Circuit Court for Baltimore City
Case No. 117030007

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1710

September Term, 2017

WAYNE BELL

v.

STATE OF MARYLAND

Wright,
Graeff,
Shaw Geter,

JJ.

Opinion by Graeff, J.

Filed: December 6, 2018

Wayne Bell, appellant, was convicted by a jury in the Circuit Court for Baltimore City of robbery of Constance Pohl and assault of Michael Speights, who witnessed the robbery and chased appellant. The court imposed a sentence of 15 years' incarceration for the robbery conviction and 10 years consecutive, five years suspended, for the assault conviction, to be followed by five years of probation.

On appeal, appellant presents the following questions for this Court's review, which we have rephrased slightly, as follows:

1. Did the circuit court err in denying appellant's motion to suppress the robbery victim's out-of-court identification?

2. Did the circuit court err in failing to regulate the prosecutor's closing argument, including comments improperly vouching for a witness and commenting on appellant's post-arrest silence?

3. Did the circuit court err in admitting prejudicial statements captured on the officer's body camera, including "inflammatory statements" made by the arresting officer and prior bad act evidence?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Motions Hearing

Prior to trial, appellant moved to suppress evidence contained in police body camera footage. First, appellant moved to suppress evidence that Ms. Pohl, the victim of the robbery, identified appellant as her assailant in a "show-up" that took place minutes after the robbery, on grounds that the procedure employed by the police was impermissibly suggestive. Appellant argued that any in-court identification by Ms. Pohl at trial should also be suppressed because it "would be tainted by the impermissibly suggestive procedure

used" in the show up. Second, appellant moved to suppress statements captured on the police body camera while he was in police custody, asserting that these statements were made prior to his being advised of his *Miranda* rights.[1]

Following a hearing on August 14, 2017, the court denied the motion to suppress the identification, finding that the procedure was not impermissibly suggestive.

With respect to the motion to suppress statements made by appellant in response to police questions, after he was placed under arrest, the discussion, as relevant to this appeal, included the prosecutor's proffer that a police officer asked appellant if a nearby shirt was his, and appellant said yes. The court agreed with defense counsel that this evidence was inadmissible because it was a statement in response to custodial interrogation and appellant had not been advised of his *Miranda* rights.

Trial

On September 23, 2016, at approximately 6:45 p.m., Ms. Pohl exited the Charles Theater after seeing a movie. As she walked around the neighborhood, she stopped to talk briefly with Michael Speights, who was sitting outside of a building on Lanvale Street with two of his co-workers and a man known by the nickname "Ten-Speed." Ms. Pohl then continued on her way and "crossed paths" with appellant, who was walking in the opposite direction.

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966). Counsel stated that there was no objection to the video being played; the objection was to the audio being played.

At that point, Ms. Pohl's "body language" drew the attention of Mr. Speights. Mr. Speights watched as appellant "disappeared" into an alleyway and then "stuck his head back out," leading Mr. Speights to believe that appellant was "going to try to roll" Ms. Pohl.

Mr. Speights continued to watch as appellant emerged from the alley and began to follow Ms. Pohl. Appellant "started picking his pace up," then "ran up and came from behind her [and] grabbed her bag." Ms. Pohl pulled back on the strap of her purse in an attempt to keep appellant from taking it. Despite these efforts, appellant was able to take the purse, and he "took off down the alley."

Mr. Speights ran after appellant. About ten seconds later, Mr. Speights saw appellant sitting on a curb, between two parked cars, going through Ms. Pohl's purse. The shirt appellant had been wearing when he grabbed the purse was on the ground next to him. Mr. Speights asked appellant why he took "that lady's purse?" Appellant responded: "[T]hat's my girl." He then stood up and hit Mr. Speights. A "scuffle" ensued and Mr. Speights, with the assistance of Ten-Speed and another bystander, restrained appellant until the police arrived on the scene.

Meanwhile, Ms. Pohl followed appellant into the alley. At the end of the alley, she saw Officer Nicholas Billings, a member of the Baltimore City Police Department, and she told him that her purse had been snatched. Officer Billings led Ms. Pohl over to where appellant was sitting on the curb, shirtless and in handcuffs. Her purse was underneath a

nearby car. Officer Billings asked Ms. Pohl: "[I]s this the guy that stole your purse?" Ms. Pohl nodded affirmatively and said "yeah."

At trial, both Mr. Speights and Ms. Pohl identified appellant as the person who stole Ms. Pohl's purse. As noted above, appellant was convicted of robbery of Ms. Pohl and second degree assault of Mr. Speights. Additional facts will be discussed as necessary in the discussion that follows.

DISCUSSION

I.

Out-of-Court Identification

Appellant contends that the court erred in denying his motion to suppress Ms. Pohl's out-of-court identification of him as the person who stole her purse. In support, he asserts (1) the "Facts Found by the Trial Court Demonstrate that the Show-Up Identification Procedure Was Impermissibly Suggestive"; and (2) the "Court Misapplied the Governing Law in Holding that the Identification Was Reliable."

The State contends that the court properly denied the motion to suppress the identification. It argues that the court properly found that appellant did not meet his burden to show impermissible suggestiveness in the identification procedure. Alternatively, the State contends that, even if the identification procedure was "impermissibly suggestive," Ms. Pohl reliably identified appellant. Finally, the State asserts that, even if identification of appellant at the crime scene was improperly admitted, it was harmless beyond a reasonable doubt because (1) both Ms. Pohl and Mr. Speights identified appellant at trial

as the person who stole Ms. Pohl's purse, without objection from defense counsel; and (2) the other evidence of appellant's guilt was overwhelming.

"Principles of due process protect those accused of criminal acts 'against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures.'" *In re: D.M.*, 228 Md. App. 451, 472 (2016) (quoting *James v. State*, 191 Md. App. 233, 251-52 (2010) (some internal quotation marks omitted)). "[W]hat triggers due process concerns is police use of an unnecessarily suggestive identification procedure, whether or not they intended the arranged procedure to be suggestive." *Perry v. New Hampshire*, 565 U.S. 228, 232, n.1 (2012).

"The admissibility of an extrajudicial identification is determined in a two-step inquiry." *Smiley v. State*, 442 Md. 168, 180 (2015). "'The first question is whether the identification procedure was impermissibly suggestive.'" *Id.* (quoting *Jones v. State*, 310 Md. 569, 577 (1987)). "The accused, in his challenge to such evidence, bears the initial burden of showing that the procedure employed to obtain the identification was unduly suggestive." *James*, 191 Md. App. at 252. "If the procedure is not impermissibly suggestive, then the inquiry ends." *Smiley*, 442 Md. at 180. "If, however, the procedure is determined to be impermissibly suggestive, then the second step is triggered, and the court must determine 'whether, under the totality of circumstances, the identification was reliable.'" *Id.* (quoting *Jones*, 310 Md. at 577).

"In assessing the admissibility of an extrajudicial identification, we look exclusively to the record of the suppression hearing and view the facts in the light most favorable to

the prevailing party." *In re: D.M.,* 228 Md. App. at 473. "We accept the circuit court's factual findings unless they are clearly erroneous, but extend no deference to the circuit court's ultimate conclusion as to the admissibility of the identification." *Id.*

We address first the circuit court's finding that the identification procedure was not impermissibly suggestive. As the circuit court recognized, the due process analysis does not prohibit "all suggestiveness but only impermissible suggestiveness." *Anderson v. State*, 78 Md. App. 471, 494 (1989); *accord Morales v. State*, 219 Md. App. 1, 14 (2014) ("[I]t is not a Due Process violation per se that an identification procedure is suggestive. . . . The procedure must be *impermissibly* suggestive and it is the impermissibility of the police procedure that warrants exclusion.").

"'[T]he scope of identification procedures constituting "impermissible suggestiveness" is extremely narrow.'" *Id.* (quoting *Jenkins v. State*, 146 Md. App. 83, 126 (2002), *rev'd on other grounds*, 375 Md. 284 (2003)). "'To do something impermissibly suggestive is . . . to feed the witness clues as to which identification to make[,]'" *id*. (quoting *Conyers v. State*, 115 Md. App. 114, 121 (1997), or "where the police, in effect, repeatedly say to the witness: 'This is the man.'" *In Re: Matthew S.*, 199 Md. App. 436, 448 (2011) (citations and some internal quotation marks omitted). "'All other improprieties are beside the point.'" *Id.* (quoting *Conyers*, 115 Md. App. at 121).

Although a single-suspect show-up may be suggestive, it "has always been considered a perfectly permissible procedure in the immediate wake of a crime while the apprehension of the criminals is still turbulently unsettled." *Turner v. State*, 184 Md. App.

175, 185 (2009). "[T]he 'practice of presenting single suspects to persons for the purpose of identification' may be justified by 'the desirable objectives of fresh, accurate identification which in some instances may lead to the immediate release of an innocent suspect and at the same time enable the police to resume the search for the fleeing culprit while the trail is still fresh.'" *In re: D.M.*, 228 Md. App. at 474 (quoting *Green v. State*, 79 Md. App. 506, 514–15 (1989)). "'[P]rompt on the scene confrontations, absent special elements of unfairness, do not entail due process violations.'" *Foster v. State*, 272 Md. 273, 289–90 (quoting *Billinger v. State*, 9 Md. App. 628, 636 (1970)), *cert. denied*, 419 U.S. 1036 (1974).

Here, we agree with the circuit court that the show-up was not impermissibly suggestive. The only evidence introduced at the suppression hearing was footage from the body camera worn by Officer Billings. It shows Officer Billings exiting his patrol vehicle on the street where appellant, who is not wearing a shirt, is being held down on the ground by Mr. Speights and two other men. Officer Billings then handcuffs appellant, helps him to his feet, and tells him to sit down on the curb, while trying to ascertain what happened and calling to another officer to help find the victim.

Ms. Pohl is then seen walking down a nearby alley toward Officer Billings. Officer Billings asks if anyone was "attacked," and Ms. Pohl explains that her purse was snatched. Officer Billings asks bystanders in the area if they witnessed the incident. One bystander says that he did not see what happened, but he points in appellant's direction and says he saw "those two gentlemen holding that gentleman down" while saying, "call the cops."

Officer Billings then leads Ms. Pohl to where appellant is sitting on the curb, surrounded by another officer and four or five paramedics and fire department personnel, and he asks Ms. Pohl "is this the guy who stole your purse?" Ms. Pohl nods affirmatively and says "yeah."

The circuit court, in denying appellant's motion to suppress the out-of-court identification, rejected defense counsel's argument that appellant's appearance, including that he was shirtless, handcuffed, and in police presence, was impermissibly suggestive, stating:

> [It] is what it is. I understand [appellant is] sitting there with his shirt off and - - and got some cuts . . . and police are there, and he's handcuffed at the time [Ms. Pohl] shows up, and it is what it is. But I don't find anything impermissible about that.
>
> I mean, if somebody is allegedly accosted on the street and citizens jump in and . . . detain them and . . . everybody's there, police shows up, she's brought back, um, nothing impermissible about that. . . . that's just . . . the reality of . . . being on the street in Baltimore City and - - and what occurred here.
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> * * *
>
> I don't see anything impermissible or unduly suggestive under . . . all the circumstances[.]

Appellant contends that the trial court erred based on the totality of the circumstances. The circumstances appellant relies on include the following: (1) before Ms. Pohl identified appellant, a witness "pointed in [appellant's] direction and stated that this was the man he had subdued"; (2) the police asked Ms. Pohl, "in a leading fashion," if appellant was the person who stole her purse; (3) appellant was "handcuffed and seated

alone on a curb, encircled by at least six law enforcement officials"; (4) appellant was "shirtless and bloodied"; and (5) appellant was "seated next to the strewn contents of [Ms.] Pohl's purse."

A review of the body camera recording viewed by the suppression court reveals that when Officer Billings arrived at the scene, appellant was being held down by three men, including an unidentified Caucasian man with dark hair, wearing khaki shorts and a grey short-sleeved shirt. A couple of minutes later, as Officer Billings was escorting Ms. Pohl from the alley to the street where appellant was seated on the curb, Officer Billings asked the same man if he "saw it happen." The man replied, "no, no, no" and gestured up the street, toward where appellant was seated on the curb, more than two car lengths away, explaining that he saw that "those two gentleman had that gentleman down, saying 'call the cops.'"[2] It appears that, from that point, appellant is barely, if at all, visible.

That Ms. Pohl was present when this statement was made did not render the identification procedure impermissibly suggestive. Officer Billings did not ask the man to identify the perpetrator in the presence of the victim, but only whether he was a witness to the crime. Moreover, the man did not identify appellant as the person who stole Ms. Pohl's purse. Even assuming it was clear that he was gesturing to appellant, the statement only identified appellant as the person who had been held down by two others. This does not

[2] The man did not, as appellant claims, state that "this was the man he had subdued."

rise to the level of impermissible suggestiveness that would require suppression of Ms. Pohl's subsequent identification of appellant as the person who stole her purse.

Appellant next suggests that the police used "leading" language in asking Ms. Pohl if she could identify appellant. We disagree. Officer Billings's exact words were: "[I]s this the guy that stole your purse?" That in no way was equivalent to the police saying: "This is the man." *In Re:* Matthews, 199 Md. App. at 448. *See Turner*, 184 Md. App. at 186 (it was not suggestive for police to tell victim that police "had a subject at the building that was possibly involved in the altercation"). When the police conduct a show-up, "[i]t is implicit that the police want the witness to look at and see if he [or she] can identify a possible participant in a crime." *Turner*, 184 Md. App. at 186.

That appellant was handcuffed and in the presence of police officers did not render the identification impermissibly suggestive. Our decision in *Anderson*, 78 Md. App. at 494, is instructive. There, one of the defendants argued that his identification by a robbery victim was impermissibly suggestive because the victim identified him when he was face down on the ground, surrounded by at least ten armed police officers. *Id*. The defendant also asserted that the victim heard radio communications describing the suspects as he was being transported to the scene of the show-up in a police vehicle. *Id.* We concluded that "there was nothing about the suggestiveness here that was impermissible," noting that "[t]he circumstances of the identification here typify the very nature of the one-on-one show-up at or near a crime scene in the immediate aftermath of a crime." *Id.*

Here, consistent with the ruling in *Anderson*, the trial court commented that the circumstances of the show-up identification were "the reality" of what occurred, i.e., a purse snatching on a city street followed by apprehension of the perpetrator by people in the area and the presence of police officers who responded to the scene. This "reality," as well as that appellant suffered some injuries in the apprehension, did not render the identification impermissibly suggestive.

The circuit court did not err in its finding that the identification was not impermissibly suggestive. Under these circumstances, there is no need to address whether the identification otherwise was reliable. The circuit court properly denied the motion to suppress the out-of-court identification.

II.

Closing Argument

Appellant next contends that the prosecutor made improper statements in closing argument. In particular, he argues that the prosecutor improperly: (1) commented on appellant's post-arrest silence; and (2) vouched for Mr. Speights's veracity.

The State contends that appellant's argument is not preserved for appellate review because defense counsel did not object to the prosecutor's closing statement. In any event, it asserts that any error was harmless beyond a reasonable doubt.

A

Post Arrest Silence

At the suppression hearing, the court made a finding that appellant was in custody after Ms. Pohl identified him as her assailant. Because appellant was not advised of his *Miranda* rights at that time, the court granted defense counsel's motion to exclude evidence of any statements appellant made, in response to police questions, that a shirt found nearby was his shirt. In accordance with the court's ruling, the audio portion of this part of the body camera video shown to the jury was redacted.

In its rebuttal closing argument, the State played portions of the body camera recording, including the video-only portion showing the police officer putting the shirt into appellant's lap after his arrest. The prosecutor commented on appellant's lack of reaction, stating:

> [Y]ou see this officer go and pick up the shirt off the ground from where it was and he ultimately places it there with the defendant, because it's his shirt. There's no reaction of this isn't mine. This is his shirt.

(Emphasis added.)

As the State notes, appellant did not object to this argument. "We have repeatedly held that, pursuant to Rule 8-131(a), a defendant must object during closing argument to a prosecutor's improper statements to preserve the issue for appeal." *Shelton v. State*, 207 Md. App. 363, 385 (2012).

Appellant contends that the issue is preserved for appellate review because he was granted a continuing objection. The nature of this continuing objection, however, is disputed.

Prior to closing argument, defense counsel stated that she intended to object during the prosecutor's closing statement "when the body camera is played or referred to" in order to preserve the record as to the "objection to the portions of the body camera that were admitted." The prosecutor suggested that the court grant the defense a continuing objection. The court agreed, stating:

> THE COURT: The Defense has a continuing objection to the State playing portions of the videotape in closing argument. It's on the record, but - - but he's going to go ahead and do it, and you're not going to object unless some other theory comes up?
>
> [DEFENSE COUNSEL]: Yes, your Honor.

(Emphasis added.)

We agree with the State that this continuing objection was not effective to cover the claim appellant makes on appeal, i.e., that the State violated his due process right by referring to his post-arrest silence. The objections at the suppression hearing were based on a *Miranda* violation, and the issue of post-arrest silence was never raised. Accordingly, the objection raised on appeal was, in the circuit court's words, "some other theory," and appellant was required to object to preserve the issue for appeal. *See* Md. Rule 4-323(b) (a continuing objection is effective only as to issues clearly within its scope). He did not do so, and therefore, the issue is not preserved for this Court's review. We will not address the issue on the merits.

B

Prosecutorial Vouching

Appellant next contends that the prosecutor improperly vouched for the credibility of Mr. Speights by referring to him during closing argument as a "good Samaritan." This claim also is not preserved for review because there was no objection to the prosecutor's use of the term during closing argument.

Appellant's argument that the issue was preserved because, at trial, he objected to the term "good Samaritan," is without merit. In *Donaldson v. State*, 416 Md. 467, 494 n. 6 (2010), upon which appellant relies, the Court of Appeals held that an objection to a prosecutor's comment in closing argument was preserved, absent a specific objection, because "the court, not seconds before, had overruled [defendant's] first objection to remarks of a substantially similar character." *Id.* Here, by contrast, the objection at issue was lodged the previous day, during the direct examination of Officer Billings.[3] Appellant's contention regarding the comment during closing argument is not properly before this Court.

III.

Admissibility of Statements Recorded on Police Body Camera

Appellant's final contention is that the trial court erroneously admitted body camera footage containing "irrelevant and prejudicial statements by parties and witnesses."

[3] Nor did defense counsel's statement that she had no exceptions to the instructions given to the jury, "subject to [her] previous objections," preserve objections to the prosecutor's closing argument.

Specifically, appellant claims that the court improperly admitted: (1) his pre-arrest statement referencing some involvement with "CPS," which was inadmissible "prior bad acts" evidence under Md. Rule 5-404(b); and (2) Officer Billings's statements expressing concern about coming in contact with appellant's blood. We agree with the State that appellant did not preserve these claims for appellate review.

A

Reference to "CPS"

Defense counsel moved in limine to redact a pre-arrest statement made by appellant, in which he tells Officer Billings, "we [sic] down at the CPS, trying to make sure my kids [indiscernible]"[4] Defense counsel proffered that, although it was difficult to discern what appellant was saying, it was a reference to Child Protective Services, which was not relevant, and the jury should not be permitted to speculate why appellant's children were involved with CPS. The court denied the motion to exclude appellant's statement regarding CPS, stating: "I don't think it's unduly prejudicial. It's hard to understand exactly what's being said."

On appeal, appellant argues that the court improperly admitted the evidence because it was inadmissible evidence of prior bad acts. Although appellant claims that he objected to this evidence at trial, the record reference he provided does not support this assertion. Appellant's objection in his motion in limine was not sufficient to preserve the issue for

[4] Because of background noise, it is difficult to hear what appellant is saying. Appellant states in his brief that he stated that his family was "down at the CPS trying to make sure our kids" were "taken care of."

appeal. *See Wimbish v. State*, 201 Md. App. 239, 261 (2011) ("Whether the motion in limine is made before trial or during trial, a court's ruling which has the effect of admitting contested evidence does not relieve the party, as to whom the ruling is adverse, of the obligation of objecting when the evidence is actually offered. Failure to object results in the non-preservation of the issue for appellate review."), *cert. denied*, 424 Md. 293 (2012).

Because appellant did not object to the evidence at trial, this contention is not properly before this Court.

B

"Inflammatory Statements"

On the body camera footage viewed by the jury, Officer Billings expressed concern after coming into contact with appellant's blood during the arrest, and he asked appellant if appellant had "any issues" he needed to know about. Appellant contends that this evidence was "incredibly prejudicial" because it implied that appellant suffered from a "serious communicable disease," and the jury could have inferred that appellant had "an unsavory past." This claim also is not preserved for review.

At the hearing on the motion in limine, defense counsel stated that she was "concerned about" this evidence. The court stated: "[T]hat doesn't appear to end up being an issue though." Defense counsel then responded: "I just think it's a little bit prejudicial." There was no further discussion of this evidence at that time, and there was no objection at trial to Officer Billings's statements regarding appellant's blood. Under these circumstances, this contention is not properly before this Court, and we will not address it.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.