Circuit Court for Prince George's County
Case No. CT180380A

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 621

September Term, 2019

TAYON WRIGHT

v.

STATE OF MARYLAND

Graeff,
Nazarian
Arthur,

JJ.

Opinion by Arthur, J.

Filed: June 8, 2021

On the night of February 12, 2017, two men armed with handguns robbed a victim in Fairmount Heights and drove away in the victim's car. Later that night, police officers found the stolen car and pursued it into the District of Columbia, where two suspects fled on foot. The officers caught the passenger, but lost sight of the driver. A few minutes later, about two blocks away from the stolen car, other officers arrested Tayon Wright after seeing him running and trying to jump over a fence. A police officer identified Wright as the driver of the stolen car, and the victim identified Wright as one of the robbers.

After a three-day trial in the Circuit Court for Prince George's County, a jury found Wright guilty of armed carjacking and several related offenses. The court sentenced Wright to imprisonment for 30 years, with all but 10 years suspended, for armed carjacking; and a consecutive term of 20 years, with all but five years suspended, for the use of a firearm in the commission of a felony. Wright appealed.

Although we reject Wright's contention that the evidence was insufficient to support his convictions, we conclude that the circuit court erred by excluding evidence that, immediately after the officers searched Wright's pockets, one officer was holding a bag of white powder. Wright had offered that evidence to show that he had a reason to run that was unrelated to the crimes for which he was charged.

In light of that error, Wright is entitled to a new trial. This opinion will also discuss the admissibility of testimony from a defense expert regarding eyewitness identifications, because that issue may reoccur at a second trial.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Robbery

On the night of February 12, 2017, Marteaco Anthony parked his car, a red 2013 Hyundai Elantra, across the street from his home in Fairmount Heights. Shortly before midnight, he walked outside to retrieve a phone charger from his car. He used his keys to remotely unlock the doors.

When Mr. Anthony reached the end of his driveway, he saw, in his peripheral vision, that two men with handguns were running across his neighbor's lawn directly toward him. He immediately ran away. He reached the end of his street, about two houses away from his home, before he tripped over a tree stump and fell to the ground. By the time he stood up, the first assailant had caught up to him. The second assailant arrived a few seconds later.

A surveillance camera on the house next to Mr. Anthony's house recorded the initial moments in which he ran from the two assailants. Because the camera faced the backs of the assailants and both assailants had hoods over their heads, their faces are not visible.

In his testimony, Mr. Anthony described both assailants as male, around 18 to 20 years old, with brown skin, wearing dark clothing. He said that the first assailant was around 5 feet 8 inches to 5 feet 10 inches tall and had a "slender" or "thin" build. The second assailant was "a little bigger" and "taller" than the first. Both assailants wore ski masks covering "[e]verywhere on their face[s] . . . except the eye and upper nostril area."

The first assailant was wearing "ski gear or [a] heavy jacket," "dark pants" that "looked like ski pants," and black gloves. The first assailant carried a black handgun and the second assailant carried a silver handgun.

Mr. Anthony testified that, once both assailants caught up to him, they demanded money and whatever else he was carrying. He told them that he did not have any cash and that he only had a cell phone. The assailants took his phone and demanded his email password, which he provided. After searching his pockets, they took his watch and his car keys. At one point during this encounter, the first assailant used his handgun to strike the side of Mr. Anthony's head.

The first assailant walked back to Mr. Anthony's car and drove it back to pick up the second assailant. The assailants told Mr. Anthony to lie down on the ground, and he did so, before they drove away.[1]

Once the car had left the area, Mr. Anthony returned to his home and called 911 to report the robbery. The police soon arrived at his home, where he provided a written statement.[2]

B. Arrests of Kevin Sparrow-Bey and Tayon Wright

Corporal Timothy Metter of the Prince George's County Police Department was

[1] During the defense case, Wright introduced a surveillance video that appears to show that, moments after the robbery, the passenger stepped out of the stolen car and drove away in a separate vehicle.

[2] Some details that Mr. Anthony mentioned during these initial reports were not identical to the details he mentioned at trial. Most notably, he initially said that the men who robbed him were around 25 or 27 years old.

one of several officers who responded to a radio announcement about an armed carjacking of a red Hyundai Elantra. At around 12:30 a.m., Corporal Metter spotted the stolen car traveling about one mile from the scene of the robbery.

After Corporal Metter followed the stolen car around several turns, it began to accelerate above the speed limit. Corporal Metter pursued the stolen car to a residential neighborhood in the District of Columbia, where it struck a curb and sustained damage to its front right side. The stolen car came to a stop. The driver and passenger stepped out of the car and ran away on foot.

Corporal Metter testified that he was able to see both occupants as they bailed out of the stolen car. According to Corporal Metter, the driver was "noticeably taller and noticeably skinnier" than the passenger. The occupants "[a]ppeared to be male" and were "wearing dark clothing." Corporal Metter said that he got a "good look" at the passenger, but he did not see the driver's face or the color of the driver's skin. The driver was wearing a black jacket with its hood up. The jacket had a reflective logo on its chest.

Corporal Metter and another police officer stopped their vehicles and ran after the two suspects. The officers apprehended the passenger, but lost sight of the driver, who continued running toward nearby townhomes.

The passenger whom the officers apprehended was Kevin Sparrow-Bey. Sparrow-Bey was wearing a pair of white latex gloves and carrying a fully loaded silver handgun. He possessed a cell phone belonging to the victim, Mr. Anthony.

Meanwhile, several other officers arrived at the scene and began searching for the

other suspect. One officer saw Tayon Wright running near the corner of 58th Street S.E. and Southern Avenue S.E., about two blocks away from the stolen car. Wright tried to jump over a fence, but he got stuck on the fence poles. The officers pulled him safely to the ground and detained him.

Wright was wearing a dark hooded jacket with a Helly Hansen ("HH") logo on the chest. The officers searched Wright and recovered a black ski mask that would cover the lower part of a person's face. Wright also possessed a phone, a watch, an iPod, cash, and a small amount of marijuana.

The officers continued searching the area for a handgun. After a few minutes, an officer found a black handgun and a separate magazine in plain view at a nearby playground. The black handgun was located about one block away from the stolen car and one block away from where Wright was arrested.

C. Identifications of Kevin Sparrow-Bey and Tayon Wright

About five minutes after Sparrow-Bey was apprehended, Corporal Metter learned that a second suspect had been found. Corporal Metter drove two blocks to where Wright was being detained. There, he identified Wright as the man that he had seen running from the stolen car. According to Corporal Metter, the basis for his identification was the person's "height," "weight," and "clothing," specifically "the hood" of his jacket.

Meanwhile, a detective informed Mr. Anthony that the police had stopped two suspects. The detective asked Mr. Anthony to examine the suspects to see whether he might be able to identify them as the persons who robbed him. The detective drove past

Wright first and said that Wright was one of the two suspects. Mr. Anthony then viewed Sparrow-Bey and said that he recognized Sparrow-Bey as one of the men who had robbed him. After returning to where Wright was being detained, Mr. Anthony viewed Wright and said that he recognized Wright as the other man who robbed him. During both identifications, the officers escorted the suspect, handcuffed, about five feet away from the police vehicle where Mr. Anthony was seated.

At trial, Mr. Anthony again identified Tayon Wright as the first assailant. At a separate trial, Mr. Anthony had previously identified Kevin Sparrow-Bey as the second assailant.

Mr. Anthony's car was "considered totaled" because of the damage that it sustained in the high-speed chase. The police recovered a pair of blue or purple latex gloves, which did not belong to Mr. Anthony, in a compartment on the front passenger side door.

A few days after the arrests, the police returned Mr. Anthony's stolen cell phone to him. When Mr. Anthony activated his phone, he saw that the Instagram app was logged into Sparrow-Bey's personal Instagram account.[3]

D. Conclusion of the Trial

At the conclusion of its case, the State withdrew several counts, most of which

[3] One photo on Sparrow-Bey's Instagram account showed Sparrow-Bey standing next to a young Black man who is slimmer than Sparrow-Bey. When defense investigators later showed the photo to Mr. Anthony, Mr. Anthony said that he recognized the second person as "the skinny robber." The person in the photograph is not Tayon Wright.

related to allegations that Wright committed traffic violations while eluding the police. The court granted Wright a judgment of acquittal on the charge of conspiracy to commit carjacking. The court denied his motion for a judgment of acquittal as to all other counts.

In his defense, Wright claimed that he was mistakenly identified as the robber and driver of the stolen vehicle. Wright offered testimony that, at the time of his arrest, he resided a short distance (about three or four blocks) away from where he was arrested. The court precluded Wright from introducing evidence that, at the scene of his arrest, one of the officers was holding a bag of white powder. The court also precluded Wright from introducing expert testimony on the subject of eyewitness identifications.[4]

After deliberating for one day and sending seven notes to the court, the jury found Wright guilty on all counts that were submitted to it. Those counts were: armed carjacking; carjacking; armed robbery; robbery; conspiracy to commit robbery; first-degree assault; second-degree assault; use of a firearm in the commission of a felony; use of a firearm in the commission of a crime of violence; wearing, carrying, or transporting a handgun on his person; wearing, carrying, or transporting a handgun in a vehicle; theft of property with a value of at least $1,500 but less than $25,000; unlawful taking of a motor vehicle; unauthorized removal of property; and theft of property with a value of at least $100 but less than $1,500.

The court sentenced Wright to 30 years of imprisonment, with all but 10 years

[4] Additional facts regarding these two rulings will be included in the discussion section below.

suspended, for armed carjacking. The court sentenced him to five years for conspiracy to commit robbery and five years for the unlawful taking of a motor vehicle and made both of those sentences concurrent to his sentence for armed carjacking. The court sentenced him to a consecutive term of 20 years, with all but five years suspended, without the possibility of parole, for the use of a firearm in the commission of a felony. For sentencing purposes, the court merged the remaining convictions into the conviction for armed carjacking.

Wright noted a timely appeal.

DISCUSSION

In this appeal, Wright raises four issues.[5] This opinion will address these issues in the following order.

First, we will address Wright's contention that the trial court erred by excluding evidence that a police officer was holding a bag of white powder at the scene of his arrest. We conclude that the court erred and that this error was not harmless.

Next, we will address Wright's challenge to the trial court's ruling precluding expert testimony on the subject of eyewitness identifications. We conclude that the trial court abused its discretion when it precluded any expert testimony regarding the identification made by Corporal Metter. We perceive no such abuse of discretion in the court's separate ruling precluding expert testimony regarding the identification made by

[5] The Appendix to this opinion includes the questions presented in Wright's appellate brief.

Mr. Anthony.

Finally, we will address two challenges to the sufficiency of the evidence. We conclude that the evidence was sufficient to establish the elements of carjacking and to establish that Wright was one of the perpetrators. Accordingly, Wright may be retried on all counts for which he was convicted.

I.

Wright contends that the trial court committed reversible error when it excluded testimony and video evidence establishing that, immediately after the police officers arrested and searched him, one of the officers was holding a bag of white powder. For the reasons explained below, we agree.

In Wright's opening statement, defense counsel asserted that Wright was "just a couple of blocks from his home" when many police officers "descend[ed] on his neighborhood" trying to find the driver who had fled from the stolen car. Counsel claimed that Wright ran from the police and tried to jump over a fence out of fear that the officers would search him. Counsel told the jury that, when the officers searched Wright, they "found bags of marijuana, bags of cocaine[,] and monies in small denominations."

During its case-in-chief, the State introduced evidence that the police officers found marijuana and cash on Wright's person. The State did not present any evidence that the officers found cocaine.

Lieutenant Benjamin Habershon of the Prince George's County Police Department was one of several officers who responded to a radio call announcing that a suspect had

fled from the stolen car. Lieutenant Habershon testified that, when he arrived at the scene, he saw Wright running and trying to jump over a fence near the corner of 58th Street S.E. and Southern Avenue S.E. When Lieutenant Habershon stepped out of his vehicle, he saw that Wright was stuck on the fence. With the help of other officers, Lieutenant Habershon managed to pull Wright safely down to the ground.

Although he did not personally perform the search, Lieutenant Habershon watched as other officers searched Wright. Lieutenant Habershon recalled that the officers found "a skull cap, or a mask type of product, along with a phone, and . . . possibly some drug paraphernalia." During cross-examination, defense counsel asked Lieutenant Habershon to explain what he meant by "drug paraphernalia." Lieutenant Habershon answered: "I believe it was a small amount of marijuana found." During redirect examination, Lieutenant Habershon said that the amount of marijuana "may have been a legal amount of marijuana" for a person to possess in the District of Columbia.

Detective Patrick McAveety of the Prince George's County Police Department testified that, when he arrived at the corner where Wright was being detained, he recovered several items that apparently had been "set aside next to" Wright: "a black ski mask, cell phone, some money and personal items," namely "a watch and an iPod." Overruling a defense objection to the "[in]complete chain of custody," the court permitted the State to introduce the mask, phone, watch, and iPod into evidence.

As part of the defense case, Wright called Officer Jason White of the District of Columbia Metropolitan Police Department. In his testimony, Officer White explained

that he transported Wright from the scene of his arrest to a nearby police station. Officer White said that he "did a quick protective pat-down" of Wright before moving him into a police vehicle.

The defense offered into evidence an approximately three-minute excerpt from a video recorded by Officer White's body camera. The video shows two Prince George's County police officers escorting Wright, while handcuffed, to the rear passenger door of Officer White's vehicle. In the video, Officer White and two other officers are seen reaching into Wright's pockets and removing cash and a clear plastic bag that appears to contain marijuana.

The video further shows that, once Wright was seated in the vehicle, Officer White closed the door and turned around. When he did so, Officer White saw a Prince George's County police officer standing near the rear of the vehicle, holding a clear plastic bag containing a white substance. The officer holding the bag appears to be one of the officers who had just searched Wright's pockets.[6]

The prosecutor objected to the defense playing any audio along with the video, observing that the audio would include statements made by persons other than Officer

[6] The audio from the body camera recording reveals that, when Officer White saw the bag, he immediately asked whether Wright "had crack on him." According to the State, "it sounds as if the Prince George's County police officer responded to Officer White's question . . . by stating that the crack cocaine was 'right next to him' when Wright was 'down there,'" in some nearby location. The State argues that the other officer's statement "would have been inadmissible hearsay." Wright attempted to remedy the hearsay problem by subpoenaing the Prince George's County officer to testify about what he found; he told this Court that the officer or his colleagues would not cooperate in accepting service.

White. During an ensuing discussion, the trial judge commented that the "relevance" of the video was "not really clear[.]" Defense counsel explained that Wright sought to show that, when the officers searched him, they found cash, marijuana, and "a baggie of crack[.]" Defense counsel said that the "entire theory of this case for the defense" was that Wright "jumped that fence because he had these things in his pocket."

The State objected, arguing that any portions of the video after the officers finished searching Wright were "irrelevant." The court stated that any video after the search was "not going to be played" for the jury.

Defense counsel argued that the court should admit the video showing the bag and that Officer White should be permitted to testify that he saw the bag. Defense counsel argued that, even if Officer White might not be able to describe the item as "crack," Officer White could at least "say [that] he saw a baggie with white rock in it." The court responded: "No. I'm not going to allow that, what he's seeing in some other officer's hands." The discussion continued:

> THE COURT: I'm trying to figure out how does he know – unless he observed that Prince George's County officer doing something.
>
> [DEFENSE COUNSEL:] Your Honor, it's a fair inference that --
>
> THE COURT: I don't do inferences. I do facts only. I don't do inferences.
>
> [DEFENSE COUNSEL:] The fact is this officer is holding a bag of white rock substance in his hand. This Prince George's officer is holding a bag. He should be able to say I saw --
>
> THE COURT: I don't do inferences. I'm sorry.

The court said that Officer White could not testify about "what he saw in another officer[']s hands unless he actually saw that officer take it from the person of the defendant." The court ruled that Officer White could testify "only about what he did" and "what he saw on the defendant's person and what he recovered from the defendant's person[.]" The discussion concluded with this exchange:

> [DEFENSE COUNSEL:] Your Honor, I believe it is entirely appropriate, just for the record, to show what was recovered at this scene.
>
> THE COURT: By [Officer White], absolutely.
>
> [DEFENSE COUNSEL:] By anyone.
>
> THE COURT: We don't have that person. [Officer White] cannot say who it was recovered from or where it was recovered from. He can't say it was from the ground or from your client, can he? No. That's my problem.
>
> [DEFENSE COUNSEL:] He can say that he saw it right there.
>
> THE COURT: That's my problem. You can't get in evidence with an inference. You have to have a fact. He can either say he saw it, that officer recovered it from your client or from the scene, somewhere. It could be from anywhere. That's my problem.

In light of the court's ruling, the jury viewed a video excerpt that ended shortly before it showed the officer holding the plastic bag containing a white substance.

During closing argument, the prosecutor remarked that Wright lacked an innocent explanation for why he was "running across the street and attempting to hop a five foot wrought iron fence when there's nobody around." The prosecutor said: "There is no reason why you would be running from the police when you have . . . a teeny tiny baggie of marijuana because it's not a crime to have that marijuana on your person, period." In

its closing argument, defense counsel pointed to "the narcotics evidence" to explain why Wright ran from the police. Defense counsel said that a person would not want to be stopped by the police "having things like he had in his pocket." In rebuttal, the prosecutor reiterated the argument that Wright had no "reasonable explanation" for why he was running from the police.

On appeal, Wright contends that the trial court abused its discretion when it precluded Officer White's testimony and portions of the body-camera video. Wright notes that the authenticity of the video was not in question. Wright argues that Officer White had personal knowledge of what he saw at the scene, namely that another officer was holding "a baggie filled with a white rock substance." Wright also argues that the evidence tended to show that he "had crack cocaine on his person and thus had a reason to evade the police unconnected to his alleged involvement in the armed robbery." According to Wright, the exclusion of the evidence was harmful to his defense because, without that evidence, defense counsel "was only able to make a significantly less compelling argument that he attempted to evade the police because he had a small amount of marijuana in his pocket."

In response, the State contends that the trial court was correct in concluding that any evidence relating to the bag of alleged crack cocaine was inadmissible. The State argues that Officer White lacked "personal knowledge of where the baggie was found or whether it was recovered from Wright." The State also argues that, "absent a connection to Wright," any evidence that Officer White "saw crack cocaine in another officer's

hands was irrelevant."

Under Maryland Rule 5-602, "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." The State is correct in observing that Officer White lacked personal knowledge of where the other officer acquired the plastic bag. Anything Officer White might have learned about where the bag was found would have been second-hand information.

At trial, the defense did not attempt to elicit testimony from Officer White about where the bag had been found. The defense limited its proffer to testimony and video to establish that Officer White saw the bag in the other officer's hands. Wright is correct to observe that Officer White had personal knowledge of what he himself observed at the scene. Officer White, therefore, had the requisite knowledge to testify that he saw one of the other police officers at the scene holding a plastic bag containing a white substance.

The next question is whether the proffered evidence was relevant. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. We review without deference a trial court's determination of whether evidence is relevant. *See, e.g.*, *Fuentes v. State*, 454 Md. 296, 326 (2017).

By itself, the fact that an officer on the scene of Wright's arrest was holding a bag with a white substance had no bearing on any issue in the case. Defense counsel offered

the evidence about the presence of the bag at the scene to show that Wright had a reason to run from the police. The proffered relevance was conditional. The defense's theory of relevance would fail if, for instance, the officer found the bag from some other suspect at some other crime scene. The defense's theory of relevance would be valid only if the jury had some basis to conclude that the bag came from Wright.

Maryland Rule 5-104(b) provides: "When the relevance of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding by the trier of fact that the condition has been fulfilled." This Rule recognizes that the relevance "of an item or testimony . . . often turns on the existence of a preliminary or foundation fact or facts." 5 Lynn McLain, *Maryland Evidence: State and Federal*, § 104:2(a), at 163 (3d ed. 2013). In determining whether to admit evidence that may be conditionally relevant, a trial judge need not be personally satisfied that the foundational fact has been established. *Id.* § 104:2(b), at 163-64. Rather, the judge's role is to determine "only whether the evidence to prove the preliminary fact . . . would permit a reasonable jury to find that the preliminary fact exists." *Id.* § 104:2(b), at 163. If "a 'jury could reasonably find the conditional fact . . . by a preponderance of the evidence[,]" then the evidence should not be excluded as irrelevant. *State v. Sample*, 468 Md. 560, 598 (2020) (quoting *Huddleston v. United States*, 485 U.S. 681, 690 (1988)).

Principles of conditional relevance often come into play when a party offers evidence regarding some object alleged to be connected to a criminal defendant.

Generally, "'[p]hysical evidence need not be positively connected with the accused . . . to be admissible; it is admissible where there is a reasonable probability of its connection with the accused.'" *Boston v. State*, 235 Md. App. 134, 156 (2017) (quoting *Aiken v. State*, 101 Md. App. 557, 573 (1994)). If there is other evidence "sufficient to create a 'reasonable probability'" that the item was connected to a defendant, then it is "for the jury to weigh the evidence and make the ultimate determination on this point." *Grymes v. State*, 202 Md. App. 70, 104 (2011).

Here, the relevance of the officer's possession of the plastic bag depended upon the fulfillment of a condition, namely that the bag came from Wright. It is true that Wright could have satisfied that condition with testimony from a witness with personal knowledge of where the bag was found. The officer who found the bag or another witness who observed its discovery would have been able to testify on that point.[7]

Yet when a party offers evidence that may be conditionally relevant, the party is not required to satisfy the condition with direct testimony. A party can satisfy a requisite condition through reasonable inferences drawn from other evidence. Contrary to the court's suggestion, the test of admissibility here was not whether a witness directly testified that an officer found the bag on or near Wright. The appropriate question was whether all the evidence in the record was sufficient to support the inference that the bag

[7] At trial, the prosecutor remarked that the defense "could have subpoenaed" the officer holding the bag to have that officer testify about where that bag came from. Defense counsel said that the defense made "many attempts" to serve a subpoena on that officer. At oral argument, Wright told us that the officer or his colleagues had not cooperated in accepting service.

probably was found on or near Wright.

In our assessment, the evidence that had already been admitted was sufficient to support a reasonable inference, not mere speculation, that the bag came from Wright. The admitted evidence established that, when the police officers arrested Wright near the corner of 58th Street S.E. and Southern Avenue S.E., no other civilians were present. Lieutenant Habershon testified that he had observed other officers searching Wright in the moments after his arrest. The body-camera video shows that Officer White, with the help of two other officers, searched Wright's pockets before moving him into Officer White's vehicle. Immediately afterwards, Officer White saw an officer holding a plastic bag containing a white substance.[8]

The trial court was correct in observing that the bag "could" have come from "anywhere." It is certainly possible that the bag's presence in the officer's hands immediately after the search was coincidental. Yet it would be an understatement to say that a bag of white powder is not exactly standard police equipment. Contraband is not something that one ordinarily would expect an officer to bring to the scene of an arrest from some separate location. Absent some additional facts pointing to some alternative explanation, a fact-finder could reasonably conclude that it was more probable than not that the officer acquired the bag at the scene of Wright's arrest.

[8] Wright asserts that the officer holding the bag "had just searched Mr. Wright incident to his arrest." That assertion may or may not be correct, but the video evidence would allow a fact-finder to assess whether the officer holding the bag is the same person seen searching Wright (or, perhaps, a person standing next to Wright when Officer White first arrived).

We conclude, therefore, that the trial court erred when it excluded Officer White's testimony and body-camera video on the ground that the evidence was irrelevant.

Wright argues that this error cannot be said to be harmless beyond a reasonable doubt. As Wright observes, the State repeatedly asserted during closing argument that Wright had no reason to run from the police unless he had committed the robbery. Under these circumstances, we cannot assert a belief beyond a reasonable doubt that the exclusion of evidence "concerning the other motivations that 'may be fully consistent with innocence' of the crimes for which he was being tried" (*Thompson v. State*, 393 Md. 291, 315 (2006)) could not have affected the verdict. The State has not even argued that the exclusion of this evidence was harmless.

In sum, we conclude that the trial court erred when it excluded testimony and video evidence establishing that, immediately after the officers searched Wright, one of the officers present was holding a bag of white powder. Because that error cannot be said to be harmless, Wright's convictions must be set aside. He is entitled to a new trial.

At a retrial, the court should not exclude the same evidence as irrelevant. If there is still any controversy on the matter, the State may bring in other evidence to dispute the conclusion that the officer found the bag on or near Wright. *See Marshall v. State*, 85 Md. App. 320, 324-25 (1991) (citing *Kosmas v. State*, 316 Md. 587, 600-01 (1989)). Ultimately, it should be up to the jury to decide the significance of that evidence.

II.

As stated above, we have concluded that the trial court committed reversible error

when it excluded evidence that a police officer possessed a bag of white powder at the scene of Wright's arrest and search. Separately, Wright contends that the trial court abused its discretion by precluding him from presenting expert testimony regarding eyewitness identifications.

Because this testimony is likely to be offered again at a subsequent trial, we shall discuss the court's rulings on the admissibility of that testimony. We conclude that the court abused its discretion when it precluded expert testimony regarding the identification made by Corporal Metter. We see no such abuse of discretion in the court's subsequent ruling to preclude expert testimony regarding the identification made by Mr. Anthony.

A. The Defense Expert Witness Notice and the State's Motion in Limine

Six weeks before his trial was scheduled to begin, Wright filed a notice informing the State that he intended to offer expert testimony from Nancy Franklin, Ph.D. The notice described Dr. Franklin as an "expert in psychology and cognition." The notice stated that Dr. Franklin would testify about "factors that influence the accuracy of eyewitness perception, memory, and identification of criminal suspects."

The notice included a summary of 15 "areas" which would be the "focus" of the expert testimony: (1) the operation or mechanism of human memory; (2) identification of strangers; (3) weapon focus; (4) event stress; (5) exposure duration; (6) angle identification; (7) facial obstruction or disguise; (8) lighting and shadows; (9) cross-racial identifications;[9] (10) confidence and flashbulb memories; (11) post-event information;

[9] The defense later withdrew the topic of cross-racial identifications.

(12) trained observers; (13) unconscious transference; (14) change blindness; and (15) procedural factors, including show-ups, instructions or inputs, and feedback.[10] The notice specified which of these factors would pertain to the identification made by Mr. Anthony, which would pertain to the identification made by Corporal Metter, and which would pertain to both identifications.

With one business day remaining before the first day of trial, the State filed a motion in limine asking the court to bar any expert testimony from Dr. Franklin. The State asserted that all subjects described in the expert witness notice "involve common sense concepts that are certainly not outside the ken of the jury." The State argued that the proposed expert testimony would not assist the jury in understanding or evaluating the evidence. The State relied on Maryland Rule 5-702 and *Bomas v. State*, 412 Md. 392 (2010), in support of its motion.

Maryland Rule 5-702 generally governs the admissibility of expert testimony. It provides: "Expert testimony may be admitted, in the form of an opinion or otherwise, if

[10] With respect to "confidence and flashbulb memories," the notice stated that "a witness'[s] confidence and perceived ability to recall will increase after repeatedly thinking and speaking about a memory." Regarding "post-event information," the notice stated that "witnesses often remember details of the initial event that were incorporated after the fact." The notice stated that "trained observers, such as police officers, are not able to make correct identifications at higher rates than laypeople." According to the notice, "[u]nconscious transference refers to the mistaken identification of a person who was seen in one situation, with a person who was seen in a different situation." Regarding "change blindness," the notice stated that "[f]alse identifications can occur when a witness views the perpetrator of a crime, and then views an innocent bystander in an apparently continuous action sequence with the perpetrator – where expectancies that the person would be the same are relatively high – and then confuses the bystander with the perpetrator."

the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* In making these determinations, the court must consider: "(1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony." *Id.*

Where "expert testimony regarding an eyewitness identification is offered," the standard for its admissibility "is 'whether [the expert's] testimony will be of appreciable help to the trier of fact in deciding the issue presented.'" *Smiley v. State*, 442 Md. 168, 184-85 (2015) (quoting *Bomas v. State*, 412 Md. at 416-17). Under Maryland law, there is no presumption that expert testimony will be sufficiently helpful to a jury in evaluating an eyewitness identification. *Bomas v. State*, 412 Md. at 417. "[T]he probative value of expert testimony on eyewitness identification and how much such testimony can actually help the jury in the case before it must be carefully weighed by the court on a case-by-case basis." *Id.* at 419. "[T]he application of this test is 'a matter largely within the discretion of the trial court[.]'" *Id.* at 416-17 (quoting *Bloodsworth v. State*, 307 Md. 164, 184 (1986)) (further quotation marks omitted).

The Court of Appeals has said that "trial courts, in considering the admission of expert testimony regarding observation and memory, should recognize scientific advances that have led to a greater understanding of the mechanics of memory that may not be intuitive to a layperson." *Bomas v. State*, 412 Md. at 423. "Nonetheless," the

Court has said that "some of the factors of eyewitness identification are not beyond the ken of jurors." *Id.* at 416. "For example, the effects of stress or time are generally known to exacerbate memory loss and, barring a specific set of facts, do not require expert testimony for the layperson to understand them in the context of eyewitness testimony." *Id.*

Moreover, the Court has said that "[e]xpert testimony is not the only means to educate juries about the vagaries of eyewitness testimonies[.]" *Bomas v. State*, 412 Md. at 418. "In some cases, other trial components such as cross-examination, closing arguments, and jury instructions, can provide the jury with sufficient information to evaluate the reliability of eyewitness identifications." *Id.* According to the Court, encouraging unnecessary expert testimony on identifications "could unnecessarily complicate a case" by allowing "[d]ueling experts" to "interject differing interpretations of statistics and scientific studies on identification, leaving the jury more confused than aided by the expert opinions." *Id.* at 419.

In *Bomas v. State*, 412 Md. at 395, the Court of Appeals held that a trial court did not abuse its discretion in precluding expert testimony regarding eyewitness identifications. In that case, an off-duty police officer witnessed a fatal shooting and, six months later, identified the defendant from a photo array. *Id.* at 396-97. The defendant offered expert testimony to the effect that: a "trained observer," such as a police officer, has no better ability to remember faces than a layperson; a witness's confidence is not necessarily correlated with the accuracy of an identification; stress and the passage of

time adversely affect a person's ability to recall events or people; and a photo array can influence a witness's identification of a suspect. *Id.* at 397. The Court of Appeals held that the trial court "was entitled to conclude . . . that the topics covered by the proffered testimony were inadmissible for at least one of the following reasons: the testimony (1) lacked adequate citation to studies or data, (2) insufficiently related to the identifications at issue, and/or (3) addressed concepts that were not beyond the ken of laypersons." *Id.* at 423.

B. Ruling Regarding Identification Made by Corporal Metter

The State presented arguments on its motion in limine before jury selection on the first day of trial. At the suggestion of defense counsel, the court announced that it would wait until the identifying witnesses testified before deciding whether to admit expert testimony regarding their identifications.

After the victim, Mr. Anthony, completed his testimony, the trial court asked defense counsel to "finish" his argument on the State's motion in limine. Defense counsel noted that one of the identifying witnesses, Corporal Metter, had not begun his testimony. The court asked the defense for a proffer of Corporal Metter's expected testimony. Defense counsel explained that Corporal Metter lost sight of the driver of the stolen car and that, after some other officers detained Wright, Corporal Metter identified Wright as the person he had previously seen driving the stolen car.

The court expressed its belief that Corporal Metter's identification of Wright did not amount to an "identification" within the meaning of expert testimony:

> THE COURT: That's not what we litigate. That's not what I would allow your expert to testify to. . . . You can talk about his opportunity to view and the chase and what he did and perhaps whoever they caught in terms of those two officers is not the right person. I don't have a problem with that, but there's no official identification that I would allow an expert to testify to. . . . We do photos and show-ups. I don't know what else you're talking about.
>
> [DEFENSE COUNSEL:] Is the officer going to be allowed to say that he went up a hill and identified my client? . . . [A]nd say that's the driver of the car[?]
>
> THE COURT: He can say that if he saw him as the driver. . . . That's typical testimony from a police officer. That's not identification testimony.
>
> [DEFENSE COUNSEL:] How is that not him identifying my client?
>
> THE COURT: Sir, I'm very clear . . . it is not going to be what the officer testifies to, because I do not hold that to be identification testimony in terms of what [your] alleged expert is going to testify to. . . . Because he's not the victim of a crime, number one. That's critical in this case. And your expert -- and I read some of the treatise[s] and things that she lists in terms of her knowledge about identification, so it doesn't really pertain[] to the actions of officers unless they're the victim of the crime, which is not true here, so in terms of the chase it is not going to happen.

On appeal, Wright argues that the trial court's "ruling with regard to Dr. Franklin's testimony concerning Officer Metter's identification was erroneous as a matter of law, and thus, was an abuse of discretion." He argues, quite simply, that the court's "stated basis for its ruling – that Officer Metter was not a victim and therefore was not providing identification testimony – was wrong."

In response, the State concedes that "a person does not have to be a victim to make an eyewitness identification." The State acknowledges that Corporal Metter made an out-of-court identification when he expressed his opinion that the person detained by

other officers was the same person whom Corporal Metter had seen fleeing from the stolen car. The State notes, however, that Corporal Metter later testified that he "did not see the driver's face or what race he was" and "identified [Wright] as the driver by his clothing and build." The State argues, therefore, that "many of the factors" mentioned in the expert witness notice "did not pertain to this type of 'identification.'"

In our assessment, the trial court did not preclude the expert testimony on the ground that the State now offers on appeal. When the court ruled that the defense expert could not opine about the identification made by Corporal Metter, the court did not mention that his identification was based on "clothing and build." Rather, the court said that a "critical" fact in its decision was that Corporal Metter was "not a victim." The court also emphasized that Corporal Metter did not make his identification through a photo array or show-up procedure.

It is true, as the State notes, that many factors from the proposed testimony "were inapplicable" to the identification made by Corporal Metter. "For example," the State says, Corporal Metter did not see a suspect "with a weapon or wearing a disguise, and he was not subject to an eyewitness identification procedure." Of course, the defense had never suggested that *all* aspects of the proposed testimony would pertain to the identification made by Corporal Metter. The expert witness notice disclosed that some aspects of the expert testimony would pertain to the victim's identification, some to Corporal Metter's identification, and some to both identifications. Because the court categorically rejected expert testimony regarding Corporal Metter's identification, the

court never considered how the expert testimony might relate to the identification that he made.[11]

We see nothing in the record that might validate the trial court's premise that the proffered expert testimony strictly concerned identifications by victims of crimes or identifications made by photo array or show-up procedure. The State has not even attempted to defend that premise on appeal.

For the purpose of a subsequent trial, we shall set aside the ruling barring the defense from introducing expert testimony regarding the identification made by Corporal Metter. If the defense offers expert testimony on that issue, and if the State challenges the introduction of that testimony, the court should evaluate the testimony under the standard set forth in *Bomas v. State*, 412 Md. 392 (2012).

C. Ruling Regarding Identification Made by Mr. Anthony

In the aftermath of the ruling precluding expert testimony about Corporal Metter's identification, defense counsel "propose[d]" to "narrow" the testimony of Dr. Franklin. Defense counsel stated that, if permitted to testify, Dr. Franklin first would discuss "how memory works" and "how identifications of strangers work." Defense counsel stated that Dr. Franklin would then testify about factors that might have affected the accuracy of Mr. Anthony's identification of his assailants, including "stress," "weapon focus," the

[11] Wright asserts that "Dr. Franklin's testimony would relate to Officer Metter's identification across many of the factors discussed [in the expert witness notice], including: general operation of human memory, identification of strangers, event stress, exposure duration, lighting and shadows, confidence and flashbulb memories, 'trained observers,' and change blindness."

presence of "multiple perpetrators,"[12] the "duration" of the event, "lighting conditions," the use of "disguise," the "suggestive" nature of "show-up" identifications, and "post identification inputs."

At the close of the evidence offered by the State, the court announced that it would not permit Dr. Franklin to testify during the defense's case.[13]

Explaining its ruling, the court said that, in its understanding, the defense wanted Dr. Franklin to testify about "four factors": "how memory works, the identification of strangers, the stress that would occur when a weapon is focused on an individual[,] and about the characteristics of a show-up." The court said that it "focused on only those four [factors] in making [its] decision."

Defense counsel said that the court's description "essentially cover[ed]" the proposed testimony, except that "other particulars" had been "raised for the record already." Counsel reiterated that, if permitted to testify, Dr. Franklin would discuss factors including "weapon focus, multiple perpetrators, duration of . . . opportunity to view[,] . . . lighting, partial disguise[,] and the suggestive nature of show-ups, the

[12] The prosecutor noted that the expert witness notice did not disclose that Dr. Franklin would testify about the effect of multiple perpetrators on an identification. The court agreed with the prosecutor's observation. The court did not expressly say whether it would impose any discovery sanction.

[13] Defense counsel had informed the court that Dr. Franklin was no longer available to testify that day, because she was testifying at a trial in another state. Defense counsel had expected that Dr. Franklin would have the opportunity to testify on February 21, 2019, but a snowstorm caused the courthouse to close on February 20, 2019. The court explained that Dr. Franklin's unavailability was not the basis for its ruling.

incidents [sic] of false identifications in show-ups and the impact of suggestive comments from police officers[.]"

The court said that jurors could use "common sense" to understand the difficulty of identifying a "stranger" and that the "stress of events such as . . . having your car taken [at] gunpoint" might affect an identification. The court said that the proffered testimony about "how memory works" was "not very clear" and would not "be of appreciable help to this jury." In the court's view, it was "not beyond [the jurors'] ability to discern or understand" that "show-up[]" identifications might be suggestive. The court noted that there had "been a lot of cross-examination and a lot of evidence presented . . . as to all of these issues with respect to this identification by the victim[.]" The court expressed its belief that the pattern jury instruction on eyewitness identifications would "cover[] almost every area that [the defense] want[ed] Dr. Franklin to talk about[.]"[14]

[14] The court later delivered an instruction based on Maryland Criminal Pattern Jury Instruction 3:30:

> You have heard evidence about the identification of the defendant as the person who committed the crime.
>
> You should consider the witness'[s] opportunity to observe the criminal act and the person committing it, including the length of time the witness had to observe the person committing the crime, the witness'[s] state of mind[,] and any other circumstance surrounding the event. You should also consider the witness'[s] certainty or lack of certainty, the accuracy of any prior description and the witness'[s] credibility or lack of credibility, as well as any other factor surrounding the identification.
>
> You have heard evidence prior to this trial a witness identified the defendant by show-up. The identification of the defendant by a single eyewitness as the person who committed the crime, if believed beyond a

On appeal, Wright complains that the court "simply ruled on [the] four" topics mentioned in its oral ruling and "fail[ed] to analyze every category" of proffered expert testimony. Wright further contends that, "[e]ven in its ruling on four limited subjects," the trial court abused its discretion in concluding that the expert testimony was not "of 'real appreciable help' to the jury."

The State argues, and we agree, that the court's failure to mention every item on the list of proffered topics does not mean that the court failed to consider each of them. As the State points out, "trial judges are not oblig[ated] to spell out in words every thought and step of logic." *Beales v. State*, 329 Md. 263, 273 (1993). "[W]hen a matter is reserved to the sound discretion of the trial court, 'a trial judge's failure to state each and every consideration or factor in a particular applicable standard does not, absent more, constitute an abuse of discretion, so long as the record supports a reasonable conclusion that appropriate factors were taken into account in the exercise of discretion.'" *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 426-27 (2007) (quoting *Cobrand v. Adventist Healthcare, Inc.*, 149 Md. App. 431, 445 (2003)).

The record here demonstrates that the court gave thoughtful consideration to the entire proffer of expert testimony. Throughout the proffer by defense counsel, the court

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> reasonable doubt, can be enough evidence to convict the defendant. However, you should examine the identification with great care. It is for you to determine the reliability of any identification and give it the weight you believe it deserves.

After this case was tried, the Maryland Criminal Pattern Jury Instructions Committee propounded a revised version of this instruction.

asked clarifying questions and made substantive comments. For instance, regarding lighting conditions, the court said that "anybody" would understand that "in low light you can't see well." We agree with the State that the court's bottom-line conclusion, that the expert testimony was "not beyond something that the jurors can decide for themselves," covered all areas of proposed testimony, even those not expressly mentioned in the oral ruling.

The State further argues that the court acted within its discretion in concluding that ordinary laypersons understand that "identifying a stranger is more difficult than identifying a known person," that "stress and having your car taken at gunpoint" might impair a person's ability to make an accurate identification, and that a "show-up" identification procedure might influence an identification. The State argues that any other factors "that that court did not specifically name" were "matters of common sense." The State also argues that "a lay juror has the ability to understand that one's attention may be divided by multiple perpetrators, that an identification may be hindered when the perpetrator uses a disguise, and that the length of time and lighting conditions of the viewing affect[] the ability to make an identification."

Wright does not directly address these assertions. He acknowledges that "jurors may intuitively understand that some of these factors negatively affect an eyewitness's ability to make an accurate identification[.]" He argues, however, that jurors "do not know how, and to what degree, these factors interplay with each other to produce inaccurate identifications, and they also are not familiar with the empirical research that

demonstrates the impact in a quantitative way." In Wright's view, expert testimony was necessary "to give the jury a scientific, empirical footing to understand and evaluate identifications[.]" Overall, Wright criticizes the court's rationale as "far too simplistic."

Although Wright may disagree with the circuit court's exercise of discretion, the court's approach was consistent with *Bomas v. State*, 412 Md. 392 (2010). There, the Court of Appeals declared that "some of the factors of eyewitness identification are not beyond the ken of jurors." *Id.* at 416. For example, the Court said that "the effects of stress or time are generally known to exacerbate memory loss and, barring a specific set of facts, do not require expert testimony for the layperson to understand them in the context of eyewitness testimony." *Id.* Accordingly, in a case where an eyewitness had identified the defendant six months after a crime, the court was "entitled to find that" expert testimony about the effect of time on memory "would have been unhelpful to a jury or within the common knowledge of a layperson." *Id.* at 421.

Under the "appreciable help" standard of *Bomas*, a trial court is not required to admit expert testimony on eyewitness identifications simply because the expert could enhance the jurors' understanding of the identification issues presented. In nearly any case involving identification testimony, it could be said that an expert might help a jury reach a more informed decision. Yet "barring a specific set of facts," the court is not *required* to admit expert testimony on factors that are "generally known" to affect an identification. *Bomas v. State*, 412 Md. at 416. Wright has failed to demonstrate either that the substance of the expert testimony was removed from the general knowledge of

laypersons or that specific facts of this case would have made expert testimony on those areas particularly helpful.

Tellingly, Wright's critique of the circuit court's decision relies on out-of-state opinions that treat expert testimony on identifications more favorably than the Court of Appeals does.[15] In his reply brief, Wright challenges the notion that "some of the factors of eyewitness identification[,]" such as stress and the passage of time, "are not beyond the ken of jurors." *Bomas v. State*, 412 Md. at 415. Wright directly challenges the notion that "cross-examination, closing arguments, and jury instructions, can provide the jury with sufficient information" to assess identification. *Id.* at 418. The Court of Appeals has previously rejected calls to alter the standard established in *Bomas*. *See Smiley v. State*, 442 Md. 168, 185 & n.11 (2015) (reaffirming *Bomas* and stating that "our jurisprudence already recognizes that certain elements influence eyewitness identifications and may be taken into account by the trial judge and jury without the admission of expert testimony"). This Court is not at liberty to employ a standard other than the one used by the Court of Appeals.

Wright takes issue with the trial court's comment that the proffered testimony on "how memory works" was "not really clear." Contrary to Wright's assertions, this proffered testimony was, by its very nature, general. By itself, this testimony would be of no direct help in evaluating the eyewitness identification by Mr. Anthony. At most, this

[15] *E.g. Minor v. United States*, 57 A.3d 406 (D.C. 2012); *Commonwealth v. Walker*, 92 A.3d 766 (Pa. 2014); *State v. Clopten*, 223 P.3d 1103 (Utah 2009).

testimony might have provided background information to help the jury understand the remainder of the testimony regarding particular factors. The trial court could reasonably conclude that this portion of the proffered testimony, standing alone, was overly "general, vague, [or] inconclusive." *Bomas v. State*, 412 Md. at 420.

The trial court's decisions to preclude expert testimony about factors that may influence the accuracy of an identification and about the general operation of human memory were permissible under *Bomas*. On this record, we see no abuse of discretion in the ruling precluding expert testimony regarding the identification by Mr. Anthony.

Because this case must be retried anyway (and because the court must reconsider at least some aspects of the proffered expert testimony), the circuit court may have another opportunity to revisit its ruling. On remand, the expert testimony offered by the defense may or may not be identical to the one made during the first trial.[16] If Wright offers expert testimony regarding Mr. Anthony's identification and if the State challenges that testimony, the court should evaluate the proposed testimony under the standard set forth in *Bomas v. State*, 412 Md. 392 (2012). The court should state the basis for any ruling it makes, so that there is an adequate record for appellate review.

III.

Notwithstanding the determination that the circuit court erred by excluding certain evidence relating to a bag of white powder, we must consider Wright's challenges to the

[16] During the trial here, the court said that it would have preferred to address the motion at a separate hearing, with testimony from the expert witness, rather than in the middle of a busy trial.

sufficiency of the evidence. *See Winder v. State*, 362 Md. 275, 324 (2001).

Wright contends that he is entitled to a judgment of acquittal on the charges of carjacking and armed carjacking. He argues that the crime committed against the victim was not a "carjacking" as that offense is defined by Maryland law.

Before trial, Wright filed a motion to dismiss the charges of carjacking, armed carjacking, and conspiracy to commit carjacking. Wright offered images from a surveillance video, along with overhead maps, to show that Mr. Anthony was "at least 45 feet away from his car" when he ran from his assailants and "at least 325 feet from his car" when the assailants obtained his keys and used them to take the car. According to Wright, no carjacking had occurred. Instead, he argued, Mr. Anthony "was robbed of property, including his car keys, and subsequently his car was stolen in what amounts, at most, to vehicle theft." The circuit court declined to rule on the pretrial motion, explaining that Wright could reassert those arguments after the State presented its case.

After the close of the evidence offered by the State, Wright moved for a judgment of acquittal on all counts. As to "the carjacking count," Wright incorporated the arguments from his written motion to dismiss. The court granted a judgment of acquittal as to the charge of conspiracy to commit carjacking but denied the motion as to all other counts.[17] Wright renewed his motion at the close of all the evidence, and the court denied his renewed motion.

[17] The court concluded that the State had presented "no evidence to show any prior plan or agreement to take a car."

On appeal, Wright contends that the circuit court should have granted a judgment of acquittal on the charges of carjacking and armed carjacking. Wright argues that the evidence failed to show that the victim had "actual possession" of the vehicle "at the time it was taken."

Maryland Code (2002, 2012 Repl. Vol.), § 3-405 of the Criminal Law Article ("CL") proscribes the offenses of carjacking and armed carjacking. It provides:

> **Prohibited--Carjacking**
>
> (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.
>
> (2) A violation of this subsection is carjacking.
>
> **Prohibited--Armed Carjacking**
>
> (c)(1) A person may not employ or display a dangerous weapon during the commission of a carjacking.
>
> (2) A violation of this subsection is armed carjacking.

CL § 3-405(b)-(c).

"It is not a defense under this section that the defendant did not intend to permanently deprive the owner or possessor of the motor vehicle." CL § 3-405(f). Accordingly, "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." *Harris v. State*, 353 Md. 596, 610 (1999).

As summarized by the Court of Appeals:

> Carjacking requires that (1) the defendant obtain unauthorized possession or control of a motor vehicle; (2) that the motor vehicle was in the actual possession of another person at that time; and (3) that the defendant used force or violence against that person, or put that person in fear through intimidation or threat of force or violence, in order to obtain the motor vehicle.

Harris v. State, 353 Md. at 614 (citing Maryland Criminal Pattern Jury Instruction 4:28A).

This Court has rejected the argument that a carjacking can occur "only when a vehicle is taken by force or threat of force *while in transit* or *while occupied*." *Mobley v. State*, 111 Md. App. 446, 452 (1996) (emphasis in original). "In this context," the Court explained, "the words 'actual possession' simply clarify that a carjacking occurs when a vehicle is 'forcibly taken from the care, custody, control, management or possession of one having a right superior to that of the' carjacker." *Id.* at 454. For a carjacking to occur, "the victim need only be entering, alighting from, *or otherwise in the immediate vicinity of the vehicle* when an individual obtains unauthorized possession or control of the vehicle by intimidation, force, or violence, or by threat of force or violence." *Id.* at 455-56 (emphasis added).

This Court has further explained:

> When one is charged with carjacking, we are not concerned with the victim's dominion and control over the vehicle except insofar as such possession is interrupted by an act of intimidation or violence on the part of an actor bent on wresting possession from the operator of the vehicle. In other words, the *actus reus* of carjacking has nothing to do with the possession by the victim of the vehicle. The only significance of the relationship between the victim and the vehicle at the time of the carjacking

> is in permitting a determination of whether the actor perpetrated a crime against person, i.e., carjacking, or a crime against property, i.e., theft. . . . Thus, we are concerned . . . not with imputing criminal responsibility, but rather with whether the defendant's actions constituted forcible taking of the vehicle or a simple theft thereof.

Price v. State, 111 Md. App. 487, 499 (1996).

In this appeal, Wright asserts that CL § 3-405 requires what he calls a "convergence" of "separate facts existing at the same time": a victim "with dominion and control over a vehicle" and "a robber 'bent on wresting possession . . . of the vehicle,' who uses intimidation, force, or violence . . . to gain possession of the vehicle." Wright argues that these facts, if they existed here, "never converged at the same time."

Wright focuses on the point in time when the victim, Mr. Anthony, ran away from the two robbers. Mr. Anthony testified that he had parked his car "right across the street from [his] house." He walked "to the front part of the driveway" and unlocked the car with his keys. At that point, he saw two men running toward him with handguns. Wright tells us that, in these initial moments, the assailants "were not near [Mr. Anthony], they were not near his car, and they had not even formed an intent to take a car." "Thus," Wright continues, "when they were nearest to (though still distant from) the car, the assailants clearly had no intent to take a car (or likely even any knowledge a car was available)."

The jury was not required to accept this view of the evidence. As demonstrated by the surveillance video, the two assailants had an unobstructed view of the car. The assailants could see Mr. Anthony, once he passed by another vehicle in his driveway,

walking toward the car. The assailants had the opportunity to see the rear lights flashing and to hear any sound produced when he unlocked it. No one else was on the street at that time.

The assailants' subsequent actions provide further evidence of their intent. Mr. Anthony recalled that, once he tripped and the two assailants caught up to him, they "demand[ed] money, whatever they could get off of [him]." Mr. Anthony told them that he had no cash, but that he did have a phone. They proceeded to take his phone, his watch, and his keys. The first assailant (identified as Wright) struck Mr. Anthony in the head with a handgun and then continued "asking [him] to give up everything [he] h[ad], searching [his pockets], things like that, seeing whatever they [could] find." The second assailant held Mr. Anthony at gunpoint while the first assailant retrieved the car, before both assailants left in the car.

On appeal, Wright asserts that the assailants "only asked [Mr. Anthony] for money, and when he told them he did not have any, they asked for whatever else he had, and only then did he produce his keys." Wright points to the initial demand for money as conclusive proof that the assailants did not form their intent to take the car until after Mr. Anthony turned over his keys.

Viewing the evidence in the light most favorable to the State, one reasonably could conclude that the assailants did not seek *only* money. They *first* demanded money before proceeding to take everything of value, including the keys to the car that he had just unlocked in their presence. A demand for money and other valuable possessions is

perfectly consistent with an intention to take a car. As the State explains in its brief, a juror could reasonably conclude that the assailants always intended to take the car but "were prevented from immediately taking the car because [the victim] ran away." In short, one could view this crime as an interrupted carjacking, not an afterthought car theft.

Wright further asserts that, by the time the assailants actually took the keys and the car, Mr. Anthony "was more than the length of a football field away from his car[.]" Wright argues that, "[f]rom that distance," Mr. Anthony lacked "dominion and control" over his car and thus was no longer in actual possession of the vehicle at the time when it was taken. This Court has previously held, however, that the distance between the victim and the car at the time the perpetrator succeeds in gaining possession or control of the vehicle is not the appropriate measure.

In *Price v. State*, 111 Md. App. at 491, the victim was standing near the hood of her car when the defendant approached in a threatening manner. The victim ran away some unspecified distance, eventually falling to the ground, before the defendant took the car and drove away. *Id.* Holding that this evidence could satisfy the actual possession element, this Court said:

> Where the victim was when the assailant drove off with her car need not detain us long because whether the victim fled after being accosted while inside her car or, in the alternative, next to the hood, the result is the same. In either event, the vehicle would have been commandeered when the victim was initially accosted by appellant not at the point in time when she had fled some distance from the vehicle. Consequently, that [the assailant] drove off at a point in time when there existed some distance between where the victim was and the point from which the car was driven away is

> of no moment. Her flight was the result of fear generated by the actions of [the assailant].

Price v. State, 111 Md. App. at 495-96.

Under *Price*, the actual possession element is not negated because Mr. Anthony, out of fear of the assailants, ran several hundred feet before the assailants succeeded in gaining possession and control of the vehicle. What matters is that he actually possessed the vehicle when he began to flee. At that point in time, Mr. Anthony was across the street from his car, close enough to unlock it remotely with his keys. He was "in the immediate vicinity of and walking to his vehicle" (*Reeves v. State*, 192 Md. App. at 305) when his assailants charged at him with handguns. The vehicle was "within [his] control, such that if he had not been overcome by fear and violence, he would have maintained control over the vehicle." *Id.* (citing *Price v. State*, 111 Md. App. at 499).

The evidence was sufficient to establish the elements of carjacking and armed carjacking. Wright is not entitled to a judgment of acquittal on those counts.

IV.

Wright contends that he is entitled to a judgment of acquittal on all counts against him. He argues that the evidence at trial was insufficient to prove that he was one of the two persons who committed the robbery.

As Wright acknowledges, appellate review of the sufficiency of evidence at a criminal trial is limited:

> The standard for appellate review of evidentiary sufficiency is whether, after viewing 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. That standard applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone. Where it is reasonable for a trier of fact to make an inference, we must let them do so, as the question is not whether the [trier of fact] could have made other inferences from the evidence or even refused to draw any inference, but whether the inference [it] did make was supported by the evidence. This is because weighing the credibility of witnesses and resolving conflicts in the evidence are matters entrusted to the sound discretion of the trier of fact. Thus, the limited question before an appellate court is not whether the evidence should have or probably would have persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder.

Darling v. State, 232 Md. App. 430, 465 (2017) (emphases and alterations in original) (citations and quotation marks omitted).

Under Maryland law, it is well established that the testimony of a single eyewitness identifying a defendant as the person who committed an offense, if believed, is sufficient to support a conviction for that offense. *See, e.g.*, *Small v. State*, 235 Md. App. 648, 705-06 (2018). The jury is entitled to credit eyewitness identification testimony even where a defendant might argue that an eyewitness identification is unreliable. *See Handy v. State*, 201 Md. App. 521, 559 (2011); *Reeves v. State*, 192 Md. App. 277, 306 (2010). Moreover, an out-of-court identification may be enough evidence to support a conviction even if the witness fails to identify the defendant at trial. *See Nance v. State*, 331 Md. 549, 561, 574 (1993).

The Court of Appeals' opinion in *Branch v. State*, 305 Md. 177 (1986), may represent "the outer perimeters of the theory that a single eyewitness is sufficient to permit a rational jury to find guilt beyond reasonable doubt." *Small v. State*, 235 Md.

App. at 705. There, a victim told the police that she had been robbed by "a black male, approximately 5 feet 7 inches tall, 15 to 16 years of age, weighing 110-125 pounds, wearing a dark jacket, and carrying a silver handgun." *Branch v. State*, 305 Md. at 178. The victim viewed a photograph of Branch and identified him as the robber even though he was actually "19 years of age, 6 feet 3 inches tall, and weighed 185 pounds." *Id.* at 179. The photograph did not show that Branch was missing two front teeth, and the victim failed to note that the robber was missing front teeth. *Id.* Nevertheless, the victim positively identified Branch at trial as the man who robbed her. *Id*. In his defense, Branch "claimed to have an alibi which was corroborated by his girlfriend, his aunt, and a ticket from a pawn shop for the day in question." *Id.* at 181. Aside from the identification, the State introduced no other evidence linking the defendant to the robbery. *Id*. at 186 (Eldridge, J., dissenting).

The Court of Appeals held that the eyewitness identification evidence was sufficient to sustain Branch's conviction for armed robbery. *Branch v. State*, 305 Md. at 183-84. The Court acknowledged the "substantial discrepancy between the description given by the victim of the crime almost immediately after the incident and the actual description of the accused." *Id.* at 184. Nevertheless, the Court viewed this discrepancy "as going to the weight and not to the sufficiency of the evidence." *Id.* The victim's identifications were "enough for a rational trier of fact to conclude beyond a reasonable doubt that [the defendant] was the culprit." *Id.*

In the present case, Wright asserts that the evidence that he was the perpetrator

"came almost exclusively" in the form of eyewitness identifications: Mr. Anthony's statement and testimony identifying Wright as one of two persons who robbed him; and Corporal Metter's testimony identifying Wright as the driver of the stolen vehicle. Wright asks this Court to hold that these identifications are, as a matter of law, insufficient to support a conviction. Wright argues that no Maryland case has ever "applied this blanket rule to eyewitness identifications as unreliable as those made in this case."

In our view, Mr. Anthony's identification of Wright was not, as a matter of law, any weaker than the identification made by the victim in *Branch v. State*. A rational fact-finder might or might not credit Mr. Anthony's identification of Wright as the person who robbed him. Accordingly, Mr. Anthony's statement and testimony were sufficient to support the finding that Wright was the person who robbed him. It is not our role, as an appellate court to "'re-weigh the credibility or attempt to resolve any conflicts in the evidence.'" *Small v. State*, 235 Md. App. at 705 (quoting *Smith v. State*, 415 Md. 174, 185 (2010)). To the extent that Wright may be asking this Court to ignore or reject the rule applied in *Branch* and other cases, we are not free to do so. *See, e.g.*, *Foster v. State*, 247 Md. App. 642, 651 (2020) (stating that "rulings of the Court of Appeals remain the law of this State until and unless those decisions are either explained away or overruled by the Court of Appeals itself") (brackets and quotation marks omitted).

In any event, the State's case against Wright did not rely exclusively on eyewitness identification testimony. The State introduced circumstantial evidence

supporting the conclusion that Wright was one of the robbers. The victim testified that one robber carried a black handgun, that the other carried a silver handgun, and that both robbers wore masks covering the lower part of their faces. An hour after the robbery, the police found two men inside the stolen vehicle, a few miles from the site of the robbery. The officers apprehended the passenger, Kevin Sparrow-Bey, who possessed a silver handgun and the victim's phone. The police lost sight of the driver, but within minutes they saw Wright, two blocks away, running and trying to jump over a fence. Wright was the only civilian in the area. Wright shared at least some general characteristics with the robber, as recorded on the surveillance video and reported by the victim. Wright possessed a mask that would cover the lower part of his face. The officers found a black handgun roughly one block from the stolen car and one block from where Wright was apprehended.

Wright asserts that, just as there are many reasons to doubt the accuracy of the identifications, these circumstances do not conclusively tie him to the robbery. Wright notes that police found him "in his own neighborhood, mere blocks from where he lived." Wright insists that he "had a very real reason, unconnected to his alleged involvement in armed robbery, to be evading the police[,]" because he was carrying drugs and cash in his pockets. Wright suggests that there is nothing unusual "about having a ski mask" on "a very cold night" in February.

Each of these points should be weighed by the fact-finder, not by an appellate court reviewing the sufficiency of the evidence. As an appellate court, it is not our role to

"second-guess the jury's determination where there are competing rational inferences available." *Smith v. State*, 415 Md. 174, 183 (2010). The jury was entitled "to 'choose among differing inferences that might possibly be made from a factual situation'" even though another fact-finder might have chosen a different inference. *State v. Suddith*, 379 Md. 425, 430 (2004) (quoting *State v. Smith*, 374 Md. 527, 534 (2004)). Viewed in the light most favorable to the State, the eyewitness identifications and circumstantial evidence were more than enough to support a conclusion that Wright was the robber.

Because Wright has not demonstrated any insufficiency of the evidence, he may be retried on all counts of which he was convicted. *See Winder v. State*, 362 Md. 275, 324 (2001).

CONCLUSION

In summary, although the evidence was sufficient to support Wright's convictions, the circuit court erred by excluding certain evidence.

The circuit court erred when it excluded testimony and video evidence establishing that, immediately after the police officers searched Wright, an officer possessed a bag of white powder. Wright was entitled to present that evidence to show that he had a reason to run from the police that was unrelated to the crimes for which he was charged.

The circuit court abused its discretion when it precluded expert testimony on the erroneous premise that Corporal Metter did not make an "identification" within the meaning of expert testimony on that subject. If the issue arises again on remand, the

court must reevaluate the admissibility of expert testimony on that subject.

We perceive no abuse of discretion in the court's separate decision to preclude expert testimony regarding the identification made by Mr. Anthony. In any event, if Wright offers expert testimony on that subject again, the court should evaluate its admissibility in light of the facts and circumstances presented at that time, which may not be identical to those presented at the first trial.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.

APPENDIX

In Wright's appellate brief, he presented the following four questions:

(1) Whether the trial court abused its discretion by excluding the testimony of Mr. Wright's eyewitness identification expert as to the State's two identification witnesses, when the trial court found that non-victim police witnesses do not make "official" identifications that an expert can testify to, and when the expert would have offered concrete, scientific, and quantitative testimony regarding human perception, memory, and identifications, all of which were directly applicable to the critical identifications in this case.

(2) Whether the trial court committed reversible error by excluding a portion of proposed testimony and body camera footage of a D.C. officer, showing that officers searching Mr. Wright obtained from him a baggie of what appeared to contain, and the testifying officer declared on camera contained, crack cocaine, which Mr. Wright offered at trial to show that Mr. Wright jumped a fence to evade police not because he had committed a robbery over an hour earlier in Maryland, but because he had illegal narcotics on his person.

(3) Whether the trial court committed reversible error by denying Mr. Wright's motions for judgment of acquittal on the carjacking counts, when the undisputed facts and video evidence established that the robbery occurred over 300 feet away from the victim's vehicle, the robbers did not ask for or attempt to take a car during the robbery, and only upon being given keys did one of the robbers go up the street to take the victim's vehicle.

(4) Whether the evidence at trial was insufficient to sustain Mr. Wright's convictions on 15 charges arising out of the armed robbery incident in this case, when Mr. Wright was not in possession of a weapon or the proceeds of the offense, no forensic evidence linked Mr. Wright to the crimes, the State failed to gather or introduce any clothing evidence linking Mr. Wright to the offense, and the only evidence directly linking Mr. Wright to the robbery was the victim's flawed and tainted identification of Mr. Wright, who did not match the victim's description of either robber, and after which the victim identified a different person as the robber.