UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1435

September Term, 2014

FRANCIS LEE

v.

STATE OF MARYLAND

Hotten,
Berger,
Arthur,

JJ.

Opinion by Arthur, J.

Filed: July 31, 2015

On November 22, 2013, a Montgomery County grand jury indicted appellant, Francis Lee, on one count of armed robbery and one count of conspiracy to commit armed robbery. Following a two-day trial against Lee and his co-defendant Najie Walker,[1] a jury sitting in the circuit court convicted Lee on the armed robbery charge and acquitted him of the conspiracy charge. The court denied Lee's post-trial motion for judgment of acquittal and imposed a 20-year prison sentence, but suspended all but five of those years.

QUESTIONS PRESENTED

Lee took a timely appeal of his conviction. He raises two issues, which we rephrase slightly as follows:

1. Did the trial court violate Lee's right to a public trial under the Sixth Amendment when it closed the courtroom for the entirety of voir dire and jury selection?

2. Did the trial court err, in violation of Lee's Fourth Amendment right against unreasonable searches and seizures, when it denied Lee's motion to suppress?

For the following reasons, we answer in the affirmative on the second question and reverse the judgment. Because we remand for a new trial consistent with this opinion, we need not reach the question of whether the trial court violated Lee's Sixth Amendment right to a public trial. *See Pearson v. State*, 437 Md. 350, 364 n.5 (2014).[2]

[1] Walker is not a party to this appeal.

[2] Regarding the propriety of closing a courtroom to the public during voir dire, see *Presley v. Georgia*, 558 U.S. 209 (2011), in which the Supreme Court, without conducting oral argument, summarily reversed a decision that had found no infringement on the right to a public trial.

FACTUAL AND PROCEDURAL HISTORY

Lee's appeal only partly relates to the facts surrounding the underlying crime for which he was convicted. For background information, however, we describe those events as adduced at Lee's trial.

D'Angelo Burke testified that on the evening of October 12, 2013, in Silver Spring, two men robbed him of his iPhone 5 at gunpoint. In the process of that robbery, one of the men struck Burke on the head with a handgun. Burke stated that one of the robbers was Najie Walker, a man with whom Burke said he was "sort of friendly." He was not familiar with his other assailant.

Burke had left Washington's Adams Morgan district and was heading home on the Metro. A short time before he arrived at his stop at Silver Spring, Walker and the other man entered Burke's Metro car. For several minutes, the three men sat within a few feet of each other and chatted. As the men arrived at Burke's stop, Walker asked Burke if he could borrow his cell phone. Burke said he felt comfortable lending Walker his phone, and the men left the Silver Spring station together as Walker placed a call. The men covered roughly a quarter of a mile on foot, with Walker occasionally asking to borrow Burke's phone, using it, and then returning it to Burke.

Burke testified that after about ten minutes, on a residential street, the other man turned to Burke, pointed a black and silver handgun at him, and said, "You already know what time it is." The man then swung the handgun at Burke, striking him over the head and causing the gun to fire a bullet. All three men fled, Burke in a different direction from the others. Walker had Burke's iPhone.

Two neighborhood residents allowed Burke into their home so that he could call the police. When the police arrived, Burke described the two assailants as black men with dreadlocks.

On October 30, 2013, Burke identified Lee as the man who had assisted in the robbery and had struck him with the handgun. On that same day, detectives filed a statement of charges against Lee. One week later, on November 7, 2013, Burke recognized Lee at a mall in Silver Spring. He immediately called the police, who arrived and placed Lee under arrest.

Meanwhile, on October 23, 2013, between the date of the robbery and Lee's arrest, Lee was arrested on separate grounds in the District of Columbia. At the time of that arrest, Lee possessed a handgun that carried a combination of Winchester and Ruger nine-millimeter bullets. At Lee's trial for armed robbery of Burke, the State's expert witness on toolmark and firearm identification testified that a nine-millimeter Winchester bullet was found at the scene. Although the expert noted similarities between the markings on that bullet and those in the gun found on Lee on November 7, he could neither include nor exclude Lee's handgun as the one that discharged that bullet.

On April 2, 2014, following a two-day trial, the jury convicted Lee of armed robbery. On August 12, 2014, the trial judge sentenced Lee to 20 years in prison, all but five of those years suspended. Lee now takes a timely appeal.

DISCUSSION

Before his trial for the armed robbery, Lee moved to suppress the handgun that District of Columbia police seized from him and that prosecutors intended to use as

evidence tending to prove he was Burke's assailant. Lee argues that the State obtained the handgun as the result of a seizure without reasonable suspicion. The trial court denied the motion.

A. The Suppression Hearing

The trial court conducted a suppression hearing on March 31, 2014. There, the State called three District of Columbia police officers: Ofcs. Casey Logan, Ein Williams, and Leslie Wheeler.

Ofc. Logan testified that at 11:30 p.m. on October 23, 2013, he was on patrol with Ofcs. Wheeler and Williams, as well as Ofc. Richardson, members of the District's crime-suppression unit. They were patrolling the area near Howard University, which Ofc. Logan characterized as a high-crime area. This particular week was the university's homecoming week, during which there had been a particular increase in robberies. The officers were in an unmarked police car, dressed in plain clothes, and wore bulletproof vests with placards on the front and back that read, "POLICE."

Ofc. Logan testified that he had gained "a lot of experience" with the crime-suppression unit and, in particular, had received specific training in recognizing armed gunmen:

> Q: Tell me about the class that you took called Characteristics of an Armed Gunman.
>
> A: Basically, it was told [*sic*] by your lead sergeant in the Metropolitan police department, Curt Sloan. He's been in the department for over 20 some odd years recovering guns and drugs, or recovering drugs mostly. He's part of the gun recovery unit at [the] department. He came in and taught us a two-day class, basically identifying individuals who possibly carry guns.

Q: And what were, I guess, what did you learn were the characteristics of an armed gunmen [*sic*] in that class, specifically?

A: Well, individuals that may be carrying on their person, may adjust it in certain ways, maybe pushing them down with their arm, maneuvering it with their hand to get it in a more comfortable position, just basically the manner which they may walk. They may – if they identify a police officer, they may adjust it in a certain way to hide it from the view of the Officer as well.

Q: When you say "they identify," basically when they see a police officer?

A: Right.

Q: Okay. And in the course of five years you've been a police officer, how many times have you come into contact with an individual that had a gun on him, just on the street, not related to a car stop?

A: Wow. It's at least been over 50 times.

Ofc. Logan then testified that, from the moving police car, he noticed Lee standing in front of a 24-hour McDonald's on Georgia Avenue. He estimated that there were about 20 people inside the McDonald's and three or four outside. He saw that Lee was standing with another man, about seven feet from the entrance, in a well-lit parking area.

Ofc. Logan testified that he "observed [Lee] was adjusting an object in the front of his waistband near his crotch area in a manner in which I recognized it could possibly be a man that had a gun on him."

After his general description of Lee's movement, Ofc. Logan demonstrated the movement on two occasions. In the first demonstration, the following colloquy occurred:

Q: Okay, you just testified that you observed him manipulating an object. Can you specify what exactly what you observed that caught your attention, I guess pursuant to your class and characteristics of an armed gunman?

> A: Thank you. When I drove past, I observed him pulling up and grabbing it in the manner like this, with his hand crotched like this and kind of pulling up his pants and adjusting whatever the unknown object could be. *It could have been anything at that point*, but I appeared – what I've been taught in the past, *it could be maybe a weapon at that point*. And it wouldn't hurt just to go and ask, and see what was going on.

(Emphasis added.)

Ofc. Logan further stated that "[t]hrough my experience, when I've observed individuals who's carrying weapons on their person, they were carrying it in their waist, near their waistband."

On cross-examination, Ofc. Logan stated that upon observing Lee adjusting something in his pants, he saw neither a weapon nor a "bulge in his pants consistent with a weapon[.]" Ofc. Logan agreed that his suspicion was "simply based on the physical movement that [he] displayed for the Court."

Upon being asked on re-direct examination whether he saw a "hard object," Ofc. Logan said only that "I said I seen him maneuvering it, maneuvering his waist band." Upon being asked whether he saw "anything that appeared to be anything other than Mr. Lee inside those pants[,]" Ofc. Logan reiterated, "From driving down? No, I didn't."

Ofc. Williams testified that, following Ofc. Logan's observation of Lee, the officers made a U-turn, turned into the McDonald's parking lot, and parked in a parking space "directly in front of [] Lee and the other individual that he was standing with." Ofc. Williams, the driver of the patrol car, stated that as he exited, he was about eight to

ten feet from Lee, who was standing several feet in front of the entrance and about two feet from the restaurant's exterior wall.

The officers directly approached Lee and the other man, walking, in Ofc. Williams's words, "at a normal pace." As previously stated, the officers wore bulletproof vests with "POLICE" printed on the front and back. They wore visible police badges around their necks, and their firearms were holstered but visible at their sides.

Ofcs. Williams and Wheeler approached Lee while Ofcs. Logan and Richardson approached the man standing next to him. Lee, who had his head turned to the side, did not appear to notice the officers as they approached. Ofcs. Williams and Wheeler stopped side-by-side in front of the patrol car, two to three feet from each other, and three to four feet from Lee, whose back was to the McDonald's wall. Ofcs. Logan and Richardson stood next to the other two officers, roughly five and six feet from Lee, respectively, and began to address the other man.

Ofc. Williams then addressed Lee, speaking "in a normal tone." He asked, "Can I ask you something?" At this point, according to the testimony, Lee turned his head toward Ofc. Williams and looked at him, but said nothing. Ofc. Williams then asked Lee, "Do you have a gun on you?" Lee's response was to state, loudly and angrily, "Man, I just got off the bus!" Ofc. Williams again asked Lee the same question: "Do you have a gun on you?" Now appearing nervous to Ofc. Williams, Lee again stated angrily: "Man, I just got off the bus."

Ofc. Williams then asked Lee, "Can you pull your shirt up for me?" Lee complied, lifting up the front of his shirt. Ofc. Wheeler testified that he saw the "grip" of

a handgun exposed above the waistband of Lee's sweat pants. Lee attempted to flee in the one direction reasonably available to him,[4] but as he took his first two steps, Ofc. Wheeler "reached out and grabbed him." The officers placed Lee under arrest.

According to the officers' testimony, 45 seconds to a minute passed between when they first parked their car and when they saw Lee's handgun. Twenty to 25 seconds passed between Ofc. Williams's first question to Lee and when he saw the handgun. At no time until Lee's apprehension did the officers make physical contact with Lee or touch or reach for their holstered firearms.

At the suppression hearing, Lee argued that the officers seized him when they converged on him as his back was to the wall, blocked his exit paths by their positioning, questioned him about whether he was committing criminal activity, and instructed him to lift his shirt. Under the circumstances, he argued, this conduct would make a reasonable person in his position feel as if he was not "free to leave or free to demur to the demands of the police officer." Lee further argued that the officers seized him without reasonable, articulable suspicion that he was engaging in, or was about to engage in, criminal activity. Lee contended that the handgun that officers discovered on him as a result of this unreasonable seizure was tainted, and thus must be suppressed.

[4] The record indicates that Ofcs. Williams and Wheeler stood directly in front of Lee, three to four feet from him, and that the man next to Lee, who had been approached by the two other officers, stood directly to Lee's right.

B. The Suppression Ruling

The circuit court rejected Lee's argument, ruling, first, that the police encounter was a mere "accosting," and not a "seizure." Consequently, the court ruled, the Fourth Amendment's protections did not apply.

The court found that, "[a]t best, [Lee] saw only the two officers" who had directly approached him.[5] Because Lee had not noticed the two officers' presence until Ofc. Williams asked his first question, the court reasoned that the analysis should focus on the 20- to 25-second period from the time of the first question until the time when the officers saw the gun. The court further reasoned that Ofc. Williams had spoken in a conversational tone of voice, that the officers never reached for their weapons, and that they did nothing to impair Lee's ability to walk away from this encounter.

Even assuming that a seizure had taken place, however, the court went on to rule that the seizure was justified by the officers' reasonable suspicion that Lee was carrying a concealed weapon. In reaching this decision, the court relied, in part, on its findings that: Ofc. Logan had training and experience in identifying armed persons; the location was

[5] In its findings the trial court stated:

> The testimony is that four officers approached; however, only two of those officers approached the defendant. The testimony, as I've already alluded to, is that he didn't even see them or take notice of those two officers until Ofc. Williams asked him a question. So, there's no evidence before the Court that he ever even saw the other two officers who according to testimony were present.

Contrary to Lee's contention, the court did not commit clear error in making that factual finding.

part of a known high-crime area; Ofc. Logan had seen Lee make a motion suggesting he was adjusting something inside his sweat pants;[6] Lee provided unresponsive answers to Ofc. Williams's questions; and Lee grew nervous as the questioning continued.

The court thus denied Lee's motion to suppress and allowed the handgun to be admitted as evidence against Lee at his trial.

Our task now is to determine whether the officers, through their conduct and the context in which the encounter took place, seized Lee, and, if so, whether this seizure was justified by reasonable suspicion that Lee had committed or was about to commit a crime. *See Swift v. State*, 393 Md. 139, 150 (2006). We answer yes to the first question and no to the second.

C. Standard of Review

In reviewing rulings on motions to suppress, we "consider only the information contained in the record of the suppression hearing, and not the trial record." *Lewis v. State*, 398 Md. 349, 358 (2007). "[W]e view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the prevailing party on the motion." *Id.*

[6] With respect to this key factor, the court stated:

> [I]t really is not just [a] motion that is one you would expect to see if somebody is pulling up their pants, rather from what the officer was displaying, is truly more that the person is adjusting something in the crotch of their pants. He displayed sort of a lifting up and then – It was more than one lifting up, or lifting up at one time. There was a couple of repeated lifting ups, and sort of a little bit of shifting, maybe left or right, clearly signifying that the person is adjusting something in the pants. Although, concededly, the officer saw no bulge or no hard object. But, it was more than simply lifting the pants.

We review the trial court's findings of fact only for clear error, giving due weight to the inferences fairly drawn by the trial court. *Swift*, 393 Md. at 154-55. We afford no deference, however, to the trial court's legal conclusions. *Id.* at 155. We thus review de novo the trial court's purely legal determination as to whether a seizure has occurred for Fourth Amendment purposes. *Id.*

D. Seizure Under the Fourth Amendment

1. Legal Standards

The Fourth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, protects against unreasonable searches and seizures. *Lewis*, 398 Md. at 360-61.[7] "The exclusion of evidence obtained in violation of these provisions is an essential part of the Fourth Amendment protections." *Swift*, 393 Md. at 149 (citing *Mapp v. Ohio*, 367 U.S. 643, 655-56 (1961)).

To evaluate Lee's claim of error, we must first evaluate whether the Fourth Amendment even applied, as "[i]t is well established that the Fourth Amendment guarantees are not implicated in every situation where the police have contact with an individual." *Swift*, 393 Md. at 149; *accord Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968); *Pyon v. State*, 222 Md. App. 412, 419 (2015) (quoting *Swift*).

[7] The Fourth Amendment states, in relevant part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

In *Swift*, 393 Md. at 149-51, Judge Raker, writing for the Court of Appeals, explained the "three tiers of interaction between a citizen and the police" under search-and-seizure law, as well as the justification the police must meet for each one:

> The most intrusive encounter, an arrest, requires probable cause to believe that a person has committed or is committing a crime. The second category, the investigatory stop or detention, known commonly as a Terry stop, is less intrusive than a formal custodial arrest. . . . A police officer may engage in an investigatory detention without violating the Fourth Amendment as long as the officer has a reasonable, articulable suspicion of criminal activity. . . . A person is seized under this category when, in view of all the circumstances surrounding the incident, by means of physical force or show of authority a reasonable person would have believed that he was not free to leave or is compelled to respond to questions.
>
> The least intrusive police-citizen contact, a consensual encounter, . . . involves no restraint of liberty and elicits an individual's voluntary cooperation with non-coercive police contact. A consensual encounter need not be supported by any suspicion and because an individual is free to leave at any time during such an encounter, the Fourth Amendment is not implicated; thus, an individual is not considered to have been "seized" within the meaning of the Fourth Amendment.

Id. at 150-51 (internal citations omitted); *see also Terry*, 392 U.S. at 13; *Pyon*, 222 Md. App. at 419-22.

The "consensual encounter," freed from the constraints of the Fourth Amendment, provides the police officer with considerable latitude to engage freely with members of the public, both as a citizen and for the purposes of law enforcement and crime prevention. *See Trott v. State*, 138 Md. App. 89, 99-100 (2001); *see also Reynolds v. State*, 130 Md. App. 304, 322-23 (1999) (recognizing "an officer's right – indeed, his or her responsibility – to conduct [field interviews] . . . . Simply put, that is what they do").

Police officers do not necessarily violate a person's Fourth Amendment rights simply by approaching him "on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." *Florida v. Royer*, 460 U.S. 491, 497 (1983). "[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, ask to examine the individual's identification, and request consent to search his or her luggage." *Florida v. Bostick*, 501 U.S. 429, 434-35 (1991) (citations omitted); *accord Reynolds*, 130 Md. App. at 322-23.

These police encounters remain consensual so long as the person is free not to answer the questions and to walk away. *See Swift*, 393 Md. at 151; *accord Royer*, 460 U.S. at 497-98) (in such moments "[t]he person approached [] need not answer any questions put to him; indeed, he may decline to listen to the questions at all and may go on his way"); *Pyon*, 222 Md. App. at 453.

Nonetheless, an encounter loses its consensual nature and becomes an investigatory detention or an arrest "once a person's liberty has been restrained and the person would not feel free to leave." *Swift*, 393 Md. at 152. This standard traces back to *United States v. Mendenhall*, 446 U.S. 544 (1980), where the Supreme Court concluded that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 545.

"[T]he crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Bostick*, 501 U.S. at 437 (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)); *accord Swift*, 393 Md. at 152 (citing *Mendenhall*, 446 U.S. at 553-54) (asking whether an "officer, by either physical force or show of authority, has restrained a person's liberty so that a reasonable person would not feel free to terminate the encounter or to decline the officer's request").

The standard is an objective one. It does not examine "'whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person.'" *Trott*, 138 Md. App. at 101 (quoting *California v. Hodari D.*, 499 U.S. 621, 628 (1991)). In making that determination, we consider the totality of the circumstances leading up to and surrounding the encounter. *See Mendenhall*, 446 U.S. at 554.

The *Mendenhall* Court set forth several factors that might indicate a seizure: "[t]he threatening presence of several [police] officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id*; *see also Swift*, 393 Md. at 153 (citing *Chesternut*, 486 U.S. at 575) (other examples include "the activation of a siren or flashers, commanding a citizen to halt, display of weapons, and operation of a car in an aggressive manner to block a defendant's course or otherwise control the direction or speed of a defendant's movement").

The Court of Appeals, in *Ferris*, 355 Md. at 377, recognized even more factors that might come to bear in certain police-citizen encounters:

> [T]ime and place of the encounter, the number of officers present and whether they were uniformed, whether the police removed the person to a different location or isolated him or her from others, whether the person was informed that he or she was free to leave, whether the police indicated that the person was suspected of a crime, whether the police retained the person's documents, and whether the police exhibited threatening behavior or physical contact that would suggest to a reasonable person that he or she was not free to leave.

2. Analysis

Applying these tests, we first hold that Lee was seized within the meaning of the Fourth Amendment. Because two officers confronted Lee, blocked all but one means of egress, did not inform him that he was free to leave, and persisted in asking questions in which they implicitly accused him of a crime, even after he had repeatedly and unmistakably signaled that he had no interest in engaging with the officers, it is unreasonable to conclude that the encounter was still "consensual" when the officer asked Lee to lift up his shirt. A reasonable person in Lee's position would not have felt free to leave or to ignore the police requests and go about his or her business, but would have felt compelled to respond to the officer's questions. In our view, therefore, Lee raised his shirt, thus exposing the handgun, not out of consent but because he had submitted to a "show of authority" clearly indicating that he was required to comply with the officers' requests.

Several factors support our conclusion. In the interest of completeness, however, we must first note the factors that do not work in Lee's favor. Here, the officers never

made any actual physical contact with Lee, nor did they draw their (holstered) weapons or indicate they might do so. They never literally commanded Lee to stop or to stay put, *see Jones*, 319 Md. at 285, and neither removed Lee to another location nor physically isolated him from others. *See Ferris*, 355 Md. at 377, 379. The officers never activated their emergency lights or sirens. *See Swift*, 393 Md. at 156. They did not retain Lee's identification for purposes of running a warrants check, a factor some courts in their analyses have found to be particularly pertinent in identifying a seizure. *See, e.g.*, *Royer*, 460 U.S. at 501; *Swift*, 393 Md. at 157. Lastly, we note that the encounter, while occurring late at night, also occurred in a well-lit and well-populated public space: outdoors at a fairly busy 24-hour McDonald's restaurant. *Compare Swift*, 393 Md. at 155; *Ferris*, 355 Md. at 383 (determining that late-night encounter on desolate, rural highway "heightened the coerciveness of the encounter").

In short, as the officers approached Lee, this event had all the markings of a consensual encounter. Yet, "a police-citizen encounter is a 'fluid situation' that can readily begin as a consensual encounter but then escalate into a [detention] as accumulating indications of domineering police behavior are added to the equation." *Pyon*, 222 Md. App. at 444 (citing *Swift*, 393 Md. at 152). Here, we focus on a number of key elements that, in our view, transformed this encounter into one by which the officers, through a show of authority, would have communicated to a reasonable person in Lee's position that he or she was not free to terminate the encounter or otherwise decline the officers' requests. *Swift*, 393 Md. at 152.

First, we note the physical circumstances. Although the two officers visible to Lee did not surround him, back him into a corner, or eliminate all exit paths,[8] Lee's means of exit were substantially limited. The relative positions of the officers and Lee were significant. Lee stood with his back just two feet from the McDonald's wall, and the officers stood immediately in front of him, three to four feet away. Immediately behind them was their parked patrol car, and immediately to Lee's right was the man whom the other officers had approached (as well as the other officers). The limited means of egress were further evidenced by the court's finding that, when Lee did attempt to flee upon discovery of the handgun, he took just two steps before Ofc. Wheeler "reached out and grabbed him." These physical dynamics provide important contextual weight to the intimidating police conduct that followed, as did the presence of at least two officers. *See Ferris*, 355 Md. at 378-79, 383; *Pyon*, 222 Md. App. at 450.

Second, Ofc. Williams's questions clearly indicated to Lee that he was under suspicion of committing a crime. "One of the relevant factors in assessing whether an encounter is coercive is 'whether the police indicated that the person was suspected of a crime.'" *Reynolds*, 130 Md. App. at 348 n.5 (quoting *Ferris*, 355 Md. at 377). Although "there can be no bright line rule that voluntary consent can never be given by one

[8] The trial court, noting Lee's proximity to the McDonald's entrance behind him, found that Lee was "on a sidewalk directly in front of the McDonald's, and there's no indication that there's anything to prevent him from simply walking away and in to the entrance of the McDonald's, or wherever else he wants to go." Although we note Lee's limited exit paths in front of him (where the officers stood) or to his right (where the other approached man stood), we reject Lee's invitation to conclude that the court clearly erred in its finding that Lee had a means of exit available to him.

suspected of committing a crime," *Reynolds*, 130 Md. App. at 348, courts should employ "greater scrutiny" in assessing "the voluntariness of the target of a criminal inquiry" than "that of a citizen whose aid is enlisted in solving a crime in which the citizen has no involvement." *Id.*; *cf. Trott*, 138 Md. App. at 104 (finding no seizure in officer-pedestrian encounter, in part, because officer never indicated defendant was under suspicion, and asked only general, non-threatening questions).

Here, we draw the same conclusion. Ofc. Williams never explicitly stated that Lee was a suspect in a criminal investigation, nor did the officer retain Lee's identification while running a warrants check. *Compare Reynold*s, 130 Md. App. at 348-49 & n.5. Yet, by asking twice, almost immediately upon first approaching, whether Lee was carrying a concealed gun (a crime in the District of Columbia, *see* D.C. Code § 22-4504), Ofc. Williams created a coercive atmosphere: he announced to any reasonable person in Lee's place that the officers suspected him of criminal activity. Even though Ofc. Williams spoke in a "normal tone of voice," this accusatory line of inquiry would have further heightened a reasonable person's sense that his or her freedom to leave or disengage from the officers was under threat.

The officer certainly did not inform Lee that he was free to leave, another factor that courts have found important in evaluating whether a seizure has occurred. *See*, *e.g.*, *Royer*, 460 U.S. at 503 (reasoning that Royer reasonably believed he had been detained in part because officials did not tell him he was free to leave); *Swift*, 393 Md. at 157 (deputy's failure to inform suspect he was free to leave, though not determinative, was factor to consider in totality of circumstances in evaluating whether seizure had

occurred); *Pyon*, 222 Md. App. at 454-55; *cf. Mendenhall*, 446 U.S. at 558-89 (holding that no seizure had occurred because, in part, "the respondent was twice expressly told that she was free to decline to consent to the search").

Lastly, and most importantly, Ofc. Williams repeated these accusatory questions even as Lee clearly and repeatedly indicated his unwillingness to participate in the inquiry. Lee responded to the initial question, "Can I ask you something?", by ignoring the officer who was right in front of him – a signal that Lee wanted to be left alone. When the officer persisted with an accusatory question – "Do you have a gun on you?" – Lee again refused to engage, complaining that he had just gotten off of the bus, and thereby signaling, again, that he wanted the officer to leave him alone. When the officer repeated this same accusatory question, Lee repeated his complaint, again refused to engage, and again signaled that he wanted to be left alone. But Ofc. Williams again persisted, culminating in his asking of Lee, "Can you pull your shirt up for me?"[9]

In light of Ofc. Williams's accusatory inquiries as well as Lee's initial refusal to answer the opening question, these responses would have communicated to a reasonable officer that Lee was not interested in answering the questions. Lee sent an unmistakable message that he did not wish to engage. And through his persistence, Ofc. Williams created an intimidating atmosphere in which a reasonable person would not feel free to

[9] We are not persuaded by Lee's attempts to cast this final question as a literal demand or an instruction. The facts below, as drawn from the officers' testimony, established that Ofc. Williams *asked* whether Lee could pull up his shirt and did not literally instruct or order Lee, in so many words, to lift up his shirt. We are not inclined to hold that the trial court clearly erred in reaching that factual finding.

disregard his requests, leave, or terminate the encounter. The final inquiries' "essentially confrontational character" (*Pyon*, 222 Md. App. at 452) is impossible to ignore.

Just as an officer has a right (and duty) to ask questions, so too does a citizen have a right to decline to respond. *See Terry*, 392 U.S. at 34 (White, J., concurring) ("[a]bsent special circumstances," the person approached in an "accosting" or consensual encounter "may refuse to cooperate and go on his way"); *Pyon*, 222 Md. App. at 445 (in an "accosting" or consensual encounter, "[t]he citizen addressed is free to ignore the officer and to walk away"); *id*. at 453 ("All of the Supreme Court cases that describe the right of an officer to ask questions of a citizen without implicating the Fourth Amendment immediately hasten to add that the citizen is equally free to decline to answer the question or simply to ignore the question and to walk away").

Here, what began as a consensual encounter transformed rapidly into a seizure for Fourth Amendment purposes. We cannot believe that, under these circumstances, a reasonable person in Lee's position would have felt free to "terminate the encounter or to decline the officer's request" (*Swift*, 393 Md. at 152), having seen his genuine attempts to do precisely that persistently rebuffed by Ofc. Williams. In fact, it is fair to conclude that a reasonable person in Lee's position would believe that if he *did not* comply with Ofc. Williams's final request, but instead tried to walk away, his decision would probably meet with an unwelcome show of police force: the police would lift his shirt for him.

A consensual encounter entails "'the voluntary cooperation of a private citizen in response to non-coercive questioning by a law enforcement official.'" *Ferris*, 355 Md. at 373 n.4 (quoting *United States v. Werking*, 915 F.2d 1404, 1408 (10th Cir. 1990)). Here,

the questioning had become anything but non-coercive. Therefore, Lee cannot accurately be said to have voluntarily cooperated. He was seized.

Our conclusion is consistent with the decisions concerning a police officer's prerogative to approach a person in a public place, to ask questions if he or she is willing to listen, to ask for identification, or even to ask for consent to see the contents of his or her luggage. *See, e.g.*, *Bostick*, 501 U.S. at 434-35; *Royer*, 460 U.S. at 502; *Reynolds*, 130 Md. App. at 322-23. We do not presume that a seizure has occurred merely because a person answers such questions or complies with such requests, even where doing so may be incriminating. *See Trott*, 138 Md. App. at 100-01 (quoting *INS v. Delgado*, 466 U.S. 210, 216 (1984) ("[w]hile most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response")). But otherwise acceptable lines of inquiry lose their consensual nature where compliance is no longer a free choice – where, as here, the police "convey a message that compliance with their requests is required." *Bostick*, 501 U.S. at 435.

We thus decline to reach the same conclusion as our peers at the District of Columbia Court of Appeals, in *Brown v. United States*, 983 A.2d 1023 (D.C. 2009), which the State insists must guide our holding. There, one of two officers present asked, in a "normal tone," whether Brown had any guns or narcotics on her, to which she replied, "I'm not doing anything. I'm counting my money." When the officer repeated that question, Brown reached into her purse and handed over a pill bottle containing narcotics. *Id.* at 1025. The Court held that the officer's conduct did not amount to a

seizure, and that Brown, despite her decision to incriminate herself, was at all times free to leave or terminate the encounter. *Id.* at 1026.

Even if this Court were bound by the decisions of the D.C. Court of Appeals, *Brown* would be distinguishable. A reasonable person in Brown's position may or may not have felt free to terminate the encounter with the officers when they repeated their initial question about whether she had any guns or drugs. The *Brown* decision, however, does not discuss whether a reasonable person in Brown's position would have felt free to terminate the encounter if the police had asked her to lift up her clothing and to expose part of her body after she had declined, on three occasions, to engage with them.

We therefore hold that Lee was seized within the meaning of the Fourth Amendment, and that Lee's decision to raise his shirt for the police officer was submission in the face of that show of authority.

E. The Officers Seized Lee Without Reasonable Suspicion

Having concluded that the officers seized Lee, we must now determine whether they possessed the requisite "reasonable suspicion" to justify a temporary detention. The State argues that the seizure was justified because Ofc. Logan observed Lee make a pulling motion that suggested he was adjusting a weapon; because he did so in a high-crime area; and because during the police encounter Lee became nervous and unresponsive. We are not persuaded. We hold that the police lacked reasonable suspicion to seize Lee, and that the trial court erred in reaching the contrary conclusion.

1. Legal Standards

Although a temporary seizure, commonly known as a 'Terry stop,' is less intrusive than a full arrest, it nevertheless must be justified by a police officer's "reasonable suspicion that a person has committed or is about to commit a crime[.]" *Swift*, 393 Md. at 150 (citing *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984)).

It is not possible to articulate *precisely* what "reasonable suspicion" means. It is "a common sense, nontechnical conception that considers factual and practical aspects of daily life and how reasonable and prudent people act." *Cartnail v. State*, 359 Md. 272, 286 (2000) (citing *Ornelas v. United States*, 517 U.S. 690, 695 (1996)). Yet, although it requires "considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause" (*Navarette v. California*, 134 S. Ct. 1683, 1687 (2014) (citation and quotation marks omitted)), it must rest on more than mere hunches. *See Stokes*, 362 Md. at 415.

A police officer "must be able to point to specific and articulable facts that warrant the stop." *Stokes*, 362 Md. at 415; *accord Cartnail*, 359 Md. at 284. The question is an objective one: whether "the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." *Terry*, 392 U.S. at 21-22. "When evaluating the validity of a detention, we must examine 'the totality of the circumstances – the whole picture.'" *Graham v. State*, 325 Md. 398, 408 (1992) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)).

Two Maryland cases with similar facts provide important guidance. *Ransome v. State*, 373 Md. 99 (2003), concerned a police officer's decision to conduct a Terry stop of

the defendant because he had a "bulge" in his front pants pocket, he was in a high-crime area late at night, he gazed at the unmarked police car containing the officer, and he appeared nervous and avoided eye contact with the officer when the latter exited the police car, approached him, and started questioning him. *Id.* at 105. The trial court denied the defendant's motion to suppress, and this Court affirmed.

The Court of Appeals reversed, holding that the seizure was not justified under the facts presented. *Id.* at 111. The Court first drew a key distinction between a mere pants bulge, under the circumstances before it, and a bulge either in the shape of a gun or coupled with other suggestive or evasive behavior. *Id.* at 108-09 (collecting cases). Viewing the limited facts before it, the Court concluded that the defendant:

> . . . had done nothing to attract police attention other than being on the street with a bulge in his pocket at the same time [the officer] drove by. He had not committed any obvious offense, he was not lurking behind a residence or found on a day care center porch late at night, was not without identification, was not a known criminal or in company with one, was not reaching for the bulge in his pocket or engaging in any other threatening conduct, did not take evasive action or attempt to flee, and the officer was not alone to face him.
>
> . . . .
>
> If the police can stop and frisk any man found on the street at night in a high-crime area merely because he has a bulge in his pocket, stops to look at an unmarked car containing three un-uniformed men, and then, when those men alight suddenly from the car and approach the citizen, acts nervously, there would, indeed, be little Fourth Amendment protection left for those men who live in or have occasion to visit high-crime areas.

Id. at 109-11.

In re Jeremy P., 197 Md. App. 1 (2011), concerned an officer's suppression-hearing testimony that the juvenile respondent "kept playing around with his waistband

area," which the officer characterized as "a high-risk area," and "adjusting hisself [sic] from the front area." *Id.* at 4. To the officer, this general action "would be indicative of somebody constantly carrying a weapon on them." *Id.* at 5. This Court reversed the trial court's denial of the motion to suppress evidence. *Id.* at 22. Drawing heavily from *Ransome*, we derived the general proposition that, "just as a bulge may be created by a wide variety of other objects other than a weapon, so, too, can a person touching the area of his waistband be indicative of a wide variety of causes other than adjusting a concealed weapon." *Id.* at 13.

Upon a thorough review of "waistband" cases from Maryland and other jurisdictions, we explained that:

> . . . a police officer's observation of a suspect making an adjustment in the vicinity of his waistband does not give rise to reasonable suspicion sufficient to justify a *Terry* stop. Typically, to provide the reasonable and articulable suspicion necessary to warrant an investigative detention in the absence of other suspicious behavior indicating the possibility of criminal activity, the officer *must be able to recount specific facts, in addition to the waistband adjustment, that suggest the suspect is concealing a weapon* in that location, such as a distinctive bulge consistent in appearance with the presence of a gun.

Id. at 14-15 (collecting cases) (emphasis added). *Compare Singleton v. United States*, 998 A.2d 295, 301-02 (D.C. 2010) (reasonable suspicion existed where defendant walked in "rigid manner," used awkward protective hand movement around bulge, and looked back nervously at officer five times while walking away), *with Louisiana v. Williams*, 621 So.2d 199, 201 (La. Ct. App. 2003) (no reasonable suspicion where officers saw defendant "fooling" with belt area, but conceded what he was doing "'could have been several things'"), *and New York v. Marine*, 142 A.D.2d 368, 371 (N.Y. App. Div. 1989)

(suspicion of concealed weapon based on "hunch" and "speculation," where officer saw inebriated defendant reach into jacket with right hand while walking in high-crime area).

Based on this review of authority, we held that the detective's description of events "lacked the specific factual information" sufficient to establish reasonable suspicion that the defendant was engaging in criminal conduct. *Jeremy P.*, 197 Md. App. at 20. The detective's testimony that he "saw appellant adjust something underneath his shirt in the 'high risk area' at his waistband with 'firm movements'" was not sufficient to generate reasonable suspicion of criminal activity, because the detective "provided no descriptive details about the specific movements he observed and failed to articulate why he considered [those] movements to be indicative of a concealed weapon." *Id.*

In addition, we emphasized that:

> Apart from these waistband adjustments, the detective did not indicate that . . . appellant . . . [was] behaving in [a] suspicious manner. Nor did [the detective] correlate this "high risk area" of the body to appellant's specific behavior that night. Significantly, the detective did not testify that he observed a bulge consistent with the presence of a weapon. Nor did he explain why he interpreted such conduct to indicate the presence of a weapon, rather than merely a cell phone or another innocent object.[] He did not state that appellant appeared to be moving an object under his shirt, much less ascribe an apparent weight or size that might have indicated a gun.

Id. at 20-21 (footnote omitted).

2. Analysis

It follows from the decision in *Jeremy P.* that Ofc. Logan's testimony failed to provide sufficient articulable facts from which a police officer would derive reasonable suspicion that Lee was committing or was about to commit a crime.

Ofc. Logan testified that he saw Lee "adjusting an object in the front of his waistband near his crotch area in a manner in which I recognized it could possibly be a man that had a gun on him." Ofc. Logan conceded, however, that he did not see either a weapon or even a "bulge in [Lee's] pants consistent with a weapon," that he did not see "anything that appeared to be anything other than Mr. Lee inside those pants," and that his inference of a concealed weapon was "simply based on the physical movement that [he] displayed for the Court." In his words, the "unknown object" in Lee's pants "*could have been anything.*" (Emphasis added.)

As to Lee's "physical movement," Ofc. Logan testified that he saw Lee "pulling up and grabbing it in the manner like this, with his hand crotched like this and kind of pulling up his pants and adjusting whatever the unknown object could be." The suppression court later characterized the movements as "sort of a lifting up and then – It was more than one lifting up, or lifting up at one time. There was a couple of repeated lifting ups, and sort of a little bit of shifting, maybe left or right . . . ."

With this description, Ofc. Logan provided limited details about the specific hand movements he observed, and, where he has provided them, he failed to persuasively articulate why he considered these movements to indicate the presence of a concealed weapon. There is little in this observed "pulling" and "grabbing" movement, without other suspicious behavior, that could lead a reasonable police officer in Ofc. Logan's position to infer that Lee was even moving an object, let alone that any object he *was* adjusting was a weapon and not some other harmless object, such as a "wallet[], money clip[], keys, change, credit cards, [a] cell phone[], cigarettes, and the like – objects that,

given the immutable law of physics that matter occupies space, will create some sort of bulge." *Ransome*, 373 Md. at 108; *see In re Jeremy P.*, 197 Md. App. at 10 (quoting *Ransome*). This description was capable of simply too many innocent explanations. Indeed, Ofc. Logan himself appeared to concede the speculative nature of his inference when he stated that he saw Lee adjusting "whatever the unknown object could be[,]" and that "it wouldn't hurt just to go and ask, and see what was going on."

Moreover, Ofc. Logan did not cure the insufficiency simply by testifying that his conclusion was informed by his years of experience in a crime-suppression unit and by his having taken a two-day training course called "Characteristics of an Armed Gunman." Ofc. Logan testified that he learned from this course that armed gunmen may adjust their weapons in certain ways, "maybe pushing them down with their arm, maneuvering it with their hand to get it into a more comfortable position, just basically the manner [with] which they may walk[,]" and further that, upon identifying a police officer, an armed gunman "may adjust [his weapon] in a certain way to hide it from view" of the officer.

Ofc. Logan nevertheless failed to articulate why he concluded that Lee's specific hand movements were the type identified in the course. Precisely *how*, for example, did Lee's actions suggest he was "maneuvering [a handgun] to get it into a more comfortable position" or reflect "the manner [with] which [armed gunmen] walk?" How were Lee's actions consistent with an armed gunman who, having noticed police presence, "may adjust [his weapon] in a certain way to hide it from the view of the officer?" How could Lee have been trying to hide the gun from the officers in the unmarked car if, as the court found, he did not notice them until Ofc. Williams had gotten out of the car and posed the

first question to him? To the extent that Ofc. Logan made any such factual connections, he simply failed to articulate them at the suppression hearing. Nevertheless, the State would have us accept that "it was clear from Logan's testimony that his training in particular movement patterns led him to recognize that Lee was engaged in a movement pattern characteristic of adjusting the gun."

We will not make such an assumption absent greater explanation. As the Court of Appeals declared in *Ransome*, 373 Md. at 110, although we generally respect experienced police officers' inferences and conclusions, we are not required to "abandon our responsibility to make the ultimate determination of whether the police have acted in a lawful manner," or to otherwise "'rubber stamp' conduct simply because the officer believed he had a right to engage in it." *Id.* at 110-11. In this case, the facts observed by Ofc. Logan would not give rise to reasonable suspicion of criminal behavior. Our conclusion does not change simply because a two-day training course may have imbued these unexplained inferences with some special meaning.

Lastly, we are not persuaded to the contrary by Ofc. Logan's testimony that Lee was standing in a high-crime area or that Lee became more nervous and unresponsive as Ofc. Williams asked him questions. As to the former assertion, while it may be relevant that a neighborhood is known to be "high-crime" area in a court's finding of reasonable suspicion, that factor alone does not transform an otherwise speculative set of facts into a basis for reasonable suspicion of criminal behavior. *See Ransome*, 373 Md. at 111 (court's holding that police officer lacked reasonable suspicion based on nondescript

"bulge" in defendant's pocket unaffected by fact that defendant walked down street in very dangerous area).

As to the latter assertions, it seems perfectly normal that a person in Lee's position would exhibit nervousness in the face of the accusatory line of questioning we have discussed; such nerves should hardly be used against him as an indicator of illegal conduct. A person's refusal to cooperate with police or to listen to or respond to an officer's questions may not alone be a basis for reasonable suspicion. It is in fact what courts expect from a person who wishes to terminate a consensual encounter and go about his or her business. *See Royer*, 460 U.S. at 497-98; *Swift*, 393 Md. at 152.

In conclusion, Ofc. Logan was unable to provide "specific and articulable facts" tying Lee to criminal activity and warranting the stop. *See Stokes*, 362 Md. at 415. In the absence of such additional information arousing reasonable suspicion, the officer's subjective inference that Lee might possibly be carrying a weapon was not a sufficient justification for the seizure. We therefore hold that the suppression court erred in denying Lee's motion to suppress the handgun and we shall reverse the judgment and remand for further proceedings consistent with this opinion, including a new trial.[9]

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED. CASE REMANDED FOR NEW TRIAL CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY MONTGOMERY COUNTY.

[9] The State does not argue that it was harmless error to admit evidence of the handgun that the District of Columbia police seized as a result of their seizure of Lee. Consequently, we need not consider that issue.