Circuit Court for Washington County
Case No.: C-21-CR-19-000086

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 814

September Term, 2022

ANTONIO CANE ARANA

v.

STATE OF MARYLAND

Reed,
Albright,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: September 29, 2023

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Appellant, Antonio Arana, was indicted in the Circuit Court for Washington County, and charged with first degree murder and related assault, robbery, and handgun charges. Following a motions hearing and a jury trial, he was convicted of second degree murder, conspiracy to commit armed robbery, attempted armed robbery, conspiracy to commit attempted armed robbery, conspiracy to commit robbery, attempted robbery, conspiracy to commit attempted robbery, and use of a firearm in the commission of a crime of violence. Thereafter, Appellant received an aggregate sentence of fifty-five years' incarceration, to be followed by five years' supervised probation upon release.[1] On this timely appeal, Appellant asks us to address the following questions:

1. Did the trial court err in denying Mr. Arana's request for a mistrial?

2. Did the motions court err in denying Mr. Arana's motion to suppress?

For the following reasons, we shall affirm.

BACKGROUND

This is a case of an attempted robbery gone wrong, resulting in the shooting death of Christopher Turner on January 20, 2019, in an apartment located at 1021 West Washington Street in Hagerstown ("the apartment"). It was established through the trial that everyone involved, namely, the victim, the witnesses, and the suspects, were acquainted.

[1] Appellant was sentenced to 40 years, suspend all but 35 years, for second degree murder, to be followed by 20 years, suspend all but 10 years, for attempted armed robbery, to be followed by 20 years, suspend all but 10 years, for use of a firearm in a crime of violence, and 20 years, all suspended, for conspiracy to commit attempted armed robbery, with the remaining counts merged at sentencing.

On the day in question, January 20, 2019, Erica Earl and the eventual victim, Christopher Turner, went to the apartment that Earl shared with her mother, Lateria Tyler. Tyler was present at the time, as was Jordan Hackett, Hailey Wiles, and Felicia Littleford. Earl went into the bedroom and joined Turner and Wiles and the three engaged in sexual relations. Realizing that her daughter was having sexual intercourse with both Turner and Wiles, Tyler and Littleford left the apartment.

At some point, Wiles disengaged and left the bedroom. Earl then heard Wiles say, from the other room, "In there." Appellant, who Earl knew as "Cane," and Dakota Paugh, who she also knew, entered the bedroom. Both men were armed with handguns.

Upon seeing the assailants, Mr. Turner fought back, first pushing Ms. Earl into Mr. Paugh and then punching him in the face. This caused Paugh to drop his gun and Turner picked it up. Paugh then yelled out, "Cane, shoot him." Gunshots were fired and Ms. Earl testified that "Cane shot Chris." Christopher Turner sustained fatal injuries. It was later determined that Mr. Turner died from multiple gunshot wounds and that the manner of his death was by homicide.

Immediately after Mr. Turner was shot, Appellant and Paugh fled the apartment. Earl checked on Turner, saw that he was not "okay," and then she, Wiles and Hackett left the apartment. Earl ran to 731 Dale Street, which she later testified was Dakota Paugh's residence.

Indeed, Ms. Earl was at Paugh's residence with Appellant and Littleford earlier that same day. Although it was unclear from Earl's testimony if Appellant and Paugh knew she was going to meet Turner, Earl testified she told Littleford before leaving their

company. She also testified that she had been in a sexual relationship with Mr. Turner for a couple months and that he gave her money and drugs in exchange for sex.

After the shooting, Ms. Earl confirmed she did not call the police because she "was still trying to process it all," and because she had ingested cocaine and other narcotics during the day. Approximately thirty to forty minutes after the shooting, Earl returned to the apartment with Hackett to retrieve her clothes, take money and drugs from Turner's person, and to dispose of Mr. Turner's body.[2]

Lateria Tyler testified at trial and confirmed she lived in the apartment on the day in question and that Erica Earl, her daughter, was living there as well. On the day in question, and after Tyler realized Earl and Turner were going to have sex, she and Littleford left the apartment and went to the nearby home belonging to Dakota Paugh's mother. As they walked out, they passed Appellant and Dakota Paugh in the entrance hallway heading into the building.[3]

We shall include additional detail in the following discussion.

[2] Earl testified that Hackett put Turner's body in a used Christmas tree bag. Later that night, the body was moved. Earl testified that Paugh and a person identified as "Shadow" took Turner's body. This was confirmed by video surveillance. On January 30, 2019, Turner's body was found lying in a drainage ditch, near Cheyennes Trail, Gerrardstown, Berkeley County, West Virginia.

[3] Tyler's subsequent identification of Appellant in a photo array is the subject of the second question presented. She identified Appellant and Dakota Paugh in separate arrays during trial.

DISCUSSION

I.

Appellant first contends the court erred in denying his motion for mistrial because evidence of his post-arrest, post-*Miranda* silence was admitted over objection.[4] This occurred when, contrary to an earlier ruling on a motion *in limine* barring any such reference, Officer Coy testified "we tried to speak to the suspects after they were arrested." The State responds that the trial court properly exercised its discretion by striking the answer, issuing a curative instruction to the jury, and then, denying the motion for mistrial. We concur with the State.

Here, after jury selection, Appellant moved *in limine* to preclude the State from mentioning that he invoked his right to counsel after initially agreeing to speak voluntarily with the police. The State responded to the motion, informing the court that it did not intend to introduce this information in its case-in-chief. The court ruled that "was good enough for now," and that, in the event that any issue should arise during trial, "we can figure it out as we go."

Thereafter, during trial, Hagerstown Police Officer Charles Coy testified that they developed two individuals suspected of being involved in the disappearance of Christopher Turner, namely, Appellant and Dakota Paugh. Officer Coy was asked on direct examination if he talked to other witnesses and the following ensued:

> A. I guess after the, uh, the second photo array, um, I believe, uh, at that point pretty much I presented the case for indictment and then - -

[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Q. Okay.

A. - - we tried to speak to the suspects after they were arrested.

Q. Okay. Well then let's - - So you went to the - - presented it for indictment - -

[DEFENSE COUNSEL]: Your Honor, objection.

The parties approached the bench and the court heard argument on the objection:

[DEFENSE COUNSEL]: Officer Coy just testified that he tried to speak to the suspects after they were arrested. That was subject to my motion in limine, which was granted, regarding my client.

THE COURT: Okay. Let's just get the timeline here. What has been testified to as to who had been arrested at that time?

[PROSECUTOR]: No one.

[DEFENSE COUNSEL]: No one.

THE COURT: Okay. No one has been arrested at that time. And, I'm sorry, what was the question again?

[PROSECUTOR]: The question was who, if any, witnesses, had you talked to after talking to Dusty Bange? And I believe his response was, "Well I got - - went to grand jury for charges," and then I think he said, "I attempted to talk to the suspects."[5]

THE COURT: Okay. I'm going to grant the objection. I'll move to strike the testimony. Did you want to push it further?

[DEFENSE COUNSEL]: Can I consider that at a recess in terms of jury instruction?

THE COURT: Yeah. I'll move to strike that response at this time.

[DEFENSE COUNSEL]: Thank you.

The court then gave the following curative instruction:

[5] Dusty Bange was not considered to be a person of interest.

THE COURT: Okay thank you counsel. Ladies and Gentlemen, uh, the last response is being stricken from the record. You are not to consider it in any way during the trial or during any future deliberations if any. Okay? So, please continue.

During a break in the proceedings, Defense Counsel moved for a mistrial, as follows:

Your Honor, on February 28th, I did file motions in limine. The first issue in that was the post-arrest silence of the defendant. Detective [sic] Coy today testified that he tried to interview the suspects. And, uh, Mr. Arana was clearly a suspect at that time. Um, and therefore indicating that in the word, "attempt" and that he interviewed the suspect and that there won't be any further testimony about an interview denying or admitting anything because my client was not interviewed, um, leaves the jury, um, with - - with the only conclusion that my client refused to be interviewed. That - - That statement by Detective [sic] Coy, um, did directly implicate my client's post-arrest silence in this matter, and that is inadmissible evidence. It goes to the heart of the Constitution. My client's Fifth Amendment privilege against self-incrimination. And that bell that was rang this morning cannot be un-rung. It cannot be un-rung in front of this jury. No curative instruction could be un-ring that bell [sic], um, and he is now being tried on his silence in violation of the Constitution.

The court denied the motion for mistrial at that time, explaining:

The Court recognizes the extreme protections that are afforded by the United States Constitution, also Maryland Declaration of Rights and are afforded the states in the United States Constitution, the 14th Amendment. Uh, the issue in this case is post - - would technically be post-arrest silence, though we don't have any details whether it was intended to be pre-Miranda or post-Miranda silence. We just can't tell from the statement. Uh, if it had gone into more detail, specifically identifying the defendant here or in some way had more detail that would directly implicate having talked with or at least approached, uh, the defendant as one of a smaller group, the Court may have ruled differently. However, the Court believes that the statement itself from Detective [sic] Coy, uh, was of such a nature and such a broad and general investigative nature that it is too tenuous a connection to the conclusion that was offered by the defense, that the jury would necessarily, uh, from that assume or infer that the defendant had remained silent. Uh, at this point, the statement, again, which was about intended acts, uh, in the investigation, in the Court's opinion, no - - in no greater way implicated the

> defendant remaining silent as would statements concerning suspects who did give testimony, including Ms. Earl who gave testimony today and indicated that she had willingly talked to the officers, albeit, second time around. Uh, the fact that that would be brought in, but not anything from the statement, could just as easily raise the inference that defense says this statement from Detective [sic] Coy, at the time Detective [sic] Coy, would raise.
>
> So the Court believes it's just too tenuous to find that, uh, the jury, any reasonable jury would infer that this defendant had remained silent. For those reasons, the Court did enter the denial on the record.

"[D]eclaring a mistrial is an extreme remedy not to be ordered lightly." *Nash v. State*, 439 Md. 53, 69 (2014). "Appellate review of a decision to deny a mistrial is conducted 'under the abuse of discretion standard.'" *Vaise v. State*, 246 Md. App. 188, 239, *cert. denied*, 471 Md. 86 (2020) (quoting *Nash*, 439 Md. at 66-67). In reviewing a trial court's exercise of discretion, we consider whether it was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State v. Baker*, 453 Md. 32, 46 (2017) (internal citation and quotations omitted). We recognize that the trial court is in a superior position to assess the effect of any improper testimony. *Howard v. State*, 232 Md. App. 125, 161, *cert. denied*, 453 Md. 366 (2017).

"The determining factor as to whether a mistrial is necessary is whether 'the prejudice to the defendant was so substantial that he was deprived of a fair trial.'" *Kosh v. State*, 382 Md. 218, 226 (2004) (quoting *Kosmas v. State*, 316 Md. 587, 594-95 (1989)). When determining if a defendant has been prejudiced, the court "first determines whether the prejudice can be cured by instruction. Such an instruction must be timely, accurate, and effective. Unless the curative effect of the instruction ameliorates the prejudice to the defendant, the trial judge must grant the motion for a mistrial." *Id*. (internal citation and quotations omitted). *Accord Simmons v. State*, 436 Md. 202, 219 (2013); *see also Vaise*, 246 Md. App. at 240 ("When, as in this instance, inadvertent presentation of inadmissible

evidence to the jury generates a request for a mistrial, we consider whether a curative instruction adequately remedied any resulting prejudice." (citations omitted)).

In *Doyle v. Ohio*, 426 U.S. 610, 619 (1976), the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment prohibits prosecutors from impeaching criminal defendants with their decision to remain silent after warnings had been given pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966).[6] Thus, it is clear that a defendant's silence after receiving *Miranda* warnings may not be used against him at trial. *See Grier v. State*, 351 Md. 241, 258 (1998) ("Evidence of post-arrest silence, after *Miranda* warnings are given, is inadmissible for any purpose, including impeachment."); *accord Zemo v. State*, 101 Md. App. 303, 318 (1994); *see also Reynolds v. State*, 461 Md. 159, 180 (2018) ("An individual's post-arrest silence is also protected by *Miranda* and generally cannot be admitted as substantive evidence at trial."), *cert. denied*, 139 S.Ct. 844 (2019); *Lupfer v. State*, 420 Md. 111, 124 (2011) (noting "the dangers of introducing at trial the fact that a defendant in a criminal case decided not to speak to law enforcement personnel, especially where that refusal occurred following arrest and after the defendant is advised of his or her Miranda rights").

Initially, we are not persuaded that Officer Coy provided specific evidence of Appellant's silence following *Miranda*. After the prosecutor asked the officer if he spoke to other witnesses, the officer answered, offering the additional nonresponsive commentary that "we tried to speak to the suspects after they were arrested." As the State observes in

[6] Although not entirely clear, Defense Counsel's written motion in limine states that Appellant was advised of his rights and requested a lawyer shortly after he was arrested.

its brief, "Officer Coy never stated, nor did the prosecutor ask, what happened as a result of that attempt, let alone mention that Arana stayed silent and requested an attorney."

We consider the appropriate factors pertinent to mistrials. As explained repeatedly by Maryland courts, there are five factors relevant to the determination of whether a mistrial is required. The factors include:

> whether the reference to [the inadmissible evidence] was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists.

Rainville v. State, 328 Md. 398, 408 (1992) (quoting *Guesfeird v. State*, 300 Md. 653, 659 (1984)); *accord Carter v. State*, 366 Md. 574, 590 (2001); *Washington v. State*, 191 Md. App. 48, 100 (2010); *see also McIntyre v. State*, 168 Md. App. 504, 524-25 (2006) (adding a factor of whether and when a curative instruction was given and stating, "no single factor is determinative in any case, nor are the factors themselves the test . . . Rather, the factors merely help to evaluate whether the defendant was prejudiced").

First, the comment that the police "tried to speak to the suspects after they were arrested," was an isolated comment that was not repeated. Second, when Officer Coy was asked if he spoke to any other witnesses, he did not simply answer that question in the affirmative, but instead, added nonresponsive information that, even Defense Counsel and the court agreed was unexpected. Both these factors support the court's ruling. *See Wagner v. State*, 213 Md. App. 419, 463 (2013) ("[T]he bald statement was isolated, unsolicited and unlikely to cause significant prejudice. The circuit court did not abuse its

discretion in declining to employ the extraordinary remedy of the declaration of a mistrial based on this statement.") (citation omitted).

As for the remaining three factors, Officer Coy was not the main witness in this case. That distinction belonged to Lateria Tyler and Erica Earl, the eyewitnesses who, respectively, saw Appellant enter the apartment building where the victim was shot. Moreover, at this point during the trial, there had been no evidence that Appellant or Dakota Paugh had been arrested; that evidence was admitted subsequently. Ultimately, we are persuaded that the trial court properly exercised its discretion in striking the answer, issuing a curative instruction, and denying the motion for mistrial. As our Supreme Court has explained:

> The fundamental rationale in leaving the matter of prejudice vel non to the sound discretion of the trial court is that the judge is in the best position to evaluate it. The judge is physically on the scene, able to observe matters not usually reflected in a cold record. The judge is able to ascertain the demeanor of the witnesses and to note the reaction of the jurors and counsel to inadmissible matters. That is to say, the judge has his [or her] finger on the pulse of the trial.

Hill v. State, 355 Md. 206, 221 (1999) (quoting *State v. Hawkins*, 326 Md. 270, 278 (1992)).

II.

Next, Appellant asserts the motions court erred in denying his motion to suppress an extra-judicial identification made by one of the State's witnesses, Lateria Tyler after viewing a photo array. Appellant's argument is that the presentation of the array was impermissibly suggestive and that Tyler's identification of him as one of the men she saw immediately before the shooting should have been suppressed. The State responds that the

presentation of the array was not unduly suggestive and that, in any event, Tyler's identification of Appellant, a person she was familiar with from prior encounters, was reliable. As will be explained, we agree with the State.

During the motions hearing, Officer Charles Coy, of the Hagerstown City Police, testified that he interviewed Lateria Tyler on January 28th and 29th, 2019, in connection with this case. On January 28th, 2019, as part of that investigation, Officer Coy met Tyler at her apartment, located at 1021 West Washington Street, the location of the murder. At that time, Tyler told him that "Kota" was one of the shooters. She explained that, on the afternoon of January 20th, 2019, the day of the shooting, she left her apartment and passed the two shooters in the hallway as they approached the door. The shooters were not wearing masks.[7]

When Officer Coy interviewed Tyler again the next day, January 29th, 2019, Tyler identified one of the shooters, *i.e.*, "Kota," as Dakota Paugh, "the half-brother of the defendant here today" on January 29th.[8] Officer Coy confirmed that, according to procedure, the array included "one suspect, five fillers, and two blanks" meaning blank pages. Appellant's photo was not included in this array.

Thereafter, on or around February 1, 2019, Officer Coy prepared eight folders containing a single photograph each. This array included a picture of Appellant, five

[7] Video surveillance footage from a gas station across the street showed the two suspects walking into the apartment building, followed shortly thereafter by Tyler and her juvenile daughter walking out.

[8] Although the motions transcript and the parties use the surname "Paul," the trial transcripts and the record reveal that the correct spelling is "Paugh."

"filler" photographs, and two empty ones in the back of the array. On February 4th, 2019, Officer Coy took those folders with him to the home of Dakota Paugh's grandmother, where Tyler was staying because she feared returning to the apartment, the scene of the murder. At some point, Tyler told police that the Paughs "were like family" but that she felt guilty and afraid. She also told police that she knew Dakota Paugh for "several years," that Paugh and Appellant were "half-brothers," and that Appellant had been at the grandmother's house. She knew Appellant also went by the nickname "Kane."

On February 4th, 2019, Officer Coy and Detective Jesse Duffey escorted Tyler back to her apartment so she could retrieve some personal items. Prior to going inside, and while they were seated in the police car, Detective Duffey showed Tyler the array containing Appellant's photograph. Tyler did not pick Appellant's photograph at that time, and instead circled the sixth photograph, stating "I got cold chills, very sure."

The three of them then went into the apartment and the police waited while Tyler collected her things. They got back inside the police car. Detective Duffey was driving, Tyler was in the front passenger seat and Officer Coy was in the rear passenger seat. While they were driving, Detective Duffey told Tyler "Come on, we know you're not being truthful." Tyler "dropped her head," and then responded, "He's five," paused, and then added, "He is in there." The police then showed Tyler the array again and she stated, "It's five" and circled Appellant's photograph.[9]

[9] Detective Duffey later confirmed that Tyler was "90%" sure as to her first pick on the sixth photo, and "100 % sure" as to her second pick on the fifth photo, or Appellant's. The court admitted Officer Coy's handwritten notes as to this issue. There is a question (continued)

Detective Jesse Duffey further testified that after Tyler initially picked the unidentified individual in the sixth photo, he and Officer Coy went into Tyler's apartment to wait while she collected her belongings. At that time, Officer Coy told Detective Duffey, apparently out of Tyler's presence, "[s]he didn't pick him out." Detective Duffey watched Tyler and noted that her demeanor had changed from prior encounters with her during the investigation. Specifically, Tyler seemed "anxious … upset, fearful." Detective Duffey testified "[h]er attitude and demeanor had changed after showing her that photo array the first time" in the police car.

After the three of them returned to the police car and were seated again inside, Detective Duffey had a "heart-to-heart" with Ms. Tyler because he believed she was "holding back[.]" He testified during the hearing that he told her:

> [Y]ou know, you've already crossed the big hurdle in identifying Dakota and, uh, I said that, I think the exact words were, "Come on," um, "Come on, we know you're not being truthful." It was the fact of, um, Detective [sic] Coy and I knew, uh, that Miss Tyler knew who Mr. Arana was and we knew how difficult it was for her to essentially pick out, identify, uh, Dakota and Mr. Arana.

Detective Duffey agreed with Defense Counsel's question that "it suggests you had a suspect in there and she didn't pick out that suspect." But, he clarified that the reason he stated this was because he knew that "number six was not the suspect" and that "she had picked out photo number six and I knew that that was not a truthful answer." He further testified:

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mark after the note "It's five?" Officer Coy explained that he wrote the question mark because Tyler paused after saying this and before saying "He's in there." Tyler then circled Appellant's photograph.

> I knew that she was withholding something. She was withholding something 100 percent. I've been doing criminal investigation now for the last seven years and have the opportunity to interview and talk to multiple people and her reaction after that photo array, I knew that - - I knew without even asking Detective [sic] Coy that she didn't pick him out. I just knew her - - her reaction to that was that she was in shutdown mode.

Detective Duffey then testified that Tyler replied, "immediately," "[t]hat he was in folder number five." The detective asked her to look at the complete array again, and she "looked at them and went to number five and said she was 100 percent sure … that was the guy that she had passed in the hallway." Detective Duffey did not recall making any further comments by either him or Officer Coy after this selection.

After hearing argument, the court denied the motion to suppress the identification. Focusing on the identification procedure involving both Officer Coy and Detective Duffey on February 4th, 2019, the court first found that there was nothing suggestive about showing Tyler the array in the car, prior to going up to the apartment to retrieve her belongings. The court then found:

> After coming back down, laden with clothing, uh, to the vehicle, I think Detective Duffey, in particular, was very honest in saying that he is frustrated and that, uh, Detective [sic] Coy appeared frustrated. That they believed, uh, as they indicated, that the defendant here today was the suspect that was included in there. And Detective Duffey, at least, allowed that to get to him to the point where he challenged Miss Tyler in the vehicle. They were saying I believe he was in the driver's seat, Miss Tyler next to him, and Detective [sic] Coy in the backseat, at that point, say, let me get the language again, "Come on, we know you're not being truthful," at that point. Now the Court does find as a matter of fact that the only thing that that could reference and that a reasonable person, I believe, is referenced is the array itself and the first time it was given.

The court continued:

> That alone is not, uh indictive of suggestiveness. Uh, it does suggest that six was wrong in the police officers' minds. It doesn't say whether the correct person according to police is in there or not in there as was indicated beforehand, she be told prior to looking at it that this may or may not include a person that was in the hallway of 1021 on the afternoon or daytime January 20, 2019. It could just as easily be that they were trying to exclude people and put suspects in there they believe were not involved, but wanted to get an eyewitness confirmation at the same time. So the Court does not believe that it's suggestive that the person they wanted was actually in there or a suspect was actually in there, but it certainly did suggest any reasonable person that number six was not the right answer.

Turning to Tyler's reaction to the comment, the court found:

> The Court then, uh, looks to what did happen and what did happen as indicated in questioning of defense counsel was that she, being Miss Tyler, immediately blurted, apparently and it's uncontradicted that, "It's number five, he's in there." And I know Detective [sic] Coy put a question mark, "It's five," question mark, "He's in there." His explanation was that that was to note a pause. Most people would use an ellipsis to do a pause between two statements, I don't know. But Detective, uh, Detective Duffey also indicated that, "It's five, he's in there," was what or "He's five, he's in there," is what was said without a question mark.

Recognizing that the test for whether an identification procedure is impermissibly suggestive is whether "the police in effect repeatedly say to the witness 'This is the man'" and that "[t]he impropriety of suggestive policeman's conduct is in giving the witness a clue about which photograph the police believe the witness should identify as the perpetrator during the procedure," the court denied the motion, concluding:

> The Court cannot find, as a matter of fact, that that is what happened in this case. It was an imperfect array to say the least. To provide - - Uh, they challenged Miss Tyler, as I'm sure they challenged her before in the first interview when she was lying to them, about something they perceived to be a lie. Her reaction was to immediately identify who she believed, and again, the Court understands Defense counsel's, uh, argument that perhaps she was just going to go through the numbers one-by-one until she got the answer

> that they wanted. The Court does not take it, uh, to mean that in the nature of how quickly she responded, dropping her head, giving other bodily clues that, uh, she was defeated as to trying to obscure the person that she believed was involved or was seen in the hallway on the date of the murder.
>
> **So the Court believes and finds as a matter of fact that the police did not in fact suggest that five was the person, where they certainly suggested that six was not the person.**

(Emphasis added.)[10]

In reviewing a court's decision to deny a motion to suppress an extrajudicial identification, we look to the record from that court, considered in the light most favorable to the prevailing party. *Greene v. State*, 469 Md. 156, 165 (2020) (citation omitted). Moreover, we accept the court's factual findings, unless they are clearly erroneous, and the court's legal conclusions *de novo*. *Id.* (citation omitted).

The pertinent law stems from the right of due process, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article 24 of the Maryland Declaration of Rights. These protect "the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures." *Small v. State*, 464 Md. 68, 82-83 (2019) (citations and quotations omitted). "When an accused challenges the admissibility of an extrajudicial identification procedure on due process grounds, Maryland courts assess its admissibility using a two-step inquiry." *Id.* at 83 (internal footnote omitted). Maryland continues to follow this test. *Small*, 464 Md. at 103 (Barbera, C.J., concurring).

[10] We note that, during her trial testimony, Tyler confirmed that, after she picked the wrong photograph, Detective Duffey stated, "We know you're not being truthful." It was after this that she picked out Appellant's photograph.

In the first step of the inquiry, the court must determine whether the identification procedure was "impermissibly suggestive." *Montague v. State*, 244 Md. App. 24, 53 (2019). "Suggestiveness can arise during the presentation of a photo array when the manner itself of presenting the array to the witness or the makeup of the array indicates which photograph the witness should identify." *Smiley v. State*, 442 Md. 168, 180 (2015). "The impropriety of suggestive police misconduct is in giving the witness a clue about which photograph the police believe the witness should identify as the perpetrator during the procedure." *Small*, 464 Md. at 88-89. "The sin is to contaminate the test by slipping the answer to the testee." *Morales v. State*, 219 Md. App. 1, 14 (2014) (citations and quotations omitted). *See also Reyes v. State*, 257 Md. App. 596, 619-20 (2023) (distinguishing between selective and confirmatory identifications and recognizing that, "[a]n impermissibly suggestive police procedure could influence such a witness into mistakenly identifying an innocent defendant (who merely resembles the perpetrator), thus infringing upon the defendant's due process rights") (citation omitted).

That said, "it is not a Due Process violation per se that an identification procedure is suggestive." *Morales*, 219 Md. App. at 14. Rather, "[t]he procedure must be *impermissibly* suggestive, and it is the impermissibility of the police procedure that warrants exclusion." *Id*. (emphasis in original). "The defendant bears the burden of making a *prima facie* showing of suggestiveness." *Small*, 464 Md. at 83. "If the court determines that the extrajudicial identification procedure *was not suggestive, then the inquiry ends* and evidence of the procedure is admissible at trial." *Id*. (emphasis added).

If, however, the suppression court determines that the identification procedure *was suggestive*, the court moves to step two of the due process inquiry, in which the court "must weigh whether, under the totality of the circumstances, the identification was reliable." *Small,* 464 Md. at 83-84. Here, the burden is on the State to show by clear and convincing evidence that "the independent reliability in the identification outweighs the corrupting effect of the suggestive procedure." *Montague*, 244 Md. App. at 54. In assessing that evidence, the court should focus on five factors: "the witness's opportunity to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's description of the criminal, the witness's level of certainty in his or her identification, and the length of time between the crime and the identification." *Small*, 464 Md. at 84.

When "the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth." *Small,* 464 Md. at 93 (citations and quotations omitted). *See Reyes, supra,* 257 Md. App. at 622 (observing that this constitutional analysis "accommodates several different concerns, including protecting the due process rights of the defendant, deterring police misconduct, and allowing the factfinder to hear and weigh identification evidence that is reliable enough from a constitutional perspective"); *State v. Greene*, 240 Md. App. 119, 139 (2019) ("A jury, the Supreme Court pointed out, is perfectly capable of weighing the pluses and minuses of [an impermissibly suggestive] identification. That is why mere suggestiveness in and of itself does not call for exclusion."); *see also Manson v. Brathwaite*, 432 U.S. 98, 116 (1977)

("Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.").

Here, Appellant recognizes that the police did not "brow-beat" Tyler into making an identification on February 4, 2019, but argues the record establishes that they, instead, "slipped the answer" to her by questioning the truthfulness of her first choice. The State disagrees, asserting that, although the police suggested that Tyler's first selection was wrong, they did not tell her which one was right. Thus, according to the State, "[e]ven if there was some suggestiveness in having eliminated one of them, it did not establish a *prima facie* case of undue suggestiveness."

The motions court relied primarily on *Small*, *supra*. There, our Supreme Court found a photo array to be impermissibly suggestive because the victim was given clues pointing directly to the perpetrator in two photo arrays. Small, who was described by the victim as having the letter "M" tattooed on his neck, was the only person in the first photo array with a neck tattoo. *Small*, 464 Md. at 76-77. The victim viewed the first photo array and, although he did not make a positive identification, he described the tattoo as "pretty much like the same tat[too] I saw[.]" *Id*. at 77.

Police showed the victim a second photo array, and Small was the only individual repeated from the first photo array. *Small*, 464 Md. at 78. He also was the only one with a tattoo with the letter "M." The victim made a positive identification of Small after being shown the second photo array. *Id*. at 78-79.

Our Supreme Court, in affirming this Court, discussed how the composition of the first photo array emphasized Small because he was the only person who had a tattoo visible

on his neck. *Small*, 464 Md. at 91. Additionally, the Court discussed how Small was the only person repeated in the second double-blind photo array. *Id.* His distinct neck tattoo was visible again in the second photo array. *Id.* The Court ultimately determined that law enforcement, through the photo arrays, implicitly suggested that Small was the perpetrator of the crime. *Id.*[11]

As did the motions court in this case, we conclude that *Small* is distinguishable. There is no evidence here that the police suggested which photograph Tyler should pick, after the pool was reduced from six photographs to five, nor was there any evidence or argument that Appellant's photograph stood out from the rest, as was the case in *Small*.

Appellant has also not cited any case where the use of five photographs, instead of six, makes an identification procedure impermissibly suggestive *per se*. Indeed, as the State observes, "even a single photograph does not automatically equate to suggestiveness." *See, e.g., Manson v. Brathwaite*, 432 U.S. at 116 (recognizing that "single-photograph displays may be viewed in general with suspicion," but upholding use of a single photo identification under the circumstances); *Reyes*, 257 Md. App. at 622 (in a case involving a showing of a single photograph, explaining the distinctions between selective and confirmatory identifications, and stating that "[b]ecause a confirmatory identification witness knows the perpetrator from before the crime, his is not the "recollection of [a] stranger [that] can be distorted easily by the circumstances or by later

[11] Notwithstanding that the arrays were unduly suggestive, the Court went on to uphold the identification on the ground that it was reliable. *Small*, 464 Md. at 101-02.

actions of the police") (quoting *Manson, supra*); *Green v. State*, 79 Md. App. 506, 514 (1989) ("[T]he practice of presenting single suspects for the purpose of identification is not per se prohibited.") (citation omitted).

Moreover, even telling a witness that the police have a suspect prior to an extrajudicial identification is not per se impermissible. *See Wallace v. State*, 219 Md. App. 234, 243, 246-47 (2014) (holding that, even though police told witness before showing the array that they "found the person that did it," the array was not impermissibly suggestive because "they left it to him to select the photograph of the person who robbed him"); *Gatewood v. State*, 158 Md. App. 458, 472-73, 476 (2004) (although police officer preparing the array told the witness, another police officer, that he knew the suspect, thereby "most likely suggesting that person's photograph was in the array," the array was not unduly suggestive), *aff'd on other grounds*, 388 Md. 526 (2005); *Conyers v. State*, 115 Md. App. 114, 120-21 (rejecting the argument that the witness was pressured into making an identification because she "stood accused of being criminally involved in the incident at the time she was shown the photo arrays," and holding that the witness's identification was not impermissibly suggestive), *cert. denied*, 346 Md. 371 (1997).

In addition, we conclude that the case of *United States v. Moskowitz*, 581 F.2d 14 (2d Cir.1978), *cert. denied*, 439 U.S. 871 (1978), involving an armed bank robbery and multiple eyewitnesses, is instructive. One of those witnesses, Joyce Pyle, the bank's assistant manager, was involved in a series of pre-trial identification procedures. *U.S. v. Moskowitz*, 581 F.2d at 19. In one instance, Pyle picked Moskowitz's picture correctly from a photo array presentation. *Id.* On a subsequent occasion, when she was shown

another photo array, she did not identify Moskowitz, but instead, she picked out a photo of an FBI clerk, included in the array. *Id*.

Pertinent to our case, Pyle was informed by the prosecutor or an FBI agent that she picked the wrong photo and that other witnesses had picked the correct photo. *U.S. v. Moskowitz*, 581 F.2d at 19. She was not told which photo the others picked. Pyle was then shown the photographs again, with no one suggesting who she should pick, and she then identified Moskowitz. *Id*.

The Second Circuit first recognized that it had "disapproved of the practice of telling potential witnesses of the 'correctness' or 'incorrectness' of pre-trial identifications," because there was a likelihood the practice could taint the identification and require reversal. *U.S. v. Moskowitz*, 581 F.2d 14 at 19. And yet, whether reversal was required "depends on how it is done." *Id*. The Court explained:

> **[T]he danger of "irreparable misidentification" is greater in cases where the witness is told that the "right" person or the suspect has been selected, than in cases, such as this one, where the witness is told that the "wrong" person has been selected.** In the former situation, the witness' belief may be improperly reinforced by the confirmatory remarks of the agents. This reduces the trustworthiness of any subsequent in-court identification because it increases the possibility that the witness will "retain in his memory the image of the (person selected) rather than of the person actually seen." *Simmons v. United States, supra*, [390 U.S. 377, 383-84 (1968)]. **The latter situation, while suggestive, is far less likely to produce an "irreparable misidentification" because it merely narrows the field from which the witness will make a second selection, and it does not involve any improper reinforcement or confirmation of the second selection itself**.

U.S. v. Moskowitz, 581 F.2d at 20 (emphasis added).

The Court continued:

> We recognize that there may be situations where a statement that a particular selection is "wrong" will impermissibly narrow the field of choices. Where the field is particularly narrow to begin with, or where the field has been narrowed by other factors, a statement that one person is "wrong" may be the functional equivalent of a statement that another is "right." This is not such a case, however. Here, the government simply told Pyle that she had chosen an FBI clerk. This narrowed the line-up field from the original six to five.

Id.

Likewise, here, after the police told Tyler they knew she was not telling the truth when she picked the sixth photograph, they did not tell her which of the remaining five photographs to select. To the extent that the presentation of the array to Tyler on February 4th was suggestive, it was not impermissibly so. As this Court explained:

> 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. There is no place in the appellate syllogism for undifferentiated angst.

Conyers, 115 Md. App. at 121.

We discern no error or abuse on the part of the circuit court in denying the motion to suppress on this ground. Having reached this conclusion, we need not consider the reliability of the identification. As this Court has stated, "[r]eliability thus does not even

become an issue for a suppression hearing until impermissible suggestiveness has been shown. The quality of the lifeboat does not become an issue until the torpedo of impermissible suggestiveness hits the ship." *Wood v. State*, 196 Md. App. 146, 161 (2010), *cert. denied*, 418 Md. 192 (2011); *see also Mendes v. State*, 146 Md. App. 23, 35 (suggesting "that the reliability of an extra-judicial identification procedure is not placed in issue unless the procedure was impermissibly or unnecessarily suggestive"), *cert. denied*, 372 Md. 134 (2002); *Conyers*, 115 Md. App. at 120-21 ("[R]eliability was never put forth by the Supreme Court as an additional ground for excluding an extrajudicial identification. It was, by diametric contrast, a severe limitation on such exclusion."). Accordingly, we hold that the court properly denied the motion to suppress.

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