Circuit Court for Cecil County
Case No. 7K131914

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 745

September Term, 2020

JOHN W. GREEN, III

v.

STATE OF MARYLAND

Graeff,
Zic,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: October 19, 2021

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

After a seven-day trial in the Circuit Court for Cecil County in December 2014, a jury found appellant, John W. Green, III, guilty of first-degree murder, conspiracy to commit murder, use of a handgun in the commission of a crime of violence, and wearing, carrying, or transporting a handgun. The Court of Appeals reversed the convictions and remanded for a new trial. *Green v. State*, 456 Md. 97 (2017).

On January 3, 2020, appellant was found guilty, pursuant to an agreed statement of facts, of murder in the second degree and use of a handgun in a crime of violence. The court sentenced appellant to 30 years' imprisonment for the conviction of second-degree murder and 20 years, consecutive, for the conviction of use of a handgun in the commission of a crime of violence.

On appeal, appellant presents the following questions for this Court's review, which we have rephrased slightly, as follows:

1. Was the evidence sufficient to sustain appellant's convictions?
2. Did the circuit court err in overruling appellant's objection to the self-authentication of phone records?
3. Did the circuit court err in ruling that documents were non-discoverable attorney work product?
4. Did the circuit court err in denying appellant's motion to suppress Doris Carter's extra-judicial and in-court identification of appellant's co-defendant?
5. Did the circuit court err in denying appellant's motion to suppress the extra-judicial and in-court identification of appellant by Eddie Haskins?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

I.

Factual Background

As indicated, at appellant's first trial in December 2014, a jury found appellant guilty of first-degree murder and related offenses. The Court of Appeals reversed the convictions because the State had not disclosed Doris Carter's identification of appellant's co-defendant, Mr. Copeland. *Green*, 456 Md. at 102.

On January 3, 2020, appellant waived his right to a jury trial and pled not guilty pursuant to an agreed statement of facts. The prosecutor presented the agreed statement of facts, as follows:

> Your Honor, if this case were to go to trial the State would prove through evidence and testimony that on October 21st of 2013 that Jonathan Copeland, the co-defendant in this matter, along with John Wallace Green, the defendant present here today, along with one other individual confronted the victim in this matter, Jeffrey Adam Myers, at his home at 1537 Principio Road in Port Deposit, in Cecil County, regarding an allegation that Mr. Myers had broken into Copeland's home earlier that day and that Myers had stolen a quantity of money and/or drugs from Copeland's residence.
>
> Witnesses would testify that Copeland drove an older model black Ford Mustang and had been at the Myers residence in that vehicle on several prior occasions.
>
> Two days later, on October 23rd, 2013, at approximately 4:30 in the afternoon Jeffrey Myers was leaving the driveway of his residence in his Ford pickup truck going towards Principio Road when a black Mustang occupied by two white males pulled up in front of the driveway and blocked his path.

Multiple witnesses and one eyewitness would testify that they heard a loud conversation between Myers and those two white males. Witnesses would testify to hearing a number of gunshots before either hearing or seeing the black Mustang drive away down Principio Road toward Theodore Road.

One eyewitness, Doris Carter, was driving by the Myers residence and driveway and would testify that she saw the two white men from the black Mustang. That one was taller and thinner while the other was shorter and stockier.

She would testify that the taller thinner male was by the driver's side door of the Mustang in the roadway. And as she was looking in her rearview mirror while slowing down to navigate around the Mustang that the shorter stockier male was seen standing by the driver's side door of Myers' pickup truck firing a handgun into the truck where Myers was sitting. Witnesses would say the two males then got into the Mustang and drove away as I previously stated.

Emergency personnel would arrive and find no signs of life on Myers and he was pronounced deceased there at the scene. Investigators would find several spent .40 caliber handgun cartridge casings near the driver's side door of Myers' pickup truck.

Dr. Locke from the Office of the Chief Medical Examiner performed the autopsy of the victim and would testify that the victim died as a result of multiple injuries from multiple gunshot wounds to the body and ruled his manner of death as homicide.

An investigation by the Cecil County Sheriff's Office would reveal that both the defendant, John Green, and the co-defendant, Jonathan Copeland, were picked up later in that evening at the Boston Market restaurant in Newark, Delaware, by Eddie Haskins, who was an acquaintance of Copeland.

Haskins would testify that he could positively identify both Copeland and Green as the people he had picked up at that location due to Copeland's black Mustang having broken down. Haskins would also testify that Copeland is the taller of the two defendants.

> Copeland and Haskins were detained shortly thereafter in the town of Rising Sun after they had previously dropped John Green off at the address of Maple Hill Drive in Port Deposit. That was the home of his then-girlfriend, Jessica Peacock. Green was later detained at that location and Peacock advised police that earlier that evening Green advised her that Copeland had told him, Apparently someone got shot.
>
> Investigators were able to determine through cell phone records of both Jonathan Copeland and John Green that their cell phone activity could be tracked from the area of the homicide on Principio Road near the time of the shooting in the area of Port Deposit to the area of Newark, Delaware, that coincided with the time that they were picked up by Eddie Haskins and later detained. Both defendants were also seen together on a surveillance video in Delaware after the homicide.
>
> After he was detained and during a custodial interview with police, Green initially stated that he was present for the argument at the Myers residence on October 21st but denied being with Jonathan Copeland on October 23rd. He also denied being at the Boston Market Restaurant in Newark, Delaware. He later on stated to detectives that Copeland had picked him up after the homicide had occurred. He also later stated that he was in fact with Copeland at the Boston Market Restaurant when Eddie Haskins picked them up but denied being at 1537 Principio Road.
>
> Based on the defendant's statement, other witnesses' statements, and the other evidence discovered in the course of their investigation, investigators then charged John Wallace Green with murder in the second degree of Jeffrey Myers and the use of a firearm in the commission of a crime of violence.
>
> For purposes of this statement of facts, all events did occur in Cecil County, Judge.

At the conclusion of the agreed statement of facts, defense counsel stated that he had no additions or corrections. The circuit court then accepted the plea of not guilty pursuant to the statement of facts, denied appellant's motion for a judgment of acquittal,

and found appellant guilty of second-degree murder and use of a handgun in the commission of a crime of violence. This appeal followed.

DISCUSSION

I.

Sufficiency of the Evidence

Appellant contends that the evidence was insufficient to support his convictions. He argues that the State did not adequately establish that he was present at the scene of the shooting, noting that there was no eyewitness testimony or physical evidence, such as fingerprints or DNA evidence, placing him at the scene.[1]

The State contends that the evidence was sufficient to support appellant's convictions. It argues that the agreed statement of facts permitted a finding that appellant was guilty of second-degree murder and use of a handgun in the commission of a crime of violence.

This Court has set forth the applicable standard of review in determining the sufficiency of the evidence, as follows:

> The test of 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.'" *State v. Coleman*, 423 Md. 666, 672 (2011)

[1] Appellant also argues that there was insufficient evidence to find that he was guilty as an accomplice by aiding or abetting Mr. Copeland in the killing of Mr. Myers. The State, however, did not argue that appellant was guilty of murder as an accomplice; it argued that he was the shooter.

> (quoting *Facon v. State*, 375 Md. 435, 454 (2003)). The Court's concern is not whether the verdict is in accord with what appears to be the weight of the evidence, "but rather is only with whether the verdicts were supported with sufficient evidence – that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offense charged beyond a reasonable doubt." *State v. Albrecht*, 336 Md. 475, 479 (1994). Further, "the finder of fact has the 'ability to choose among differing inferences that might possibly be made from a factual situation . . . .' That is the fact-finder's role, not that of an appellate court." *Smith v. State*, 415 Md. 174, 183 (2010) (quoting *State v. Smith*, 374 Md. 527, 534 (2003)). Moreover, when evaluating the judgment of the trial court in a non-jury trial, the judgment of the trial court will not be set aside unless clearly erroneous. *Khalifa v. State*, 382 Md. 400, 418 (2004).

Kamara v. State, 205 Md. App. 607, 632 (2012). *Accord Fuentes v. State*, 454 Md. 296, 307–08 (2017).

As indicated, appellant's convictions resulted from a plea of not guilty pursuant to an agreed statement of facts. The Court of Appeals has referred to this type of plea as a "hybrid plea," in which the defendant pleads not guilty and foregoes trial, in exchange for the ability to argue legal issues on appeal. *Bishop v. State*, 417 Md. 1, 16 (2010). By pleading not guilty, appellant "in effect had a trial," and he "retained his full appellate review." *Bruno v. State*, 332 Md. 673, 691 (1993). As this Court has explained:

> Under an agreed statement of facts, the State and the defense agree to the ultimate facts, and the court merely applies the law to the agreed upon facts. *Bishop*, 417 Md. at 21. *Accord State v. Thomas*, 464 Md. 133, 140 (2019). By entering [a not guilty plea], the accused retains the right to argue legal issues, including sufficiency of the evidence. *Bishop*, 417 Md. at 22. If the prosecutor fails to present evidence to support all elements of the crime, an acquittal will result. *Id.* at 23.

White v. State, 250 Md. App. 604, 648, *cert. denied*, __ Md. __ (2021).

Here, appellant's sufficiency claim rests solely on his argument that the State did not prove that he was the shooter. We are not persuaded. Applying the appropriate standard of review, we conclude that the agreed statement of facts permitted a reasonable inference that appellant shot Mr. Myers, supporting appellant's convictions of second-degree murder and use of a handgun in the commission of a crime of violence.

The facts presented were that, two days prior to the murder, Mr. Copeland and appellant went to the victim's home and confronted him regarding money and/or drugs the victim stole from Mr. Copeland's residence. On October 23, 2013, two days later, a black Mustang, the type of car Mr. Copeland drove, pulled into the victim's driveway and blocked the victim's path. Two white males argued with the victim, after which witnesses heard gun shots, and the black Mustang drove away. One witness, Ms. Carter, saw two men, one who was shorter and stockier, and one who was taller and thinner, and she saw the shorter man firing a handgun into the victim's truck. Appellant and Mr. Copeland subsequently were picked up that evening, by Mr. Haskins, after Mr. Copeland's black Mustang broke down. Mr. Haskins stated that appellant was shorter than Mr. Copeland. Appellant initially lied to police, stating that he had not been with Mr. Copeland on October 23, 2013. He subsequently admitted to being with Mr. Copeland on that day, but only after the shooting. Cell phone records, however, showed that appellant's and Mr. Copland's cell

phone activity were tracked from the area of the homicide near the time of the shooting to the area of Delaware where Mr. Haskins picked up appellant.

These facts were sufficient to support a rational inference that appellant was the person who shot Mr. Myers. The evidence was sufficient to support appellant's convictions.

II.

Self-Authentication of Phone Records

Appellant contends that the circuit court erred in overruling his objection to the admission of certified records from AT&T (for Mr. Copeland's cell phone) and Verizon (for appellant's cell phone). This claim involves Maryland Rule 5-902, which addresses self-authentication of business records. The Rule provides as follows:

> (b) Certified Records of Regularly Conducted Business Activity.
>
> *(1) Procedure.* Testimony of authenticity as a condition precedent to admissibility is not required as to the original or a duplicate of a record of regularly conducted business activity, within the scope of Rule 5-803 (b)(6) that has been certified pursuant to subsection (b)(2) of this Rule, provided that at least ten days prior to the commencement of the proceeding in which the record will be offered into evidence, (A) the proponent (i) notifies the adverse party of the proponent's intention to authenticate the record under this subsection and (ii) makes a copy of the certificate and record available to the adverse party and (B) the adverse party has not filed within five days after service of the proponent's notice written objection on the ground that the sources of information or the method or circumstances of preparation indicate lack of trustworthiness.

The circuit court overruled appellant's objection on the ground that it was not timely filed pursuant to the rule.

Both appellant and the State address whether the court properly found that appellant's objection was not timely. The State also argues that, based on the evidence, including that the certifications were admitted in the initial trial, the records were authentic.

Given the posture of this case, we cannot conclude that the court committed reversible error in its ruling on this issue. Although appellant contends that the court erred by "admitting the records without any indication that it looked at them," the court ultimately did *not* admit the records because appellant elected to proceed to trial pursuant to an agreed statement of facts. Thus, the State did not present evidence of cell phone records at all, much less without the testimony of an authenticating witness. Rather, appellant agreed that the cell phone records showed that his and Mr. Copeland's phone activities could be tracked from the area of the homicide to the area in Delaware where they were found later that day. Accordingly, even if the circuit court's ruling that the records could be admitted into evidence without testimony of authentication was erroneous, it had no impact on the proceeding in which appellant was convicted, i.e. a plea pursuant to an agreed statement of facts where the records were not introduced into evidence. Any error by the circuit court in this regard was harmless error that does not require reversal of appellant's convictions. *See Bruno*, 332 Md. at 685, 691 (harmless error doctrine applies to guilty plea pursuant to an agreed statement of facts); *Dorsey v. State*,

276 Md. 638, 659 (1976) (where error in no way influenced the verdict, the error is harmless).

III. & IV.

Ms. Carter's Identification of Mr. Copeland

Appellant's next two contentions relate to Ms. Carter's identification of Mr. Copeland. Appellant contends that the circuit court erred in ruling: (1) that the State did not violate Maryland Rule 4-263 by failing to disclose the pretrial identification procedure leading to this identification; and (2) denying the motion to suppress the identification. Before explaining why these contentions have no merit, we will summarize what transpired below.

A.

Proceedings Below

On May 23, 2019, the defense filed a Motion to Suppress Extra-Judicial and In-Court Identification by Ms. Carter. The defense noted that, at the first trial, Mr. Copeland was brought into the courtroom in handcuffs, and Ms. Carter identified him as the man who was standing by the car. Appellant's conviction was reversed based on the Court of Appeals' holding that the State was required to disclose this identification because the pre-trial identification of the co-defendant in this case was "the equivalent of a pre-trial identification of the defendant." *Green*, 456 Md. at 162. On remand, appellant asked the court to require the State to "reveal the circumstances of the pre-trial 'identification' by

Ms. Carter when she informed Detectives (or any subsequent pre-trial conversation or procedure by the then prosecutor, Mr. [Steve] Trostle)."

At a hearing on July 25, 2019, Ms. Carter testified regarding her observations on October 23, 2013. She saw a black Mustang partially on the road, a "tall and thin" man standing with one foot in the car and one foot on the outside, and another man who was short and stout on the side of the road. She then heard a "pop," and she saw the shorter person "shooting down into the truck." Ms. Carter told the police that she did not see the shooter, only the person standing partially in the Mustang, i.e., the taller person.

Ms. Carter subsequently identified Mr. Copeland after she saw his picture in a "Cecil Daily" article on Facebook. She recognized one of the individuals as "the person who was standing inside the car." The article's picture "triggered him looking at [her] as [she] looked – as [she] was driving by his door." During cross-examination, she testified that she did not believe their names were in the article, just their faces.

Although Ms. Carter believed that she spoke with the police or prosecutors "[t]hree or four times," she did not contact the police to tell them that her memory of the incident improved and she was then able to identify Mr. Copeland by his face. After her initial conversation with the police, she next spoke to the police and a prosecutor in 2013, before the trial. She did not think that she told the prosecutor or police about the Facebook article that she saw.

During cross-examination, Ms. Carter testified that she was never shown a photo array or any photographs of appellant or Mr. Copeland during any of the interviews that she had with the police or prosecution. She connected with the photograph on Facebook based on her memory; she recognized the eyes. The photograph was not sent to her, but it was a post on another person's Facebook feed.

Ms. Carter could not remember telling the detectives about the photographs on Facebook or being able to identify Mr. Copeland. She knew Mr. Copeland's name because she was involved in appellant's trial. She probably learned his name as a result of her conversation with Mr. Trostle, the prosecutor for the first trial, and the detectives. She thought the detectives took notes during their interviews. They only asked her about what she could remember, but they did not show her any photographs. At the first trial, when Mr. Copeland came into the courtroom, she identified him, but no one had told her "that that procedure was going to occur."

Corporal William Sewell, the lead detective on this case in 2013-2014, remembered interviewing Ms. Carter twice. During the first interview on October 24, 2013, at the Cecil County Sheriff's Office, Corporal Sewell did not show Ms. Carter a photo array. As a result of this interview, police were not able to specifically identify any suspects, but Ms. Carter did provide them general descriptors of the people she saw. Ms. Carter never told detectives about her ability to identify Mr. Copeland.

Corporal Sewell could not remember if he took notes during this interview, but he stated that he probably did. He did not know where the notes were at that time. The report he prepared was not in the binder the State gave to the defense. The prosecutor then gave defense counsel the report, and counsel was given time to read it.

Senior Deputy Chris Lewis, a detective in the Cecil County Sheriff's Office, also was an investigator on the case in 2013 to 2014. He testified that he was not involved with trial preparation, and he could not recall whether Ms. Carter told prosecutors that she could identify Mr. Copeland. He did not remember Ms. Carter saying that she was able to identify Mr. Copeland's face.

On November 22, 2019, Mr. Trostle, the lead prosecutor in the initial trial, testified that he vaguely remembered meeting with Ms. Carter for the "trial prep meeting." He anticipated that Ms. Carter would testify about what she saw as she drove down the road, including general descriptions of the suspects, i.e. "[t]all and skinny; short and fat." With respect to Ms. Carter's ability to identify Mr. Copeland, Mr. Trostle testified: "At the time of trial prep I have a distinct memory of being surprised and caught off guard by something that she said. And that was that she thought she could identify Mr. Copeland. It surprised me." Mr. Trostle did not remember exactly what happened, but he had been thinking about it because it was this issue that got appellant's conviction overturned. Mr. Trostle tried, when Ms. Carter mentioned it, to find the photograph she referenced, but he was unsure if he ever found the photograph. Mr. Trostle remembered that Ms. Carter identified Mr.

Copeland as he was brought into the courtroom by a deputy. Mr. Trostle was not sure if he showed Ms. Carter any photographs of either defendant during the trial prep.

On cross-examination, Mr. Trostle said the following about trial prep notes:

> I don't know if I [took notes]. I know that more often than not when I'm doing trial prep, I have a series of questions and I usually put what I expect the answer to be ahead of time. It's a clue to myself to listen to their answer and make sure that I'm hearing what I expected to hear. And so if the answer is the same, I don't write anything. But if their answer is different, I'll typically scratch out what I thought was going to be the answer and then put in what is going to be the answer of the witness.

Mr. Trostle said that there is a chance that the meeting with Ms. Carter could have been impromptu, in which case he would not have had his notes with him.

Mr. Trostle testified that he does not destroy his notes, and he did not think he did so in this case. Copies of his notes, however, sometimes got shredded, and occasionally documents would get lost. Mr. Trostle said that his notes usually were typed and put in a trial notebook. He did not think he strayed from his usual routine in this case.

Ms. Mary Burnell, second-chair for the initial trial prosecution, recalled that Ms. Carter planned to testify about general descriptions of the individuals and what she saw. She did not remember whether she took notes at the trial preparation meeting, but she indicated that it "wouldn't be abnormal" if she did. She did not remember when or how she learned that Ms. Carter could identify Mr. Copeland, whether by a detective or from a police report. She thought, though, that the prosecutors learned this information from the police, and they either told the prosecutors, or she read it in a report. She did recall that

she and Mr. Trostle talked about it. She did not think that Ms. Carter ever told them that she could identify anyone.

On December 20, 2019, there was another hearing. Defense counsel stated that he wanted to "refine the search . . . to anything related to the extrajudicial identification procedure with Mr. Trostle that he testified about with Ms. Carter." The defense attorney argued that there should have been a list of printed questions that he reviewed with Ms. Carter that would document her conversation with him, including any discussions about her ability to identify Mr. Copeland.[2]

The State argued that any documents that were not produced, such as notes by Mr. Trostle or police reports prepared on this issue, no longer existed, if they ever did. It stated that "[n]othing in that file reflects anything in the way of a police report documenting this interview that Doris Carter had with Mr. Trostle before the court, notes from Mr. Trostle, notes from Ms. Burnell." The prosecutor submitted the trial binders from the initial trial to the court for *in camera* review, to verify for the defense that the box, the only documents not produced to the defense, contained only trial notes prepared by Ms. Burnell and Mr. Trostle, and it did not include any interview notes with Ms. Carter.

[2] Defense counsel argued that the State likely had printed questions concerning the identification, and if the document did not exist, then the State violated the discovery rule of preserving records. If the documents did exist, but had not been given to the defense, then the State violated discovery rules by not providing the document containing the pretrial identification procedure.

On January 2, 2020, the court ruled:

> The work product submitted for *in camera* review, I have reviewed it, I haven't read every page, I haven't even looked at every page, but the Court notes that it's state's attorney's work product. State's attorney says they have provided everything that they can to [the defense]. [The defense] indicated last month actually that he hadn't seen everything. But my review is that it's work product. Now, I didn't look at every page. Quite frankly, I'd be here until next month if I did that. But what I saw appeared to be state's attorney's work production, mostly notes about who was going to question that [] witness and what questions they were going to ask. Those are available on the transcript. It's work product and the Court is going to deny further in camera review of state's attorney work product.

In its written opinion, after the *in camera* review, the court determined that the items in the binder were "motions previously filed into the record; police reports; trial notebooks; and other documents containing mental impressions, trial strategy, personal beliefs, or other privileged attorney work product."

B.

Appellant's Contentions

Appellant makes two contentions relating to Ms. Carter's identification of Mr. Copeland. First, he asserts that the court erred in finding no violation of Maryland Rule 4-263, which provides, in part, as follows:

> (g) Matters Not Discoverable
>
> *(1) By any Party.* Notwithstanding any other provision of this Rule, neither the State's Attorney nor the defense is required to disclose (A) the mental impressions, trial strategy, personal beliefs, or other privileged attorney work product or (B) any other material or information if the court finds that its

> disclosure is not constitutionally required and would entail a substantial risk of harm to any person that outweighs the interest in disclosure.

Appellant states that the prosecutor designated "[t]wo trial notebooks and additional documents" that were not subject to discovery and submitted them to the court for *in camera* review. He argues that the court erred in finding, in "baldly conclusory terms," that the documents were not discoverable pursuant to the rule. As indicated, however, the discovery request below ultimately was limited to information regarding Ms. Carter's identification of appellant's co-defendant, Mr. Copeland.

Second, appellant argues that the trial court erred in denying his "motion to suppress the extra-judicial and in-court identification of appellant's co-defendant by Doris Carter." He argues that Ms. Carter's identification of Mr. Copeland in the first trial, which necessarily implicated appellant as the shooter, violated appellant's right to due process and could not be remedied without prohibiting Ms. Carter to testify in the present trial. He further argues that Ms. Carter's identification of Mr. Copeland was unreliable for a variety of reasons, including her inability to fully observe the scene, and that she viewed Mr. Copeland's picture on Facebook in the context of a report of the shooting.

The State contends that, "[t]o the extent this claim is not moot, the circuit court properly denied the motion to suppress Doris Carter's identifications of Green's co-defendant." The State argues that this claim is moot because the circuit court granted appellant's motion to suppress an in-court identification of appellant's co-defendant by Ms.

Carter, and, as far as the extra-judicial identification of Mr. Copeland, the State did not include this identification in the statement of facts. To the extent that this claim is not moot, the State argues that Ms. Carter's identification did not implicate due process because, among other reasons, the identification procedure was not impermissibly suggestive, and the identification was reliable.

C.

Analysis

We need not address the merits of appellant's claim regarding Ms. Carter's identification of Mr. Copeland because this evidence was not included in the agreed statement of facts that was the basis of the convictions on appeal. As this Court has explained, in a case similarly addressing an agreed statement of facts, if the Court rules that evidence is admissible, but that evidence is not contained in the agreed statement of facts, "it is difficult to see where there could be error." *Linkey v. State*, 46 Md. App. 312, 315 (1980). "[T]he validity of such a ruling is preserved for appellate review only if the evidence in question (or its fruits) is admitted at trial." *Id.* at 316. *See also Jordan v. State*, 323 Md. 151, 159 (1991) (rule permitting appellate review of preliminary evidentiary rulings "obviously was not intended to authorize appellate review of a judge's . . . ruling that permits the State to introduce evidence at trial unless the evidence is ultimately introduced at trial."). Accordingly, because the agreed statement of facts did not include

an identification of Mr. Copeland by Ms. Carter, appellant's claims regarding any such identification are not preserved for this Court's review.

V.

Identification by Mr. Eddie Haskins

Appellant's last contention is that the trial court erred in denying his "motion to suppress the extra-judicial and in-court identification of appellant by Eddie Haskins." He argues that the identification procedure was impermissibly suggestive because the officer presented the photo array to Mr. Haskins with his "thumb and forefinger under/at [a]ppellant's photo." He further asserts that the identification was not reliable because Mr. Haskins was not credible, noting Mr. Haskins's heroin use that evening and his inconsistent statements regarding his familiarity with appellant.

The State argues that the circuit court properly denied appellant's motion to suppress Mr. Haskin's identification of appellant. The State contends that the identification procedure was not suggestive, noting that the interview lasted 45 minutes, the officer's thumb was near appellant's picture for only 5 seconds, and the officer had to hold the array at some place. In any event, the State asserts that, even if the procedure was impermissibly suggestive, Mr. Haskins's identification was reliable because he had a previous relationship with both of the co-defendants, so he had "ample opportunity to view them," both on the day of the shooting and before that day. Finally, the State argues that if there was error in admitting the identification evidence, which was limited to placing appellant and Mr.

Copeland together in Delaware after the shooting, the error was harmless because the identification was cumulative of other evidence in the agreed statement of facts.

A.

Proceedings Below

At a hearing on January 2, 2020, Mr. Haskins testified that he knew Mr. Copeland through a mutual friend, and he had worked as an automotive technician on many of Mr. Copeland's vehicles. On October 23, 2013, Mr. Copeland called Mr. Haskins to tell him that his vehicle, a Mustang, had broken down at the Boston Market in Newark, Delaware, and he wanted Mr. Haskins to see if he could get the car running again. Mr. Haskins arrived there at approximately 6:30. He worked on the car and talked with Mr. Copeland. Appellant was also present. Mr. Haskins had met appellant "a couple times within the last month" at Mr. Copeland's house. Mr. Haskins could not get the vehicle running, so he called his boss to tow it.

They waited approximately one hour for the tow truck to arrive. Mr. Haskins and Mr. Copeland spoke about the vehicle, and Mr. Copeland gave him four bags of heroin for helping him, which Mr. Haskins ingested that evening. Mr. Haskins testified that the heroin did not affect him. It just made him "not sick." Mr. Haskins had purchased heroin from Mr. Copeland before that evening. While they were waiting for the tow truck, Mr. Haskins testified that appellant was "pretty quiet," but they spoke "a couple times." They were talking about "guy stuff, females and stuff like that."

The tow truck eventually arrived and towed the vehicle, and Mr. Haskins drove the two men home. He drove appellant to a trailer park, and he and Mr. Copeland went to Mr. Copeland's apartment. They then went to a PNC Bank, where police swarmed Mr. Haskins's vehicle and arrested Mr. Copeland.

Mr. Haskins was taken to the police station. He remembered being shown the photo array. He initially was "very standoffish" because he was worried for his and his children's safety. He saw in the array, however, the person that was with Mr. Copeland on October 23. When he was subsequently interviewed and shown the photo array again, he picked appellant's picture. He was a "[h]undred percent" certain that he picked the photograph of the man who was with Mr. Copeland that evening.

With respect to his ultimate identification of appellant from the photo array, Mr. Haskins testified:

> [MR. HASKINS]: The second time another police officer come in and started saying that if I didn't point this character out and show him who was with me, then I would be arrested for drug paraphernalia and drugs in my apartment.
>
> [DEFENSE]: Okay. And so?
>
> [MR. HASKINS]: So I pointed him out.
>
> [DEFENSE]: You picked him out the second time?
>
> [MR. HASKINS]: Mm-hmm.

After he pointed out the photograph, he said: "Just make sure my kids are safe." He remembered that Detective Mahan thanked him and shook his hand after he picked out the photograph.

Although Mr. Haskins initially told police that he had not met appellant prior to October 23, he testified that he had previously met appellant at Mr. Copeland's house. Mr. Haskins remembered that they had to take appellant home and drop him off at the same trailer park he had dropped appellant off on October 23. He had "seen [appellant] multiple times on different occasions."

The court made conflicting statements regarding whether the identification procedure was unnecessarily suggestive. At the hearing, the court initially found that it was not, but the court then indicated that it was unnecessarily suggestive, without explaining what changed in the court's determination. In its written opinion, the court found "that [Detective] Mahan's conduct was not unduly suggestive" because Mr. Haskins was shown the same line-up every time at the same location.

B.

Analysis

"The admissibility of an extrajudicial identification is determined in a two-step inquiry." *Smiley v. State*, 442 Md. 168, 180 (2015). "'The first question is whether the identification procedure was impermissibly suggestive.'" *Id.* (quoting *Jones v. State*, 310 Md. 569, 577 (1987)). "The accused, in his challenge to such evidence, bears the initial

burden showing that the procedure employed to obtain the identification was unduly suggestive." *James v. State*, 191 Md. App. 233, 252 (2010). "If the procedure is not impermissibly suggestive, then the inquiry ends." *Smiley*, 442 Md. at 180. "If, however, the procedure is determined to be impermissibly suggestive, then the second step is triggered, and the court must determine 'whether, under the totality of the circumstances, the identification was reliable.'" *Id.* (quoting *Jones*, 310 Md. at 577).

"'[T]he scope of identification procedures constituting "impermissible suggestiveness" is extremely narrow.'" *Morales v. State*, 219 Md. App. 1, 14 (2014) (quoting *Jenkins v. State*, 146 Md. App. 83, 126 (2002), *rev'd on other grounds*, 375 Md. 284 (2003)). "'To do something impermissibly suggestive is . . . to feed the witness clues as to which identification to make[,]'" *id.* (quoting *Conyers v. State*, 115 Md. App. 114, 121 (1997), or "where the police, in effect, repeatedly say to the witness: 'This is the man.'" *In Re: Matthew S.*, 199 Md. App. 436, 448 (2011) (citations and some internal quotation marks omitted). "'All other improprieties are beside the point.'" *Id.* (quoting *Conyers*, 115 Md. App. at 121).

As this Court explained in *Conyers*:

> Impermissibly suggestive police misbehavior, even assuming it to have been the case, which we do not, is not a category that embraces every variety of police misbehavior. We offer an extreme hypothetical simply to make the point. Even if it were to be assumed that the police dragged a witness screaming into the police station, rudely shoved her down in front of a "mug" book containing a thousand photographs, and threatened her that if she did not pick out one of them within the hour they would shoot her on the spot,

> such behavior would no doubt be improper. It would not, however, be impermissibly suggestive. To do something impermissibly suggestive is not to pressure or to browbeat a witness to make an identification but only 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.

Conyers v. State, 115 Md. App. 114, 121, *cert. denied*, 346 Md. 371 (1997).

"In assessing the admissibility of extrajudicial identification, we look exclusively to the record of the suppression hearing and view the facts in the light most favorable to the prevailing party." *In re D.M.*, 228 Md. App. 451, 473 (2016). "We accept the circuit court's factual findings unless they are clearly erroneous, but extend no deference to the circuit court's ultimate conclusion as to the admissibility of the identification." *Id.* "'[We] must make an independent constitutional evaluation . . . by reviewing the relevant law and applying it to the unique facts and circumstances of the case.'" *Gatewood v. State*, 158 Md. App. 458, 475 (2004) (quoting *Carter v. State*, 367 Md. 447, 457 (2002)).

Here, although appellant asserts that the detectives threatened incarceration, warned him that he could lose his job, and made references to Mr. Haskins's and his children's safety if Mr. Haskins did not identify appellant from the array, the only claim relating to the suggestiveness inquiry is whether the detective's momentary thumb placement when handing Mr. Haskins the array amounted to impermissibly suggestive conduct. We hold that it did not.

Detective Mahan set the photo array on the table while encouraging Mr. Haskins to "do the right thing." Mr. Haskins picked up the paper from the table by himself and looked at it while holding it in his own two hands, for close to thirty seconds. He then handed the array back to Detective Mahan and said that "it [was] either two or four." After looking at the array himself, Detective Mahan held it out for Mr. Haskins to see, told Mr. Haskins to think back to his time in the car, and then gave the array back to Mr. Haskins to hold. Mr. Haskins held it, himself, for approximately twelve seconds, after which he identified appellant.

To be sure, when Detective Mahan held the array out to Mr. Haskins, he held it by the bottom edge, resulting in the placement of his thumb near appellant's picture. This lasted, however, only for a couple of seconds. Mr. Haskins then viewed and held the array on his own for a much longer time before he selected appellant's picture as the person he saw with Mr. Copeland in Delaware.

We have reviewed the video of the interrogation, and Detective Mahan's action in holding the array at the bottom edge, resulting in his thumb being placed somewhat below appellant's photograph for a matter of seconds, did not amount to "feed[ing] the witness clues as to which identification to make." *Id.* The procedure was not impermissibly suggestive. Accordingly, the court did not err in ruling that the identification was admissible.

C.

Harmless Error

Even if it was error to admit Mr. Haskin's identification of appellant as the person he saw with Mr. Copeland in Delaware, any error was harmless. Harmless error exists when "'there is no reasonable possibility that the evidence complained of – whether erroneously or excluded – may have contributed to the rendition of the guilty verdict.'" *Dove v. State*, 415 Md. 727, 743 (2010) (quoting *Dorsey*, 276 Md. at 659 (1976)).

Here, Mr. Haskins's identification was cumulative to other evidence showing that appellant was with Mr. Copeland when Mr. Haskins picked them up after Mr. Copeland's black Mustang broke down. According to the agreed statement of facts, surveillance video showed appellant and Mr. Copeland together in Delaware after the homicide. Further, appellant admitted to police that he was with Mr. Copeland and Mr. Haskins at the Boston Market in Newark and that Mr. Haskins picked them up. Mr. Haskins's identification of appellant as the man present with Mr. Copeland was cumulative to other evidence, and any error in admitting the identification was error that does not require reversal of appellant's convictions.

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