UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0432

September Term, 2014

TUSON REESE

v.

STATE OF MARYLAND

Krauser, C.J.,
Graeff,
Friedman,

JJ.

Opinion by Graeff, J.

Filed: January 29, 2016

Appellant, Tuson Reese, was charged with various offenses related to the stabbing of Steven Hobson in October 2010. He was convicted by a jury in the Circuit Court for Carroll County of first degree burglary, first degree felony murder, second degree murder, and third degree burglary. The court sentenced appellant to life imprisonment.

On appeal, appellant presents the following questions for our review:

1. Did the circuit court err in denying appellant's pretrial motion to suppress evidence of two out-of-court photo array identifications?

2. Did the circuit court err in denying appellant's motion for a new trial based on a Brady violation?

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

FACTUAL AND PROCEDURAL BACKGROUND

Suppression Hearing

Prior to trial, appellant moved to suppress evidence that two witnesses, Dawn Myers and Bobbie Bowman, identified him from a photo array. Detective Jeffrey Schuster, a member of the Westminster Police Department, prepared the photo array, a photo book. Along with appellant's photograph, taken upon his arrest, Detective Schuster included five photographs of other individuals from a collection of arrest photos maintained by Carroll County Central Booking.

Detective Schuster testified at the suppression hearing that he tried to find photos of African-American men with similar facial features, hairstyles, and facial hair. He believed

that all the men had similar skin pigmentation. He agreed, however, that none of the men, other than appellant, had a tattoo on their face.[1]

On cross-examination by the State, Detective Schuster stated that he had created a "hundred plus" photo arrays in his career. When doing so, he tried to find photos that "stay consistent within the shapes of the eyes," as well as nose and mouth features that were "[s]imilar in shape." He also attempted to maintain the same color background for each of the photos.

On October 7, 2010, approximately five days after the stabbing, Corporal David Feltman, a member of the Maryland State Police Homicide Unit, interviewed Mr. Bowman. Mr. Bowman identified two individuals, known to him as "Easy" and "Keys," who arrived at his apartment in the early morning hours on the day of the stabbing. Corporal Feltman believed that Easy referred to Michael Bernard Brooks, and Keys was appellant.

Mr. Bowman looked at each photo in the book for approximately two to three seconds. He was familiar with several individuals, and he told the officer that he knew them by their street names. Mr. Bowman identified appellant as "Keys." His identification was "immediate[]" and "absolutely certain." Corporal Feltman noted the date and time of Mr. Bowman's identification, and Mr. Bowman signed appellant's photograph. Mr. Bowman told Corporal Feltman that he was with appellant for some time on the day

[1] The photo book, included with the record on appeal, contains six photographs of African-American men. Each man, including appellant, has a mustache and some facial hair on the chin. Some men have beards along the jaw line and cheeks, while others, like appellant, do not.

in question, from "approximately 2:00 to 3:00 o'clock in the morning on the second . . . until the following afternoon."

On October 8, 2010, Corporal Anthony Dubas, a member of the Maryland State Police Homicide Unit, showed a photo book to Ms. Myers, who was incarcerated in the Carroll County Detention Center at the time. Ms. Myers was shown the book because, during her interview, she indicated that she was "in the company of both defendants just prior to the stabbing in an apartment above where the murder occurred." Ms. Myers stated that she spent approximately a half an hour with two men inside a small, one-room apartment on the day in question. They were African-American males of average height, one of whom had a small tattoo under his eye, one was missing a tooth, and both men had goatees.

Corporal Dubas asked Ms. Myers to look at the photo book to see if she could identify the men. Ms. Myers went through the book containing appellant's photo. She looked at each picture and stopped on appellant's photo. After she pointed to appellant's photo, Corporal Dubas asked her to look at the remaining two photos in the book. Ms. Myers did so, then went back to appellant's photograph and initialed it with the date and time. She wrote: "Known as Keys. He was in Mr. James [Digg's] apartment." Corporal Dubas agreed that appellant's photo was the only one in the book that showed a tattoo on the face.

At the conclusion of the hearing, defense counsel argued that the photo book was impermissibly suggestive because there were differences in skin tone and facial hair in the six photographs. Counsel also argued that, because there were two suspects involved, it

was suggestive to show the witnesses only two photo books, one for Mr. Brooks and one for appellant. Counsel further argued that the fact that Mr. Bowman knew several of the individuals in the photo book by their street names diminished the number of photos from which he could choose. And finally, with respect to the photos shown to Ms. Myers, counsel argued that appellant's photograph, the only one showing a tattoo, was suggestive because Ms. Myers knew one of the men had a tattoo. The State argued that the photographs did "not rise to impermissibly suggestiveness." With respect to the tattoo in appellant's photograph, the prosecutor asserted that it was not so prominent as to be a "bull's eye, so to speak, as to identify Mr. Reese very specifically from any other individual." He argued that Mr. Bowman's knowledge of some of the other individuals in the photo book did not mean that "he is more likely to identify Mr. Reese." The State asserted that the procedures followed by the police did not create a coercive environment or suggest to the witness who they should identify. In any event, the State argued, even if the photo book somehow was impermissibly suggestive, the identifications were reliable under the circumstances, and appellant failed to meet his burden to suppress them.

The court denied the motion to suppress, stating that "[t]he test is . . . to avoid any taint that might lead to a wrongful identification of the Defendant as the person who committed the crime."[2] It found that the "mere fact" that Mr. Bowman knew some of the

[2] The court also found it relevant that the officers did not intend to taint the identification procedure. This was erroneous. *See Perry v. New Hampshire*, 132 S. Ct. 716, 721 n.1 (2012) ("[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.").

people did not "make[] the photo array violative of the Defendant's constitutional rights." Although the court found defense counsel's argument that only one person had a facial marking under the eye "more troubling," it questioned "how easy it would have been to get five other pictures of somebody who had a facial blotch under their eye," stating: "I don't know. There is no evidence to that effect."

The court continued:

> It is up to the defense to show that the photo array was impermissible. So the burden is on the defense to say, well, Judge, yes, that could have easily been done. He could have gotten five other pictures with someone who had a mark on the person's face. But there is no evidence to that effect.
>
> As to the general appearance of these individuals, I have to compliment Detective Schuster. I think he did a good job of picking people who would make it difficult for someone who was not an eyewitness to pick out Mr. Reese from the other pictures. Except for one gentleman, whose face is kind of – whose head is rather – I don't know what the word is. It is not rectangular, but a very narrow oval. Everybody else has a face that is pretty much the same shape. Again, eyes, nose, mouth, hairlines, they are all very, very similar.

The court ultimately concluded as follows:

> I cannot find that there was a purposeful taint of these lineups that made them so impermissibly suggestive that there is a chance of an irrevocable or an inappropriate misidentification of Mr. Reese. And again, all I am doing here is saying that the jury should consider the pretrial identification. And I am sure [Defense Counsel] will bring up all these arguments at the trial, which she should do as the advocate [for] Mr. Reese, in terms of the jury's decision as to whether or not to accept the pretrial identification.

Trial

At trial, Nathaniel DeShong testified that, on October 1, 2010, he and Mr. Hobson spent most of the day drinking together in Westminster. The two stayed at Ernie's Bar

until it closed at approximately 1:00 a.m. They then went their separate ways. Shortly thereafter, Mr. Hobson called Mr. DeShong and asked him if he wanted to "hang out" some more. Mr. DeShong agreed and walked to Mr. Hobson's apartment, arriving sometime after 1:00 a.m. on October 2, 2010.

The two were talking and watching television when Mr. DeShong heard a "loud boom," and two African-American males entered the apartment, ran straight toward Mr. Hobson, and started beating him with their fists. Mr. DeShong stood up, and the shorter of the two men approached him holding a knife. Mr. DeShong fell down onto the couch and said: "I don't know what's going on. . . . I'm just here visiting my friend."

Mr. DeShong shut his eyes, and the two African-American men left. He then went to Mr. Hobson, who looked like he was in shock. Mr. DeShong was unable to rouse Mr. Hobson. He lifted up Mr. Hobson's shirt and noticed a puddle of blood "in his rolls." Mr. DeShong called his mother and told her to call the police. At approximately 2:17 a.m., the police responded to the scene and Mr. DeShong overheard someone state that Mr. Hobson was "D.O.A." Mr. DeShong could not identify the men who entered the apartment.

Mr. Hobson sustained a blunt force injury, three stab wounds, and one cutting wound. The most severe stab wound was to Mr. Hobson's chest, which went through Mr. Hobson's left lung and cut his pulmonary artery. The cause of death was sharp force injuries, and the manner of death was homicide.

Mitchell Dinterman, an expert in blood stain pattern analysis, testified that there was blood in the living room and the bathroom. He opined that, at the time the victim's pulmonary artery was severed, the victim was in the bathroom.

Mr. Brooks testified for the State pursuant to a plea agreement, where he pleaded guilty to felony murder in connection with this case and agreed to testify against appellant. He had known appellant for five or six years. Appellant was known as "Keys," and Brooks sometimes was known as "Easy."

On the evening of October 1, 2010, Mr. Brooks was with appellant. They drank and played pool until approximately 1:00 a.m. After the bar closed, appellant and Mr. Brooks remained outside for a few moments. Appellant appeared upset because he had lost money playing pool. Appellant then saw someone that had "whipped out [a gun] on him," and he confronted the person about the incident. Mr. Brooks tried to get everyone to "chill," but someone hit Mr. Brooks in the back of the head. They all started fighting, which continued until the Westminster police responded.

Upon seeing the police, appellant and Mr. Brooks ran to a nearby apartment building. Mr. Brooks had been at this building other times to sell drugs, and he knew the code for the front entry. After eventually gaining access, appellant and Mr. Brooks went upstairs to Apartment 14. Dawn Myers was inside the apartment when appellant and Mr. Brooks arrived.

After a time, Ms. Meyers left the apartment. When she returned, Mr. Brooks inquired if she locked the door. When Ms. Meyers stated she did not recall, Mr. Brooks went to the front door, and he heard a "strange knock or something." Mr. Brooks looked

through the peephole and saw someone wearing a mask over his head and holding a gun. The man then tried to kick the door in, but Mr. Brooks was able to prevent the man from entering. This man tried to get his arm and the gun into the apartment, but Mr. Brooks and appellant were able to close the door.[3]

After catching their breath, and seeing that the man no longer was outside, appellant and Mr. Brooks left the apartment. Appellant was armed with a four or five inch silver chrome pocketknife, and Mr. Brooks grabbed a nail file. Appellant's knife was open as they left Apartment 14. As they ran down the stairs, appellant stopped on the second level, near Mr. Hobson's apartment. Believing that the assailant went inside Mr. Hobson's apartment, appellant kicked the door in and both men ran inside. They encountered Mr. Hobson sitting in a chair and another man sitting on the couch. Appellant ran toward Mr. Hobson, and Mr. Brooks went to the man on the couch. Mr. Brooks stated that, due to the day's events, appellant was "out of it a little bit, just mad."' Appellant asked where the man was, and Mr. Hobson replied that he did not know what was going on. Mr. Brooks then heard Mr. Hobson say, "ah man, you stabbed me. Ah." At that point, Mr. Brooks fled the apartment. Appellant soon followed.

Appellant and Mr. Brooks then went to "Donny[']s] house" on West Main Street. Inside the apartment, Mr. Brooks saw appellant playing with the knife that appellant was carrying earlier that evening. Approximately 20 to 30 minutes later, between 1:45 and 2:00

[3] Corporal Anthony Dubas, the lead investigator, later testified that the police suspected that the armed man who tried to enter Ms. Meyers' apartment was Montrell Schumpert, the same man who was involved in the altercation with appellant outside the bar.

a.m., appellant and Mr. Brooks went to a different apartment, which was owned by a man Mr. Brooks only knew as "Bobby."

The next morning, between 11:00 a.m. and 12:00 p.m., Mr. Brooks asked Bobby to go buy him some food and retrieve his belongings from Mr. Diggs' apartment. When Bobby returned, he informed Mr. Brooks that the police were around the building, and he was unable to retrieve Mr. Brooks' belongings.

Mr. Brooks and appellant then learned that Mr. Hobson was dead. Mr. Brooks then testified that "we like shared a dumb look, like, wow. What the fuck just happened?" Appellant then pulled Mr. Brooks into the back bedroom and told him to "just chill out, relax." Mr. Brooks testified that he was upset because "[t]his man had passed away. I was there, you know what I mean? It was upsetting."

Appellant then called a friend to pick them up, and appellant and Mr. Brooks left Westminster to return to appellant's residence in Baltimore. Appellant spoke to Mr. Brooks and told him to relax, and that, if the police questioned him, Mr. Brooks was to "keep the story how we said it and just leave the significance out, leave the other part out." Mr. Brooks explained that this meant he was not supposed to talk about being in Mr. Hobson's apartment.

Mr. Brooks eventually was arrested in connection with the stabbing incident. While he was being processed at the Maryland Reception, Diagnostic and Classification Center ("MRDCC"), Mr. Brooks received a letter from appellant. The letter stated: "I love you Shorty. I hope you see through them damn fake-ass pictures. They was, the picture they

was painting. All the way. I love you. Stay focused." The letter included the phone number of appellant's girlfriend.

Mr. Brooks gave a number of statements to police. In one, he told Sergeant David Sexton, a member of the Maryland State Police, what occurred in Mr. Hobson's apartment on the night in question. According to Sergeant Sexton, Mr. Brooks admitted his involvement in the homicide. Mr. Brooks also drew a diagram of Mr. Hobson's apartment and a picture of the knife that appellant had. When Mr. Brooks spoke to Sergeant Sexton, he had not yet entered into a plea agreement with the State.

Sergeant Troy McDonough testified that, on October 5, 2010, appellant waived his *Miranda*[4] rights and agreed to provide a statement in connection with this case. During the course of that four hour interview, appellant never stated that he was in Mr. Hobson's apartment or Lyle Lettie's residence. He also denied his involvement in the homicide. He did, however, admit that he and Mr. Brooks were in Ms. Myers' apartment, where they fought off an attempted robbery, and later, they were in "Ms. Terri's" apartment.

Lyle D. Lettie, Jr., who was known by his middle name, "Donny," testified that, on October 1, 2010, appellant and Mr. Brooks, known to him as Keys and Nick, came to his apartment at approximately 11:00 p.m. They returned to the apartment the next day, between 2:30 and 2:45 a.m. Both men appeared agitated and were saying: "Not going to put up with this shit." Appellant and Mr. Brooks were with Mr. Lettie that evening for only "10, 15 minutes, tops."

[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

The next morning, when Mr. Lettie was taking out the trash, he found a folding knife inside his trash can. The knife had a "white like pearl colored handle," and it was fully functional. Because it was not his knife, Mr. Lettie placed it on top of his radiator cover and went to work. When he returned from work at approximately 5:00 p.m., Detective Todd Liddick was waiting for him, and he asked to see the knife. Mr. Lettie showed it to Detective Liddick.

Stephanie Anschuetz, a Crime Scene Technician with the Maryland State Police, examined the knife. No fingerprints were recovered, but there was suspected blood on the blade. Three swabs were collected from the blade, the handle, and the inside handle area of the knife, and they were submitted to the police lab for further analysis.

Julie Kempton, a Forensic Scientist III with the Maryland State Police, testified as an expert in the field of forensic serology and DNA testing. She compared swabs from the knife against profiles from numerous individuals, including swabs of blood found in Mr. Hobson's apartment, and she concluded that the knife contained a mixture of DNA from at least three people, with a major mixture belonging to appellant and the victim, Mr. Hobson. Ms. Kempton was able to exclude the remaining individuals tested as being contributors to this major mixture.[5]

[5] Ms. Kempton explained that the possibility of selecting a random, unrelated person who could not be excluded as a major contributor in the major mixture was 1 in 470,000 Caucasian individuals, which statistically "means that greater than 99.9998 percent of people would be excluded as being possible contributors to that mixture," or 1 in 220,000 African-American individuals, which meant that "greater than 99.9995 percent of individuals would be excluded."

Ms. Myers testified that, on October 1, 2010, she was staying with Mr. Diggs in his apartment in Westminster. She came to the apartment between 12:30 and 12:45 a.m. on October 2, 2010. Ms. Myers subsequently heard a knock at the door, and appellant and Mr. Brooks entered the apartment. She testified that she knew appellant, who was the taller of the two men, by his nickname "Keys" and Mr. Brooks as "Nick." She testified that appellant and Mr. Brooks had been involved in some sort of altercation at a nearby bar and sought refuge at Mr. Diggs' apartment.

At some point, Ms. Myers received a telephone call from a friend, and she went downstairs to meet him. She was gone for approximately four minutes. As she reentered the apartment building, she encountered Mr. Hobson out front with another person. Mr. Hobson told her "don't mind me, my friend is a little drunk, I'm just trying to get him upstairs." Ms. Myers responded: "[Y]ou're good, you know." She then returned to Mr. Diggs' apartment. Ms. Myers entered the apartment, fastened the chain on the door, and sat in the living room. Appellant and Mr. Brooks were "going crazy" at the time. Someone knocked at the door. Appellant asked "who is it," but the person on the other side of the door did not respond. Mr. Brooks walked up behind appellant as appellant opened the door slightly, leaving the door chained. A man carrying a black handgun broke the chain and charged the door, but appellant and Mr. Brooks managed to get the door shut again. After waiting for approximately a half an hour, appellant and Mr. Brooks looked out the peephole, determined that no one was there, and left Mr. Diggs' apartment.

While appellant was in Mr. Diggs' apartment, Ms. Myers noticed that he had a Buck knife in his possession. It was approximately five inches long, with a pearl handle. She

did not see any weapons on Mr. Brooks. At some point, appellant gave Ms. Myers his phone number.

At approximately 3:30 a.m., she looked out the window and saw that the parking lot was full of police cars. At approximately 10:00 a.m., the police came to Mr. Diggs' door. As indicated, Ms. Myers identified a photograph of appellant from a photo array book.

As discussed in more detail, *infra*, Ms. Myers was questioned extensively regarding her prior convictions. She also admitted to lying under oath and drug use.

Mr. Bowman testified that, on the night in question, he was staying at a friend's apartment. Mr. Bowman knew appellant as "Keys," and appellant usually was in the company of a man named "Easy." On October 1, 2010, appellant stopped by the apartment, by himself, in the afternoon. Later that same evening, appellant and Mr. Brooks returned to the apartment. They indicated that they had been to Mr. Diggs' apartment. Mr. Bowman subsequently went to Mr. Diggs' apartment to retrieve Mr. Brooks' clothing and cell phone, but the area was cordoned off by the police.

The next afternoon, Mr. Bowman learned that Mr. Hobson had died. Appellant and Mr. Brooks heard this information as well, and appellant stated: "[T]hey are going to try and pin that on us." Appellant and Mr. Brooks then left the apartment, and approximately three hours later, appellant called and asked Mr. Bowman whether he had "heard anything?"

Mr. Bowman subsequently spoke to the Maryland State Police at the Westminster Police Station. He identified both appellant and Mr. Brooks in separate photo array books. Mr. Bowman also testified, on cross-examination, that on October 2, 2010, he purchased

crack cocaine from appellant and Mr. Brooks. Mr. Bowman clarified that a companion of his actually purchased the drugs.

As indicated, appellant was convicted by the jury of first degree burglary, first degree felony murder, second degree murder, and third degree burglary.

DISCUSSION

I.

Motion to Suppress Photo Array Identifications

Appellant first contends that the circuit court erred in denying his motion to suppress the extrajudicial identifications made by Mr. Bowman and Ms. Myers. He asserts that the photo array was impermissibly suggestive for three reasons: (1) there were differences in facial hair; (2) appellant was the only one with a marking on his face; and (3) Mr. Bowman was familiar with several people in the array, which effectively made the array contain less than six photographs.

The State contends that the court properly admitted the identifications. It asserts that the photo arrays were not impermissibly suggestive because there was sufficient similarity among the faces depicted. Moreover, they assert that the identifications were reliable and thus properly admitted. Finally, they assert that, even if the identifications were improperly admitted, any error was harmless.

An appellate court's review of a trial court's denial of a motion to suppress an out-of-court identification is well settled. We have explained the scope of our review as follows:

> We view the evidence and inferences that may be reasonably drawn therefrom in a light most favorable to the prevailing party on the motion, and will uphold the motions court's findings unless they are clearly erroneous. We must make an independent constitutional evaluation, however, by reviewing the relevant law and applying it to the unique facts and circumstances of the case.

In re Matthew S., 199 Md. App. 436, 447 (2011) (quoting *Gatewood v. State*, 158 Md. App. 458, 475-76 (2004)).

It is well-established that "[d]ue process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures." *James v. State*, 191 Md. App. 233, 251-52 (quoting *Webster v. State*, 299 Md. 581, 600-01 (1989)), *cert. denied*, 415 Md. 338 (2010). *Accord Perry v. New Hampshire*, 132 S. Ct. 716, 724 (2012) ("due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary"). The concern, which must be assessed on a case-by-case basis, is "whether improper police conduct created a 'substantial likelihood of misidentification.' '[R]eliability [of the eyewitness identification] is the linchpin' of that evaluation." *Perry*, 132 S. Ct. at 724-25 (quoting *Manson v. Brathwaite*, 432 U.S. 98, 114-116 (1977)).

Maryland case law establishes "a two-stage inquiry for due process challenges to extrajudicial identifications." *Jones v. State*, 310 Md. 569, 577 (1987), *vacated on other grounds*, 486 U.S. 1050 (1988). As this Court has explained:

> First, the burden falls on the accused to establish that the procedures employed by the police were impermissibly suggestive. If the accused demonstrates that the identification was tainted by suggestiveness, 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." The linchpin of the analysis is the reliability of the

> identification. If the accused fails to carry his or her burden demonstrating impermissibly suggestive police procedures, however, our inquiry ends and the identification is deemed reliable.

Morales v. State, 219 Md. App. 1, 13-14 (2014) (citations omitted).

In other words:

> The first requirement is that the photographic array or other extrajudicial identification procedure be *suggestive*. It is further required that even if the procedure were suggestive, it must be *impermissibly* (or unnecessarily) suggestive. *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). The third requirement, at least where the defendant seeks to exclude a subsequent in-court identification as the "fruit of the poisonous tree," is that even an impermissibly suggestive identification procedure must have been *so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification*. Not a mere "likelihood" but a "very substantial likelihood"! Not a mere "misidentification" but an "irreparable misidentification"! That's a hard furrow to plow. These are three integral parts of a single definition. It is not the case that a defendant need establish only the first and second elements and then sit back and enjoy a presumption as to the third element, which the State must then try to rebut. The proponent of exclusion carries the burden of justifying exclusion.

Smiley v. State, 216 Md. App. 1, 33 (2014), *aff'd*, 442 Md. 168 (2015).

We are not persuaded that the photo arrays here were impermissibly suggestive. A review of the arrays indicates that the circuit court's observation, that the men depicted are "very, very, similar" due to the similarity of their face shape, eyes, nose, mouth and hairline, was not clearly erroneous. *See McGrier v. State*, 125 Md. App. 759, 766 ("Appellant does not suggest that the six men depicted did not have similar features, which is the critical identification factor."), *cert. denied*, 355 Md. 613 (1999).

With respect to appellant's argument that the photo array was impermissibly suggestive because only appellant had a tattoo or marking on his face, this Court rejected

a similar argument in *Sallie v. State*, 24 Md. App. 468 (1975). In that case, we upheld the denial of a motion to suppress an identification based on a photographic array where appellant's photo had a mark on his face and the other photographs did not. *Id.* at 472-73. We explained:

> Appellant argues that his mark is unique. Every individual is unique. The mouth, the lips, the teeth, the chin, the cheeks, the nose, the eyes, the forehead, the ears, the hair, or any combination of two or more of those and other features, make every individual unique. They make him different from all others. They are the basis upon which any person is visually distinguished from other persons. The more subtle the distinctions, the more difficult the identification, and the greater the potential for error. If the burglar in this case had not had such a distinctive mark, then Sallie's mark would have cleared him forthwith as a suspect. The fact that the burglar had the mark, and that Sallie had it, and that the mark is unique, made his identification inevitable indeed, but also made it more rather than less reliable.

Id. at 472.

Other jurisdictions have reached similar conclusions. *See State v. Alvarez*, 701 P.2d 1178, 1180 (Ariz. 1985) (disagreeing that lineup was unduly suggestive because defendant was the only one with moles, a feature observed by the victim); *People v. Castellano*, 79 Cal. App. 3d 844, 851 (Cal. Ct. App. 1978) (that defendant's photo "was the only one showing a person with a birthmark did not make it unduly suggestive"); *State v. Savoy*, 501 So. 2d 819, 821 (La. Ct. App. 1986) (rejecting the argument that photographic array was unduly suggestive where "six photographs depict[ed] men of similar skin color and complexion with some facial hair," and "[t]he blemish on the defendant's face [was] hardly noticeable and did not focus attention on his photograph."), *writ denied*, 502 So. 2d 576 (La. 1987).

Similarly, although both Ms. Myers and Mr. Bowman indicated that one of the men had a goatee, we are not persuaded that the photo array including men with different styles of facial hair made the array so impermissibly suggestive as to deny appellant due process of law. *See Commonwealth v. Silva-Santiago*, 906 N.E.2d 299, 310 (Mass. 2009) (rejecting claim that the array was impermissibly suggestive, because only defendant's photo showed a "fade" haircut, because the men shown in the array "possessed reasonably similar features and characteristics, including the style and length of their hair"). A man changing his facial hairstyle is not uncommon.

With respect to the contention that the array was suggestive because one of the witnesses, Mr. Bowman, knew several people in the array, we again are not persuaded. *See People v. Douglas*, 656 N.Y.S.2d 500, 502 (N.Y. App. Div. 1997) ("the array was not per se unduly suggestive simply because [the witness] knew some of the fillers," noting that the witness also knew defendant), *appeal denied*, 90 N.Y.2d 892 (N.Y. 1997). *Accord Taul v. State*, 862 P.2d 649, 653-54 (Wyo. 1993) (identification was not unnecessarily suggestive where witness knew three of six men depicted in photo array). The circuit court properly found that the photo arrays here were not unnecessarily suggestive.

Given this conclusion that the photo arrays were not impermissibly suggestive, our discussion of this issue could end. We note, however, that even if we agreed with appellant that the arrays were impermissibly suggestive, we agree with the State that the identifications were admissible because the State proved "by clear and convincing evidence the existence of reliability in the identification that outweighs the corrupting effect of the suggestive procedure." *Loud v. State*, 63 Md. App. 702, 706, *cert. denied*, 304 Md. 299

(1985). *Accord In re Matthew S.*, 199 Md. App. at 448. The factors to be used in determining reliability include:

> "(i) the opportunity of the witness to view the criminal at the time of the crime;
>
> (ii) the witness' degree of attention;
>
> (iii) the accuracy of the witness' prior description of the criminal;
>
> (iv) the level of certainty demonstrated by the witness at the confrontation; and
>
> (v) the length of time between the crime and the confrontation."

Jones, 310 Md. at 578 (quoting *Webster*, 299 Md. at 607). *Accord State v. Hailes*, 217 Md. App. 212, 265-66 (2014), *aff'd*, 442 Md. 488 (2015).

Here, the length of time between the crime and the confrontation was relatively short. Mr. Bowman was shown the array five days after the crime, and Ms. Myers was shown the array approximately six days after the crime. On that day, there was more than ample opportunity for both witnesses to identify appellant. Ms. Myers spent approximately a half an hour with the two defendants inside a small one room apartment. And Mr. Bowman was with appellant and Mr. Brooks for approximately 12 hours after the crime. During that time, both Mr. Bowman and Ms. Myers noted that appellant had a goatee, and Ms. Myers saw the tattoo on appellant's face. Both witnesses were certain of their identification of appellant. Mr. Bowman's identification was "immediate" and "absolutely certain," and Ms. Myers identified appellant by stating: "This is him." Under the totality of the circumstances, the identifications by Mr. Bowman and Ms. Myers were

reliable. Accordingly, the motions court properly denied the motion to suppress the extra-judicial identifications in this case.

II.

Brady Violations

Appellant next argues that the trial court erred in denying his motion for a new trial on the ground that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by not disclosing that Ms. Myers had a theft conviction within a month of the trial date. Although the State agrees that it did not disclose this evidence, it nonetheless argues that the evidence was not material to the outcome in this case, and therefore, the circuit court properly exercised its discretion to deny appellant's motion for a new trial. We agree with the State.

We generally review the denial of a motion for new trial for abuse of discretion, except where the moving party did not and could not have discovered the alleged trial error until after trial. *See Merritt v. State*, 367 Md. 17, 30-31 (2001). In that circumstance, we review the denial of the motion for new trial "'under a standard of whether the denial was erroneous.'" *Nero v. State*, 144 Md. App. 333, 365 (2002) (quoting *Merritt*, 367 Md. at 31).

In *Brady*, 373 U.S. at 87, the Supreme Court held that: [T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Accord Yearby v. State*, 414 Md. 708, 716 (2010). *See also Strickler v. Greene*, 527 U.S. 263, 280 (1999) (duty to disclose such evidence applies even when no request by accused, and encompasses impeachment evidence as well as

exculpatory evidence). There are three elements necessary to show a *Brady* violation: "(1) that the prosecutor suppressed or withheld evidence that is (2) favorable to the defense-either because it is exculpatory, provides a basis for mitigation of sentence, or because it provides grounds for impeaching a witness-and (3) that the suppressed evidence is material." *Wilson v. State*, 363 Md. 333, 345-46 (2001) (quoting *Ware v. State*, 348 Md. 19, 28 (1997)).

We agree with the State that, under the circumstances of this case, appellant failed to show the third prong of the *Brady* analysis. The evidence of Ms. Myers' November 2013 conviction for theft under $100 was not material to appellant's case.[6]

Evidence is considered material, and relief is therefore appropriate, if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Ware*, 348 Md. at 46 (quoting *State v. Thomas*, 325 Md. 160, 190 n. 8 (1992)). *Accord Strickler*, 527 U.S. at 281 ("Strictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.").

[6] It is not entirely clear that the information regarding Ms. Myers' conviction was "suppressed" within the meaning of *Brady v. Maryland*, 373 U.S. 83 (1963). As the court has stated: "[The information] is a public record, it is on the Maryland Case Search and it is available to virtually any citizen who wants to investigate the matter." *See Diallo v. State*, 413 Md. 678, 705 (2010) ("*Brady* offers a defendant no relief when the defendant knew or should have known facts permitting him or her to take advantage of the evidence in question or when a reasonable defendant would have found the evidence."). In any event, we will confine our analysis to the State's argument regarding materiality.

Here, the evidence of Ms. Myer's recent conviction was not material for several reasons. First, even if the conviction had been disclosed, it would not have been admissible at trial. Pursuant to Maryland Rule 5-609(c)(3), evidence shall be excluded where "an appeal or application for leave to appeal from the judgment of conviction is pending, or the time for noting an appeal or filing an application for leave to appeal has not expired." Ms. Myers was found guilty of theft under $100 on November 13, 2013, and she testified in this case on December 3, 2013. Because the 30-day time period to appeal her conviction to the circuit court had not expired, *see* Maryland Rule 7-104(a), her prior conviction would not have been admissible.

Moreover, we are persuaded that appellant suffered no prejudice for the failure to disclose this conviction because any impeachment value from the prior conviction would have been, at best, cumulative. *See State v. Rockette*, 718 N.W.2d 269, 280 (Wisc. Ct. App.) ("Impeachment evidence is *not* material [for *Brady* purposes], and thus a new trial is *not* required, when the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable."), *review denied*, 721 N.W.2d 484 (Wis. 2006). *Accord Watson v. United States*, 940 A.2d 182, 187 (D.C. 2008) (same).

Here, Ms. Myers' credibility was thoroughly challenged during appellant's jury trial. Ms. Myers testified that she had three prior convictions for theft and one prior conviction for second degree escape. She also testified that she had lied to the court, under oath, in an unrelated case when she claimed she was guilty of a drug paraphernalia crime. She acknowledged that she used crack cocaine daily, including on the day of the murder,

and that she was addicted to drugs. She agreed that she may have told the police something to the effect that "drug addicts are like chameleons because they lie, cheat and steal."

Defense counsel used this evidence to attack Ms. Myers' credibility during closing argument. Indeed, the defense suggested that Ms. Myers had something to do with the murder itself, theorizing that Ms. Myers arranged a drug transaction with Mr. Hobson, and it was Mr. Brooks and Ms. Myers who were in Mr. Hobson's apartment during a drug transaction that went wrong. Because she was involved, counsel continued, Ms. Myers did not tell the police what really happened that night.

Given the quantity of impeachment in this case, evidence of an additional conviction for theft under $100 was immaterial. The circuit court did not err in denying appellant's motion for a new trial.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.