UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1379

SEPTEMBER TERM, 2014

DOCKERY WHITEHEAD

v.

STATE OF MARYLAND

Eyler, Deborah, S.,
Hotten,
Nazarian,

JJ.

Opinion by Eyler, Deborah, S., J.

Filed: September 1, 2015

A jury in the Circuit Court for Baltimore City convicted Dockery Whitehead, the appellant, of armed carjacking, carjacking, theft of an automobile, two counts of robbery with a dangerous weapon, two counts of robbery, two counts of second-degree assault, and two counts of theft under $1,000. He was sentenced to a total of 23 years' imprisonment–18 years for armed carjacking and 5 years consecutive for robbery with a deadly weapon.

The appellant presents five questions for review, which we have rephrased as follows:

I. Did the circuit court err in denying his motion to dismiss for lack of a speedy trial?

II. Did the circuit court err in denying his motion to suppress tangible evidence?

III. Did the circuit court err in denying his motion to suppress two pretrial identifications?

IV. Did the circuit court err in precluding defense counsel from questioning a detective about a change in protocol regarding the way the police conduct photo arrays?

V. Did the circuit court err in overruling defense counsel's objection to the prosecutor's remarks during rebuttal closing argument?

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

FACTS AND PROCEEDINGS

On August 5, 2012, Gerald Blue, Jr., borrowed his father's Ford F150 to go out with his friend, Tyvaze Commander. Around midnight, they stopped at the M&T Bank in the 4500 block of Edmondson Avenue, in Baltimore City, to use the ATM. Blue

pulled into the parking lot, chose a spot near the bank entrance, and got out of the truck. He left his keys in the ignition. Commander remained in the front passenger's seat. Blue walked to the ATM and withdrew cash. As he was returning to the truck, a man carrying a gun approached him and said, "[G]ive me your money." Blue ran from the man. The man walked to the truck and entered it through the driver's door. As he was doing so, he put a mask over his face. The man pointed his gun at Commander and said, "[G]ive me your money, give me your money." Commander gave him ten dollars and a cell phone.

Meanwhile, Blue returned to the truck. As Blue approached the driver's side door, the man turned the gun on him. Blue gave the man his cell phone and backed away from the vehicle. While the man was pointing the gun at Blue, Commander exited the truck and moved away from it. Now alone in the Ford F150, the man drove off.

Blue and Commander flagged down a passing fire truck and were given a ride to a nearby fire station. They called the Baltimore City Police Department ("BCPD"), which dispatched Officer Michael Kolins to the fire station. Blue and Commander gave Officer Kolins a description of the man who had robbed them. Officer Kolins canvassed the area, but did not see anyone matching that description and did not see any sign of the Ford F150. Officer Kolins transported Blue and Commander to the Southwest District Police Station, where Detective Christopher Hollingsworth took their written statements. The police eventually recovered the Ford F150, but it did not reveal any evidence.

The BCPD assigned Detective Eric Johnson, of the Southwest District, to further investigate the August 5, 2012 incident.

Independent of Detective Johnson's investigation, on August 16, 2012, two BCPD officers in an unmarked car pulled over a motor scooter because they suspected that the passenger, later identified as the appellant, was carrying a weapon. As the scooter was about to stop, the appellant jumped off and ran. The officers quickly caught him and placed him under arrest. Before the officers caught him, the appellant threw a pellet gun on the ground, which the officers recovered.[1] From the appellant's person, the officers recovered a mask, some cash, and a pair of black socks.

The appellant soon became a suspect in the robbery of Blue and Commander and in several other similar offenses committed around the same time. On August 19, 2012, Blue and Commander each identified the appellant from a photographic array as the man who robbed them. Charges were brought against the appellant the next day. On September 12, 2012, in the Circuit Court for Baltimore City, the appellant was indicted. That same month, the appellant was indicted in four other cases in the Circuit Court for Baltimore City.[2]

On December 27, 2012, the appellant filed a motion "to suppress all evidence and property seized [during his] illegal arrest" and a motion to suppress the pretrial identifications made by Blue and Commander.

[1]On appeal, both parties refer to the weapon as a "BB gun." However, at the hearing on the motion to suppress the evidence recovered on August 16, 2012, one of the officers who pulled over the scooter testified that a "pellet gun" was recovered. Any distinction is not relevant to our analysis, but for clarity, we shall refer to the weapon as a "pellet gun."

[2]All five cases were handled by the same prosecutor.

On November 26, 2013, the court held a hearing on the appellant's motion to suppress tangible evidence. The court also addressed an oral motion to dismiss that the appellant made for violation of his right to a speedy trial. The court denied both motions.

On June 4, 2014, the appellant renewed his speedy trial motion, which the court again denied. That day and on the morning of the following day, the court held a hearing on the appellant's motion to suppress the extrajudicial identifications made by Blue and Commander, and denied it as well.

A jury trial began on June 5, 2014, after the last motion was ruled on. The State called Blue and Commander. They both identified the appellant as the man who had robbed them. On June 6, 2014, the jury returned its verdict, as described above. The court sentenced the appellant on August 11, 2014, and he filed a timely notice of appeal.

We shall include additional facts as necessary to our discussion.

DISCUSSION

I.

The Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights both guarantee a criminal defendant the right to a speedy trial. The appellant contends he was denied his constitutional speedy trial right and therefore the circuit court erred in denying his motion to dismiss. The State responds that the court "correctly found that [the appellant]'s constitutional right to a speedy trial was not denied as a result of the delay between arrest and the start of trial."

> In reviewing the judgment on a motion to dismiss for violation of the constitutional right to a speedy trial, we make our own independent

> constitutional analysis. We perform a *de novo* constitutional appraisal in light of the particular facts of the case at hand; in so doing, we accept a lower court's findings of fact unless clearly erroneous.

Glover v. State, 368 Md. 211, 220-21 (2002) (citations omitted). We apply the balancing test announced in *Barker v. Wingo,* "in which the conduct of both the prosecution and the defendant are weighed." 407 U.S. 514, 530 (1972); *accord State v. Kanneh*, 403 Md. 678, 687-88 (2008). The *Barker* balancing test requires us to examine four factors: "'Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.'" *Kanneh*, 403 Md. at 688 (quoting *Barker*, 407 U.S. at 530). "None of these factors are 'either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant.'" *Kanneh*, 403 Md. at 688 (quoting *State v. Bailey*, 319 Md. 392, 413-14 (1990), in turn quoting *Barker*, 407 U.S. at 533).

1) Length of Delay

"[T]he first factor, the length of the delay, is a 'double enquiry,' because a delay of sufficient length is first required to trigger a speedy trial analysis, and the length of the delay is then considered as one of the factors within that analysis." *Kanneh*, 403 Md. at 688 (quoting *Glover*, 368 Md. at 222-23). "For speedy trial purposes the length of delay is measured from the date of arrest or filing of indictment, information, or other formal charges to the date of trial." *Divver v. State*, 356 Md. 379, 388-89 (1999).

The appellant was arrested on August 16, 2012, and the date of his trial was 22 months later, on June 5, 2014. The length of delay between the appellant's arrest and his trial is of constitutional dimension and triggers a speedy trial analysis. *See id*. at 389 ("[A] delay of one year and sixteen days raise[d] a presumption of prejudice and trigger[ed] the balancing test.").

Next, we consider the length of delay as a factor in our speedy trial analysis. The Supreme Court has noted that there is "no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months." *Barker*, 407 U.S. at 523. Instead, the impact of the length of delay, as a factor in our speedy trial analysis, "is necessarily dependent upon the peculiar circumstances of the case." *Id*. at 530-31; *accord Kanneh*, 403 Md. at 689. "In particular, 'the delay that can be tolerated is dependent, at least to some degree, on the crime for which the defendant has been indicted.'" *Kanneh*, 403 Md. at 689 (quoting *Glover*, 368 Md. at 224). *See also Lloyd v. State*, 207 Md. App. 322, 328-329 (2012) ("[T]he more complex and serious the crime, the longer a delay might be tolerated because 'society also has an interest in ensuring that' longer sentences 'are rendered upon the most exact verdicts possible.'" (quoting *Glover*, 368 Md. at 224)).

The appellant contends a 22-month delay "must weigh very heavily in [his] favor" because "[t]his case was not remotely complex—it was a straightforward robbery that involved relatively few witnesses, no scientific analysis, and no expert testimony." He

asserts that "[t]he only dispute of fact concerned the accuracy of the identifications by the two complaining witnesses."

The State acknowledges that, as it turned out, "the trial of this case was straightforward." It asserts that the length of delay analysis concerns the crimes charged, and what is necessary to bring those charges to trial, however, and here the delay was permissible because "the case involved the serious crimes of armed carjacking and armed robbery of two victims . . . ."

We agree with the State. The appellant was indicted for a number of serious crimes against two victims. From that standpoint this was not a simple case. Moreover, the State was preparing for trials in multiple cases against the appellant that were being scheduled in coordination with one another. "[O]f the four factors we weigh in determining whether [the appellant]'s right to a speedy trial has been violated, '[t]he length of delay, in and of itself, is not a weighty factor.'" *Kanneh*, 403 Md. at 689 (quoting *Glover*, 368 Md. at 225). *See also Erbe v. State*, 276 Md. 541, 547 (1976) (quoting *United States v. Brown*, 354 F. Supp. 1000, 1002 (E.D. Pa. 1973) for the proposition that "'delay is the least conclusive of the four factors identified in *Barker*"'). Under the circumstances here, the length of delay does not weigh against the State.

2) Reason for Delay

The second factor, the reason for the delay, is a significant consideration in the speedy trial analysis.

> [D]ifferent weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted

> heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker, 407 U.S. at 531 (footnote omitted); *accord Bailey*, 319 Md. at 412. In analyzing this factor, we accord "considerable deference" to the circuit court's findings regarding the reasons for the delay. *Doggett v. United States*, 505 U.S. 647, 652 (1992).

The appellant was arrested on August 16, 2012, was charged on August 20, 2012, and was indicted on September 12, 2012. He was arraigned on four of the cases on November 28, 2012. (The fifth case was *nolle prossed* that day.) The appellant plead not guilty. The parties agreed to a January 17, 2013 trial date for the remaining cases. This trial date applied to all four cases, including this case, and the joint scheduling of the trial date was agreed to by the appellant even though he was not agreeing to a joinder of the cases. The initial delay of five months was necessary for trial preparation and is not chargeable to either party. *See Howell v. State*, 87 Md. App. 57, 82 (1991) ("The span of time from charging to the first scheduled trial date is necessary for the orderly administration of justice, and is accorded neutral status."). The appellant does not contend otherwise.

On January 17, 2013, the State requested a postponement because it had "additional discovery that [it] need[ed] to get" from law enforcement officers, including

officers in Baltimore County.[3] The court granted the State's request and postponed the trial date for the four cases until March 19, 2013. This request was not unreasonable, and, while the two-month delay is chargeable to the State, it does not weigh heavily in our speedy trial analysis.

March 19, 2013, was a Tuesday. There was no courtroom available that day. The court offered to hold the four cases over until Thursday, March 21, 2013, for trial. All counsel estimated that it would take three days to try the first case. Defense counsel was not available after Friday, so the court postponed the trial date for the four cases until April 22, 2013. Because the reason for the postponement was unavailability of the courts, the delay is chargeable to the State, but it does not weigh heavily in our speedy trial analysis.

On April 22, 2013, the State *nolle prossed* another one of the cases against the appellant, but was prepared to go forward on the three remaining cases, including the case at bar. There was no courtroom available, however. Again, the court offered to hold the cases over for a trial date later that week. Defense counsel responded that the appellant considered it a "hardship . . . to wait in the lockup," and requested a

[3]The prosecutor stated that she was "trying to get a detective to bring" her "a photo or picture of the defendant that was shown to one of the witnesses" "in one of the cases"; that "this case is intertwined with Baltimore County officers, and [she was] still trying to get information from their reports, … so [she could] turn that over to defense as well"; and "one of the officers in one of the cases … may have some type of pending issue, which [she was] still waiting to get information for that as well, that may or may not have to be disclosed to the defense."

postponement.[4] The court postponed the trial date until July 9, 2013. This delay, of almost three months, is chargeable to the appellant.

On July 9, 2013, a Tuesday, an attorney from the Office of the Public Defender, standing in on behalf of defense counsel of record, informed the court that defense counsel was "currently in trial …, in a murder case, that he expects will be finished on Thursday." The judge replied, "[U]fortunately, I can't even help with that. I have no courts available." The judge told the appellant that "[e]ven though your attorney is in trial, even if he were present, I couldn't get your case before a court, because there are not courts available." The court found good cause to postpone, stating that "no courts available is the reason." Trial was rescheduled for September 9, 2013. This two-month delay is chargeable to the State, but carries very little weight.

On September 9, 2013, the prosecutor was in trial elsewhere and the cases were postponed until November 20, 2013. The Supreme Court has observed:

> Unintentional delays caused by overcrowded court dockets or understaffed prosecutors are among the factors to be weighed less heavily than intentional delay, calculated to hamper the defense, in determining whether the Sixth Amendment has been violated but, as we noted in *Barker v. Wingo*, 407 U.S. 514, 531 (1972), they must
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> > nevertheless . . . be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.

[4]The appellant told the court, "I want a definite court date. I don't want to come down here tomorrow to possibly get a court. This is the second time I sat down here all day to not get a court."

Strunk v. United States, 412 U.S. 434, 436 (1973); *see also Henry v. State*, 204 Md. App. 509, 551 (2012) (observing that the prosecutor's unavailability is chargeable to the State, but is weighed less heavily than an intentional delay). Here, the delay from September 9, 2013, until November 20, 2013, is chargeable to the State, but does not weigh heavily in our speedy trial analysis.

On Wednesday, November 20, 2013, the State and defense were ready to proceed on all three cases. There were pending motions, however. The court set them in to be heard the following Tuesday, November 26, 2013, with trial to begin on Monday, December 2, 2013.[5]

The trial on December 2, 2013, began with one of the other two cases. Although the plan had been to try the three cases one after the other, with the case at bar to be second, the judge stated at the outset of the first trial that he would not be available after that trial. He later changed his mind, but by then the State had released its witnesses in this case. On December 4, 2013, the jury in the first trial acquitted the appellant of all charges. The State requested a postponement because of witness unavailability. The court found good cause for, and granted, a postponement until February 25, 2014.

This delay is chargeable to the State, but does not weigh heavily in our speedy trial analysis. *See Barker*, 407 U.S. at 531 ("[A] valid reason, such as a missing witness,

[5]The trial was scheduled for Monday, December 2, 2013, rather than immediately following the motions hearing, because Thursday, November 28, 2013, was Thanksgiving Day. Defense counsel did not object to this brief delay.

should serve to justify appropriate delay."). The State had released its witnesses based on the trial court's original statement that the trial in this case would not immediately follow the trial in the first case.

On February 25, 2014, the trial date case was postponed until April 21, 2014, because there was no courtroom available. This delay, of almost two months, is chargeable to the State, but does not weigh heavily in our speedy trial analysis.

Finally, on April 21, 2014, the State was ready to proceed, but defense counsel was in trial. The court postponed the trial date until June 4, 2014. This delay weighs against the appellant in the speedy trial analysis.

On June 4, 2014, the appellant renewed his motion to dismiss for lack of speedy trial, which the court denied. The next day, trial began in this case. (The third case against the appellant went to trial on August 11, 2014, and resulted in his pleading guilty to armed carjacking.)

3) Assertion of Right

The third *Barker* factor concerns the "defendant's responsibility to assert his right." *Id.* at 531. This factor is "closely related" to the other three, and "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id*. at 531-32. We "weigh the frequency and force of the objections as opposed to attaching significant weight to a purely *pro forma* objection." *Id*. at 529.

The appellant filed an omnibus motion on November 13, 2012, which included a demand for speedy trial. We do not accord significant weight to a demand for speedy

trial included as part of an omnibus motion. *See Lloyd*, 207 Md. App. at 332 (referring to a "motion for a speedy trial [included] . . . as part of an omnibus motion" as "perfunctory"). Then, on July 9, 2013, an attorney from the Office of the Public Defender, standing in on behalf of defense counsel of record, informed the court that the appellant was "demanding a speedy trial."[6] Finally, on November 26, 2013, the appellant moved to dismiss for lack of a speedy trial and the court held a hearing on that motion. Following that hearing, the trial in the case at bar was delayed approximately another six months. The third *Barker* factor weighs in the appellant's favor in our speedy trial analysis.

4) Prejudice

"[T]he most important factor in the *Barker* analysis is whether the defendant has suffered actual prejudice." *Henry*, 204 Md. App. at 554. In assessing the significance of this factor, we consider the three interests, identified by the *Barker* Court, that the speedy trial right is designed to protect:

> (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Barker, 407 U.S. at 532 (footnote omitted).

[6]We note that the demand for speedy trial came after the same attorney informed the court that defense counsel of record was unavailable because she was "currently in trial . . . in a murder case."

The appellant stresses that "[t]he prejudice element of the evaluation . . . includes personal factors as well as a presumption of prejudice derived from the length of the delay . . . ." *Divver*, 356 Md. at 395. Those "personal factors" include "'interference with the defendant's liberty, the disruption of his employment, the drain of his financial resources, the curtailment of his associations, his subjection to public obloquy and the creation of anxiety in him, his family and friends.'" *Id*. at 392 (quoting *Epps v. State*, 276 Md. 96, 116 (1975)).

The appellant argues that, although "the court below found that no witnesses became unavailable because of the delay" (a finding he does not dispute), he nevertheless "suffered the stress, anxiety, and actual prejudice of extensive unnecessary pretrial incarceration." The State responds that the appellant "does not argue that his defense was impaired by any delay in his trial . . . [; a]ccordingly, the claim of prejudice hardly weighs in [the appellant]'s favor."

At the June 4, 2014 hearing on his speedy trial motion, the appellant asserted only that "the fact that [he] has been in jail now pending these cases since August of 2012 demonstrates prejudice enough that this Court should consider dismissing these cases." While there is some inherent prejudice in being incarcerated pretrial for 22 months, the appellant did not provide any evidence of even a single example of a "personal factor" that was negatively affected by his incarceration. In fact, he did not even argue that these "personal factors" must be weighed in his favor. In the absence of any impairment to the

appellant's defense and no concrete "personal factor" evidence, the prejudice factor does not weigh heavily in our speedy trial analysis.

5) Balancing

The circuit court weighed the *Barker* factors and determined that the appellant's speedy trial right was not violated. As the Court of Appeals has explained:

> Balancing the four factors is undoubtedly a sensitive task, completely dependent on the specific facts presented by each unique case. In carrying out this difficult task, we are mindful that our task is to ensure that the petitioner's right to a speedy trial has not been violated; we are also mindful, however, that delay is often the result of efforts to ensure the highest quality of fairness during a trial.

Glover, 368 Md. at 231-32.

Under the specific circumstances in the case at bar, upon analyzing and balancing the *Barker* factors, we agree with the circuit court's assessment that the appellant's constitutional speedy trial right was not violated. Accordingly, the circuit court properly denied the appellant's motion to dismiss.

II.

The appellant contends the circuit court erred in denying his motion to suppress the tangible evidence recovered by the police on August 16, 2012. He maintains that the evidence was seized in violation of his Fourth Amendment rights as the officers lacked reasonable articulable suspicion to stop him and his arrest was not supported by probable cause.

The State responds that the officers did not seize the appellant until after he discarded the pellet gun; therefore, "the gun was lawfully recovered by virtue of [the

appellant]'s abandonment of it." The State further responds that "the police had probable cause to arrest" the appellant, and "[t]he mask and socks were recovered in a search incident to [that] arrest."

"The Fourth Amendment protects against unreasonable searches and seizures ...." *Ferris v. State*, 355 Md. 356, 369 (1999) (citing *United States v. Mendenhall*, 446 U.S. 544, 551 (1980)). In reviewing a circuit court's ruling on a motion to suppress based on a violation of the Fourth Amendment, we consider only the evidence adduced at the suppression hearing, and we view that evidence in the light most favorable to the prevailing party, here, the State. *Williamson v. State*, 398 Md. 489, 500 (2007). We give "great deference" to the court's "findings of fact and determinations of credibility." *Cox v. State*, 161 Md. App. 654, 666 (2005); *see also Longshore v. State*, 399 Md. 486, 498 (2007) ("[W]hen there is a conflict in the evidence, [we] give great deference to a hearing judge's determination and weighing of first-level findings of fact."). We will reject those findings only if they are clearly erroneous. *Longshore*, 399 Md. at 498. "'[W]e review independently the application of the law to those facts to determine if the evidence at issue was obtained in violation of law and, accordingly, should be suppressed."' *Williamson*, 398 Md. at 500 (quoting *Whiting v. State*, 389 Md. 334, 345 (2005)).

At the November 26, 2013 suppression hearing, the State called Officer Benjamin Critzer of the BCPD. Officer Critzer testified that at 10:15 p.m. on August 16, 2012, he

was on patrol with Officer Timothy Nies in an unmarked police vehicle.[7] Officer Critzer was driving the vehicle northbound in the 500 block of Normandy Avenue when he observed a motor scooter, "come out of [an] east side alley." The scooter had a driver and a passenger, later identified as the appellant. As the scooter proceeded north on Normandy Avenue, Officer Critzer noticed that the appellant was "holding his right hand on the right side of his hip, near his crotch, holding it very tightly to his body." The officer testified that based on his "training, knowledge and experience with the police department, [he] believed that this [was] characteristic of what we have come to know as an armed person." In other words, the appellant's hand motions indicated that he was carrying a gun or similar weapon on his person, at his waist.

The officers followed the scooter, which turned left on Edmondson Avenue. Officer Critzer observed the appellant "looking all around in all directions, scanning the area for unknown purposes." The scooter then turned on to Wildwood Parkway. At that point, Officer Critzer activated his vehicle's "lights and sirens in an attempt to make a stop to further investigate what [he] suspected to be an armed person." "[T]he scooter continued for another block, almost block and a half, before pulling to the right." Then, "[a]s the scooter came to a stop–it hadn't come to a complete stop, [the appellant], came

[7]Officer Critzer testified that he "was working with Officer Niles." In the Statement of Probable Cause, which Officer Nies prepared, he spells his name "Nies." We shall use that spelling.

and jumped off the back of the scooter, holding on to his waistband area, and begin [sic] running at us." Officer Nies gave chase.

According to Officer Critzer, as the appellant was running, his "right arm c[a]me up . . . and then [went] to the left." And, "[a]fter that movement [Officer Critzer] heard a heavy metal sound of something hitting the ground." Officer Nies apprehended the appellant, placed him under arrest, and searched his person incident to arrest. The search revealed a mask, $150 in cash, and a pair of black socks. The police recovered a pellet gun from the bushes in "the direction that [Officer Critzer] saw the [appellant] run at the time [he] saw [the appellant] make that gesture and [he] heard that sound

On cross-examination, defense counsel elicited that, on October 15, 2012, about two months after the appellant's arrest, Officer Critzer was arrested for driving under the influence. On March 14, 2013, he pled guilty to that charge. Also, Officer Critzer was charged departmentally for making a false statement relating to the DUI charge. At the time of the suppression hearing, that charge had not yet gone to a trial board for a decision.

Neither the State nor the appellant called Officer Nies. Defense counsel introduced the Statement of Probable Cause that Officer Nies had prepared. There was no substantive difference between Officer Critzer's testimony and Officer Nies's version of events as set forth in the Statement of Probable Cause.

In ruling on the motion, the judge noted that "the departmental charges for making a false statement, does cast some doubt on [Officer Critzer's] credibility"; but, "even in

light of the challenge," the judge found Officer Critzer's testimony was credible. The court denied the motion to suppress, explaining:

> [Officer Critzer] has testified, his observing the [appellant]'s actions on the back of the scooter, and what the [appellant] did as a result of, though it's an unmarked vehicle but with lights and sirens, I think anyone would otherwise accept that it was, in fact, a police car, or the police.
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> And the [appellant] giving chase, or the [appellant] running, although towards the direction of the oncoming police vehicle, the Court, in determining whether probable cause exists, and considering the totality of the circumstances, when the Court considers the facts and the circumstances within the knowledge of the Officers was, in fact, I think sufficient to warrant a prudent person to believe that the [appellant] was, or had, was in the process or was about to commit a crime, based upon the furtive action of the arm, and then the throwing of the gun.
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> So, for that reason, the Court does find that probable cause did in fact exist, and the Court will deny the motion to suppress.

We first consider when the appellant was seized for Fourth Amendment purposes. The appellant asserts that he was seized when the officers pulled the scooter over. The State counters that the appellant was not seized until Officer Nies physically apprehended him.

The point at which "a person has been 'seized' for Fourth Amendment purposes, is an 'ultimate, conclusionary fact' about which 'we must make our own independent constitutional appraisal.'" *Partee v. State*, 121 Md. App. 237, 246 (1998) (quoting *Dedo v. State*, 105 Md. App. 438, 446 (1995)). "[A] Fourth Amendment seizure occurs either when the subject yields to a 'show of authority' by the police or when the police apply physical force." *Partee*, 121 Md. App. at 246 (quoting *California v. Hodari D.*, 499 U.S. 621, 626 (1991)); *see also Brummell v. State,* 112 Md. App. 426, 432-33 (1996).

Here, there was a "show of authority" when Officer Critzer turned on the police car's lights and siren. The appellant did not yield to the show of authority, however. *See Brummell*, 112 Md. App. at 432 ("[A]n attempted seizure is not a seizure." (citing *Hodari D.*, 499 U.S. at 626 n. 2)). Instead, he jumped off the scooter, before it came to a stop, and took flight on foot. The appellant was not seized until Officer Nies physically apprehended him. *See Hodari D.*, 499 U.S. at 629 (holding that because Hodari did not submit to the police officer's "show of authority" during a foot chase, "he was not seized until he was tackled"). At that point, the Fourth Amendment became applicable. *See Partee*, 121 Md. App. at 246-49. Because the pellet gun was discarded by the appellant while he was fleeing, before he was seized, it was abandoned and was not the fruit of a seizure. *See Hodari D.*, 499 U.S. at 629; *accord Partee*, 121 Md. App. at 245 ("[T]he police are free to confiscate property that is abandoned by an individual before he is seized by them, even if the seizure is found to be illegal under the Fourth Amendment." (citing *Hester v. United States*, 265 U.S. 57, 58 (1924))). The circuit court did not err in refusing to suppress the pellet gun from evidence when the police obtained it after the appellant abandoned it.

Even assuming *arguendo* that the officers seized the appellant when they pulled the scooter over, the stop was supported by reasonable suspicion. "Under the Fourth Amendment, . . . a policeman who lacks probable cause but whose 'observations lead him reasonably to suspect' that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to 'investigate the

circumstances that provoke suspicion.'" *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (footnote omitted) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975)). "[T]he 'police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" *Ferris*, 355 Md. at 384 (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). "Due weight must be given 'not to [an officer's] inchoate and unparticularized suspicion or "hunch,"' but to 'the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.'" *Derricott v. State*, 327 Md. 582, 588 (1992) (alteration in original) (quoting *Terry*, 392 U.S. at 27).

Officer Critzer testified about his factual observations of the appellant and the inferences he drew from those observations, which led him to believe the appellant was carrying a gun. He explained that he drew those inferences based on his professional experience. Officer Critzer's testimony was sufficient to establish that he had a reasonable articulable suspicion that the appellant was armed. Therefore, a stop and brief detention were permissible to investigate the suspicious circumstances.

We now consider whether there was probable cause to arrest and search the appellant. Probable cause for a warrantless arrest "exists where the facts and circumstances within the officer's knowledge and of which he had reasonably trustworthy information would justify the belief of a reasonable person that a crime has been or is being committed." *Johnson v. State*, 356 Md. 498, 504 (1999) (citing *Beck v. Ohio*, 379 U.S. 89, 91 (1964)) (additional citation omitted).

Both officers saw the appellant flee while they were attempting to pull the scooter over. *See Crosby v. State*, 408 Md. 490, 509 (2009) ("'[H]eadlong flight—wherever it occurs—is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive.'" (quoting *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000))). As the appellant ran, Officer Critzer observed him clutch his waist area and then throw something metal to the ground. As his Statement of Probable Cause recites, Officer Nies saw that the appellant "immediately grabbed for the front of his pants when he began running and removed a black in color handgun with his right hand and attempted to throw the gun into the bushes." At that point, the officers had probable cause to believe that the appellant had committed a crime, *i.e.,* illegal possession of a handgun. They arrested him based on that probable cause and therefore "were justified in searching his person incident to arrest." *Stokeling v. State*, 189 Md. App. 653, 670-71 (2009) (citing *Arizona v. Gant*, 556 U.S. 332 (2009)). For this reason, the court did not err in denying the motion to suppress with respect to the items found on the appellant's person.

III.

The appellant contends the circuit court erred in denying his motion to suppress the extrajudicial identifications made by Blue and Commander because "the photo array was impermissibly suggestive."

> The admissibility of an extrajudicial identification is determined in a two-step inquiry. "The first question is whether the identification procedure was impermissibly suggestive." If the procedure is not impermissibly suggestive, then the inquiry ends. 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 circumstances, the identification was reliable."

Smiley v. State, 442 Md. 168, 180 (2015) (internal citations omitted). The defendant bears the burden of proof on the issue of impermissible suggestability. *Upshur v. State*, 208 Md. App. 383, 400-01 (2012). If the defendant meets that burden, we move to the issue of reliability, where "the prosecution has the burden." *Id*. at 401.

When reviewing a circuit court's ruling on a motion to suppress extrajudicial identifications, we consider only the evidence presented at the suppression hearing. *Wallace v. State*, 219 Md. App. 234, 243 (2014).

> We accept the findings of fact and credibility determinations of the circuit court unless they are clearly erroneous, and we examine the evidence and inferences reasonably drawn from the evidence in the light most favorable to the party prevailing before the circuit court, in this case the State.

Id. (citing *McFarlin v. State*, 409 Md. 391, 403 (2009)). However, "[w]e review the trial court's conclusions of law *de novo* and make our own independent assessment by applying the law to the facts of the case." *Wallace*, 219 Md. App. at 243-44.

At the hearing on the appellant's motion to suppress the extrajudicial identifications, defense counsel called Detective Johnson, who testified that he put together the photographic arrays that were shown to Blue and Commander. The two arrays contained the same six photographs, one of which was of the appellant, but the photographs were not in the same order. Detective Johnson showed the photographic arrays to Blue and Commander on August 19, 2012. Once the victims were at the police station that day, he took Blue into a private room, leaving Commander in the hallway.

He read Blue the following instructions, which are printed on the back of all the photographic arrays:

> The six photographs on this form may or may not contain a picture of the subject in connection with this investigation. When looking at the photographs, keep in mind that the individuals may not appear exactly as they did on the date of the incident because features such as hairstyles and facial hair (beards and mustaches) may be changed. Photographs may not always depict the true complexion of the person and can be affected by the quality of the photographs. After reviewing each photograph, please indicate whether you have made any identification in connection with this investigation.

Detective Johnson then placed the array in front of Blue with the instructions face up. Blue initialed the instructions. Detective Johnson told Blue to turn the array over to see the photographs whenever he was ready. Blue did so, and Detective Johnson allowed him to "have [the photographic array] on [his] own to look at [his] leisure." He did "not stand[] over the top of [Blue] or, you know, near the photographic array . . . to be any type of way trying to point out the person or say that might be the person or anything like that." Blue selected the appellant's photograph and signed his name above it to indicate that he was the robber.

When Blue was finished, Detective Johnson repeated this procedure with Commander. He also initialed the instructions, chose the appellant's photograph from the array, and signed his name above the photograph to indicate that the appellant was the robber.

Detective Johnson testified that Blue and Commander were not given an opportunity to speak between their identifications.

Defense counsel next called Commander and questioned him as follows:

[DEFENSE COUNSEL:] Okay. So Detective Johnson called you on the phone?

[COMMANDER:] I think so, yeah.

[DEFENSE COUNSEL:] And do you remember what he said to you when he called you up?

[COMMANDER:] He just asked me to come in and – and pick out the person that I think that – thought, you know, basically what happened that night, so.

[DEFENSE COUNSEL:] Okay. So Detective Johnson indicated to you that he did have a suspect?

[COMMANDER:] Yes.

* * *

[DEFENSE COUNSEL:] All right. Do you remember how you got to the Southwest District that day?

[COMMANDER:] I think he actually came and picked me up, Detective Johnson actually picked me up.

* * *

[DEFENSE COUNSEL:] Did [he] pick anybody else up?

[COMMANDER:] Um, Gerald Blue.

* * *

[DEFENSE COUNSEL:] And during the ride to the Southwest District station, do you recall whether Detective Johnson said anything?

[COMMANDER:] No.

[DEFENSE COUNSEL:] At any point when Mr. Blue was in the car did Detective Johnson indicate to you that he had a suspect?

[COMMANDER:] I mean, besides that he, you know, he just had the pictures, no. But he didn't say anything, unusual.

[DEFENSE COUNSEL:] No, I'm sorry. You said – he said he had some pictures?

[COMMANDER:] That's the only thing. He just said to pick – pick out, just going to pick out who we thought was the person that did this to us, that was it.

[DEFENSE COUNSEL:] Okay. And that was in the car on the way to [the] Southwest District?

[COMMANDER:] Yes.

[DEFENSE COUNSEL:] So, at that point did you believe that the police had a suspect?

[COMMANDER:] Yes.

* * *

[DEFENSE COUNSEL:] And what, if any – when Detective Johnson showed you the photographs what, if anything, did he say?

[COMMANDER:] Just pick out the person who I thought did what they did to me.

[DEFENSE COUNSEL:] Okay. And when he said that was it you're [sic] understanding that somebody who did something to you was in that photographic array?

[COMMANDER:] Yes.

* * *

[DEFENSE COUNSEL:] All right. Now, um, did Detective Johnson – when Detective Johnson showed you this photo array did he indicate in any way who you should pick?

[COMMANDER:] No.

[DEFENSE COUNSEL:] Did he indicate to you that the suspect was one of the six photographs?

[COMMANDER:] No.

[DEFENSE COUNSEL:] But that was your understanding, correct?

[COMMANDER:] Yes.

On cross-examination, Commander testified that Detective Johnson read aloud the instructions on the back of the photographic array form "before and after[]" he viewed the photographs. The prosecutor asked Commander whether "the detective [told him] that he knew for sure the person that robbed [him] was in the six photos . . . ?" Commander stated that Detective Johnson did not tell him that the man who robbed him was included in the photographic array. On redirect, the following transpired:

[DEFENSE COUNSEL:] And did you indicate to Mr. Blue that you had picked someone out?

[COMMANDER:] Yes.

[DEFENSE COUNSEL:] So you did discuss this with him after?

[THE STATE:] Objection.

[THE COURT:] Sustained.

* * *

[DEFENSE COUNSEL:] When did you tell Mr. Blue that you had picked someone from photographic array?

[THE STATE:] Objection.

[THE COURT:] Sustained.

[DEFENSE COUNSEL:] All right. Nothing further.

After Commander's testimony, the parties were given an opportunity for argument. Thereafter, the court found that Detective Johnson had not conducted the photographic arrays in an impermissibly suggestive manner and denied the appellant's motion for failure to meet his initial burden. The judge stated:

> Based on what was presented to the Court, the officer indicated that he went through his normal procedure, um, and did not tell . . . Mr. Commander that there was anyone in the photo array that was the person involved.
>
> I think people get a little too caught up in the idea that you're bringing someone down for the purpose of identifying, the hope that there is an identification made of someone at some point in some way, shape or form.

The judge then read aloud the instructions on the back of the photographic array. He concluded:

> At no point was this Court presented with any information to say that Detective Johnson gave any information to Mr. Commander that would show it to be suggestive in such a way. And Mr. Commander did not testify to that.
>
> For those reasons, the Court is satisfied that the defendant has failed to meet its initial burden to show that the identification procedure was impermissibly suggestive, and the motion is denied as far as Mr. Commander goes.

The next day, evidence was taken on whether Blue's extrajudicial identification should be suppressed. The appellant's only additional witness was Blue.

> [DEFENSE COUNSEL:] Okay. And [Detective] Johnson called you by telephone. Can you tell us what – what he said to you when he called you by phone?
>
> [BLUE:] He asked me to come in.

[DEFENSE COUNSEL:] Did he say why he was asking you to come in?

[BLUE:] To identify.

[DEFENSE COUNSEL:] To – to identify?

[BLUE:] Yes.

* * *

[DEFENSE COUNSEL:] And what, if anything did [Detective Johnson] say to you when he presented [the photo array] to you?

[BLUE:] He didn't say anything.

* * *

[DEFENSE COUNSEL:] Did he say or indicate to you that he believed that the individual who robbed you was one – was depicted in one of the six photographs you were shown?

[BLUE:] No.

* * *

[DEFENSE COUNSEL:] Okay. Did he say anything to you before [you turned over the photo array]?

[BLUE:] He – he left the room.

* * *

[DEFENSE COUNSEL:] And so did you turn the photo array over before he left the room or after?

[BLUE:] After he left.

* * *

[DEFENSE COUNSEL:] And how – did you pick somebody from the photographic array?

[BLUE:] Yes.

On cross-examination, the prosecutor asked Blue about the instructions on the back of the photographic array form.

> [THE STATE:] Okay. And if you flip [the photographic array] over to the back, um, when you said that the detective presented this to you face down, is that what you recall seeing initially?
>
> [BLUE:] Yes.
>
> [THE STATE:] And do you recall whether or not the detective read, um, the paragraph that's above where you can write anything, a comment to you?
>
> [BLUE:] I –
>
> [THE STATE:] Do you recall reading that –
>
> [BLUE:] Yes.
>
> [THE STATE:] – or it being read to you?
>
> [BLUE:] Yes.
>
> [THE STATE:] Is that you, where it says "viewer's initials" is that your initials?
>
> [BLUE:] Yes, that's my initials.

The court ruled as follows:

> All right. Yesterday this court was able to hear the testimony of Detective Johnson who indicated that he did the photo array with Mr. Blue[.] . . . The witness just indicated that the detective did not tell him to pick anyone out. His testimony is he walked out of the room, but that there was no coercion on the part of the – of law enforcement, that no one told him who to pick.
>
> The . . . Defense has a burden to show a prim[a] faci[e] case that this was impermissibly suggestive.

> This Court finds that there's no evidence that the photo array done by Mr. Blue was impermissibly suggestive, and the motion is denied.

The appellant contends the court erred in denying his motion to suppress the extrajudicial identifications by Commander and Blue because he met his initial burden of showing that the identification procedure was impermissibly suggestive. Specifically, he asserts that Commander testified "that [Detective] Johnson said he had a suspect and wanted Commander to come pick him out[,] . . . that [Detective] Johnson told him to pick the person he thought had done it, and [that he] thought the person was represented in the array." He asserts that Blue testified "that Detective Johnson had a suspect he wanted him to identify." The State responds that the appellant's "argument flies in the face of the judge's factual findings," and the court properly denied the appellant's motion to suppress.

"In looking at whether the identification was tainted by suggestiveness, we look in essence at whether the officers prompted [the victims] to identify [the appellant.]" *Wallace*, 219 Md. App. at 244.

> To do something impermissibly suggestive is not to pressure or 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.

Id. at 244-45 (citations and internal quotation marks omitted). *See also Smiley v. State*, 442 Md. at 180 ("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.").

In *Wallace*, this Court addressed a factual scenario similar to the one here. There, the victim identified the defendant in a photo array. The defendant moved to suppress that identification on the ground that the procedure used was impermissibly suggestive. At the suppression hearing, the victim "testified that prior to being shown the photo array, the detectives informed him 'they had the person.'"[8] 219 Md. App. at 245. The victim also "testified that he selected [the defendant]'s photo believing that the array contained the person who robbed him." *Id.* We held that, "because the detective 'did not in any way suggest which photograph or photographs were of the suspect or give any indication why the person in the photograph was suspected of having committed the robbery,'" the identification procedure was not impermissibly suggestive. *Id.* at 246-47 (quoting *State v. Bolden*, 196 Neb. 388, 243 N.W.2d 162, 164 (1976)).

For the same reason, the identification procedure employed by Detective Johnson was not impermissibly suggestive. The appellant does not contend that Detective Johnson indicated which of the six photographs, if any, Blue and Commander should select, and there was no evidence presented to support that conclusion. Instead, the appellant points to the victims' testimony that Detective Johnson told them he had a suspect, and that the victims believed that a suspect was represented in the photographic array. Even assuming the truth of those statements, the circuit court did not err in ruling

[8]The detective who testified at the motions hearing denied this was said. We assumed the statement was made. *Wallace*, 219 Md. App. at 245 n.6.

that the appellant failed to meet his initial burden to prove that the photographic array was impermissibly suggestive.

Furthermore, the facts the appellant relies on in advancing his arguments are contrary to the factual findings made by the judge, which were not clearly erroneous. The judge credited Detective Johnson's testimony and did not accord any significant weight to the victims' testimony that Detective Johnson told them there was a suspect. By commenting that sometimes "people get a little too caught up in the idea" that they are coming in "for the purpose of identifying" someone and they "hope that there is an identification made of someone at some point in some way, shape or form," the judge was making clear that the notion that there would be a photograph of a suspect in the array had more to do with what these victims (and any victim) would think about being asked to review an array at all, and not about what they were told by Detective Johnson.

IV.

As explained above, the photographic arrays shown to Commander and Blue on August 19, 2012, were comprised of six photographs and were shown to them by Detective Johnson, the lead investigator on the case. By general order issued more than a year later, on October 22, 2013, the BCPD changed the manner in which photographic arrays are carried out, in two ways. First, the officer leading the investigation is not the officer who shows the array to the victim. And second, the photographs are shown one by one, not in a "six pack."

Before trial, the prosecutor made an oral motion to preclude the defense from questioning Officer Johnson about the new procedures, given that they did not exist when the photographic arrays were shown to the victims on August 19, 2012. The prosecutor argued "that it's irrelevant and should not be part of the trial for this case."

Defense counsel responded by arguing that because "[i]dentification . . . is going to be an issue in this case," the jury was "entitled to know what the state of the art regarding identification is, and the fact that that wasn't what was done in this case," and therefore cross-examination about the new procedure should be allowed.

The court granted the State's motion, explaining:

> Okay. All right. Um, the Court is mindful of the fact that the procedure has changed. Um, as far as the identification of any witness, procedures certainly do change over time. Historically that's been the issue with anything, any new kind of technology or any kind of new procedures.
>
> What has been presented to this Court though is that photo array was done by Mr. Commander and possibly, well, one was done by Mr. Blue, it may come into play if Mr. Blue is here, but as far as the use of a new procedure that is not of Constitutional proportions, that it's a change with the police department, the Court is satisfied that the procedure that was in place at the time of the incident is the one that should be dealt with and will not allow the defense to bring up the new procedure.

The appellant contends the trial court's ruling prohibited him "from conducting … relevant cross-examination of Detective Johnson" regarding the new procedure and therefore denied him "his Sixth Amendment right to confrontation and/or to present a defense." He argues that "the fact that the [BCPD] had employed new protocols for the conducting of photo array identification procedures since [his] arrest was . . . [relevant] to the accuracy and reliability of the ultimate identifications at issue here." The State

responds that the appellant's "argument lacks merit" because "[t]he evidence he sought to elicit about a police department policy change was irrelevant."

We agree with the State regarding relevancy. "Evidence that is not relevant is not admissible." Md. Rule 5-402. The issue before the jury was whether the victims accurately identified the appellant as the man who robbed them. Whether the BCPD later changed the manner in which police officers' conduct photographic arrays was not probative of whether the manner in which the photographic arrays in this case were carried out caused them to be impermissibly suggestive.[9] The appellant was not entitled to cross-examine Detective Johnson about irrelevant information and certainly did not have a constitutional right to do so.

The appellant also argues that, even if "the inquiry was somehow not relevant," the State opened the door to it, and, once that happened, the trial court erred by not allowing defense counsel to inquire about the new procedure.

This issue came up during defense counsel's cross-examination of Detective Johnson. Defense counsel argued that he should be allowed to question Detective Johnson about the change in procedure because the State "opened the door," explaining: "I think [the prosecutor] opened the door when she – she asked [Detective Johnson] questions that were designed to show how trustworthy this procedure [*i.e.,* the one

[9]We note as well that defense counsel did not proffer to the court that the policy was changed for any particular reason or that Officer Johnson had any knowledge about the reasons for the change.

actually used] is." The court disagreed with defense counsel's characterization of the purpose of the prosecutor's questions:

> THE COURT: No. Those questions were not designed to show how trustworthy the procedure was, *it was to show what the procedure was*.
>
> Now, you can ask anything you want about the procedure. And if you don't like the procedure you can ask certain questions, but you can't go to exactly where I said you can't.

(Emphasis added.)

The transcript of the State's direct examination of Detective Johnson supports the trial court's conclusion that the State did not "open the door," so as to allow the defense to question Detective Johnson about the change in protocol. The prosecutor's questions concerned the circumstances surrounding his showing the photographic arrays to Commander and Blue, so the jurors would understand what the procedure was. In response to the questions, Detective Johnson gave a factual account of what happened on August 19, 2012, when Commander and Blue made their extrajudicial identifications. The State did not ask the detective whether the procedure was "reliable." The trial court's ruling was proper.

V.

At trial, Officer Critzer testified about the events that transpired on August 16, 2012, leading up to the appellant's arrest. His testimony was substantively the same as his testimony at the earlier hearing on the appellant's motion to suppress tangible evidence.

On cross-examination, defense counsel questioned Officer Critzer about his DUI and the subsequent departmental charges, which by then had been resolved through an agreement.

> [DEFENSE COUNSEL:] In October of 2012, you were involved in an accident in Anne Arundel County; is that correct?
>
> [OFFICER CRITZER:] That's correct.
>
> [DEFENSE COUNSEL:] And as a result of that you were charged with driving while intoxicated? . . . And – and you were charged with lying to the officers who responded; is that correct?
>
> [OFFICER CRITZER:] No, sir, that's not correct.
>
> [DEFENSE COUNSEL:] What were you charged with?
>
> [OFFICER CRITZER:] I was charged with driving while intoxicated.
>
> [DEFENSE COUNSEL:] And were you charged with making a false statement?
>
> [OFFICER CRITZER:] No, sir.
>
> [DEFENSE COUNSEL:] Were you not charged before a trial board with making a false statement?
>
> [OFFICER CRITZER:] That charge was dismissed, sir.
>
> [DEFENSE COUNSEL:] The facts to that charge were sustained, were they not, Officer?
>
> [OFFICER CRITZER:] The facts were sustained, but the charge was dismissed.
>
> [DEFENSE COUNSEL:] In – pursuant to a plea bargain, correct?
>
> [OFFICER CRITZER:] They were dismissed, sir, yes.
>
> [DEFENSE COUNSEL:] Pursuant to a plea bargain, correct, Officer?

[OFFICER CRITZER:] That's correct.

During closing argument, defense counsel challenged Officer Critzer's credibility and questioned why the State did not call Officer Nies to testify:

> Now, ladies and gentlemen, I would like to start from the end of the testimony in this case. How did [the appellant] become a suspect?
>
> * * *
>
> Well, you . . . heard . . . [that] Officer Critzer was watching while Office[r Nies] followed the [appellant]. And I know you didn't hear from Office[r Nies], you didn't hear a word [from] him. He didn't testify. All you heard was [O]fficer Critzer.
>
> Now, ladies and gentlemen, bear in mind that this happened two months before [O]fficer Critzer was arrested himself, and felt it was appropriate to lie to the arresting officers.
>
> And he told you during his testimony that although he was charged with making a false statement that that charge was resolved by way of a plea bargain. Well, that's how, um, [the appellant] became a suspect in this case, ladies and gentlemen.
>
> And you're being asked to believe Officer Critzer, that officer – it's the only person you heard would testified [sic] that this came from [the appellant], (indicating), that this gun came from [the appellant], et cetera. So, that's how he became a suspect in [this] case. I just ask you to bear that in mind when you're making your deliberations.

In response, in rebuttal closing argument, the prosecutor stated:

> And in terms of defense arguing that you didn't hear from Officer [Nies], well, if he thought that – if defense thought Officer [Nies] had something to offer, just like the State had subpoena power to make people come to court to get witnesses to court, defense has the same power.
>
> * * *
>
> So if he wanted him here, he should have used that power to bring him before you, if he thought he had something more to offer in terms of Officer [Nies].

Defense counsel objected and the court overruled that objection.

On appeal, the appellant contends "the State was erroneously permitted to shift the burden" of proof to the defense during rebuttal closing argument by stating that the appellant also could have called Officer Nies. The State responds that the appellant "'opened the door' by identifying the [State's] failure to call Officer [Nies] as a witness in the case, [and] the prosecutor properly argued . . . that Officer [Nies] was equally available to the defense."

Mitchell v. State, 408 Md. 368 (2009), controls this issue. In that case, defense counsel emphasized in closing that the State had not called a number of people who had witnessed the crime. In rebuttal closing, the prosecutor stated that "[t]he defense has subpoena power just like the State does" and could have brought those witnesses into court. *Id*. at 379. Mitchell objected. The trial court overruled the objection, stating it did not "think [the State was] burden shifting" and the State "ha[d] a right to respond to [Mitchell] raising this issue of why [the witnesses] weren't here." *Id*. at 378.

On appeal, Mitchell argued "that the prosecutor's remarks in rebuttal calling attention to the defendant's subpoena power improperly shifted the burden of proof." *Id*. at 379-80. The Court of Appeals disagreed, holding "that the prosecutor's remarks calling attention to Mitchell's subpoena power . . . did not shift the burden of proof." *Id*. at 392. The Court went on to analyze the prosecutor's remarks in context, stating:

> Here, during his opening statement and closing argument, defense counsel emphasized to the jury that it was the State's burden to prove the defendant's guilt. More importantly, the court carried out its function and instructed the jury as to the burden of proof. Moreover, immediately preceding counsel's closing arguments, the court noted to the jury that such arguments are not evidence and that the jury was entitled to draw any

> reasonable inference from the evidence, and not just the inferences that counsel asked them to draw.

Id. at 393.

The Court observed that "[t]he 'opened door' doctrine is based on principles of fairness and permits a party to introduce evidence that otherwise might not be admissible in order to respond to certain evidence put forth by opposing counsel." *Id*. at 388. *See also Clark v. State*, 332 Md. 77, 85 (1993) ("'[O]pening the door' is simply a way of saying: 'My opponent has injected an issue into the case, and I ought to be able to introduce evidence on that issue.'"). The Court concluded that defense counsel's argument "'opened the door' for the prosecutor to offer an explanation as to why those witnesses were not present." *Mitchell*, 408 Md. at 388-89. The Court noted, however, that its holding was "a narrow one," and stressed the fact that "[t]he prosecutor's remarks . . . were a tailored response to defense counsel's" statements. *Id*. at 389.

The case at bar is closely akin to *Mitchell*. In his closing argument, defense counsel urged the jury to discredit Officer Critzer's testimony and to question why the State did not call Officer Nies. The prosecutor's response on rebuttal—that the appellant also has subpoena power—was fair, narrowly tailored, and did not shift the burden of proof to the appellant. The prosecutor did not suggest that the appellant *should have* called Officer Nies, only that he *could have*, had he wanted to. The trial court did not err in overruling defense counsel's objection.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.