in a shooting) at large. Thus, these circumstances typified the type of emergent situation that justifies a show-up identification. *See Anderson*, 78 Md. App. at 494 (noting that circumstances of the identification "typify the very nature of the one-on-one show-up at or near a crime scene in the immediate aftermath of a crime").

We are not persuaded that the circuit court erred in denying Jones' motion. We agree with the State that the court found that Officer Cummings' instruction signaled to

Brent that she was under no obligation to make a positive identification. Jones failed to introduce any evidence that the police influenced Brent's thought processes prior to or during the show-up. Therefore, there was no evidence of improper police conduct, which is required to demonstrate that an identification procedure is impermissibly suggestive. *See Perry v. New Hampshire*, 565 U.S. 228, 241 (2012) (noting that the second step in the identification test only comes into play when the accused establishes improper police conduct). We agree with the motions court that Jones failed to carry his burden to demonstrate that the show-up identification procedure was impermissibly suggestive but will address the issue of reliability for completeness.

B. Show-up identification was reliable.

The reliability of the identification is assessed based on the "totality of the circumstances." *Turner v. State*, 184 Md. App. 175, 181 (2009). The Supreme Court has set out several factors in determining whether an identification is reliable:

> "[The] opportunity of the witness to view the criminal at the time of the crime; the witness' degree of attention; the accuracy of the witness' prior description of the criminal; the level of certainty demonstrated by the witness at the confrontation; and the length of time between the crime and the confrontation."

Neil v Biggers, 409 U.S. 188, 199-200 (1972); *accord Thomas*, 213 Md. App. at 417. "In addition to the five *Biggers* reliability factors, the suppression court may find that the factors identified in *Henderson*, many of which overlap with the *Biggers* factors, and other factors are relevant to the court's evaluation." *Small v. State*, 468 Md. 68 (2019) (citing *State v. Henderson*, 27 A.3d 872, 908 (N.J. 2011) (footnotes omitted).

The Supreme Court recently reiterated the test for suggestiveness: it requires a showing of "unnecessarily suggestive circumstances arranged by law enforcement." *Perry*, 565 U.S. at 248. The purpose of this standard "is to deter law enforcement use of *improper* lineups, showups, and photo arrays in the first place." *Id.* at 241 (emphasis added). With regard to the predicate showing of suggestiveness, this Court has noted: "To do something impermissibly suggestive . . . is to feed the witness clues as to which identification to make. *In re Matthews, S.*, 199 Md. App. At 448, quoting *Conyers v. State*, 115 Md. App. 114, 121 (1997).

The State contends that, even if Jones could demonstrate that the show-up was impermissibly suggestive, the identification of Jones was reliable under the totality of the circumstances. Jones, however, argues that the State failed to prove by clear and convincing evidence that the independent reliability in the identification outweighed the corrupting effect of the suggestive procedure. *Id.* at 447. Jones also contends that the court made no finding that an alternative to the show-up procedure was not possible. We disagree.

As the State responds, Brent's testimony covered nearly all of the following factors, *infra*.

The opportunity of the witness to view the criminal at the time of the crime. Although she only saw the man jump out of the Cadillac for a few seconds initially, she saw him again when he ran across the road while she was talking to the officers. This

provided Brent with a second opportunity and lengthened the overall amount of time for observation.

The witness's degree of attention. Brent's description of the event demonstrates a significant degree of attention. The Cadillac drove quickly through the neighborhood, drawing her attention to watch as the man jumped out of the vehicle once it slowed down. It was an unusual event that caused her to pay attention and to immediately contact police because of its uncommon nature.

The accuracy of the witness's prior description of the criminal. This factor is more difficult to gauge solely from the suppression hearing. Jones argues that Brent was able to offer only a general description. Her description of the suspect as a black male, medium to dark complexion, with short hair wearing black jeans and a white shirt was not tested against, for instance, a photograph of Jones at the time of his arrest.[3] The record does not establish that the description was reported prior to the show-up identification. Nothing in the suppression hearing record, however, suggests that her description was inaccurate.

The final two factors – **the level of certainty demonstrated by the witness at the confrontation** and **the length of time between the crime and the confrontation** – weighs in favor of reliability. Both Brent and Officer Cummings testified how certain Brent was that it was the same individual she saw earlier. Moreover, the identification

[3] Photographs and video evidence were introduced during the trial itself but were not part of the evidence at the suppression hearing.

occurred within 30 to 45 minutes of when she initially saw the man jump out of vehicle, a time during which she saw the person for a second time. We agree with the State that this short period of time provided a close temporal connection between the initial observations and the identification.

Moreover, Jones overlooked the fact that the Court in *Brownlee* ultimately concluded the identifications were reliable despite the suggestiveness. 454 F.3d at 140. As the State points out, the Court found the witnesses' opportunity to observe the perpetrator was "sufficient," at close range and in daylight, their degree of attention was substantial, their descriptions were general but fairly accurate, their certainty was absolute, and relatively little time had passed between the incident and the identifications (approximately 25 minutes). *Id.* These same factors are present in this case and support a finding of reliability. Here, Brent made an identification during daylight hours, paid close attention, was certain of her identification, and made the identification quickly after the incident (30 to 45 minutes).

Jones also argues that the error is not harmless. The State responds that even assuming that the show-up identification was both unduly suggestive and unreliable, the error was harmless when considered in light of the case against Jones. Error is harmless if "a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict . . . ." *Dorsey v. State*, 276 Md. 638, 659 (1976). The State is correct.

In this case, Brent's testimony helped connect Jones to a vehicle believed to have been involved in the shooting, but it was not the only evidence that did so. Two eyewitnesses (Caballero and Doblado) saw Jones with a backpack. Further, none of the evidence of the attempted carjacking came from Brent's testimony. Although the prosecutor did reference her testimony in closing argument, Brent's identification was by no means the sole piece of evidence connecting Jones to the crimes.

Finally, we do not agree with Jones that the State failed to prove by clear and convincing evidence that the independent reliability in the identification outweighed the corrupting effect of the suggestive procedure. *In re Matthew S.*, 199 Md. App. at 447. The circuit court found to the contrary that Officer Cummings did not influence Brent's thought process prior to or during the show-up. Therefore, there was no evidence of improper police conduct, which is required to demonstrate that an identification procedure is impermissibly suggestive. *See Perry*, 565 U.S. at 241 (noting that the second step in the identification test only comes into play when the accused establishes improper police conduct). We conclude, as did the motions court, that Jones failed to carry his burden to demonstrate that the show-up identification procedure was impermissibly suggestive, and that the identification was unreliable as measured by the *Biggers* factors.

II. Refreshed Recollection.

Jones argues that the circuit court abused its discretion by allowing the prosecution to refresh a witness's recollection with the witness's prior written statement. Jones avers

that a party's preference for a witness's pre-trial statement over a witness's in-court testimony statement is simply no foundation for "refreshing" the witness's memory with that preferred statement. Jones further states that the admission of the witness's prior written statement should not have come into evidence as substantive proof and that, as stated in *Farewell v. State*, 150 Md. App. 540, 578 (2003) (quoting *Goings v. United States*, 377 F.2d 753, 958 (1967)), "if a party can offer a previously given statement to substitute for a witness's testimony under the guise of 'refreshing recollection,' the whole adversary system of trial must be revised." Jones argues that Caballero did not testify that he did not remember or that his memory needed to be refreshed. Further, Jones maintains that the proper foundation for refreshing the witness's memory was never laid and, thus, the introduction of the prior witness's statement constituted the improper admission of hearsay (*i.e.* witness's statement to the police that Jones was "aggressive"). The State responds that the court properly permitted the State to refresh Caballero's memory based on the prosecutor's belief that Caballero's testimony was inconsistent with his written statement to police. The State also argues that if the court did abuse its discretion after all, any error was harmless.

In *Stouffer v. State*, 118 Md. App. 590, 626 (1997), *aff'd in part and rev'd in part on other grounds* in *State v. Stouffer*, 352 Md. 97, 99 (1998), this Court held that because the witness could not remember material facts of a phone conversation she had with the appellant, the State introduced her prior statement to refresh her recollection about their conversation. Because the witness used the statement to refresh her memory, "either

party had the right to examine her about it and the State did so on occasions when the witness gave inconsistent testimony" and, thus, the trial court had the discretion to allow the statement to be used for the purpose of recollection. *Id.* *See also* Md. Rule 5-802.1(e) (Statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule when the statement is "in the form of a memorandum or record concerning a matter about which the witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, if the statement was made or adopted by the witness when the matter was fresh in the witness's memory and reflects that knowledge correctly. If admitted, the statement may be read into evidence[,] but the memorandum or record may not itself be received as an exhibit unless offered by an adverse party.").

Here, Caballero, a State's witness, testified during cross-examination, that he did not recall that any of Jones' gestures were "threatening," although he previously wrote a statement in which he described Jones as being "aggressive." As a result, the prosecutor sought to refresh Caballero's recollection as to whether Jones acted in a threatening way. During cross-examination, Caballero had trouble recalling what he had previously told law enforcement of the incident.

The testimony alluded to by the State is as follows:

> DEFENSE COUNSEL: The person didn't make any gesture to you in a threatening manner in an attempt to try to hurt you?

CABALLERO: No.

Jones argues that the circuit court abused its discretion by permitting the prosecution to improperly refresh a witness's memory. The witness, Caballero, testified with the aid of a Spanish-speaking interpreter. On cross-examination, defense counsel asked whether Jones made "any gestures to [him] in a threatening manner in an attempt to try to hurt you?" Caballero answered, "No." On re-direct, the prosecutor engaged in the following questioning:

> PROSECUTOR: And in fact, you gave a written statement in Spanish to the detectives in this case. Is that right?
>
> CABALLERO: Yes.
>
> PROSECUTOR: And if I showed that to you, you would be able to read it. Right?
>
> CABALLERO: Yes.
>
> PROSECUTOR: If I show that to you, would that refresh your recollection as to what you remember about this event that was written the day that it happened?
>
> CABALLERO: Yes.

At that point, defense counsel objected, and the circuit court overruled the objection. After defense counsel objected to further questioning by the prosecutor based on a lack of foundation, the circuit court conducted a bench conference. During the conference, defense counsel argued that the prosecutor was improperly refreshing the witness's recollection. The prosecutor responded that the questioning was "responsive to the cross-examination about [Jones] not being aggressive." The court agreed it was "a

proper redirect area" and overruled the objection, noting that the defense counsel had questioned the witness about the subject. Defense counsel insisted that Caballero had never stated that he did not remember, but the court overruled the objection.

Following his review of his prior written statement, the following exchange occurred:

> CABALLERO: To me, yes. He had an attitude like that.
>
> PROSECUTOR: Like what? What was the word you used?
>
> CABALLERO: Like concerned, aggressive.
>
> PROSECUTOR: Right. You used the word aggressive, right?
>
> CABALLERO: Yes. That's what I put, what crossed my mind and I was able to write that.

The Court of Appeals has recognized that whether a witness's recollection "may be refreshed by a writing or by other means depends on the particular facts and circumstances of the individual case." *Germain v. State,* 363 Md. 511, 531-540 (2001) (the witness testified to a lack of memory and held that trial court should not have precluded petitioner from using a key State witness's pre-sentence investigation report to refresh that witness's recollection). Although "in many circumstances, an examining attorney must first establish that a witness's memory is exhausted before refreshing the recollection of that witness . . . laying such a foundation is not an absolute prerequisite." *Id.* (quoting *Oken v. State*, 327 Md. 628, 672 (1992) (internal citations omitted)). Instead, the question of refreshing a witness's recollection "depends upon the particular

circumstances." *Id.* In short, there is "no required, ritualistic formula for finding exhaustion of memory." *Id.* (internal citation omitted).

The decision on whether a witness's memory may be refreshed lies within the discretion of the trial court. As one treatise described the process:

> Once a witness has been asked a question on a subject as to which the witness has, or once had, first-hand knowledge, but has testified to (or otherwise demonstrated) lack of recollection of the answer, counsel may attempt to refresh the witness's memory. Because whether there appears to have been some memory lapse depends upon the circumstances of each case, it is in the court's discretion whether to permit refreshing recollection.

Lynn McLain, *Maryland Evidence State and Federal* § 612:1 (Sept. 2019 Update, West 2020). McLain further states: "The memory must be refreshed, so that the witness is testifying from revived memory, not reading from the exhibit used to 'refresh memory.'" *Id.* "When a document or other item is used merely to refresh a witness's recollection, it is not that item, but rather the testimony of the witness, on the basis of revived memory, that comes into evidence." *Id.*

In the instant case, Caballero testified during cross-examination that he did not recall any "gestures . . . in a threatening manner" made by Jones. The prosecutor knew that Caballero had previously written a statement in which he described Jones as "aggressive" and sought to refresh his recollection as to whether Jones acted "in a threatening manner." This came following a cross-examination in which there were multiple instances of Caballero not recalling what he had previously told police. The prosecutor did not follow a ritualistic formula in first confirming Caballero's lack of

recall, but the circuit court was well within is discretion to allow Caballero's memory to be refreshed under these circumstances. *See Muhammad v. State*, 177 Md. App. 188, 273-74 (2007) (discussing the court's power to permissibly manage the orderly flow of a trial and the reception of evidence).

We also accept the State's argument that even if the circuit court abused its discretion, the error was harmless. *See Dorsey*, 276 Md. at 659. The testimony that Jones was "aggressive" was in fact cumulative to the other evidence presented at trial. *See Dove v. State*, 415 Md. 727, 743-44 (2010) (explaining that evidence is cumulative when, beyond a reasonable doubt, the court is convinced there was sufficient other evidence to support conviction).

Caballero testified that when Jones entered his car, he had trouble understanding him, but he did pick up two words: "go" and "kill." He said Jones appeared "nervous" and, the second time he entered Caballero's car, he repeatedly used the word "go." Caballero testified he was scared when Jones entered his car. Jones' actions in entering a stranger's car, telling him to "go," using the word "kill," and scaring the driver would in fact support the conviction for attempted carjacking independent of the evidence that he was "aggressive." *Dove*, 415 Md. at 744 (observing that "cumulative evidence tends to prove the same point as other evidence presented"). We agree that the court properly allowed the State to refresh Caballero's memory.

III. Sufficient Evidence.

At the conclusion of the State's case, defense counsel moved for judgment of acquittal. The motion was denied. The motion was renewed and again denied at the conclusion of the evidence. Jones challenges the sufficiency of the evidence on two of the three counts for which he was convicted: attempted carjacking and accessory after the fact to attempted second-degree murder. Jones does not challenge the sufficiency of the evidence of his conviction for possession of a firearm after a disqualifying conviction. Jones further argues that the evidence presented, even when viewed in the light most favorable to the State, cannot support a finding beyond a reasonable doubt that Jones committed the disputed crimes.

In reviewing a claim that the evidence was insufficient to sustain a conviction, this Court must determine "whether, after considering the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *accord State v. Smith*, 374 Md. 527, 533 (2003). The reviewing court must "defer to any possible reasonable inferences the trier of fact could have drawn from the admitted evidence . . . ." *Derr v. State*, 434 Md. 88, 129 (2013) (quoting *Titus v. State*, 423 Md. 548, 577-58 (2011)). The reasonable doubt standard requires that the finder of fact reach a "subjective state of near certitude" of the defendant's guilt. *Jackson*, 443 U.S. at 315.

It is not the court's role to "retry the case," *Smith v. State*, 415 Md. 174, 185 (2010), or to "re-weigh the credibility of witnesses or attempt to resolve any conflicts in

the evidence." *State v. Mayers*, 417 Md. 449, 466 (2010) (quoting *Smith*, 415 Md. at 185). It is the job of the jury to view the evidence, to observe the demeanor, and to assess the credibility of witnesses during testimony. *Id.* Ultimately, it is up to the jurors to view the evidence and they are free to believe or discount the witness's testimony. *Pryor v. State*, 195 Md. App. 311, 329 (2010). Moreover, "[w]e do not second-guess the [fact-finder's] determination where there are competing rational inferences available." *Smith*, 415 Md. at 185. We also do "not decide whether the [fact-finder] could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence." *Id.* at 184 (citation omitted). To the extent our inquiry requires us to interpret a statute, we apply a *de novo* standard of review, applying the ordinary principles of statutory construction. *See, e.g., Tarray v. State*, 410 Md. 594, 607-09 (2009).

A. Attempted Carjacking.

The State argues that the evidence was sufficient to convict Jones of attempted carjacking. Jones, however, argues that the evidence was insufficient to convict him of attempted carjacking because there was no evidence of any attempt to take Caballero's car "by application of force or violence." Jones maintains that there was insufficient evidence that he put Caballero "in fear through intimidation or threat of force or violence." He further avers that Caballero's description of him as "nervous," "concerned," and "aggressive" were insufficient.

The carjacking statute provides in pertinent part:

> (b)(1) An individual may not take unauthorized possession or control of a motor vehicle from another individual who actually possesses the motor vehicle, by force or violence, or by putting that individual in fear through intimidation or threat of force or violence.

Md. Code (2012, Repl. Vol.), Criminal Law Article ("CL") § 3-405(b)(1). *See Harris v. State*, 353 Md. 596, 610 (1999) ("We hold that the intent element of carjacking is satisfied by proof that the defendant possessed the general criminal intent to commit the act, *i.e.*, general intent to obtain unauthorized possession or control from a person in actual possession by force, intimidation or threat of force.").

Attempt, on the other hand, requires that an individual take "a substantial step, beyond mere preparation, toward the commission of a crime." Md. State Bar Ass'n, *Maryland Criminal Pattern Jury Instructions* ("*MPJI-Cr*") 4:02 (2nd ed. 2018). The State must show that both a substantial step occurred and that the defendant "intended to commit the crime." *Id.* Therefore, the test here is a sufficiency test, which determines whether the Jones took a "substantial step" toward the commission of a carjacking, with the "specific intent" to commit the carjacking by putting Caballero in fear through "intimidation or threat of force or violence." Additionally, this Court "has also emphasized that when considering whether there has been a threat of force or intimidation, an objective test must be employed. This test should consider whether an ordinary, reasonable person under the circumstances would have been in fear of bodily harm." *Spencer v. State*, 422 Md. 422, 434 (2011).

Here, Caballero got into his vehicle after a long day of work when Jones, whom he had never seen or met before, entered his vehicle and got into the passenger seat while carrying a backpack. Caballero spoke very little English. According to his testimony, Caballero acknowledged that he was scared because Jones was black. As mentioned in Section II, *supra*, Jones used the words "kill" and "go," although Caballero was confused as to what Jones was talking about. Jones got out of Caballero's car at one point, leaving the passenger door open. Caballero got out of his car to close the passenger side door. Upon returning to the driver's seat, Jones again entered Caballero's car and told him to "go" several times. At that point, police blocked Caballero from moving his vehicle, and Caballero told Jones that he could not move the car.

We agree with the State that there is no dispute that Jones entered Caballero's car without permission. As the applicable statute states, "An individual may not take unauthorized possession or control of a motor vehicle from another individual . . . *by putting that individual in fear through intimidation or threat of force or violence*." (Emphasis added). Jones did not "take unauthorized possession or control of a motor vehicle," and thus did not commit the crime of carjacking.

The evidence supports the fact that Jones took a "substantial step, beyond mere preparation" towards the crime of carjacking. However, we agree that there was no evidence of "force or violence," but Jones did commit attempted carjacking "by putting that individual in fear through intimidation or threat of force or violence." *See* CL § 3-405(b)(1). Jones twice entered Caballero's car without permission and repeatedly told

him to "go" in an aggressive manner.[4] *See supra Section II*. Caballero's testimony supported the element of "fear through intimidation." Jones argues that "Caballero did not testify that something Jones said or did put [Caballero] in fear through intimidation or threat of force or violence," and that the "only reason he gave for the fear was the fact that Jones is African American." Jones also argues that there is no evidence that Jones stated to Caballero or intimidated to Caballero that he was in possession of a gun or some other weapon. Caballero, however, was scared when Jones entered the car, stating that Jones acted in a nervous, concerned, and aggressive manner, and that Jones used the word "kill" and "go." This behavior signaled a forceful command for Caballero to drive him away.

In *Price v.* State, 111 Md. App. 487, 494 (1996), we decided an attempted carjacking case where the defendant walked behind the victim, said "Shut up, bitch," and had his hand placed near his waist. The victim was "in fear at that time" and ran away as she believed the defendant had a gun and was going to kill her. The victim further testified that the defendant's orders frightened her. *Id*. Similarly, here, Jones was a stranger and entered into Caballero's car without his permission. He also ordered Caballero to "go" multiple times. Despite there being a language barrier, Caballero testified that that he was fearful based on the statements from Jones that he could understand. We also accept the State's argument that it is hard to imagine that someone

[4] Jones instructed Caballero to "go" multiple times in the hopes that Caballero would drive him away.

would *not* be fearful and intimidated if a nervous stranger suddenly entered their car without permission and used the words "go" and "kill."

While Jones argues that there is no evidence that Caballero was injured, that Jones ever touched Caballero or made any contact with his person, or that Jones ever tried to touch Caballero or make contact with him, this is not relevant. *See Spencer v. State*, 422 Md. 422, 434 (2011) (When considering whether there has been a threat of force or intimidation, an objective test must be employed; in other words, whether an ordinary, reasonable person under the circumstances would have been in *fear* of bodily harm."). Jones further avers that Caballero made no attempt to move his vehicle or flag down Sgt. Muollo to support Jones' argument that Jones did not intimidate Caballero; however, these facts are not persuasive as Caballero may have been too frightened to take any action. While Caballero confirmed that Jones, in getting into his car, did not make any gestures in an attempt to hurt him, Caballero was reasonably frightened by Jones' actions, in not knowing why Jones entered his car, or whether he had a weapon in his backpack. Thus, in telling Caballero to "go" and in getting into his vehicle without permission, Jones took a "substantial step" toward carjacking.[5] *See Young v. State*, 303 Md. 298, 312 (1985) (conduct shall be held to constitute substantial step if it is "strongly corroborative" of the actor's criminal intention).

B. Accessory after the fact to attempted second-degree murder.

[5] It is clear that the race of Jones, standing alone, would be insufficient without there being words, threats or other action that conveyed force or intimidation.

The pattern jury instruction for "accessory after the fact" describes the crime as follows:

> An accessory after the fact is a person who, with knowledge that a crime has been committed, assists the offender with the intent to hinder or prevent the offender's arrest, prosecution, or trial. In order to convict the defendant, the State must prove:
>
> (1) that the crime of (*felony*) has been committed;
> (2) that the defendant knew that the crime of (*felony*) has been committed;
> (3) that the defendant gave assistance to the person who committed the crime; and
> (4) that the defendant did so with the intent to hinder or prevent that person's arrest, prosecution, or trial.

MPJI-Cr 6:01.

In order to be guilty of attempted second-degree murder, a defendant must specifically intend to kill the victim. *Earp v. State*, 76 Md. App. 433, 440 (1988) ("a conviction for attempted second degree murder may only be sustained if the perpetrator is found to have harbored the intent to kill his victim").

Jones argues there is no evidence to support a rational inference that Jones knew of this other person's intent. Jones maintains that the evidence was insufficient to convict him of accessory after the fact to attempted second-degree murder because there was no evidence that he knew the gunman intended to kill the victim. He further avers that there was at most "strong suspicion" that he did anything with the backpack that was "intended to hinder anyone but himself in avoiding the consequences of any crime." Jones states that the State misses his argument because to prove that Jones was guilty as an accessory after the fact, the State is required to prove that Jones *knew* that the gun was fired with the intent to kill the victim(s). Jones further maintains that there is no evidence that the

shooter, before or after the shooting, announced his or her intent in firing the gun, no evidence that anyone else in the company of the shooter audibly or demonstrably encouraged the gun to be fired with the intent to kill, no evidence that the Jones saw the gun being fired and/or the direction in which the gun was fired, and no evidence that Jones saw or otherwise learned where the bullets struck.

Jones also argues that there is insufficient evidence to prove that Jones acted in an effort to assist the shooter in order to avoid the consequences of his or her attempted second-degree murder, or that Jones ever opened the backpack in which the gun was discovered or otherwise knew that the gun was in the backpack. In response, the State argues that the evidence was sufficient to justify the inference that whoever fired the weapon intended to kill the victim(s). We agree with the State.

It is clear that a crime of attempted murder had been committed (someone in the car opened fire on the Dodge Challenger, and the shots injured one person and left bullet holes in the car); Jones knew that a crime of attempted murder had been committed (a shooting took place while Jones was in the vehicle where the gun was used); Jones gave assistance to the person who committed the crime (he fled with the weapon used in the shooting in his backpack and later concealed it near some bushes); and Jones did so with the intent to hinder or prevent that person's arrest, prosecution, or trial (this can be inferred by the fact that he tried to escape by getting into Caballero's vehicle, he ran away from the officers, and he threw the backpack near a portable toilet, which was later found by officers). The backpack contained a handgun that was connected to the scene of

the shooting through shell casings. Jones attempted to hide from the police officers, which also indicates that he was avoiding being apprehended for criminal behavior.

Jones argues that there was no evidence he knew Smith intended to kill anyone. We disagree. The evidence of bullet holes in the windshield, hood, and car seat, along with the injuries to a victim, demonstrated the requisite intent that the shots were meant to kill, not merely fired accidently or as a warning. *See Jones v. State*, 440 Md. 450, 457 (2014) (noting that a finder of fact may, but need not, infer that the defendant intended the natural and probable consequences of the defendant's actions). Jones also argues that there was no evidence that he was attempting to assist anyone but himself. We disagree. Taking the gun out of the Cadillac made it harder for police to connect Smith with the crime and concealing the weapon in a backpack in bushes benefited both Smith and Jones. We conclude that these facts allowed jurors to put together what had occurred on April 26, 2017.

Finally, the fact that Jones was seen jumping out of the Cadillac with a backpack that contained a handgun that was connected to the scene of the shooting, which he later concealed near some bushes, shows that Jones, with knowledge that a crime had been committed, assisted "the offender with the intent to hinder or prevent the offender's arrest, prosecution, or trial." *State v. Hawkins*, 326 Md. 270, 279 (1992). Accordingly, we conclude that the evidence was sufficient to sustain the convictions for accessory after the fact to attempted second-degree murder.

IV. The circuit court did not abuse its discretion in denying the Motion for a New Trial.

Jones contends that the circuit court abused its discretion by failing to grant his motion for a new trial. His argument is the same as he puts forth as to the insufficiency of the evidence and is equally without merit.

"A trial judge may order a new trial if the court finds it is in the interest of justice to do so." *Williams v. State*, 462 Md. 335, 344 (2019). That decision is "ordinarily reviewed under the abuse of discretion standard." *Id.* (citing *Buck v. Cam's Broadloom Rugs, Inc.*, 328 Md. 51, 57 (1992)). "Generally, abuse of discretion is the appropriate standard because the decision to grant or deny a motion for a new trial . . . 'depends so heavily upon the unique opportunity the trial judge has to closely observe the entire trial, complete with nuances, inflections, and impressions never to be gained from a cold record.' " *Id.* at 344-45 (quoting *Buck*, 328 Md. at 59). This is a "deferential" standard. *Id.* at 345. To reverse a circuit court's exercise of discretion, "the reviewing court must find that the degree of probable prejudice [was] so great that it was an abuse of discretion to deny a new trial." *Id.* (internal quotation marks omitted) (quoting *Merritt v. State*, 367 Md. 17, 29 (2001)).

Jones avers that the sufficiency and weight of the evidence should not have led to his convictions. In this case, the circuit court, as was required, heard the evidence in its entirety, considered, and denied Jones' motion for a new trial. We have discussed *infra*

the evidence presented which makes abundantly clear that the circuit court did not abuse its discretion in denying the motion for a new trial.

V. The circuit court permissibly corrected its mistake in pronouncing Jones' sentence under Md. Rule 4-345.

Jones contends that the circuit court violated Md. Rule 4-345(c) by improperly correcting its sentence on attempted carjacking, altering the sentence from 10 years to 15 years. He maintains that there was no "clear or obvious" mistake for the circuit court to correct under Md. Rule 4-345(c). Jones asks this Court to remand the case in order to vacate the 15-year sentence and reimpose the 10-year sentence for attempted carjacking. We disagree with Jones.

The pertinent parts of the circuit court's pronouncement of the sentence occurred as follows:

> COURT: The sentence of this Court is, for Count 1, which I'm showing as attempted carjacking, I'll sentence you to 10 years to the Department of Corrections. Now, I may be a little unclear. Can he still be violated in Virginia, or has he been?
>
> ***
>
> COURT: On Count 2, possession of a firearm after having been convicted of a disqualifying crime, and in this case, two disqualifying crimes, I'll sentence him to 15 years to the Department of Corrections. Five of that can't be paroled, and you can't be - - and I'll run that consecutively to Count 1. Count 3, accessory after a fact to attempted second-degree murder, the Court will sentence you to - - Count 2, I sentenced you to 15 years, correct?
>
> DEFENSE COUNSEL: Yes, sir.

COURT: Count 3, I'll sentence you – and that's the maximum for that offense. Count 3, I'll sentence you to a maximum for the accessory after the fact to attempted second-degree murder, which seems rather low, but that's what it is, 10 years to the Department of Corrections to run consecutively to Counts 2 and 1. The only reason I only did 10 on attempted carjacking, as I said, because it wasn't a consummated act and there was no injury inflicted. That's a total of 15, 25, 35 years, if my math is correct. And did I miss some –

PROSECUTOR: I think he can only get five on Count 3, Your Honor, unless it's an actual completed murder, is the way I read the statute. Accessory after to any felony is a five-year offense unless it's a first or second-degree murder, in which case, it's a 10-year offense, is that way I read the –

COURT: Is that the way you read it, Mr. Johnson?

DEFENSE COUNSEL: Yes, Your Honor.

COURT: All right, 10, 15. All right, give me a second. All right, I don't want to renege on what I said on the – well, 10, 15, 25, 30. All right, *the Court [sic] intent when I came out here was to give the defendant a 35-year executed sentence.* I will stand by the fact that I didn't think attempted carjacking should be the maximum, which I understand is 30 years. But in light of *my correction, or the correction* from the State and the Defense on Count 3, I'm going to rescind what I said earlier with respect to Count 1.

DEFENSE COUNSEL: And just so the record is clear.

COURT: I'm going to –

DEFENSE COUNSEL: --we would object to that rescission. We think Your Honor—

COURT: Okay.

DEFENSE COUNSEL: --has already sentenced.

COURT: Okay. I am going to – and I find that my sentence hasn't been completed, but even if it has, I'm going to sentence the defendant to Count

1, 15 years to the Department of Corrections. Count 2, we agree the maximum is 15 on that, yes?

PROSECUTOR: Twenty, Your Honor.

COURT: Oh, then I may, I'm all out of whack here. I see. I was looking at the – okay. Give me a second.

PROSECUTOR: Your Honor, you may be correct.

COURT: Yes, check that out, because I thought –

PROSECUTOR: No, it's 15.

COURT: -it was mandatory five, but cannot—

PROSECTOR: I have 15.

COURT: --could not exceed 15.

PROSECTOR: Yes, Your Honor.

COURT: Is that what you have, Mr. Johnson?

DEFENSE COUNSEL: Yes, sir.

COURT: Okay. All right, so 15. All right. So give me a second here. All right. So on Count 1, I'll sentence the defendant to 15 years to the Department of Corrections. Count 2, I'll sentence the defendant – that's the possession of a firearm after being convicted of a disqualifying crime – to the maximum 15 years to the Department of Corrections to run consecutive with Count 1. And Count 3, I'll sentence the defendant to the maximum, which both sides agree is five years, to the Department of Corrections to run consecutive. Just to point out, so that's a total of 35 years. I'll give the defendant credit for 687 days. *I just want to reiterate the intent of the Court was to give an overall sentence of 35 years, which the Court understands the entire, all the crimes.* I was mistaken with respect to Count 3 as to what the maximum was. But I believe that I'm consistent with what I was saying on Count 1. I didn't believe it deserved 30, and I went 10 to get my total of 35. I understand the objection of the defendant. So it's 15, 15, and 5.

(Emphasis added).

The circuit court corrected its sentence under the authority provided by Md. Rule 4-345(c), although not specifically referring to the same. That provisions states: "(c) Correction of Mistake in Announcement. The court may correct an evident mistake in the announcement of a sentence if the correction is made on the record before the defendant leaves the courtroom following the sentencing proceeding." Md. Rule 4-354(c).

Jones does not make an argument as to the timing of the correction as being made after "the defendant [left] the courtroom following the sentence proceeding." He also does not dispute that the correction was made "on the record." Instead, he challenges whether there was an "evident mistake" that permitted the circuit court to revise its sentence.

"An appellate court reviews without deference the legal questions of whether a trial court made 'an evident mistake in the announcement of a sentence' under Md. Rule 4-345(c), and whether the trial court corrected such a mistake under Md. Rule 4-345(c)." *State v. Brown*, 464 Md. 237, 251 (2019). In *Brown*, the Court of Appeals considered for the first time what the phrase "evident mistake" means in the context of Md. Rule 4-345(c). *Id.* at 240. The Court first recognized the purpose of the rule itself: "On occasion, in a criminal case, a trial court may make a mistake when announcing a sentence; in other words, the trial court might announce a sentence that differs from the one that the trial court intended to impose." *Id.*

In *Brown*, the circuit court sentenced the defendant to "20 years, suspend all but time served, place him on two years supervised probation" on a count of conspiracy to rob with a dangerous weapon. *Id.* at 241. Although it affirmed his convictions, the Court of Special Appeals remanded the case after discovering that the commitment record, probation order, and docket entries did not reflect the circuit court's sentence. *Id.* at 242. On appeal, the State argued that the court's announcement of "time served" was an evident mistake, one that the court corrected by making "informal statements" that were "seemingly inconsistent" with a sentence of time served. *Id.* Brown maintained that the mistake was not "evident" and that the circuit court must expressly correct any mistakes on the record, which the court did not do. *Id.*

The Court of Appeals agreed with Brown, concluding that a mistake must be "clear or obvious," not "merely unusual or anomalous compared to other sentences" imposed during the same proceeding. *Id.* at 243. The Court held, an appellate court may find that a circuit court corrected an evident mistake "where the trial court acknowledges that it made a mistake in the announcement of a sentence, and indicates that it is corrected that mistake." *Id.*

Following the dictates of *Brown*, the circuit court complied with the dictates of Md. Rule 4-345(c). Here the circuit court announced that it had made a mistake in calculating the permissible sentence for each count, explained that it intended to impose an aggregate sentence for each count, explained that it intended to impose an aggregate sentence of 35 years for all the offenses, and then corrected the sentence for attempted

carjacking so that Jones would receive the intended 35-year aggregate sentence, actually using the term "correction." *See Brown*, 464 Md. at 244 (observing in Brown's case that "[a]t no point did the circuit court acknowledge that it had made a mistake . . . or indicate that it was correcting a mistake").

As discussed in *Brown*, the pertinent rule came about in response to a series of court decisions that treated imposed sentences as final, even though the judges made clearly evident mistakes in their sentences that were immediately brought to the courts' attention. *Id.* at 261-63. Amending the Maryland Rules was designed to allow for such errors to be corrected. *Id.*

The circuit court corrected its sentence, on the record, after determining that it could not impose its intended 35-year sentence because of its own mistake in calculating the permissible sentence for each count. Md. Rule 4-345 allows a court, under the limited circumstances proscribed by the rule (on the record, before the defendant leaves the courtroom) to fix such mistakes if errors are made. The circuit court followed the proper procedure and Jones' sentence will stand.

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