Circuit Court for Prince George's County
Case No. CT181368X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 980

September Term, 2020

KEITH COOK, JR.

v.

STATE OF MARYLAND

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

JJ.

Opinion by Wright, J.

Filed: January 6, 2022

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

A jury sitting in the Circuit Court for Prince George's County convicted Keith Cook, Jr., appellant, of attempted robbery, conspiracy to commit robbery, and second-degree assault. The court sentenced him to serve two concurrent 15-year terms for attempted robbery and conspiracy to commit robbery, suspending all but 2 years and 14 days of time served, followed by 2 years of supervised probation. The assault conviction merged for sentencing purposes. In this appeal, appellant presents one question:

> I. Did the trial court err by denying Mr. Cook's motion to suppress eyewitness identification evidence?

We answer that question in the negative and shall affirm the judgments of the circuit court.

FACTS AND PROCEEDINGS

On September 7, 2018, Yves Cooper arranged to purchase a used video game console through an application called Offer Up. The seller's screen name was "Big Mike." Around noon that day, Mr. Cooper drove to meet Big Mike at an agreed location in Suitland, Maryland. Big Mike showed up with a friend who was "[s]lightly shorter" than Big Mike,[1] wearing a black T-shirt and pants with dark skin and short dreadlocks poking out from under a black skull cap. Mr. Cooper told Big Mike he no longer was interested in purchasing the gaming console because he had received a better offer, but that he would buy video games that Big Mike also had advertised on Offer Up. Big Mike agreed but stated that the video games were at his house. Mr. Cooper drove a short

[1] Mr. Cooper estimated that Big Mike was 5 foot 8 inches tall.

distance to the townhouse where Big Mike lived while the other two men walked there. Big Mike was unable to retrieve the games from inside the townhouse because he was locked out but offered to reduce the price for his gaming console. Mr. Cooper agreed to purchase it at the lower price, but before he could do so, Big Mike's friend "press[ed] his phone into [Mr. Cooper's] back as if it were a gun" and said, "you might as well just give it up right now, Bro." Mr. Cooper said that he didn't "play like that" and got back in his car. Big Mike put his hand around the driver's side door to prevent Mr. Cooper from shutting it and his friend tried to pull Mr. Cooper out of the vehicle. Mr. Cooper managed to shut his door and drive away. He drove a short distance and called 911.

Officers from the Prince George's County Police Department ("PGCPD") responded to the scene. Mr. Cooper gave a statement, including a description of Big Mike and his friend.

Detective Curtis Hamm, with the PGCPD robbery suppression team, was the lead investigator on the case. His investigation linked the Offer Up account used by Big Mike to the mother of a man named Lorenzo Kelly. Detective John Bunce, who also worked on the robbery suppression team, was familiar with Mr. Kelly and knew him to associate regularly with Mr. Cook. Consequently, Detective Hamm prepared two photo arrays, one containing a photo of Mr. Cook and one containing a photo of Mr. Kelly.

On September 16, 2018, Mr. Cooper went to the police station at the request of Detective Hamm. Detective Hamm took Mr. Cooper to a conference room and left him there. Detective Michael Washington then entered the room to administer the two photo

arrays. Ultimately, Mr. Cooper selected a photograph of Mr. Cook from the first array, identifying him as Big Mike's friend, and selected a photograph of Mr. Kelly from the second array, identifying him as Big Mike.

Mr. Cook filed a pre-trial motion to suppress Mr. Cooper's extrajudicial identification, arguing that the identification was unreliable because the photo array was unduly suggestive. On September 25, 2019, the circuit court held a hearing on the motion at which Mr. Cook called four witnesses: Detective Washington, Detective Hamm, Mr. Cooper, and Mr. Cook's father, Keith Cook, Sr ("Mr. Cook, Sr.").

Detective Washington testified that he and Detective Hamm both worked on the robbery suppression team, but that they were on different squads. On September 16, 2018, Detective Hamm asked Detective Washington to "show a photo array for one of his cases." Detective Washington was familiar with a PGCPD policy for "double-blind sequential photo array[s]," which required that the person administering the array did not "have any information or knowledge of who the suspect may be" and that the witness be permitted to look at the photographs one by one. He testified that he did not know who the suspects were in the investigation. He was familiar with Mr. Cook from a prior armed carjacking case he investigated, however. He also was familiar with the persons depicted in the other photographs in the array, though he could not recall all their names.

Detective Washington explained that he began the photo array by paraphrasing information on the "Photo Viewing Sheet" cover page, including instructing Mr. Cooper that he would be viewing a series of photographs, that the "person who committed the

crime may or may not be in the set of photographs being presented," and that he was "not obligated to identify anyone[.]" Detective Washington then handed Mr. Cooper all six photographs in the array in a stack and allowed him to flip through them.

When Mr. Cooper selected Mr. Cook's photo, he said, "This is him," which Detective Washington documented on the photo viewing sheet. On the back of the photograph of Mr. Cook, Detective Washington handwrote two questions and Mr. Cooper handwrote answers to them:

> Q: Was this person present on 09/07/18 when two suspects attempted to rob and carjack you?
>
> A: Yes
>
> Q: What role did he play during this incident?
>
> A: Initiated the robbery by pressing his phone into my back as if it were a gun and then demanding money. He also tried to pull me out of my car as I fled. He stated that someone else was coming with a real gun.

Detective Washington thought he "[p]robably" learned the information about the date and circumstances of the robbery from Mr. Cooper. He did not ask Mr. Cooper how confident he was in making the selection. On the photo viewing sheet, Mr. Cooper answered and initialed a series of questions. He answered "No" to two questions asking whether Detective Washington had "influence[d] [his] decision in any way" or if anyone had "advised" him that "the suspect's picture was included in the group of photos." Four minutes elapsed between the time that Detective Washington gave Mr. Cooper the photographs and when he finished answering the questions on the back of the photograph of Mr. Cook and on the photo viewing sheet.

Mr. Cooper testified at the suppression hearing that on September 7, 2018, he spoke directly to Big Mike's friend for three to four minutes while Big Mike was trying to gain entry to the townhouse. Aside from the description he gave the police, he could not "recall" anything else "noticeable" about him. He could not recall with certainty if the friend was wearing a short sleeve or long sleeve shirt, but because he had called it a "T-shirt" in his statement to the police, he believe it was short sleeved.

Mr. Cooper then described the administration of the photo array. He testified that when Detective Washington entered the conference room, he "let[] [Mr. Cooper] know that they had picked up the suspects" and that Mr. Cooper could "try to, if [he] could, identify who they are." Detective Washington also instructed him that he was not obligated to identify anyone and that it "was possible that the suspect was not in the photo array[.]" Detective Washington handed Mr. Cooper the stack of photographs and let him "flip through [them] on [his] own." He flipped through "all six pictures twice to make sure" and, at one point, he placed all six photographs on the table in front of him to compare them. He then selected the fourth photograph. He did not "express any doubt" to Detective Washington about his selection. The only statement he made was, "This is him." After Mr. Cooper had completed the second photo array, in which he selected Mr. Kelly, Detective Washington told Mr. Cooper that he had "picked the right two people[.]"

Detective Hamm testified that he never shared any information with Detective Washington about the suspects in this case prior to the administering of the photo arrays.

Mr. Cook, Sr. testified that Mr. Cook had a tattoo on his right arm of the words "I'm blessed" and a tattoo that "span[ned] the entire width of his neck" of a heart with wings on it. He received both tattoos prior to the attempted robbery.

Defense counsel argued that the extrajudicial identification was unreliable and violated Mr. Cook's rights under the United States Constitution, the Maryland Declaration of Rights, and Md. Code, Pub. Safety ("P.S.") § 3-506.1, which, coupled with P.S. § 3-506, sets out eyewitness identification procedures that police departments in Maryland must adopt as part of their written policies.[2] He argued that Detective Washington was not a "blind" "administrator" as those terms are defined under P.S. § 3-506.1[3] because it was evident from his statements to Mr. Cooper that he knew Mr. Cook was the suspect; that the "filler"[4] photos used in the array did not match Mr. Cooper's description of the perpetrator; that the array was not conducted "sequentially" because Mr. Cooper testified that he viewed the photos side-by-side; that Detective Washington

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[2] After the suppression hearing in this case, the Court of Appeals adopted Md. Rule 5-617 (effective July 1, 2021), which requires a court to "consider whether there was compliance with the requirements of [P.S.] §§ 3-506 and 3-506.1" when "determining whether eyewitness identification evidence is admissible[.]"

[3] The statute defines a "blind" "administrator" as a person conducting a photo array who "does not know the identity of the suspect." P.S. § 3-506.1(a)(2)-(3).

[4] A "filler" is "a person or a photograph of a person who is not suspected of an offense and is included in an identification procedure." P.S. § 3-506.1(a)(6). In a photo array, at least five fillers must be used and "each filler shall resemble the description of the perpetrator given by the eyewitness in significant physical features, including any unique or unusual features[.]" P.S. § 3-506.1(c)(1)-(2).

failed to record Mr. Cooper's level of confidence, as required by statute[5]; and that Detective Washington "tainted" any future identification by telling Mr. Cooper he had picked the right person.

The State responded that the evidence showed the photo array as administered was not unduly suggestive and, consequently, the court did not have to reach the issue of reliability. It argued that P.S. § 3-506.1 established "best practices" and that even if Detective Washington violated it, Mr. Cook still had to show the procedure was unduly suggestive under due process law.

After hearing argument, the court ruled from the bench, denying the motion. It determined as a threshold matter that noncompliance with P.S. § 3-506.1 was not an independent basis upon which to suppress an extrajudicial identification. The court nevertheless found that Detective Washington was a blind administrator under the statute, crediting his testimony that he did not know who the suspect was in the investigation of the robbery.

The court rejected Mr. Cook's argument that the photo array was unduly suggestive. The court found that the filler photographs used in the array were not so dissimilar to the description given of the perpetrator or to the photo of Mr. Cook as to make them unduly suggestive. The court specified that all the men pictured had "some

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[5] P.S. § 3-506.1(a)(9)(ii) defines an "Identification statement" as a "documented statement" by the eyewitness in his or her own words that "describ[es] the eyewitness's confidence level that the person identified is the perpetrator of the crime[.]"

type of facial hair" and similar hairstyles. Addressing the procedural aspects of the array, the court noted that there was a dispute as to whether Detective Washington told Mr. Cooper that the police had "caught the suspects" prior to administering the array. The court did not resolve that dispute of fact but found that even if it credited Mr. Cooper's testimony on that issue, it would not find that that statement made "the photo viewing or the process by which the photo spread was done impermissibly suggestive." It reasoned that most people would assume if they were called to the police station that there had been some development in the case. Further, there was no dispute that Detective Washington instructed Mr. Cooper that the "person who committed the crime may or may not be in the set of photographs presented." The court credited Mr. Cooper's testimony and the similar testimony of Detective Washington that he did not say or do anything to influence Mr. Cooper's selection of the photo of Mr. Cook.

Mr. Cooper's testimony that Detective Washington told him that he had "picked the right person" gave the court "some concern and pause[,]" but "only as it relates to any [future] in-court identification[.]" The court denied the motion to preclude Mr. Cooper from making an in-court identification on that basis, however.

The court ruled, in the alternative, that even if the photo array was unduly suggestive, the extrajudicial identification was reliable under factors identified by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188 (1972), and would not be suppressed. The court found that the evidence showed that Mr. Cooper had an opportunity to observe the perpetrator in close proximity for two to three minutes before the crime; that Mr.

Cooper was "paying attention" to Mr. Cook; that he gave the police a "general description" that matched Mr. Cook; that though Mr. Cooper did not quantify his level of certainty, his handwritten statement on the back of the photo about what Mr. Cook did demonstrated that he was certain that Mr. Cook was the perpetrator; and that there were just "nine short days" between the robbery and the identification. Based upon those factors, the court found under the totality of the circumstances that Mr. Cooper's identification was reliable.

At trial, Mr. Cooper, Detective Washington, and Detective Hamm testified consistent with the above stated facts. Over defense objection, the photo array and supporting documentation and evidence about the extrajudicial identification was introduced by the State. Mr. Cooper also made an in-court identification of Mr. Cook over defense objection. Detective Bunce testified that he had seen Mr. Kelly and Mr. Cook together "maybe a dozen times" and that he suggested to Detective Hamm that they could be potential suspects in the attempted robbery based upon the descriptions given and the location of the attempted robbery.

In his case, Mr. Cook called his father to testify about his tattoos and Nancy Steblay, Ph.D., who testified as an expert witness on eyewitness identifications.

As discussed, the jury convicted Mr. Cook of attempted robbery, conspiracy to commit robbery, and second-degree assault. This timely appeal followed. We shall include additional facts as necessary to our resolution of the issues.

DISCUSSION

Mr. Cook contends that the circuit court erred by admitting unreliable eyewitness identification evidence. "In assessing the admissibility of an 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) (citation omitted). "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.* (citation omitted). "[We] must make an independent constitutional evaluation by reviewing the relevant law and applying it to the unique facts and circumstances of the case." *Carter v. State*, 367 Md. 447, 457 (2002).

"The admissibility of an extrajudicial identification is determined in a two-step inquiry." *Smiley v. State*, 442 Md. 168, 180 (2015). The first step asks '"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 of 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). At that stage, the

State bears the burden of showing that the identification was reliable by clear and convincing evidence. *Small v. State*, 464 Md. 68, 84 (2019).

Here, Mr. Cook contends that the circuit court erred by denying his motion to suppress Mr. Cooper's extrajudicial identification both because the procedure was unduly suggestive and because the identification was unreliable under the totality of circumstances. Because, for the reasons to follow, we hold that the photo array procedure was not impermissibly suggestive, we need not reach the second stage of the inquiry.

"'[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)). "An identification procedure is properly deemed suggestive when the police 'in effect . . . repeatedly sa[y] to the witness, "*This* is the man."'" *Small*, 464 Md. at 88 (quoting *Jones*, 310 Md. at 577). The presentation of a photo array may be rendered unduly suggestive either by "the manner itself of presenting the array to the witness or [if] the makeup of the array indicates which photograph the witness should identify." *Smiley*, 442 Md. at 180.

Mr. Cook first contends that the filler photos in the array did not match the description of the perpetrator given by Mr. Cooper. We conclude that the composition of the photo array was not unduly suggestive. The Court of Appeals has held that although an array ought to be composed of individuals who are similar in appearance, it "'need not

be composed of clones'" to comply with due process. *Small*, 464 Md. at 89 (quoting *Smiley*, 442 Md. at 181). The circuit court did not clearly err by finding that the filler photographs used in the array all resembled each other *and* Mr. Cook and met the general description given by Mr. Cooper. Our review of the photographs confirms that the variations in hair length and complexion were insignificant and did not make Mr. Cook's photo stand out. The composition of the array plainly satisfied due process.[6]

Mr. Cook next contends that Detective Washington was not a blind administrator and made two inappropriate statements that tainted the identification. On the first point, the circuit court credited Detective Washington's testimony that he did not know the identity of the suspects in the crime prior to administering the array and it is not our prerogative to second guess that finding. Second, neither of the statements Mr. Cooper testified were made by Detective Washington, if made, would have rendered the procedure impermissibly suggestive. With respect to the first statement, this Court has held that a pre-identification statement advising a witness that the police have apprehended a suspect does not render an identification unduly suggestive so long as it does not signal to the witness which person he should select. *See Wallace v. State*, 219 Md. App. 234, 245-47 (2014) (concluding a police officer's pre-identification statement

[6] Mr. Cook also argues that the composition of the array violated P.S. § 3-506.1(b) because the filler photographs did not match the description of the perpetrator given by Mr. Cooper. Though we conclude that the filler photos did match the description, we emphasize that at the time of the suppression hearing, Md. Rule 5-617 had not been adopted and the circuit court was not obligated to consider whether the array satisfied the procedures set out in the statute.

to an eyewitness that "they had the person" did not render the photo array impermissibly suggestive because "they left it to [the witness] to select the photograph"). Here, there was no evidence that Detective Washington told Mr. Cooper who to select and, in fact, instructed Mr. Cooper that he was not obligated to select anyone from the array and that the perpetrator may not be pictured. Detective Washington's alleged second statement that Mr. Cooper had picked the right people was made post-identification. Consequently, it could not have made the already completed identification procedure impermissibly suggestive.[7]

We reject Mr. Cook's arguments that the manner in which Mr. Cooper was permitted to view the photographs or the recording of his post-identification statements could have rendered the identification unduly suggestive. The evidence showed that Detective Washington handed Mr. Cooper the six photos in a stack, with the photo viewing sheet on top. Mr. Cooper testified that he flipped through all six photos twice and then laid them all in front of him on the table. Mr. Cook does not cite to any Maryland law establishing that a method of side-by-side comparison is unduly suggestive, and we have found none. Though he maintains that PGCPD policy required that the photos be viewed sequentially, our review of the identification procedure is limited to determining if the police improperly suggested to the witness which photo to

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[7] Mr. Cook does not make any specific argument in his brief concerning the in-court identification. We perceive no error in the court's determination to allow Mr. Cooper to make an in-court identification of Mr. Cook.

select. *See Jenkins v. State*, 146 Md. App. 83, 126 (2002) (explaining that "[t]o do something impermissibly suggestive is . . . to feed the witness clues as to which identification to make" (quotation marks and citation omitted)), *rev'd on other grounds*, 375 Md. 284 (2003).

There is likewise no merit in Mr. Cook's contention that Detective Washington's failure to document Mr. Cooper's level of confidence in his selection rendered the identification unduly suggestive.[8] The documentation required by P.S. § 3-506.1 may aid a court or a finder of fact in assessing the reliability of an identification but it does not have any bearing upon whether the identification procedure was unduly suggestive. In any event, Detective Washington documented Mr. Cooper's statement upon selecting the photograph – "This is him" – coupled with his answers to the questions posed that were handwritten on the back of Mr. Cook's photo. Mr. Cooper's answers reflect that he was certain that Mr. Cook was Big Mike's friend and there was no evidence that Detective Washington attempted to influence that selection.

In sum, Mr. Cook "failed to demonstrate that the photo array itself, or the way it was conducted, 'indicate[d] which photograph the witness should identify.'" *Montague v. State*, 244 Md. App. 24, 55 (2019) (quoting *Smiley*, 442 Md. at 180). Consequently, we need not reach the issue of whether the identification was reliable. *See Wood v. State*, 196 Md. App. 146, 161 (2010) ("Reliability . . . does not even become an issue for a

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[8] P.S. § 3-506.1 requires that the administrator of a photo array record a statement documenting the witness's level of confidence in his or her selection.

suppression hearing until impermissible suggestiveness has been shown.”). For all these reasons, the circuit court did not err by denying the motion to suppress.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE’S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.