Circuit Court for Wicomico County
Case No. C-22-CR-19-000244

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1534

September Term, 2021

ELIJAH TYRELL COWART

v.

STATE OF MARYLAND

Wells, C.J.,
Zic,
Ripken,

JJ.

Opinion by Wells, C.J.

Filed: October 28, 2022

Elijah Cowart, appellant, was charged with the attempted first-degree murder of Randall Dornon and related offenses stemming from events on January 29, 2019. Cowart filed a motion in limine to preclude an in-court identification of him by Dornon. The motion alleged that, during a trial preparation meeting with Dornon, the State conducted an impermissibly suggestive identification procedure which tainted the reliability of any subsequent identification by Dornon. The suppression court denied Cowart's motion. On appeal, Cowart presents one question for our review:

> Under the totality of the circumstances, did the circuit court err in denying appellant's motion to suppress eyewitness identification testimony by Dornon of Cowart?

For the reasons we discuss below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

While he was driving through a Salisbury neighborhood on January 19, 2019, someone fired several shots through the back window of Dornon's vehicle. A few months later, Cowart was charged in the Circuit Court for Wicomico County with the attempted first-degree murder of Dornon and related offenses.

On February 15, 2020, Cowart filed a pre-trial motion to preclude the admission of Dornon's in or out-of-court identification of him. The motion alleged that, during a pre-trial meeting with Dornon, the State used an impermissibly suggestive method of identification by presenting Dornon with a single photograph of Cowart, without showing him photographs of similar suspects. Cowart argues that "this overly suggestive identification process has also tainted any in-court identification which Dornan [sic] may make of the Defendant."

A. Events Leading Up to the Trial

Around midday on January 29, 2019, Dornon drove his girlfriend and their minor child to 613 Light Street in Salisbury to collect $30 from a woman named "Adrianna" as part of a drug debt she owed Dornon. But, when Dornon arrived, Adrianna told them that they would need to come back later for the money. Returning that night, Dornon testified that he did not find Adrianna, but he saw four masked men carrying long guns standing in her front yard.

A man, who was not wearing a mask, approached Dornon's vehicle, a van, and leaned into the passenger side window. Although it was dark outside, Dornon could see the man's face because his car "was lit up on the inside." The man looked at Dornon's child, who was in the backseat, and the child's mother, who was in the passenger seat, and then at Dornon. As he was leaning into Dornon's car window, the man asked Dornon if he was looking for Adrianna. When Dornon answered "yes," the man replied, "she's not here right now, you can't be driving around here like that, we work around here." The interaction lasted roughly ten to fifteen seconds.

As Dornon drove away, someone fired several shots at his van. One round struck him in the face and he immediately drove to a nearby hospital. There, after getting medical treatment, Dornon met with Corporal Anthony Foy and described the man he spoke to right before the shooting as:

> a black male, light skinned complexion, green beanie with [a] ball on top, like a fuzz, like snowball type, dark colored clothing. He indicated he wasn't sure of height but he was no taller than 5'10", thin build, light facial hair, possibly clean shaven but definitely was not a full beard. Early to mid-

> twenties. And he said he had short hair with what he described as really curly hair like he had just gotten a perm.

According to Cpl. Foy, Dornon "was very confident in the description that he provided" and confident that he could identify the man again in the future.

After providing the initial description to Cpl. Foy, Dornon was taken to the Salisbury Police Department headquarters where he was shown three photographic lineups. Cowart's picture was not included in any of those photographic arrays nor did Dornon identify anyone from the photographs.

Following an investigation, Cowart was eventually charged with the attempted first-degree murder of Dornon and related offenses. Cowart's arrest warrant provided that he was born October 23, 1992 (meaning he would have been 26 years-old at the time of the incident), his height was 5'5", and his weight was 140 lbs.

On February 12, 2020, six days before Cowart's trial was scheduled to begin, prosecutors met with Dornon. During this meeting, one of the prosecutors asked Dornon if he could identify anyone involved in the incident that occurred January 29, 2019. Dornon replied, "only one because he didn't have a mask on." According to Dornon, he described the man he saw "to a tee from the shoulders up." After he gave a description, the prosecutor showed Dornon a picture of Cowart, and Dornon said, "that's him." When the State informed defense counsel of what transpired at this pre-trial meeting, defense counsel filed a motion in limine "to preclude any testimony about pre-trial or in-court identifications of [Cowart] by [Dornon]."

B. The Suppression Hearing

On June 4, 2021, the circuit court held a suppression hearing to determine the admissibility of evidence of the State's pre-trial identification procedure. At the hearing, Dornon and several officers testified about what occurred the night of the incident and shortly thereafter, as previously described.[1]

Additionally, Dornon recalled meeting with prosecutors on February 12, 2020, days before Cowart's trial:

> [PROSECUTOR]: And when you met with that attorney in preparation for trial, do you recall discussing the identity of the male that leaned into your vehicle?
>
> [DORNON]: Yes. You asked if I could identify any of the people and I said only one because he didn't have a mask on. And I described him to a tee from the shoulders up.
>
> * * *
>
> [PROSECUTOR]: So you described him based on your recollection of him, is that correct?
>
> [DORNON]: Yes.
>
> [PROSECUTOR]: And were you shown a photograph?
>
> [DORNON]: After, yes.
>
> [PROSECUTOR]: And you observed the photograph after you provided the description?
>
> [DORNON]: Yes.

[1] Dornon's testimony recalling the description he provided at the hospital largely aligns with Cpl. Foy's except that Dornon testified to telling the officer that the man he saw had a tattoo on his neck. Additionally, Cpl. Foy testified that Dornon indicated that he had seen a man with a beanie standing on the porch during his first arrival to the home and inferred that it was the same person who leaned into his car, while Dornon testified that he did not recall seeing anyone with Adrianna when he first arrived.

> [PROSECUTOR]: What did you say when you saw the photograph?
>
> [DORNON]: I said that's him.
>
> [PROSECUTOR]: How sure are you that the male in the photograph is the male you saw in the window?
>
> [DORNON]: I'm 100 percent.

Then, from the witness stand, Dornon identified Cowart as the individual he saw that night.

In closing argument, defense counsel asserted that the State created an impermissibly suggestive identification when the prosecutor showed Dornon a single photograph of Cowart without showing him photographs of any other similar looking people. As a result, defense counsel asserted, Dornon's in-court identification was not otherwise sufficiently reliable to be considered by the jury under the factors outlined in *Neil v. Biggers*, 409 U.S. 188 (1972).

The court noted that in *In re Matthew S.*, 199 Md. App. 436 (2011), this Court held that a police officer's identification of a suspect using the officer's own high school yearbook was not impermissibly suggestive. But here, a lay person identified Cowart from a single picture that the police had provided. The court determined "that the nature of the [pre-trial] identification in this case was impermissibly suggestive." But after considering the reliability of the identification in light of the *Biggers* factors and weighing that reliability against the suggestive effect of the procedure, the court ultimately determined that the identification was still sufficiently reliable to be considered by the jury.

A jury convicted Cowart on three counts of attempted murder and related offenses. The court later sentenced Cowart to life plus 58 years, with the first 30 years to be served without parole. This timely appeal followed.

STANDARD OF REVIEW

Appellate review of a circuit court's denial of a motion to suppress is limited to the record of the suppression hearing and not the record of the trial. *Moats v. State*, 455 Md. 682, 694 (2017). The record is viewed in the light most favorable to the prevailing party, in this case, the State. *Greene v. State*, 469 Md. 156, 165 (2020). The reviewing court accepts the circuit court's factual findings unless they are clearly erroneous, but "must make an independent constitutional evaluation by reviewing the relevant law and applying it to the unique facts and circumstances of the case." *Grant v. State*, 449 Md. 1, 14–15 (2016) (quoting *State v. Wallace*, 372 Md. 137, 144 (2002)).

DISCUSSION

I. The Circuit Court Did Not Err in Denying the Motion to Preclude Dornon's Eyewitness Identification of Cowart.

A. Parties' Contentions

Cowart asserts that the circuit court erred in denying the motion to preclude Dornon from making an in-court identification of Cowart because it failed to give sufficient weight to the suggestive identification arranged by the State's attorney. Under the two-part due process test, first, Cowart argues that the single-photo identification in the State's Attorney's office was impermissibly suggestive and unnecessary. And second, Cowart contends that "by deliberately slipping the answer to [Dornon], the State has made it

impossible to rely on the *Biggers* factors" in determining the reliability of Dornon's identification independent of the suggestive procedure. Under these circumstances, Cowart argues that the circuit court should have disregarded three of the five *Biggers* factors, and instead considered other relevant "system and estimator variables" under a totality of the circumstances approach.

The State does not challenge Cowart's assertion that the prosecutor's pre-trial identification method was impermissibly suggestive. However, the State does contend that, in light of the totality of the circumstances, Dornon's in-court identification of Cowart was otherwise sufficiently reliable to be considered by the jury. Specifically, the State argues that all of the *Biggers* factors, except the lapse of time between the crime and the identification, weigh in favor of finding Dornon's identification of Cowart reliable.

B. Analysis

Cowart challenges the admissibility of Dornon's pre-trial and in-court identifications on due process grounds. The right to due process of law is guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article 24 of the Maryland Declaration of Rights. *Small v. State*, 464 Md. 68, 82 (2019) (citing *Webster v. State*, 299 Md. 581, 599 (1984)). "Due process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures." *Jones v. State*, 310 Md. 569, 577 (1987), *judgment vacated on other grounds*, 486 U.S. 1050 (1988) (quoting *Moore v. Illinois*, 434 U.S. 220, 227 (1977)). When the accused challenges the admissibility of an out-of-court identification on due process grounds, Maryland courts apply a two-step inquiry. *Id.* The

inquiry ultimately evaluates "whether the challenged identification procedure was so suggestive that the identification was unreliable." *Small*, 464 Md. at 83; *see also Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) ("[R]eliability is the linchpin in determining the admissibility of identification testimony[.]").

In step one, the suppression court must consider whether the identification procedure was suggestive. *Jones*, 310 Md. at 577. The defendant has the burden of making a prima facie showing of suggestiveness. *Small*, 464 Md. at 83. If the court finds that the identification procedure was not suggestive, then evidence of the identification is admissible. *Jones*, 310 Md. at 577. If, however, the court finds that the identification procedure was tainted by suggestiveness, then the court proceeds to step two. *Id.*

In step two, "the suppression court must weigh whether, under the totality of the circumstances, the identification was reliable." *Small*, 464 Md. at 83-84; *see also Manson*, 432 U.S. at 113-14 (emphasizing a totality of the circumstances approach when determining the reliability of identification testimony). For this step, the burden shifts to the State to prove by clear and convincing evidence that the reliability of the identification outweighs "the corrupting effect of the suggestive procedure." *Morales v. State*, 219 Md. App. 1, 13-14 (2014). The court must screen the identification's reliability to determine if there is "a very substantial likelihood of irreparable misidentification." *Small*, 464 Md. at 92 (quoting *Perry v. New Hampshire*, 565 U.S. 228, 232 (2012)). The United States Supreme Court and our Court of Appeals have recognized five factors that may be used to assess reliability:

> [1] the opportunity of the witness to view the criminal at the time of the crime; [2] the witness' degree of attention; [3] the accuracy of the witness' prior description of the criminal; [4] the level of certainty demonstrated by the witness at the confrontation; [5] the length of time between the crime and the confrontation.

Jones, 310 Md. at 577-78; *see Biggers*, 409 U.S. at 199-200.

The Court of Appeals has had the opportunity to review this two-step framework, particularly after the New Jersey Supreme Court's decision in *State v. Henderson*, 27 A.3d 872 (N.J. 2001). In *Henderson*, the New Jersey Supreme Court reviewed a court-appointed special master's evaluation of the scientific evidence behind eyewitness identifications.[2] 27 A.3d at 877. Based on these findings, the New Jersey court revised its due process framework, expanding the list of factors—some of which overlap with the *Biggers* factors—trial courts may find relevant when assessing suggestiveness and reliability.[3] *Id.* at 920-22.

Yet, the Court of Appeals has thus far declined the invitation to abandon its current framework in part because Maryland courts have consistently reaffirmed the two-part, totality of the circumstances analysis. *Small*, 464 Md. at 86; *Smiley v. State*, 442 Md. 168,

[2] The hearing included 360 exhibits, 200 published scientific studies, and testimony from seven expert witnesses. *Henderson*, 27 A.3d at 884.

[3] These factors include two sets of variables: system variables—those within the control of the legal system—such as blind administration, pre-identification instructions, lineup construction, feedback, recording confidence, multiple viewings, showups, private actors, and other identifications made by the eyewitness; and estimator variables—those outside the legal system's control—such as stress, weapon focus, duration, distance and lighting, witness characteristics, characteristics of perpetrator, memory decay, race-bias, opportunity to view, degree of attention, accuracy of prior description of the criminal, level of certainty, and time between the crime and confrontation. *Henderson*, 27 A.3d at 920-22.

180 (2015). Moreover, at this time, the Court considers its current totality-of-the-circumstances inquiry "sufficiently flexible" to account for developments in social science research. *Small*, 464 Md. at 87 n.21.

> The [suppression] court's assessment should be guided by the circumstances before it. In addition to the five *Biggers* reliability factors, the suppression court may find that the factors identified in *Henderson*, many of which overlap with the *Biggers* factors, and other factors are relevant to the court's evaluation. . . Therefore, although we do not revise this Court's jurisprudence for assessing the admissibility of eyewitness identification, we do recognize the breadth that is inherent in an inquiry that hinges upon the totality of the circumstances.

Small, 464 Md. at 87 (internal citations omitted).

Cowart urges us to apply variables articulated in *Henderson*, and to ignore three of the factors outlined in *Biggers*: opportunity to view, degree of attention, and level of certainty. But, *Henderson* even acknowledges that some of its estimator variables overlap with the five *Biggers* factors, including all five in their revised framework. 27 A.3d at 921-22. In fact, the expanded *Henderson* variables largely fit into the *Biggers* factors. For example, distance between the witness and suspect, lighting conditions, and duration of the encounter, all help with the analysis of the witness' opportunity to view the suspect at the time of the crime. *See id.* at 921. Stress and weapon focus relate to the witness' degree of attention at the time of the encounter. *See id.* And the speed with which a witness makes an identification overlaps with the witness' level of certainty. *See id*. at 921-22. Having set out the appropriate test for analyzing Cowart's due process challenge, we now apply this framework to the facts of the case at hand.

1. Suggestiveness

"Suggestiveness can arise during the presentation of a photo array when the manner itself of presenting the array to the witness or the makeup of the array indicates which photograph the witness should identify." *Smiley*, 442 Md. at 180. "The sin is to contaminate the test by slipping the answer to the testee." *Conyers v. State*, 115 Md. App. 114, 121 (1997).

The Court of Appeals has held an identification procedure impermissibly suggestive where only a single photograph was shown to the witness, under non-exigent circumstances. *Evans v. State*, 304 Md. 487 (1985). In *Evans*, during a grand jury proceeding, the prosecutor presented a single photograph of the suspect, Evans, to the witness and asked if it was the man he saw. *Id.* at 496-98. The Court found the procedure impermissibly suggestive because "[t]here were no exigent circumstances justifying the presentation of a single photograph rather than an appropriate array." *Id.* at 498. *See Barrow v. State*, 59 Md. App. 169, 187-88 (1984) (finding exigent circumstances where an officer, "while in hot pursuit of a gun-wielding robber," showed witnesses the photograph on the driver's license found in the suspected getaway car to determine who to look for).

However, identifications that generally could be seen as suggestive, may not be impermissibly suggestive when made by a police officer who is both the investigator and the witness. For example, in *In re Matthew S.*, an officer observed a juvenile suspect engage in a drug transaction, and then, after learning his name, extrajudicially identified the suspect upon looking his picture up in a high school yearbook. 199 Md. App. at 443-45. This Court held that the identification was not impermissibly suggestive, but rather "an

instance of productive investigative footwork. It merely sought to confirm the information he had gathered through his investigation." *Id.* at 452 (internal quotation marks omitted).

In this case, as Cowart points out, Salisbury police never conducted a photographic array or lineup that included Cowart. Instead, an assistant state's attorney, a week before Cowart's trial, presented Dornon with a single photograph. The State offers no exigent or emergency circumstances to justify this departure from appropriate procedures. Additionally, as the suppression court noted, unlike in *In re Matthew S.*, where the identification was made by the officer as part of his own investigation, in this case, Dornon is not an officer. A prosecutor, in the State Attorney's office, presenting a photo of only one suspect to a lay witness inappropriately suggests to the witness which photograph to identify. We conclude that the State's identification procedure was suggestive.

2. Reliability

Finding that the pre-trial identification was suggestive, we turn to the second step of the due process inquiry: "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." *Webster v. State*, 299 Md. 581, 601 (1984) (citing *Biggers*, 409 U.S. at 199). When assessing an identification's reliability, among the factors that the suppression court may consider are:

> [1] the opportunity of the witness to view the criminal at the time of the crime; [2] the witness' degree of attention; [3] the accuracy of the witness' prior description of the criminal; [4] the level of certainty demonstrated by the witness at the confrontation; [5] the length of time between the crime and the confrontation.

Small, 464 Md. at 92 (citing *Biggers*, 409 U.S. at 199-200). "[W]here a procedure's suggestiveness creates a very substantial likelihood that the witness misidentified the culprit, evidence of the identification must be suppressed[.]" *Id.* at 93 (citing *Perry*, 565 U.S. at 239). However, where "the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth." *Id.* (quoting *Perry*, 565 U.S. at 232).

The facts in this case are similar to those in *Small v. State*, 464 Md. 68 (2019). In *Small*, the defendant attempted to rob the victim at gunpoint and as the victim fled, shot him. *Id.* at 74. Shortly thereafter, at the hospital, the victim described the assailant's skin tone, beard, hair, and neck tattoo to detectives. *Id.* at 75-76. Following his description, detectives showed the victim a photo array in which the defendant was the only suspect with a neck tattoo, and then repeated the defendant's photograph in the second array. *Id.* at 76-79. The Court of Appeals concluded that there was clear and convincing evidence that the victim's identification was reliable, despite law enforcement's suggestive identification procedure.

To reiterate, Cowart argues that we should ignore three of the *Biggers* factors—opportunity to view, degree of attention, and level of certainty—in our analysis because their reliability has been so tainted by the State's highly suggestive identification procedure. However, for the reasons discussed, we determine these factors among those relevant to our analysis.

First, we review Dornon's opportunity to view the suspect at the time of the crime. According to Dornon's testimony at the suppression hearing, Dornon's encounter with the man who approached his car lasted ten to fifteen seconds. Even though the encounter occurred at night, Dornon testified that his van "was lit up on the inside." *See Small*, 464 Md. at 95-96 (pointing out that although it was nighttime, a streetlight was shining directly on the assailant). Dornon also testified that the man was unmasked when he leaned into Dornon's passenger-side window, only three feet from Dornon and started asking him what he was doing there. *See Small*, 464 Md. at 95-96 (noting that the victim and the assailant "were close together, only separated by about one foot, and [the victim] spoke with the assailant[]"). At the hearing, when asked "how good of a look did you get at that gentlemen's face?" Dornon replied, "I stared right at him." Later that night, at the hospital, Dornon was able to provide Cpl. Foy a description of the suspect's gender, skin tone, clothing, facial hair, height, weight, age, and hair. *See Small*, 464 Md. at 96 (noting that although the victim's view of his assailant was partially obstructed by a T-shirt covering the bottom of his face, the victim was still able to describe specific characteristics of the assailant). We agree with the suppression court that this factor—the opportunity to observe the suspect—weighs in favor of reliability.

Next, we review Dornon's degree of attention during the encounter. As discussed directly above, Dornon was only a few feet from the man who leaned into his vehicle. Dornon testified that he spoke with the individual. At the hearing, when asked by defense counsel how much attention he was paying to the individual speaking to him, Dornon responded "[a]s much as I am to you now." It has been observed that high levels of stress

can diminish an eyewitness' ability to make an accurate identification. *Henderson*, 27 A.3d at 904. In addition, the presence of a weapon during a short encounter can impact the reliability of the witness' ability to identify or describe the perpetrator. *Id.* at 904-05. However, while Dornon did see several men with guns that night, he testified that he did not know if the man he spoke with had one. And, while it might be that Dornon was under stress during the encounter, Dornon's proximity to the man and the details he related about the man "indicate that he was attentive during the [encounter]." *Small*, 464 Md. at 96-97 (commenting that there would need to be facts indicating that the weapon distracted the victim). We conclude that Dornon's degree of attention weighs in favor of reliability.

We also review the accuracy of Dornon's prior description of the suspect. Cpl. Foy testified that at the hospital, Dornon described the person he spoke with as:

> a black male, light skinned complexion, green beanie with [a] ball on top, like a fuzz, like snowball type, dark colored clothing. He indicated he wasn't sure of height but he was no taller than 5'10", thin build, light facial hair, possibly clean shaven but definitely was not a full beard. Early to mid-twenties. And he said he had short hair with what he described as really curly hair like he had just gotten a perm.

This description was provided the same day Dornon observed the unmasked man, adding to its reliability. It is also relatively consistent with Cowart's appearance: black male, light skinned, mid-twenties, short curly hair, 5'5" with a thin build. While Cowart concedes that "Dornon provided a fairly accurate description," he argues that Dornon omitted a key identifying characteristic—Cowart's neck tattoo.[4] Indeed, Dornon's initial description

[4] While Dornon testified at the suppression hearing that he indicated to the officer at the hospital that the individual had a neck tattoo, Cpl. Foy testified that he did not have anything in his notes about a tattoo.

would be more accurate if it included a neck tattoo. However, even without reference to the neck tattoo, Dornon's initial description is sufficiently accurate, if not complete. *See Manson*, 432 U.S. at 116 (finding the prior description accurate where the eyewitness described the perpetrator's race, height, build, hair, cheek bones, and clothes); *see also Biggers*, 409 U.S. at 200 (finding the victim's description "more than ordinarily thorough" where it included the assailant's age, height, weight, complexion, skin texture, build, and voice). We conclude that Dornon's description of the suspect weighs in favor of reliability.

It is worth noting that, while Dornon testified that he did not recall seeing anyone besides Adrianna when he arrived earlier that day, Cpl. Foy testified that, at the hospital, Dornon said that he had seen a man with a beanie standing on the porch when he first arrived to 613 Light Street and implied that it was the same person who leaned into his car. In *Small*, the Court of Appeals considered the fact that the victim told the detective at the hospital that he believed he had seen his assailant before at his place of employment. 464 Md. at 94. Because "the suppression court chose to credit [the victim's] testimony that he recognized the assailant, and that the recognition aided him in making an identification[,]" the Court of Appeals afforded due deference to the court's decision and found this fact weighed in favor of reliability. *Id.* at 95. Similarly, in this case, the suppression court chose to credit Cpl. Foy's testimony that Dornon had seen the appellant at the front of the house earlier that day. Affording due deference to the suppression court's decision giving credit to Dornon's prior familiarity with the appellant, we find this fact weighs in favor of reliability.

Next, we consider Dornon's level of certainty at the time of the confrontation. Dornon testified that when he was shown the photograph at the pre-trial meeting, he told the prosecutor, "that's him." And when asked, at the hearing, how sure he was that the man in the photograph was the man who leaned into his window, he replied, "I'm 100 percent." There is no indication that Dornon's level of certainty wavered. *See Small*, 464 Md. at 98-99 (finding this factor did not weigh in favor of reliability where the witness' level of certainty undisputedly wavered).

Appellant concedes that Dornon was confident when he identified Cowart at the suppression hearing. However, Cowart contends that this Court should ignore the certainty factor for two reasons: because the State violated statutory identification procedures, and because eyewitness certainty is no longer a reliable indicator of accuracy. While we agree with Cowart that the State, in this case, failed to comply with procedural requirements for conducting an eyewitness identification under Md. Pub. Safety Code Ann. (PS) § 3-506.1[5], we do not read this statute as an alteration of our current two-step due process inquiry. *See Small*, 464 Md. at 86 n.18. (explaining that while the statute's legislative history references the New Jersey Supreme Court's decision in *Henderson*, the General Assembly also references the United States Supreme Court's decision in *Perry v. New Hampshire*, which

[5] Specifically, PS § 3-506.1(a)(8) defines "identification procedure" in relevant part as "[a] procedure in which . . . an array of photographs, including a photograph of a suspect and additional photographs of other persons not suspected of the offense, is displayed to an eyewitness . . . for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator." A photographic array must include at least five "filler" photographs. *Id.* § 3-506.1(c)(2).

"reaffirmed that *Manson* is the appropriate test to apply when assessing due process challenges to eyewitness identifications[]").

We acknowledge, as Cowart points out, that research has "undermined the common sense notion that the confidence of the witness is a valid indicator of the accuracy of the identification." (Quoting *State v. Cabagbag*, 277 P.3d 1027, 1036 (Haw. 2012). In *Henderson*, the court noted that "mistaken identifications are more likely to occur when the suspect stands out from other members of a live or photo lineup." 27 A.3d at 897-98. "[A] biased lineup may inflate a witness' confidence in the identification because the selection process seemed easy." *Id.* at 898. We recognize that the presentation of one photograph to Dornon, just over a year after the incident, may have inflated his confidence in his identification of Cowart. On the other hand, the suspect in the photograph presented to Dornon was consistent with the description he provided an officer the night of the incident. Additionally, shortly after Dornon left the hospital, he was taken to the police station where he was shown three photographic arrays. While Cowart was not included in any of these photographs, Dornon also did not identify anyone from these arrays as the man who leaned into his car, suggesting that Dornon was not easily susceptible to such influence. Acknowledging the risk that a single photograph "array" *may* inappropriately influence an eyewitness' confidence in the identification, under these circumstances, we find Dornon's consistent level of certainty weighs in favor of reliability.

Finally, we consider the length of time between the crime and the confrontation. Dornon was shot on January 29, 2019. The pre-trial identification occurred February 12, 2020. Over a year went by before Dornon positively identified Cowart. Such a long delay

raises the risk of an eyewitness' memory decaying. Thus, this factor weighs against reliability.

Having conducted an independent evaluation of the identification made by Dornon in light of Cowart's due process rights, we cannot say that Dornon's identification of the suspect was unreliable. This Court's opinion in *James v. State*, 191 Md. App. 233 (2010) is instructive, particularly as to the lapse in time between the crime and confrontation. In *James*, we found that the identification testimony of a witness was sufficiently reliable to be admissible, even though 1) the witness had seen the defendant in handcuffs at the courthouse, 2) had not previously provided a description to investigators, and 3) *fourteen months* had passed between the assault and the identification. *Id.* at 248-50, 254-55. In favor of reliability, we found that the witness had ample opportunity to view and focus on the defendant when he announced himself to everyone at the bar, and, later that same night, shot at the witness' cousin. *Id.* at 254-55.

The pre-trial identification procedure in this case was unnecessarily suggestive because it could readily be perceived that "law enforcement guided [the witness] to identify [Cowart]" as the individual he spoke with prior to being shot. *Small*, 464 Md. at 101. However, under the totality of the circumstances of this case, that risk, as well as the year-long delay between the crime and identification, is sufficiently diminished by several other relevant indicia of reliability. Specifically, Dornon had an adequate opportunity to view and focus on the suspect when he leaned into Dornon's lit car without a mask and spoke with him. That same night, Dornon provided officers with a detailed and accurate description of the suspect. Although Dornon did not identify the suspect until a year later,

he was certain that the man in the photograph was the same man he saw at his van's window seconds before shots were fired at the vehicle. Based on our review of the evidence, we affirm the suppression court's denial of Cowart's motion to suppress Dornon's identification testimony of Cowart.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. APPELLANT TO PAY THE COSTS.