UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

CONSOLIDATED CASES

Nos. 1680 & 1721

September Term, 2014

JAY HANSON BALL & LLOYD SULLIVAN

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: March 11, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Following a trial in the Circuit Court for Baltimore City, a jury convicted defendants Jay Hanson Ball ("Ball") and Lloyd Sullivan ("Sullivan") of conspiracy to commit robbery, attempted robbery, second-degree assault, and reckless endangerment.[1] The trial court sentenced each defendant to a total of 10 years in prison,[2] after which each filed a timely notice of appeal. Thereafter both defendants filed with this Court an unopposed motion to consolidate their cases for briefing and argument. We granted that motion by order dated February 13, 2015.

Both appellants pose the following question for our consideration, which we rephrase slightly:

> Did the trial court err in denying appellants' pre-trial motions to suppress evidence of an out-of-court photographic array identification?

The second question presented by each appellant differs slightly. Ball asks:

> Was the evidence sufficient to convict [him]?

Sullivan's question is narrower:

> Was the evidence sufficient to sustain the conviction of attempted robbery?

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[1]The State *nolle prossed* several burglary charges against each defendant during trial, and the jury acquitted both defendants of conspiracy to commit robbery with a dangerous and deadly weapon, attempted robbery with a dangerous and deadly weapon, first-degree assault, use of a handgun in the commission of a felony or crime of violence, wearing, carrying or transporting a handgun, and discharging a firearm within city limits.

[2] The court imposed concurrent 10-year sentences with regard to the conspiracy and attempted robbery convictions, merging, for sentencing purposes, the remaining charges.

For the reasons that follow, we shall affirm the judgments of conviction entered in the trial court as to each appellant.

I.
FACTS AND LEGAL PROCEEDINGS

A. Hearing on the Motion to Suppress

At the suppression hearing on August 27, 2014, Baltimore City Detective Akshay Banker testified that on the evening of September 7, 2013, he responded to a call for a home invasion/discharging of a firearm at 1827 East 29th Street (the "29th Street address") in Baltimore City. On his way to the 29th Street address, he was advised that police officers had located the victim, Denzel Hightower ("Hightower"), approximately two blocks away from the 29th Street address. Hightower told the responding officers that two men had attempted to rob him at the last mentioned address. Hightower said both were "older," one was lighter complected and the other darker complected. He added that one of the men was "real slick" in the way he walked and carried himself, and that the man who had the gun was approximately 5'11" in height.

Detective Banker learned that two shooting victims were at Johns Hopkins Hospital. After responding to the hospital, Detective Banker saw the two shooting victims and learned that their names were Jay Hanson Ball and Lloyd Sullivan. Detective Banker suspected that Ball and Sullivan may have been the persons who had attempted to rob Hightower. He then developed two photographic arrays, each containing one photograph of the suspect and five photographs of randomly selected individuals who were similar in appearance to the suspect(s).

Detective Banker explained that in choosing the photos to accompany the picture of each suspect, he employed a police database that provides a choice of photos of individuals matching the description of the suspect, and he chose the ones closest to each suspect's appearance.

Before showing the arrays to Hightower, Detective Banker read Hightower the following paragraph from the reverse side of the array:

> The six photographs on this form may or may not contain a picture of the subject in connection with this investigation. When looking at the photographs, keep in mind that individuals may not appear exactly as they did on the date of the incident because features such as hairstyles and facial hair (beards and mustaches) may be changed. Photographs may not always depict the true complexion of the person and can be affected by the quality of the photographs. After viewing each photograph, please indicate whether you have made any identification in connection with this investigation.

After reading the paragraph aloud, Detective Banker had Hightower initial the paragraph on each array to indicate that he understood it. Hightower then turned over the arrays, one at a time, so the pictures were visible. Hightower made a positive identification of each of the appellants within 15 to 30 seconds of seeing their pictures. Hightower then returned each picture to its original position and wrote a brief statement as to each suspect's role in the crime, signing his name when he was through. With regard to Sullivan, he wrote, "the short slick guy. I was shaven pass we got to a fight."[3] With regard to Ball, he

[3] State's Exhibit 1 comprised the photo array from which Hightower identified Sullivan, and State's Exhibit 2 was the photo array from which Hightower identified Ball; both exhibits were admitted into evidence for the purpose of the motions hearing.

wrote, "Pull the gun & he tryed to shot me wen he came ina house. He said were the money at."

Upon cross-examination regarding the suspects' complexions, Ball's attorney asked if Detective Banker would agree that, notwithstanding Hightower's description of one of the suspects as light complected and one as dark complected, none of the photos in either array showed a man with a light complexion. The detective responded that the photos "are subject to change" and that the "lighting from the photos can be light or dark, which is stated in the statement" he read to the victim.

Denzel Hightower testified that he positively identified, from the photo arrays presented to him, the men who attempted to rob him on September 7, 2013. He further testified that he was able to get a good look at them that night. He denied having been coached by the police about whom to choose.

Hightower added that he had been shown pictures other than those in the photo arrays during his interview with police, but he could not recall if the other pictures had been shown to him before he was shown the photo arrays containing appellants' pictures, and he denied that the other photos he was shown depicted "people that were taken to the hospital."

Counsel for Ball argued at the conclusion of the suppression hearing that because Hightower (purportedly) had examined other photos before viewing the photo arrays at issue, that prior viewing gave rise to an inference that the police had improperly suggested to Hightower whom he should select. Counsel for Sullivan adopted that same argument.

The court ruled:

> From Detective Banker and Mr. Hightower. I take note that Detective Banker testified that in State's Exhibit No. 1, for the motion, as well as State's Exhibit No. 2, for the motion, the photo arrays at issue here, that they were shown to Mr. Hightower faced down, that – with the instructions faced up and that Detective Banker read on both times, for both Exhibit 1, Exhibit 2, the instructions before asking Mr. Hightower to turn over State's 1 and State's 2 to identify whoever he was able to identify.
>
> That's to say, Detective Banker also indicated that the alleged victim had indicated to him that he was able to see the suspects from the front, one of them, and from the side the other. Detective Banker also testified that it did not take long for Mr. Hightower to identify the suspects in this case.
>
> For Mr. Sullivan it took a few seconds and I think he said maybe 15 seconds and for Mr. Ball it took a little longer and then he indicated maybe about 30 seconds.
>
> With respect to Mr. Hightower's testimony, he was only shown and shown by Mr. LaCorte [trial counsel for Ball], State's Exhibit No. 1, which he identified as having seen it before. Also identified his handwriting and he indicated that the police asked him, "Does anybody look like the person?"
>
> He also indicated that he was able to identify the suspects. He also stated, meaning Mr. Hightower, that he was free to leave and although had initially testified that he was not able to recall how many officers. He did say that there were two officers present and that there was no discussion or no talk before the taped statement.
>
> There was no indication, he testified, of who the suspect was that was given to him. And upon Mr. Beatty's questioning on behalf of Mr. Sullivan, he finally indicated that the detectives did not ask anything about any charges that he may have been facing. In determining the admissibility of an

> extrajudicial identification such as the photo arrays at issue here, the burden of showing some unnecessary suggestiveness in the procedures employed by the police lies with the defense.
>
> If the defense met that burden then that is when the State must prove by clear and convincing evidence the existence of reliable---of the reliability of the identification and then the Court would have to determine whether that reliability outweighs any corrupting affect [sic] of the suggestive procedure.
>
> So that, as you all know, in Maryland there is a two-stage inquiry for challenging an out-of-court identification and that has been established. I conclude that in order for the Court to make a determination that a pre-trial identification is excludable, that suggestiveness has to be impermissible and such that it gives rise to a very substantial likelihood of irreparable misidentification.
>
> That is not the situation here and having considered the motion to suppress for both Mr. Ball and Mr. Sullivan, it is denied.

B. Trial

Hightower testified that on September 7, 2013, he had smoked marijuana both before and after his arrival at the 29th Street address. That evening he visited the 29th Street address and while there he, along with two females, were playing a video game. At one point he went out onto the porch of the house. It was there that two men approached him on the steps of the porch. One of the men was armed with a gun, that he pointed toward his face, and attempted to push him (Hightower) into the house while asking, "Where the money at?"[4] As Hightower struggled with that man over possession of the gun, the second

[4] The State introduced evidence that someone grew marijuana plants in the bathroom of the house that appellants attempted to invade. The police found approximately eight suspected marijuana plants and eight bags of suspected marijuana in the house.

man stood behind him on the porch talking on a cell phone. As the struggle continued, the second man then went into the living room of the 29th Street address.

During the struggle, the gun went off near Hightower's right ear. Hightower pushed the shooter off the porch and took off running down the street. Shortly thereafter, the police approached him and placed him in handcuffs, saying "something about a shooting."

When interviewed by the police, Hightower described the would-be robbers as black men, one with a lighter complexion and one with a darker complexion. When asked which defendant was the lighter complected and which was the darker complected, he opined that Sullivan was the lighter complected man, but he agreed that in the courtroom "they both look the same complexion now[.]"

During his approximately 18 hours at the police station, the detectives showed Hightower photographic arrays from which he identified the men who had approached him on the porch and attempted to rob him. He also made an in-court identification of appellants as the men he had chosen from the photo arrays.

Detective Banker testified that in responding to the home invasion/discharging call, he encountered Hightower, who had a laceration on his finger. After interviewing Hightower, the detective proceeded to the 29th Street address. Finding no one in the house, he went to Johns Hopkins Hospital because other police officers had received a call regarding two walk-in shooting victims, Ball and Sullivan, who had arrived at that hospital close in time to the home invasion on 29th Street.

In front of the jury, Detective Banker repeated his suppression hearing testimony concerning the procedure he used when showing Hightower the photo arrays. He testified that Hightower positively identified appellants as the men who approached him on the porch of the house shortly before they attempted to rob him.[5]

At the close of the State's case-in-chief, appellants moved for judgment of acquittal. Ball argued that "given the inconsistencies in the testimony and the prior statements of this witness, . . . no rational fact finder, even when the evidence is viewed in the light most favorable to the State, could find [Ball] guilty beyond a reasonable doubt[.]" Sullivan, in his motion, argued that judgment should be entered in Sullivan's favor, not only because of inconsistencies in Hightower's testimony, but because the victim had only testified as to what the two assailants did collectively, without ever identifying what each individual person did. Therefore, Sullivan's counsel asserted, the State had not established specific criminal agency for the charged counts.

The State countered that Hightower had identified both appellants as his assailants and that, given the facts, the jury could infer that they were working in concert as accomplices, which would impute guilt to each of them. As for inconsistencies in the testimony, the prosecutor asserted: "that goes to the trier of fact."

The court denied the motion for judgment of acquittal.

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[5]The detective agreed that approximately six weeks after Hightower's identification of appellants, the Baltimore City Police Department changed its policy with regard to photographic identifications. The new policy requires that the photos be presented to a witness one at a time by an officer not involved in the investigation, so as to minimize suggestiveness.

Neither appellant put on any evidence, but both appellants renewed their motions for judgment of acquittal at the close of all the evidence. Ball adopted what Sullivan had argued during his initial motion, and Sullivan reiterated that the State had not elicited any testimony "that specifically said who did what." The court denied the renewed motions.

II. DISCUSSION

A. First Argument

Both appellants contend that the suppression court erred when it denied their motions to suppress Hightower's pre-trial identification of them as the perpetrators of the charged crimes. Ball argues that because Hightower testified at the suppression hearing that the police had shown him photos prior to his viewing of the photo arrays, the police "slipped the answer" to him, thus contaminating the identification procedure. Sullivan on the other hand contends that the array containing his photo was impermissibly suggestive and unreliable because Hightower had described him to the police as "lighter complected," but Detective Banker could not say that either photo array contained any photos of lighter complected black men.

Although not raised by the State in its brief, we conclude that Sullivan has not preserved for appellate review his contention that the array was suggestive because it did not contain the photographs of any lighter complected men. At the suppression hearing, counsel for Sullivan argued, as did Ball's counsel, only that Hightower's (alleged) review of other photos before he reviewed the photo array in question gave rise to an inference that the police were improperly suggesting to Hightower which picture(s) he should

choose. Counsel for Sullivan, in arguing for suppression, never contended that the array was suggestive because no light complected black men were included in it.

Pursuant to Maryland Rule 8-131(a), ordinarily, except for certain jurisdictional issues, an "appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" In addition, "[i]t is well established that, absent good cause, Rule 4–252 prohibits a criminal defendant from raising a theory of suppression on appeal that was not argued in the circuit court." *Savoy v. State*, 218 Md. App. 130, 141 (2014)(footnote omitted); *see also Carroll v. State*, 202 Md. App. 487, 513 (2011), *aff'd,* 428 Md. 679 (2012) ("if a defendant fails to raise a ground seeking suppression of evidence, which is required to be raised pre-trial by Rule 4–252, the defendant has waived his or her right to appellate review of that issue"). In failing to raise an argument that the photos in the array presented to Hightower did not contain pictures of light-complected black men, Sullivan has waived that issue for appeal purposes.

Even were this issue properly before us, Sullivan would not prevail. Although Hightower described one of his assailants as "lighter complected," he did not specify at the suppression hearing which suspect was the lighter and which the darker complected man. It was not until trial that Hightower opined that Sullivan may have been the lighter complected man, and, at that point, he believed both appellants to have approximately the same complexion.

Although no lighter complected black men appeared in the array containing Sullivan's photograph, Detective Banker developed Sullivan as a suspect after responding

to Johns Hopkins Hospital and seeing Sullivan there. The photos he chose from the police database to accompany Sullivan's photograph were ones he believed *actually* resembled Sullivan, not just the general description Hightower gave of him. Also, from our independent review of the photo array, Sullivan's photograph does not differ in any appreciable or unreasonable manner from the other photographs therein, and, based on the complexion of the men in the array, we can discern no impermissible suggestiveness.

With regard to Ball's argument, it should be remembered that our review of a circuit court's denial of a motion to suppress evidence is ordinarily limited to information contained in the record of the suppression hearing and not the record of the trial. *Brown v. State*, 397 Md. 89, 98 (2007). When the motion to suppress has been denied, we are further limited to considering the facts in the light most favorable to the State as the prevailing party. *Id.* In considering the evidence presented at the suppression hearing, we extend great deference to the fact-finding of the suppression court, and when conflicting evidence is presented, we accept the facts as found by the hearing court unless it is shown that those findings were clearly erroneous. *Id.* We review *de novo*, however, all legal conclusions, making our own independent determinations of whether a constitutional right has been violated. *Wengert v. State*, 364 Md. 76, 84 (2001).

"'[D]ue process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures.'" *McDuffie v. State*, 115 Md. App. 359, 366 (1997) (quoting *Moore v. Illinois*, 434 U.S. 220, 227 (1977)). We have explained that "the scope of identification procedures

constituting 'impermissible suggestiveness' is extremely narrow[.]" *Jenkins v. State*, 146 Md. App. 83, 126 (2002), *rev'd on other grounds*, 375 Md. 284 (2003).

> To do something impermissibly suggestive is not to pressure or browbeat a witness to make an identification but only 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. (citation and quotation marks omitted) (emphasis in original); *see also Thomas v. State*, 213 Md. App. 388, 417 (2013), *cert. denied*, 437 Md. 640 (2014) ("Suggestiveness exists where the police, in effect, say to the witness: This is the man.").

Maryland case law establishes a two-prong test for resolving challenges to extrajudicial identifications. First, the defense bears the initial burden of showing that the identification procedure employed was impermissibly suggestive. If the suppression court rules that the out-of-court identification was not made under suggestive circumstances, the inquiry ends, and the identification evidence is admissible. *Thomas*, 213 Md. App. at 416-17. 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." *Thomas v. State*, 139 Md. App. 188, 208 (2001).

Turning to the matter at hand, we conclude, from the testimony at the suppression hearing, that the identification procedure employed by the police was not suggestive at all.

Ball makes no argument that the preparation or presentation of the photo array containing his photograph was impermissibly suggestive. He argues only that the police

showed Hightower other photos prior to his review of the photo array, and, in so doing, the police suggested to him whom he should choose from the array. But there was no testimony at the suppression hearing that Hightower was actually shown other pictures prior to reviewing the two arrays in question. Moreover, the testimony at the suppression hearing was uncontradicted that the police did not suggest to Hightower what picture(s) to select.

Hightower testified only that he was shown some photos other than those appearing in the photo arrays during his interview with police, but he could not recall if that had occurred before he was shown the photo arrays. He emphatically denied having been coached by the police about whom to choose from the arrays. Detective Banker corroborated Hightower's testimony when he testified that he did not tell Hightower anything in relation to making an identification, other than reading him the introductory paragraph on the back of the photo array.

In the absence of any evidence to contradict the testimony of Hightower or Detective Banker, and considering the totality of the circumstances of the pre-trial identification procedure, we agree with the suppression judge that there was no indication that the presentation of the array was in any way suggestive. We therefore hold that, the suppression court's denial of Ball's motion to suppress Hightower's pre-trial identification of him from the photo array was not erroneous.

B. <u>Sufficiency of the Evidence</u>

Sullivan contends that the evidence was insufficient to sustain his conviction for attempted robbery; Ball contends that the evidence was insufficient to convict him of any charge because Hightower's testimony was "incredibly vague" and did not specify which man performed which acts. Both appellants contend the State failed to prove that either appellant committed a specific crime, as opposed to merely being present during the commission of a crime.

We recently set forth the applicable standard for reviewing challenges to the sufficiency of the evidence:

> In reviewing the sufficiency of the evidence, an appellate court determines "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979); *see also Derr v. State,* 434 Md. 88, 129, 73 A.3d 254 (2013); *Painter v. State,* 157 Md. App. 1, 11, 848 A.2d 692 (2004) ("[t]he test is 'not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder'") (citations omitted) (emphasis in original).
>
> The appellate court thus must defer to the factfinder's "opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence[.]" *Pinkney v. State,* 151 Md. App. 311, 329, 827 A.2d 124 (2003); *see also State v. Mayers,* 417 Md. 449, 466, 10 A.3d 782 (2010) ("[w]e defer to any possible reasonable inference the jury could have drawn from the admitted evidence and need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence") (citations omitted). Circumstantial evidence, moreover, is entirely sufficient to support a conviction, provided that the circumstances support rational inferences from which the trier of fact could be convinced beyond a reasonable doubt of the guilt of the accused. *See, e.g., State v. Manion,* 442

> Md. 419, 431–32, 112 A.3d 506 (2015); *Painter,* 157 Md. App. at 11, 848 A.2d 692.

Benton v. State, 224 Md. App. 612, 629-30 (2015).

Hightower testified that two men, one with a gun, approached him as he stood on the porch at a house on 29th Street. One of the men demanded money from him while trying to push him into the house. After the gun discharged, Hightower pushed the shooter off the porch and ran.

Hightower's testimony, if believed, established that both appellants approached him on the porch of the house. One was in front of him and the other behind him. On the photo array from which he identified Ball, Hightower wrote that it was that man who pulled the gun, tried to shoot him, and demanded to know where the money was. Thus, contrary to Ball's claim that no evidence established which man performed which act during the attack, the evidence did show that Ball was the man with the gun. According to Hightower's testimony, while he struggled with the gunman, the second man went behind him and entered the living room of the house. Hightower therefore did distinguish which appellant performed which act. But even if Hightower had failed to make that distinction, the jury reasonably could have determined from Hightower's testimony that the two men acted in concert to commit the charged crimes.[6]

[6] During his direct-examination by the State, Hightower was asked which appellant was the one with the gun and Hightower said: "[t]he one right there," whom the prosecutor clarified was wearing a teal-colored shirt. Counsel did not, however, say whether it was Ball or Sullivan who wore the teal-colored shirt, but the judge and jury would have known. On another occasion during trial, counsel for Sullivan commented that his client was the (cont.)

As we explained in *Diggs & Allen v. State*, 213 Md. App. 28, 90 (2013) (quoting *State v. Williams*, 397 Md. 172, 195 (2007)), *aff'd sub nom. Allen v. State*, 440 Md. 643 (2014), "'when two or more persons participate in a criminal offense, each is responsible for the commission of the offense and for any other criminal acts done in furtherance of the commission of the offense or the escape therefrom.'" In other words, "[e]ach conspirator is responsible for everything done by his confederates which follows incidentally as one of the probable and natural consequence in the execution of the common design[.]" *Veney v. State,* 251 Md. 159, 174 (1968) (quoting 1 Wharton, Criminal Law and Procedure, § 90 (1957)).

Here, Hightower's testimony established that Ball shot at him during a struggle for possession of a gun; and that while the struggle was ongoing, Sullivan went behind Hightower and entered the house. That evidence was sufficient for the jury to conclude that Ball and Sullivan were accomplices in the attempted robbery and related crimes, and that both should be held equally accountable.

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

(cont.)
one wearing a "blue shirt." Based on the above, Sullivan suggests that Hightower wrongly identified him as Ball. We disagree. First, the comment by counsel that Sullivan wore a blue shirt is not evidence. Second, although teal is a shade of blue, it may well have been that both appellants wore blue shirts of different shades.