Circuit Court for Baltimore County
Case No. C-03-19-000991 & C-03-19-00969

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 809

September Term, 2020

TIMOTHY ROBERT MEADOWS

v.

STATE OF MARYLAND

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

JJ.

Opinion by Raker, J.

Filed: September 14, 2021

Appellant Timothy Robert Meadows was convicted by a jury in the Circuit Court for Baltimore County of armed carjacking, attempted armed carjacking, kidnapping, and two counts of first-degree assault. Appellant presents the following questions for our review:

> "1. Did the trial court err by failing to *voir dire* two jurors who were observed nodding off and by refusing to remove [juror eleven], who had also been observed nodding off, and who was admittedly—'a little out of it'?
>
> 2. Did the trial court err by allowing in-court identifications of appellant by Kenneth Battaglia and Lisa Scott despite the absence of a pretrial identification by either witness?
>
> 3. Did the circuit court err by failing to rule on motion to change venue?"

Finding no error, we shall affirm.

I.

Appellant was indicted by the Grand Jury for Baltimore County on charges of armed carjacking, attempted armed carjacking, kidnapping, and two counts of first-degree assault. The jury convicted him of all charges. The court sentenced appellant to a term of incarceration of 30 years for kidnapping, 30 years for armed carjacking, 30 years for attempted armed carjacking, and five years for each conviction of first-degree assault, all consecutive, for a total term of 100 years.

On March 22, 2019, Emily Hanna discovered her red Toyota Corolla missing from its parking space in front of her workplace on Falls Road between 3:00 p.m. and 10:30 p.m.

Kenneth Battaglia was driving on I-695 on his way to work at 4:20 a.m. on April 2, 2019. Near the Dulaney Valley Road exit, Mr. Battaglia's vehicle was bumped from behind, and he pulled over to inspect the damage. As he examined his vehicle, a man and a woman exited a red car and approached Mr. Battaglia. The woman attempted to enter Mr. Battaglia's vehicle, but he pushed her away. The woman's male companion hit Mr. Battaglia over the head, Mr. Battaglia fell into his vehicle, and then he drove away.

On April 2, 2019, at around 4:30 a.m., Ms. Scott was driving on I-695 on her way to work in a Chevy Camaro. As she approached the Charles Street exit, her vehicle was bumped from behind. Ms. Scott and the other car took the exit, and both vehicles pulled over. Ms. Scott was hit over the head and forced into the backseat of her car. The assailants—a man and a woman—drove away in the Chevy Camaro with Ms. Scott in the back. The perpetrators released Ms. Scott shortly before 9:30 a.m. in northern Baltimore County.

Officer Frank Gullion of the Baltimore County Police Department located an unoccupied Toyota Corolla on Charles Street just south of West Joppa Road on April 2, 2019. The Toyota Corolla belonged to Ms. Hanna, and on the pavement next to the Corolla Officer Gullion found a vehicle registration card for Ms. Scott. Clint Edwards, the lead investigator, testified that a print lifted from the rear-view interior mirror of the Toyota matched the known prints of Edward Buffington.

Police located Ms. Scott's Chevy Camaro on the 3800 block of Cottage Avenue in Baltimore County through the vehicle's OnStar tracking system. Appellant and Lauren

Schmidt were in the back of the vehicle; the police arrested them and charged them. Ms. Schmidt entered into a plea agreement, pleading guilty to the attempted carjacking of Mr. Battaglia and carjacking of Ms. Scott. Ms. Schmidt testified for the State pursuant to her cooperation agreement.

At trial, Ms. Schmidt testified that she and appellant rear-ended and attempted to steal Mr. Battaglia's vehicle to pay for drugs after consuming crack cocaine and methamphetamines. Ms. Schmidt stated that after attempting to carjack Mr. Battaglia, Ms. Schmidt and appellant rear-ended Ms. Scott's vehicle, took control of Ms. Scott's car, and drove away with Ms. Scott in the backseat. Ms. Schmidt testified that she and appellant used Ms. Scott's bank card to withdraw money from an ATM to purchase drugs. Ms. Schmidt further testified that on April 1, 2019, appellant drove a red Toyota Corolla and hit both Mr. Battaglia's and Ms. Scott's vehicles.

The two victims, Mr. Battaglia and Ms. Scott, testified at trial. During the direct examination of Mr. Battaglia, as related to the identification of appellant, the State asked him whether he would "recognize him again . . . also if [he] saw pictures of him, at least how he was dressed?" Mr. Battaglia answered yes, and defense counsel objected "to any sort of in court identification." The court overruled the objection. The State asked Ms. Scott whether she would recognize the person who was involved in her carjacking, and she pointed out and identified appellant. Defense counsel again objected "based on the lack of a prior out of court identification" and due process grounds. Again, the court overruled the objection.

Appellant testified in his own defense. In response to photographs introduced by the State depicting a man using an ATM, appellant admitted that he was the person in the picture but denied any involvement in the carjackings or assaults of Mr. Scott and Ms. Battaglia. He testified that on April 1, 2019, he was homeless and using heroin and cocaine. He related that Ms. Schmidt woke him around 5:00 a.m. and told him that she had ATM bank cards from someone who was paying her for sexual intercourse. He went with her to a nearby ATM and testified, "I knew I was stealing." After using the ATM, Ms. Schmidt dropped appellant off.

Appellant testified that Ms. Schmidt returned around 9:00 a.m. with someone in the Camaro. He did not get into the vehicle at that time and admitted he retrieved more money from the ATM. He stated that Ms. Schmidt borrowed his phone and then dropped off her passenger. When Ms. Schmidt returned, appellant drove her to buy drugs and the police stopped them.

On the afternoon of the second day of trial, defense counsel moved for mistrial, alleging that juror numbers three and eleven had been observed sleeping.[1] The judge denied the mistrial request, stating that he would watch those jurors to determine if another issue arose, and he would ensure "evidence availability" when the jury deliberated.

Later the same day, the court brought up juror number three's increased

[1] At one point in the proceeding, defense counsel referred to juror number twelve, making the transcript less than clear. The judge, though, later corrected counsel and indicated that counsel apparently was referring to juror number eleven by the wrong number. Defense counsel agreed.

attentiveness. Defense counsel agreed with the court's observations about juror number three, but defense counsel expressed concerns about juror numbers ten and eleven's ability to fulfill juror duties. Defense counsel claimed both jurors had nodded off during a video portion and fell asleep during questioning. Defense counsel renewed his motion for a mistrial on the grounds that evidence availability would not compensate for missed questions, answers, or observations of Ms. Schmidt as she testified and that replacement of three jurors with alternates would not suffice for a loss of observational evidence.

In response, the court noted that juror number three took notes and paid attention despite occasionally closing her eyes during pauses; juror number eleven had been briefly nodding off but also stared at the television attentively, looked at the witnesses, and took notes; juror number ten had not demonstrated any inattentiveness. The court denied the motion for a mistrial but agreed to *voir dire* juror number eleven.

Upon bringing juror number eleven to the bench, the court inquired as to his ability to follow and hear the testimony and to give the case his full attention. Juror number eleven apologized stating, "I'm just getting over a disease, so that's probably the reason why I'm a little out of it." But, he stated that he had no issue following the testimony and that he had taken notes while observing everything. The court offered defense counsel an opportunity to question the juror, but defense counsel declined. The court and defense counsel agreed to continue watching juror number eleven.

Appellant was convicted and sentenced and this timely appeal followed.

II.

Before this Court, appellant argues that the circuit court erred in failing to *voir dire* two of the jurors observed nodding off and refusing to remove the third juror, number eleven, who admitted to being "a little out of it," allowing in-court identifications of appellant by Mr. Battaglia and Ms. Scott despite an absence of any pretrial identification by either witness, and neglecting to rule on appellant's change of venue motion.

Appellant argues first that his right to a fair trial was compromised by the combination of the three jurors nodding off and the circuit court's failure to *voir dire* two of those jurors and failure replace juror number eleven with an alternate juror or take any other remedial action. Appellant argues that the court's sole remedy of "continuing to watch" juror number eleven inhibited his access to a fair trial, and that the court should have replaced juror number eleven and questioned the other jurors accused of misconduct.

Next, appellant argues that the circuit court erred by allowing the State to elicit first-time in-court identifications of appellant by Mr. Battaglia and Ms. Scott without any pretrial identification. He contends that where the State had not obtained a pretrial identification of appellant from either witness, it was impermissibly and prejudicially suggestive to permit the first identification, in court, where it was obvious that the only person with defense counsel who was not a lawyer was the accused. Building on this argument, appellant goes on to apply the factors set forth by the Supreme Court in *Neil v. Biggers*, 409 U.S. 199 (1972), ordinarily applicable to evaluate whether an in-court identification procedure is reliable despite a suggestive pre-trial procedure. Appellant

argues that accurate witness identification of the assailants is unreliable nine months after the crime and highlights the factors established in *Biggers*. He concludes by arguing that both identifications were unreliable, and that the trial court should not have allowed the in-court identifications of appellant by the witnesses where they observed appellant sitting as the "lone defendant, next to his counsel."

Appellant's final argument relates to the circuit court's failure to rule on appellant's motion for change of venue. Before trial, on January 7, 2020, appellant filed a *pro se* motion requesting a change of venue. In the motion he alleged that because the crime took place close to the courthouse the venue was highly prejudicial:

> "I was informed by my attorney that the courts are trying my case with prejudice due to the location and the time of the crime alleged . . . . My attorney explained to me that the courts feel it could have been any one of them because it happened at the same exit everyone who works in the courthouse takes to go to work around the same time they start arriving at work. This location is very close to the courthouse and the situation has caused the State's Attorney and potentially the judge to view this alleged case with prejudice. Therefore I would like to have a change of venue so I can exercise my right to a fair trial without prejudice."

The motion was stamped "set for hearing" and "To be considered by trial judge on 1/16/20." On January 16, 2020, the first day of trial, no one brought the motion to the attention of the trial judge and the court never ruled upon the motion. Appellant argued that he never withdrew the motion and that he was tried in a prejudicial atmosphere.

In response to the jury *voir dire* and juror replacement issue, as a threshold matter, the State argues non-preservation. More specifically, the State argues that appellant's

claim that the trial court erred in not dismissing juror number eleven in favor of an alternate, and in not making appropriate inquiry of jurors numbers three and ten, is not preserved because counsel never asked the court to dismiss juror number eleven nor to *voir dire* juror number three or ten. Instead, he only asked for a mistrial. Moreover, the State argues, appellant declined to seek further relief once the judge found the jurors paid sufficient attention during the second day of trial and indicated he would take no further action. On the merits, the State maintains the trial court exercised its discretion properly in dealing with the jurors.

As to the identification issue, the State argues first that appellant's argument is factually wrong as to Mr. Battaglia's testimony in that Mr. Battaglia never made an in-court identification of appellant but identified him only in a photograph. Second, the State argues that the trial court exercised its discretion properly in permitting both witnesses to identify appellant—Mr. Battaglia from a photograph, and Ms. Scott, to point appellant out as the assailant, because appellant misstates the applicable legal test. Explaining the applicable law, the State notes that the *Biggers* two-step inquiry and five-factor analysis is reserved for instances where the in-court identification follows a suggestive out-of-court identification, and has no application where there has been no prior suggestive identification.[2]

[2] The State makes a half-hearted non-preservation argument as to the Battaglia identification but recognizes that the objection was made to the court by two attorneys for appellant, one arguing the absence of an out of court identification, and that part of counsel's objection to Mr. Battaglia's identification was inaudible. We find that issue preserved for our consideration.

As to appellant's change of venue argument, the State argues that the circuit court did not err in failing to rule on the motion. On the first day of trial, appellant never raised the issue with the first presiding judge or the trial judge. The trial commenced without a motion ruling. According to the State, by failing to raise the issue pre-trial with the court, or to ever raise the issue below (except by filing the motion), the issue is waived.

III.

We turn first to the juror issues. We agree with the State that appellant has not preserved this issue for our consideration. Appellant never asked the court to remove the two jurors or to *voir dire* the juror.

At trial, appellant requested a mistrial only, based on the conduct of the three jurors who were apparently (or possibly) sleeping. The judge declined to grant a mistrial, and found that the three jurors paid sufficient action, such that he would take no further action. As appellant requested only a mistrial, his claim of error is limited to the ground he raised below—a mistrial—and the court's denial of that motion. Significantly, he does not argue to us that the trial court abused its discretion in denying a mistrial.

IV.

We now turn to the second issue, the in-court testimony by Mr. Battaglia and Ms. Scott regarding the identification of appellant as the male actor in these crimes. We hold that there was no constitutional bar to the identifications by either witness, Mr. Battaglia

or Ms. Scott. *Conyers v. State*, 115 Md. App. 114 (1997).

Courts recognize that identifications made by witnesses of defendants sitting at trial table with counsel are suggestive, but, to offend due process, more is required than suggestivity. The procedure must create an "unnecessary" or "impermissible" suggestion. *See United States v. Brown*, 699 F.2d 585, 593-4 (2d Cir. 1983) (noting "an in-court identification without a prior line-up or hearing does not necessarily violate a defendant's rights"); *United States v. Gentile*, 530 F.2d 461, 467-69 (2d Cir. 1976), cert. denied, 426 U.S. 936 (1976); *United States v. Davis,* 487 F.2d 112, 122 (5th Cir. 1973), cert. denied, 415 U.S. 981 (1974); *United States v. Hamilton*, 469 F.2d 880, 883-4 (9th Cir. 1972) (declining to "take the giant step of holding in-court identifications inadmissible"); *Middleton v. United States,* 401 A.2d 109, 132 (D.C. 1979). The *Hamilton* court explained that

> "[i]t is sufficient safeguard that the accused be allowed to question the weight to be given the 'in-court' identification considering the length of time the witness saw the perpetrator of the crime, the elapsed time between the act and the trial, and the fact that the witness had made no other identification of the defendant."

Permitting a witness to identify a defendant seated at trial counsel, in the absence of any pre-trial identification, does not in and of itself violate due process or any other constitutional protection.

Whether a witness may identify a defendant seated in the courtroom as the perpetrator of the charged crimes is left to the sound discretion of the trial judge. And, if defense counsel requests the court to seat a defendant other than at counsel table, the court

has discretion to permit protective procedures, *i.e.,* having the defendant sit in the audience among other individuals fitting the same general appearance, or having state employees fitting the defendant's description sit at the defense table. *See Brown*, 699 F.2d at 593. Here, defense counsel objected merely to the in-court identification and in effect asked to have the two witnesses precluded from identifying him at trial.

Considering this issue in *Conyers*, Judge Charles Moylan, Jr., writing for this Court, explicated as follows:

> "The appellant says, however, that the in-court identification was suggestive. Even to use the word 'suggestive' to condemn such a procedure is to import the specialized jargon of extrajudicial identification law into a legal region where it is not spoken. Any in-court identification of a defendant seated at the trial table is, by its very nature, in a layman's sense of the word, 'suggestive.' It is self-evidently so, and all parties know it and always have known it. It is nevertheless the standard procedure that is almost always routinely followed. Whatever its suggestiveness, it is done in full view of the jury which is able to weigh it for what it is. Counsel, moreover, is freely permitted to argue such weight or lack thereof to the jury. An in-court identification is not something that invokes, as a matter of law, any exclusionary principle."

Id. at 123.

The trial court did not abuse its discretion in permitting Mr. Battaglia to identify appellant in the photographs or in permitting Ms. Scott to identify appellant as the person involved in the charged crime. Mr. Battaglia did not make an in-court identification of appellant. Mr. Battaglia was not asked whether he recognized his assailant in the courtroom. Rather, the prosecutor asked Mr. Battaglia whether he would "recognize him again also if you saw pictures of him, at least how he was dressed?" Mr. Battaglia testified

that he recognized the person shown in two State's exhibits to be his assailant. Those exhibits were photographs of appellant at an ATM. Mr. Battaglia did not identify appellant in the courtroom. The admissibility of his testimony was within the discretion of the court, and the court exercised its discretion appropriately.

Ms. Scott identified appellant in court. The State is correct that the factors set out in *Biggers* are inapplicable in assessing the admissibility of an in-court identification absent a pre-trial identification procedure. The trial judge did not abuse his discretion by allowing Ms. Scott's testimony identifying appellant in the courtroom.

V.

As to the third issue, the motion for change of venue, we hold that the trial court did not err in failing to rule on the outstanding motion to change venue because appellant waived the issue. He never called the outstanding motion to the attention of the trial court, nor did he ask the court to rule on the motion on the day of the trial. By remaining silent, he waived the issue. *White v. State*, 23 Md. App. 151, 156 (1974) (holding that appellant waived claim of error where appellant failed to bring the motion to the attention of the trial court).

Appellant cites *Saunders v. State*, 8 Md. App. 143, 146 (1969), and *Brice v. State*, 254 Md. 655 (1969), as support for his argument that the failure to rule on a pretrial motion is fatal error, at least in the absence of waiver. The *Brice* Court held that there was no waiver where a motion had been made and the moving party sought to have a ruling on

that motion and the court, through error or omission, did not rule. *Id*. at 663. In *Saunders*, "the trial court was made aware of both the fact that the motion had been filed and that there was no ruling on it." *Id.* at 147. The court ruled: "[i]n view of the obvious merit to the motion, we think the motion should have been granted at the time it was called to the judge's attention." *Id.*

The case at bar differs from *Brice* and *Saunders* in that appellant never sought a ruling on the motion before the court, nor, we note, was there any obvious merit to the motion.

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