UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1080

September Term, 2015

CLIFTON GARDNER

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Wright,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: June 14, 2016

A jury in the Circuit Court for Prince George's County convicted Clifton Gardner, appellant, of fourth-degree burglary. At a subsequent sentencing proceeding, the court sentenced appellant to a prison term of three years. On appeal, appellant raises two issues for our review, the second of which we have rephrased:[1]

> 1. Did the motions court err by denying the motion to suppress Eric Faulkner's identification of Appellant at a show-up?
>
> 2. Did the trial court abuse its discretion in refusing to ask two of appellant's proposed *voir dire* questions of the jury *venire*?

For the reasons that follow, we answer both questions in the negative and affirm.

BACKGROUND

In September 2014, Eric Faulkner was renting the basement of a townhouse in Hyattsville. On the morning of September 10, 2014, Faulkner was home alone, watching TV, and listening to music. At around 10:00 a.m., he heard a loud bang followed by a series of repeated loud noises coming from outside of the basement door. Faulkner stated that the basement door was dead-bolted from the inside, and there was no way to enter the basement from outside through that door. The noises continued for "four or five minutes," and Faulkner went upstairs to investigate. Looking out of the kitchen window on the ground floor, he observed a man walking out of the backyard through the fence gate.

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[1] Appellant's second question presented, verbatim from his brief, reads:

> 2. Did the trial court err by refusing to propound *voir dire* questions requested by the defense aimed at identifying prospective jurors unable or unwilling to apply the presumption of innocence or to respect the right to remain silent?

Faulkner returned downstairs to retrieve his shoes. As he walked back upstairs and out through the front door, he heard glass breaking, and he ran to the backyard. There, Faulkner saw the same man he had previously seen leaving the backyard standing on top of the air conditioning unit, which was next to the kitchen window. The man was wearing a black "ski jumper suit," which Faulkner described as a bib with overalls, which was unusual considering the warmth of the day. The man had his hands on the broken kitchen window, and Faulkner surmised that he was attempting to open it. Faulkner asked the man, "What you doing?" In response, the man jumped over the fence into the neighboring backyard and ran away.

Faulkner returned to the townhouse, called his landlord to report a robbery, and then called the police. On the kitchen floor, near the broken window, Faulkner observed a brick surrounded by broken glass. Faulkner reported an attempted robbery to the police and described the perpetrator as wearing a black ski jumper. Officer David Greir responded to the townhouse and spoke with Faulkner about ten or fifteen minutes after the call.[2]

Meanwhile, Corporal Steven Holland received a description of the subject over the police radio. He then observed two men walking in a neighborhood near Faulkner's residence, and one of the men was wearing black overalls. Police stopped and held the two men. Officer Greir observed that the man wearing the black ski suit was sweating profusely, as it was in the "70s or 80s" that day.

[2] All law enforcement officers in this case are members of the Prince George's County Police Department.

Officer Nicholle Savoy transported Faulkner to the location where the police had stopped the two men. Police asked Faulkner if he recognized either of the two men, and Faulkner identified the man in the black ski outfit as the one he saw standing on the air conditioning unit in his backyard attempting to open the kitchen window. Faulkner also provided a written statement to police. The man that Faulkner identified was appellant.

The State charged appellant with first-degree burglary, third-degree burglary, fourth-degree burglary, and malicious destruction of property. The jury acquitted appellant of every charge except for fourth-degree burglary. Following sentencing, appellant noted this appeal.

DISCUSSION

I. The Identification

Prior to trial, appellant filed a motion to suppress Faulkner's out-of-court identification of appellant at the show-up. After hearing testimony from Faulkner and Officer Savoy, the circuit court denied appellant's motion. The court determined that there was no evidence that police did anything to create an impermissibly suggestive identification procedure: "Based on the testimony before the Court, the Court finds it is the defendant's burden and he has failed to demonstrate through evidence and testimony that there was any unnecessary suggestion to the procedures employed by the police[.]"

On appeal, appellant contends that show-ups are, by definition, unduly suggestive. Appellant argues that the procedure in this case was made worse because he was wearing the same unique item of clothing that Faulkner described the suspect wearing, and he was

stopped and identified for that reason. Accordingly, appellant contends that Faulkner's identification of him, as the perpetrator, is unreliable and should have been suppressed.

The State argues that the circuit court rightly denied appellant's suppression motion because the show-up identification was properly conducted and was not an unduly suggestive procedure. The State points out that appellant bears the burden of first demonstrating that the identification procedure was unduly suggestive, and the State contends that appellant failed to carry this burden. In order for an identification procedure to be unduly suggestive, the State argues, there must be some police conduct that effectively "rigs" the process, which he has failed to demonstrate. Moreover, the State contends, even if appellant could demonstrate that the show-up was unduly suggestive, Faulkner's identification of appellant was, nevertheless, reliable.

In reviewing the denial of a motion to suppress, this Court has noted that "'we confine ourselves to what occurred at the suppression hearing[,]'" and "'[w]e view the evidence and inferences that may be reasonably drawn therefrom in a light most favorable to the prevailing party on the motion[.]'" *Lindsey v. State*, 226 Md. App. 253, 262 (2015) (quoting *Gonzalez v. State*, 429 Md. 632, 647 (2012)), *cert. denied*, ___ Md. ___ (Apr. 25, 2016).

The Court of Appeals has noted:

> The admissibility of an extrajudicial identification is determined in a two-step inquiry. "The first question is whether the identification procedure was impermissibly suggestive." If the procedure is not impermissibly suggestive, then the inquiry ends. If, however, the procedure is determined to be impermissibly suggestive, then the second step is triggered, and the court must determine "whether, under the totality of circumstances, the identification was reliable." If a *prima facie* showing is

> made that the identification was impermissibly suggestive, then the burden shifts to the State to show, under a totality of the circumstances, that it was reliable.

Smiley v. State, 442 Md. 168, 180 (2015) (internal citations omitted). Importantly, "'[t]he accused . . . bears the initial burden of showing that the procedure employed to obtain the identification was unduly suggestive.'" *In re Matthew S.*, 199 Md. App. 436, 447 (2011) (quoting *James v. State*, 191 Md. App. 233, 252 (2010)). In undertaking this review, we will uphold the motions court's factual findings, unless they are clearly erroneous, and we review *de novo* the constitutionality of the identification procedure. *Id.* (citing *Gatewood v. State*, 158 Md. App. 458, 475-76 (2004), *aff'd* 388 Md. 526 (2005)).

Judge Moylan, writing for this Court, remarked that "[b]y its very nature . . . a one-on-one show-up is suggestive, just as 99 out of every 100 judicial or in-court identifications are suggestive." *Turner v. State*, 184 Md. App. 175, 180 (2009). In order to suppress a show-up identification, however, the procedure "must be not only suggestive, but *impermissibly* suggestive." *Id.* "Impermissible suggestiveness exists where the police, in effect, repeatedly say to the witness: 'This is the man.'" *Matthew S.*, 199 Md. App. at 448 (quoting *McDuffie v. State*, 115 Md. App. 359, 367 (1997)). Stated another way, "'[t]o do something impermissibly suggestive is . . . to feed the witness clues as to which identification to make. The sin is to contaminate the test by slipping the answer to the testee. All other improprieties are beside the point.'" *Id.* (emphasis omitted) (quoting *Conyers v. State*, 115 Md. App. 114, 121 (1997)).

Show-up identifications are not, contrary to appellant's position, *per se* unduly suggestive. Indeed, show-up identifications may be deemed permissibly suggestive "because of the exigent need to take quick action before the trail goes cold." *Turner*, 184 Md. App. at 180 (citing *Billinger v. State*, 9 Md. App. 628, 636-37 (1970)). The Court of Appeals has remarked that prompt show-up identifications "fostered '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 fresh.'" *Foster v. State*, 272 Md. 273, 290 (1974) (quoting *Bates v. United States*, 405 F.2d 1104, 1106 (1968)).

In this case, Faulkner and Officer Savoy testified at the suppression hearing. Faulkner testified that he described the perpetrator as a black male wearing a black jumper suit, a white shirt, and a ski cap. Shortly after the 911 call, Officer Savoy arrived to transport Faulkner to the location where police had stopped two men. Officer Savoy explained the show-up process to Faulkner and stated that police had stopped two men and wanted to know if either one was the man whom Faulkner observed. Faulkner and Officer Savoy did not converse during the short drive, and Faulkner did not hear any information over the police radio. Upon arriving at the scene, Officer Savoy stopped her police cruiser so that Faulkner, sitting in the front passenger seat, could see the two men, who were not in handcuffs. Officer Savoy asked Faulkner if he could identify any of the persons. Within thirty seconds of arriving at the scene, Faulkner identified appellant and stated he was certain.

The circuit court determined that appellant had failed to carry his burden to demonstrate that the identification procedure was unduly suggestive. The court noted that Officer Savoy made no suggestive comments to Faulkner, and no officer attempted to give any assistance to him. The court also commented on the speed of the identification and Faulkner's certainty, noting that the identification occurred close in time to Faulkner's initial observation of appellant in broad daylight.

We are not persuaded that the circuit court committed any error in denying appellant's motion. Appellant contends that the show-up was impermissibly suggestive because appellant was shown to Faulkner in a black ski jumper outfit, which is the same unique outfit that Faulkner described to police. Appellant attempts to distinguish *Cook v. State*, 8 Md. App. 243 (1969), from his case. The cases are, indeed, distinguishable, but not for the reasons appellant believes. *Cook* is distinguishable primarily because that case involved a line-up that occurred a day after the victim was robbed at gunpoint by a man wearing a yellow shirt and jacket. *Id.* at 249. When police arrested Cook, officers permitted him to dress, and Cook opted to wear a yellow shirt and yellow jacket. *Id.* Appellant contends that the line-up procedure was not impermissibly suggestive in *Cook* because Cook dressed himself, whereas in this case police forced appellant to be shown to Faulkner in the black ski jumper outfit.

Overlooking the fact that *Cook* – which included discussions of other line-up procedures in *Baker v. State*, 3 Md. App. 251 (1968), and *Hernandez v. State*, 7 Md. App. 355 (1969) – involved a line-up identification as opposed to a show-up procedure, appellant failed to produce any evidence that he changed his clothes between the alleged

break-in and the show-up. Moreover, appellant failed to introduce any evidence that police influenced Faulkner's thought processes prior to or during the show-up. As such, there was no evidence of improper police conduct, which is required to demonstrate that an identification procedure is impermissibly suggestive. *See Perry v. New Hampshire*, 132 S. Ct. 716, 726 (2012) (noting that the second step in the identification test only comes into play when the accused establishes improper police conduct). We agree with the motions court that appellant failed to carry his burden to demonstrate that the show-up identification procedure was impermissibly suggestive.

II. *Voir Dire*

During *voir dire* of the prospective jurors, appellant requested the circuit court to propound the following questions:

> 19. The Court will instruct you that the Defendant is presumed to be innocent of the offenses charged throughout the trial unless and until the Defendant is proven guilty beyond a reasonable doubt. Is there any member of the jury panel who would be unable to give the Defendant the benefit of the presumption of innocence?
>
> 20. Under the law the Defendant has an absolute right to remain silent and to refuse to testify. No adverse inference or inference of guilty may be drawn from the refusal to testify. Does any prospective juror believe that the Defendant has a duty or responsibility to testify or that the Defendant must be guilty merely because the Defendant may refuse to testify?

The State objected to these questions, as cumulative of other *voir dire* questions, and the circuit court declined to ask them. The State argued that appellant's *voir dire* Questions 19 and 20 were cumulative of the following questions, which the court propounded to the *venire*:

> 17. The Court will instruct you that the State has the burden of proving the Defendant's guilt of the offenses charged beyond a reasonable doubt. Are there any of you who would be unable to follow and apply the Court's instructions on reasonable doubt in this case?
>
> 18. Is there any member of the prospective jury panel who would hesitate to render a verdict of not guilty if you had a hunch that the defendant had committed the alleged crime, but were not convinced of that fact beyond a reasonable doubt?

On appeal, appellant contends that the circuit court abused its discretion in refusing to ask Questions 19 and 20. Appellant argues that those questions permit investigation into whether prospective jurors are able to follow jury instructions, which is a form of bias. Appellant concedes that those proposed questions ask about legal issues for which the court would later provide jury instructions, but appellant contends that *Twining v. State*, 234 Md. 97 (1964), in which the Court of Appeals held that a trial court does not abuse its discretion in refusing to ask *voir dire* questions as to the presumption of innocence, is no longer good law.

The State argues that the circuit court was well within its discretion to refuse to ask appellant's proposed questions. The State points out that this Court and the Court of Appeals have repeatedly held that a trial court does not abuse its discretion in refusing to ask *voir dire* questions concerning issues of law, especially when the court will later provide jury instructions on those issues. Moreover, the State contends that *Twining* is good law and appellant's proposed questions were covered by other questions the court asked of the *venire*.

The Court of Appeals has remarked: "'*Voir dire*, the process by which prospective jurors are examined to determine whether cause for disqualification exists, is the

mechanism whereby the right to a fair and impartial jury . . . is given substance.'" *Moore v. State*, 412 Md. 635, 644 (2010) (quoting *Dingle v. State*, 361 Md. 1, 9 (2000)) (internal citations omitted). "In the absence of a statute or rule prescribing the questions to be asked of venire persons during the examination, 'the subject is left largely to the sound discretion of the court in each particular case.'" *Id.* (quoting *Corens v. State*, 185 Md. 561, 564 (1946)). The Court of Appeals noted that questions asked of the *venire* panel should "'discover the state of mind of the juror in respect to the matter in hand or any collateral matter reasonably liable to unduly influence him.'" *Id.* at 645 (quoting *Corens*, 185 Md. at 564). The questioning court should tailor the questions to the case, with "the ultimate goal, of course, being to obtain jurors who will be 'impartial and unbiased.'" *Id.* (quoting *Dingle*, 361 Md. at 9).

A court abuses its discretion where the ruling under consideration is "'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Consol. Waste Indus., Inc. v. Standard Equip. Co.*, 421 Md. 210, 219 (2011) (quoting *King v. State*, 407 Md. 682, 711 (2009)). Stated another way, a court abuses its discretion "'where no reasonable person would take the view adopted by the [trial] court[] . . . or when the court acts without reference to any guiding principles.'" *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 418 (2007) (quoting *Wilson v. John Crane, Inc.*, 385 Md. 185, 198 (2005)). "'An abuse of discretion may also be found where the ruling under consideration is clearly against the logic and effect of facts and inferences before the court[] . . . or when the ruling is violative of fact and logic.'" *Id.* (quoting *Wilson*, 385 Md. at 198).

We fail to see how appellant's proposed *voir dire* questions are directed at any possible bias of the prospective jurors. Appellant's proposed questions were, essentially, "Can you and will you follow instructions?" The State is correct that numerous appellate decisions of this Court and the Court of Appeals have held that propounding *voir dire* questions concerning rules of law covered by jury instructions is inappropriate. *See, e.g., Stewart v. State*, 399 Md. 146, 162-63 (2007) (noting that *voir dire* questions concerning jury instructions are "disfavored"); *State v. Logan*, 394 Md. 378, 398-99 (2006) (same); *Marquardt v. State*, 164 Md. App. 95, 144 (2005) ("We begin by stating that this Court has not, nor could it, retreat from *Twining*. We have consistently held that *voir dire* need not include matters that will be dealt with in the jury instructions."); *Baker v. State*, 157 Md. App. 600, 616 (2004) ("'The rules of law stated in the proposed questions were fully and fairly covered in subsequent instructions to the jury. It is generally recognized that it is inappropriate to instruct on the law at this stage of the case [*voir dire*], or to question the jury as to whether or not they would be disposed to follow or apply stated rules of law.'" (Quoting *Twining*, 234 Md. at 100)).

Appellant argues that *Twining* is no longer binding case law because that case was decided when jury instructions were advisory only, whereas today they are mandatory. Appellant, however, misreads *Twining* and overlooks cases that have reinforced the *Twining* rule since jury instructions have been held to be mandatory.

In *Twining*, the Court of Appeals held:

> The other question sought to be propounded related to whether the talesmen would give the accused the benefit of the presumption of innocence and the burden of proof. We find no abuse of discretion here.

> The rules of law stated in the proposed questions were fully and fairly covered in subsequent instructions to the jury. It is generally recognized that it is inappropriate to instruct on the law at this stage of the case, or to question the jury as to whether or not they would be disposed to follow or apply stated rules of law. **This would seem to be particularly true in Maryland, where the courts' instructions are only advisory.**

234 Md. at 100 (emphasis added) (internal citations omitted). Appellant fails to acknowledge that the Court discussed the general rule of refusing to give *voir dire* questions concerning issues covered by jury instructions and then noting that it was "particularly true" in Maryland. *Id.* The general rule did not change when jury instructions became mandatory in this state.

Accordingly, we do not perceive any abuse of discretion in the circuit court's refusal to propound appellant's proposed *voir dire* Questions 19 and 20, as those questions asked the prospective jurors about legal issues that were later covered by the jury instructions. Appellant does not contend that the court failed to provide proper jury instructions.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.