UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2127

September Term, 2014

KENDALL ALONZO GOVAN

v.

STATE OF MARYLAND

Woodward,
Reed,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: March 17, 2016

Appellant Kendall Alonzo Govan appeals from his convictions in the Circuit Court for Anne Arundel County of attempted second degree murder and related charges. He raises the following questions for our consideration, which we have rephrased:

> 1. Did the circuit court err when it failed to grant a new trial in light of Christopher Masson's letters to the circuit court that he had been pressured by the State to identify Mr. Govan as the driver of the car involved in the shooting, and indeed that Mr. Govan was innocent?
>
> 2. Did the circuit court err when it failed to grant a new trial in light of the later-discovered evidence that a juror had witnessed an audience member making a threatening gesture towards Christopher Masson during his testimony?
>
> 3. Did the Circuit Court err by allowing the identification testimony of David Masson?
>
> 4. Was the evidence sufficient to support the conviction?

Finding no error, we shall affirm.

I.

Appellant was indicted by the Grand Jury for Anne Arundel County of thirty four charges including three counts of attempted first degree murder, two counts of attempted second degree murder, two counts of first and second degree assault, reckless endangerment, carrying a handgun, and two counts of use of a firearm in a felony. He proceeded to trial before a jury and the jury convicted him of one count of attempted second degree murder, two counts of first degree assault, five counts of reckless endangerment, five counts of

malicious destruction of property and two of the firearm charges. The charges arose from an event which occurred on January 13, 2014. The following facts were adduced at trial.

On the morning of January 13, 2014, David Masson was asleep in his home while his son Christopher Masson was outside getting ready for work. A silver sedan drove slowly down the street. The driver of the silver sedan held a firearm out of the window of the car and shot at Christopher Masson. David Masson testified that, at around 10:00 a.m., he heard approximately six gunshots, and a bullet came through his window. He then ran outside, and he saw the vehicle driving very slowly in front of his house, moving from his right to his left, the driver's hand holding a gun. He saw the profile of the driver's face, but he could not see how many people were in the vehicle. He could not tell the race of the people in the car, but he could see the black sleeve of the driver's jacket.

David Masson got in his truck and followed the silver car, noting the license plate number. At this point, he could see an African-American male with dread locks in the car. The passenger turned to look back at David Masson a couple of times while David Masson was following the car. David Masson also saw the driver, an African-American male with short hair, who did not turn back to look at Mr. Masson, but whom Mr. Masson could see looking back at him in the car mirrors. Mr. Masson followed the vehicle, then he turned into a guard shack at a National Security Agency facility to call the police when the silver vehicle turned into an apartment building parking lot.

Detective Kelly Harding of the Anne Arundel County Police Department responded to the shooting. David Masson told Detective Harding that there were two black males involved in the shooting, that the driver had short hair and the passenger had shoulder-length corn rows. He described the driver as wearing a black sweatshirt type of material. Shortly thereafter, Detective Harding informed David Masson that the police apprehended a suspect and would like for him to view the suspect. Detective Harding drove Mr. Masson in her vehicle to where the suspect was detained, where Mr. Masson identified the suspect, Kingsley McLean, as the passenger of the silver car from the shooting.

Detective Harding then drove David Masson in her vehicle to another location nearby where police had detained appellant. David Masson identified appellant as the driver of the car based on his race, his short hair and the black sleeves.[1] Upon inspection of the silver sedan, a Lexus, the police found a Lincoln College of Technology identification with appellant's picture on it, ammunition, an empty pistol magazine, and spent shell casings.

The jury convicted appellant of one count of attempted second degree murder, two counts of first degree assault, five counts of reckless endangerment, five counts of malicious destruction of property and two firearm charges. Appellant filed a motion for a new trial.

[1]David Masson wears prescription eyeglasses for nearsightedness. He was not wearing his eyeglasses when he left his house and first saw the vehicle, he was not wearing his eyeglasses when he followed the vehicle in his truck, nor was he wearing his eyeglasses when he identified appellant as the driver of the car.

He raised several issues, but the one important to this appeal was that the trial court erred by not removing a juror for cause and seating the next numerical alternate juror when that juror had reported a member of the gallery made a threatening gesture at her. On October 8, 2014, the assistant state's attorney emailed defense counsel and stated that he had learned that a second juror had witnessed an audience member making a threatening gesture towards the witness, Christopher Masson, during his testimony. On September 23, 2014,[2] and on October

[2]One letter, addressed to the trial judge, dated September 23, 2014, bearing the signature of Christopher Daniel Masson, and bearing a notary seal, reads as follows:

> "I am contacting you in regards to Mr. Kendall Govan, the defendant in case number: 02K14000269. On August 29, 2014, a jury found Mr. Govan guilty in a case in which I provided eyewitness testimony. During trial, I stated that Mr. Govan was not the person I saw driving the vehicle involved in the crime.
>
> I am reaching out to you because I saw the person who was driving the vehicle and Mr. Govan was not the driver. Although I do not know Mr. Govan personally, he faces time in prison for a crime I know for a fact he did not commit. Prior to trail (sic) I received pressure from the Assistant State's Attorney [name deleted], to identify Mr. Govan as the driver. I fear my father was also subject to such pressure. It would be a terrible injustice on my part not to speak up and bring this matter to your attention.
>
> I hope you consider this information in regards to the charges Mr. Govan is facing. Whatever the outcome I want it to be known that Mr. Govan was not the driver. Therefore, making him innocent of the crime his (sic) accused of and sending him to prison would be wrong. Thank you for taking the time to hear my thoughts on this matter.

(continued...)

18, 2014,[3] Christopher Masson wrote two letters to the circuit court, stating that [a different assistant state's attorney] had "placed pressure on [him] to identify Mr. Govan as the driver" and that "Mr. Govan is innocent and is not the person I saw driving the vehicle."[4] Defense

(...continued)

Sincerely,
/s/
Christopher Daniel Masson
[phone number deleted]"

[3]The assistant state's attorney sent the following letter to defense counsel:

> "I wanted to inform you that after the verdict the State attempted to meet with the jurors to discuss the case. However the jurors wanted to leave without talking. It was brought to our attention by the courtroom clerk that a juror indicated, after the verdict, that he/she witnessed an audience member make a threatening gesture toward Mr. Christopher Masson during his testimony. The juror never brought this to the attention of the Court during the trial. Therefore, the State was unaware of the gesture until after the verdict.
>
> I thought I had sent you an email/letter about this issue when the State first learned of it. Having received Mr. Masson's recent letter, I went back through my file and can not find an email/letter addressing this issue.
>
> Please do not hesitate to contact me if there are any questions."

[4]One letter, dated October 18, 2014, signed by Christopher Daniel Masson and notarized by notary public, reads as follows:

> "I am contacting you in regards to case number: 02K1400026. On September 23, 2014, I sent a letter to the Clerk of the Circuit

(continued...)

counsel incorporated the email and the two letters into his motion for a new trial.

The circuit court held a hearing on the motion for a new trial. Appellant did not call

[4](...continued)

> Court for Anne Arundel County in reference to Mr. Govan and case number: 02K1400026. In the letter, I stated that the Assistant State's Attorney [name deleted] placed pressure on me to identify Mr. Govan as the driver.
>
> When I spoke with the Assistant State's Attorney [name deleted] he informed me that Mr. Govan had a criminal record and because of his criminal background, they believed he committed the crime. I was questioned, told what questions I would be asked, how to respond, what say and what not to say. I was told not to confirm or deny if Mr. Govan was the driver and not to mention the fact the person I saw driving the vehicle had hair.
>
> During our meeting, I made the Assistant State's Attorney [name deleted] aware that I had seen the driver twice, and that it was not Mr. Govan. During trial, I did not testify to the court having seen the driver twice because I felt intimidated and did not want to say the wrong thing. During my testimony I said, 'I didn't know' or 'couldn't remember' information because of the pressure I received from the State's Attorney [name deleted] to distort and conceal what I actually saw.
>
> I regret not bringing this matter to the courts attention prior to or during trial. Please take the time to consider this information. Mr. Govan is innocent and is not the person I saw driving the vehicle. Thank you for taking the time to consider this matter.
>
> Sincerely,
> /s/
> Christopher Daniel Masson
> [phone number deleted]"

any witnesses but instead relied upon the email and the two letters. The court denied the motion, finding that Christopher Masson was not credible. The court explained as follows:

> "The Court will simply address the Christopher Masson letters as follows. Christopher Masson, a sworn witness in this case, has written two letters. They are in the file. He alleges improprieties against the Assistant State's Attorney [name deleted]. The Court notes that the Court previously commented on Mr. Masson's perhaps lack of credibility. I did so outside of the presence of the jury so as not to influence the fact finder in any way and that was the jury.
>
> The Court did not find credible Christopher Masson. Christopher Masson was credible when he said someone shot at him. Christopher Masson was credible when he described a car, a chase and a second shooting. Beyond that, his vague recollections and his assertions over and over and over again that he can't remember, let me get the exact word because I even highlighted it in my notes when I wrote it down.
>
> I am sorry, I have about 60 pages of notes. 'I don't know' said over and over 'I don't know.' The Court did not find him credible as it related to his comments that he did not know what happened. The evidence though was overwhelming when we consider the defendant's identification in the car, shells in the car, the gun was found in the apartment that was the co-defendant's mother's that she had just moved out of.
>
> The fact that the defendant and co-defendant were arrested right at the scene. Evidence is overwhelming in other regards. I find Mr. Masson's comments not credible in any way, shape or form. I think I remarked at the time out of the presence of the jury, I am well aware there is a code. I am well aware that people have to adhere to a code. I have had more than one case where a witness was stabbed or beaten in a prison setting. And that person may have actually been the other person's cell mate.

> And when it comes time for trial, they have absolute amnesia. That is the code, Christopher Masson followed it, he upheld his end of the bargain which was to remember practically nothing but I find him not credible and I would not do anything in light of his comments. The motion for a new trial is denied."

The court sentenced appellant to two twenty-five year terms of incarceration, to be served concurrently, for the two first degree assault convictions of Christopher Masson; thirty years, concurrent, for the attempted second degree murder of David Masson; five consecutive five-year sentences, concurrent with the other sentences, for the reckless endangerment convictions; five concurrent sixty day sentences and restitution in the amount of $3,994.65 for the malicious destruction of property convictions; and, two concurrent twenty year sentences for the two firearm convictions.

This appeal followed.

II.

We turn to appellant's argument that the trial court erred in denying his motion for a new trial. We review the denial of a motion for a new trial for abuse of discretion. *Merritt v. State*, 367 Md. 17, 28-29 (2001). The burden of persuasion is upon the defendant, not the State. *Jackson v. State*, 164 Md. App. 679, 686 (2005). If the defendant is relying upon newly discovered evidence as a basis for the motion, the defendant must show that the evidence is indeed newly discovered. *Argyrou v. State*, 349 Md. 587, 609 (1988). The trial

judge should consider the weight of the evidence presented, as well as the credibility of the witness. *Id.* at 599-600. In our review of the trial judge's ruling, we pay great deference to credibility determinations of the trial judge. *Id.* at 600. The trial judge exercises discretion based upon "the opportunity the trial judge had to feel the pulse of the trial, and to rely on his or her own impressions in determining questions of fairness and justice." *Id.*

A. Christopher Masson's letters following the verdict

We address first appellant's argument that his conviction should be reversed in light of Christopher Masson's letters stating that he was intimidated by the assistant state's attorney to falsely identify appellant as the driver and Masson's statement that appellant is innocent. We are fortunate in this case that the trial court did what we expect of trial judges: to explain reasons for rulings, on the record. In his ruling on the motion, the trial judge told all that he did not believe Christopher Masson. This was not the first time in this case that the trial judge expressed an opinion on the credibility of Masson. During the trial, outside the presence of the jury, the trial judge indicated that he did not believe Masson when he testified that he did not know who shot at him.

In addition to not believing Masson, the trial judge was within his discretion to deny the motion based upon (1) Masson's pretrial and in-court identification of appellant, (2) gunshot residue upon appellant's hands, (3) appellant running from the police, and (4) appellant's photo identification found in the back seat of the Lexus.

Finally, at trial Masson told the jury that he did not think that appellant was the shooter and therefore, the substance of the evidence was not newly discovered evidence. The jury heard Masson's testimony as to appellant's involvement in the criminal event and had the opportunity to assess his credibility and to reject his testimony.

We hold that the trial judge did not err nor abuse its discretion in denying the motion for a new trial.

B. Allegation that juror witnessed audience member making threatening gesture

Appellant argues that the trial court erred in denying his motion for a new trial based on what he characterizes as newly discovered evidence. Following the return of the verdict, the State was informed by the courtroom clerk "that a juror indicated, after the verdict, that he/she witnessed an audience member make a threatening gesture toward Mr. Christopher Masson during his testimony." The State informed defense counsel on October 8, 2014, after the State received Christopher Masson's first letter. Appellant maintains that while it is impossible now to determine what effect the audience member's threatening gesture had on the juror, or if any other jurors witnessed the incident, "it is reasonable to suppose, however, that the jury would have assumed that the threatening gesture was made by someone connected with [appellant], in an attempt to suppress the testimony of Christopher Masson (who was testifying for the State)," concluding, he says that this assumption could have

improperly created bias in the jury's mind against appellant. Further, appellant argues that because the juror did not disclose the threatening gesture when it occurred, that juror permitted "potential jury bias to fester, unknown to the defense, and thereby depriving [appellant] of a fair trial before impartial peers."

The State's argument before this Court is based upon the trial court's ruling, and the procedural argument that appellant has the burden of proof to support a motion for a new trial, and he fails to carry this burden. Because the trial court had no way of knowing what the juror actually may have seen, or if any audience member conduct had any effect on any juror, appellant has not met his burden of proof. The State quotes from *Jackson v. State*, 164 Md. App. 679, 686 (2005):

> "When the evidence and the argument at a hearing on a Motion for New Trial, . . . are so frustratingly scant that the trial judge cannot arrive at a definitive conclusion one way or the other, how does he resolve his doubt? To wit, who wins and who loses the nothing-to-nothing tie? In law, of course, there are no ties, for we have deliberately created a device called the allocation of the burden of proof for the precise purpose of avoiding ties. That party to whom the burden of proof is allocated is, by definition, the loser of what would otherwise be a tie. At a hearing on a Motion for New Trial, the burden of persuading the trial judge that such a remedy is called for is on the defendant, as the moving party."

The trial court held a hearing on appellant's Motion for a New Trial. The court rejected this basis for a new trial, explaining as follows:

"The Court will simply address the Christopher Masson letters as follows. Christopher Masson, a sworn witness in this case, has written two letters. They are in the file. He alleges improprieties against the Assistant State's Attorney [name deleted]. The Court notes that the Court previously commented on Mr. Masson's perhaps lack of credibility. I did so outside of the presence of the jury so as not to influence the fact finder in any way and that was the jury.

The Court did not find credible Christopher Masson. Christopher Masson was credible when he said someone shot at him. Christopher Masson was credible when he described a car, a chase and a second shooting. Beyond that, his vague recollections and his assertions over and over and over again that he can't remember, let me get the exact word because I even highlighted it in my notes when I wrote it down.

I am sorry, I have about 60 pages of notes. 'I don't know' said over and over 'I don't know.' *The Court did not find him credible as it related to his comments that he did not know what happened*. The evidence though was overwhelming when we consider the defendant's identification in the car, shells in the car, the gun was found in the apartment that was the co-defendant's mother's that she had just moved out of.

The fact that the defendant and co-defendant were arrested right at the scene. Evidence is overwhelming in other regards. I find Mr. Masson's comments not credible in any way, shape or form. I think I remarked at the time out of the presence of the jury, I am well aware there is a code. I am well aware that people have to adhere to a code. I have had more than one case where a witness was stabbed or beaten in a prison setting. And that person may have actually been the other person's cell mate.

And when it comes time for trial, they have absolute amnesia. That is the code, Christopher Masson followed it, he upheld his end of the bargain which was to remember practically nothing

> but I find him not credible and I would not do anything in light of his comments. The motion for a new trial is denied."

As noted above, a motion for new trial is addressed to the sound discretion of the court, and the trial court's ruling will not be disturbed on appeal except upon a showing of clear abuse. We hold that the trial court did not abuse its discretion in denying appellant's motion for new trial on the ground of newly discovered evidence.

The evidence presented to the trial court was indeed sparse. The court had before it the sole comment of the courtroom clerk. Appellant did not subpoena the juror to the hearing or the courtroom clerk to establish the facts or to assess any prejudice or bias on the juror's part. Aside from the statement that an audience member made a "threatening gesture," the trial court had no facts as to what had transpired nor did the court have any evidence of any effect upon the juror or prejudice. Appellant failed to carry his burden and the trial court did not abuse its discretion in denying the motion for a new trial.

III. Admissibility of eye-witness identification

A. The Show-up

Appellant appears to be contesting the eyewitness identification in two ways: first, the in-court identification by David Masson, and second, the admission into evidence of the pre-trial identification arising from the on the street show-up. He argues that the trial court erred

in several ways when it allowed witness David Masson's eyewitness identification into evidence. One argument refers to the witness's in-court identification during the trial and the second argument refers to the trial court's denial of appellant's pre-trial motion to suppress David Masson's extrajudicial show-up identification. Appellant argues that Mr. Masson's identification was flawed for two reasons: (1) that the witness did not see the face of the driver of the vehicle, that the witness's clothing description of the driver did not match appellant's jacket and that the witness was not wearing his prescription eyeglasses when he witnessed the crime or identified appellant, and (2) that the identification was procedurally improper because the pre-trial show-up was "unnecessarily suggestive."

As to the in-court identification the State maintains that appellant's eyeglass/clothing unreliability issue as it relates to an arguably flawed and inadmissable identification was not raised below, and therefore is not properly before this court for our review. According to the State, the trial court should not have *sua sponte* precluded Mr. Masson's eyewitness testimony. On the merits, assuming preservation *arguendo*, the State asserts that appellant's argument is factually and legally incorrect. While conceding that the witness admitted that he did not see the driver's face as the car drove past his house, the State adds the additional testimony by the witness that "I saw the driver's profile." The witness also testified that the car chase lasted a few minutes, and that he saw appellant, as appellant repeatedly looked in the mirrors back at the witness.

As to the extra-judicial identification, the State relies upon accepted eye-witness jurisprudence that prompt show-ups, absent some "special element of unfairness," are admissible generally in evidence. Noting that appellant complains about the timing of the show-up, and the police failure to conduct a lineup, the State maintains that simply because Mr. Masson had identified the passenger shortly before the show-up with appellant, the procedure was not so impermissibly suggestive as to lead to an irreparable misidentification. Moreover, according to the State, the timing of the show-up was nothing more than a normal incident of hot pursuit of two suspects, not just one.

The trial court held a hearing pre-trial on appellant's motion to suppress the eye-witness identification. Finding no unnecessary or impermissible suggestiveness, the court denied the motion, explaining as follows:

> "There is no unnecessary or impermissible suggestiveness in the detective's actions. There is nothing to indicate that she said we got them, I am taking you to see the passenger, I am taking you to see the driver. In fact, she did what it seems she has been trained to do and she should do, we have someone in custody, they have been detained, I am telling you to take a look, tell me where you know them from . . . Tell me if you know him. The person could say I know him or I don't know him.
>
> The issue of the weight, the issue of the circumstantial evidence is really that for trial . . . in this case it might be the circumstantial type evidence, [defense counsel], that you speak of. But there is also some direct evidence, too. How long the victim had to look at the individuals, is a factor. His certainty is a factor. There is a Jury Instruction directly on point.

> But in terms of the threshold issue of admissibility, the Court denies the Motion to Suppress in terms of the admissibility.
>
> The weight to be given to the evidence is an entirely separate issue and that will be determined by a Trier of Fact at a later date."

We address the show-up first. Whether an extra-judicial identification is admissible in evidence at a criminal trial is a mixed question of law and fact. *Gatewood v. State*, 158 Md. App. 458, 475-76 (2004). We give great deference to the trial court's findings of fact unless clearly erroneous, and apply the relevant facts to the law *de novo*. *Id.* Ordinarily, we confine our review to the evidence presented at the suppression hearing. *Id.*

A pretrial identification procedure may be so suggestive and conducive to mistaken identification that use of that identification at trial would deny the defendant due process of law. *Neil v. Biggers*, 409 U.S. 188, 198 (1972). To determine whether a pretrial identification, such as a show-up, is admissible in evidence at a criminal trial, the trial court employs a two step analysis. The court considers first whether the pretrial procedure was impermissibly suggestive; and second, if the answer is yes, the court must determine whether, based on the totality of the circumstances, the suggestive pretrial procedure was reliable. *Smiley v. State*, 442 Md. 168, 180 (2015); *see also Biggers*, 409 U.S. at 199-200.

The State has the burden to show that under a totality of the circumstances the identification was reliable. *Jones v. State*, 395 Md. 97, 111 (2006) (quoting *Smith and*

Samuels v. State, 6 Md. App. 59, 68 (1969)). Therefore, even if the court finds the pretrial procedure to be impermissibly suggestive, the identification may nevertheless be admissible if, after considering the totality of the circumstances, there is no substantial likelihood of irreparable misidentification. *See Manson v. Brathwaite*, 432 U.S. 98, 116 (1977). If a substantial likelihood of misidentification exists, then admission of the identification amounts to a denial of due process and the evidence must be excluded. *See Biggers*, 409 U.S. at 198-99.

It is generally recognized that a one-on-one show-up is suggestive. *Turner v. State*, 184 Md. App. 175, 180 (2009). In fact, while many of our sister states recognize that although show-ups are highly suggestive, they are condoned nonetheless. *E.g. State v. Dakers*, 112 A.3d 819, 824 (Conn. 2015) (suggestive one-on-one show-up identification not unnecessarily so when supported by exigent circumstances); *State v. Herrera*, 902 A.2d 177, 183 (N.J. 2006) (while inherently suggestive, one-on-one show-ups permitted for on or near-the-scene identifications as likely to be accurate, taking place, as they do, before memory has faded, and facilitate and enhance fast and effective police action); *Commonwealth v. Martin*, 850 N.E.2d 555, 561 (Mass. 2006) (proper routine followed by the police can ameliorate suggestiveness of a one-on-one identification days after the incident); *State v. Cottrell*, 968 P.2d 1090, 1094 (Idaho Ct. App. 1998) (where reliability of identification is sufficient to outweigh corrupting effect of suggestive identification

procedures, admission of identification will not violate due process); *Jefferson v. State*, 425 S.E.2d 915, 918 (Ga. 1992) (although one-on-one show-ups sharply criticized and inherently suggestive, identification need not be excluded as long as under all the circumstances identification was reliable notwithstanding any suggestive procedure); *People v. Duuvon*, 571 N.E.2d 654, 655 (N.Y. 1991) (show-up identifications, while generally suspect and disfavored, at-the-crime-scene civilian show-up identifications not presumptively infirm). Many states admit evidence of field show-ups only when deemed necessary or when conducted within a certain limited time after the criminal event. *Turner*, 184 Md. App. at 188 n.1. Maryland has not gone that far.[5]

Suggestiveness may arise in many ways and in many different police procedures. Photo arrays, in-court identifications, on the street show-ups, lineup compositions, all present opportunities for suggestiveness. None of those procedures are *per se* impermissibly suggestive. *Id.* at 178-82.

[5]In *Smiley v. State*, 442 Md. 168 (2015), where the petitioner asked the Court of Appeals to adopt standards and guidelines similar to those the Supreme Court adopted in New Jersey in *State v. Henderson*, 27 A.3d 872 (N.J. 2011), our Court declined to change Maryland law regarding eyewitness identification. The Court explained as follows:

> "We again shall decline to adopt a new standard regarding the admissibility of an extrajudicial eyewitness identification, or for incorporating expert testimony into challenges of an eyewitness identification, because our jurisprudence already provides suitable means to assay an eyewitness identification."

Smiley, 442 Md. at 185.

For a comprehensive and enlightening explication on the jurisprudential history of extra-judicial eyewitness identifications, see Judge Charles E. Moylan, Jr.'s opinion for the Court of Special Appeals in *Turner*, 184 Md. App. at 175. The bottom line is that "reliability is the linchpin in determining the admissibility of identification testimony" based upon pre-trial identification procedures. *Id.* at 184 (quoting *Neil*, 432 U.S. at 114). In *Manson v. Brathwaite*, the United States Supreme Court set out the five critical criteria courts should consider in determining reliability:

> "We therefore conclude that reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-*Stovall* confrontations. The factors to be considered are set out in *Biggers*. 409 U.S., at 199-200. These include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation."

Id. at 114. In the end, "it is only where there is 'a very substantial likelihood of irreparable misidentification,' to wit, a situation where the identification could not be found to be reliable, that exclusion would be warranted." *Turner*, 184 Md. App. at 184. In the absence of that, it is for the jury to weigh the evidence.

In the instant case, the identification procedure at issue was an on the street show-up. Show-ups are undeniably suggestive, but as we have noted, are admissible in evidence if not so impermissibly suggestive as to lead to a substantial likelihood of irreparable

misidentification. In Maryland, a show-up always has been considered a permissible procedure in the immediate wake of a crime while the perpetrator is at large. *Turner*, 184 Md. App. at 185; *Foster and Forster v. State*, 272 Md. 273, 289-94 (1974); *Davis v. State*, 13 Md. App. 394, 402-03 (1971), *cert. denied*, 264 Md. 746 (1972); *Spencer v. State*, 10 Md. App. 1, *cert. denied*, 259 Md. 736 (1970); *Billinger v. State*, 9 Md. App. 628, 636-37, *cert. denied*, 259 Md. 729 (1970).

In this case, the shooting occurred at approximately 10:20 a.m. on January 13, 2014. At 10:40 a.m. on the same date, the police apprehended a suspect, later identified as the passenger in the car. The police took Mr. Masson immediately to view the apprehended suspect. Shortly thereafter, the police told Mr. Masson that they had apprehended another suspect. Detective Harding drove Mr. Masson immediately to the location where appellant had been detained. All this occurred within a very short period of time. Simply because Mr. Masson had been shown one of two suspects a few minutes earlier does not make the second show-up (of appellant) so suggestive or even an impermissible procedure. We reject appellant's argument that Mr. Masson having been shown one suspect would be impermissibly influenced so as to cause him to identify appellant as the second assailant. As this Court pointed out in *Turner*:

> "It is implicit that the police want the witness to look at and see if he can identify a possible participant in a crime. *McDuffie v. State*, 115 Md. App. 359, 366-67 (1997). The words spoken

> here were about as innocuous as they could be in the context of conducting a show-up. How else do the police conduct the show-up? They have to say something. *See, e.g.*, *Davis v. State*, 13 Md. App. at 396 ('The officer in charge of the cruiser then asked the victim to look inside the cruiser through the window to see if the person inside was one of the boys who had robbed him.'); *Spencer v. State*, 10 Md. App. at 4 ('Is this the one?' was unoffending.)."

Id. at 186. Nor does the fact that the witness may have said that he did not see his assailant's face make the identification *per se* excludable. As noted, the witness testified that when he ran out of his house as he saw the vehicle driving by, that he saw the profile of the driver's face, and then later saw the driver looking back at him in the car mirrors.

Because we do not find that the identification procedure was so impermissibly suggestive, we need not engage in the next step analysis set out in *Manson v. Brathwaite*, 432 U.S. 98 (1977).[6]

[6]The second step in the analysis set out in *Manson v. Brathwaite*, is as follows:

> "We therefore conclude that reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-*Stovall* confrontations. The factors to be considered are set out in *Biggers*. These include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation."

432 U.S. 98, 114 (1977).

B. The In-court Identification

We consider appellant's argument that the in-court identification was procedurally flawed and inadmissible because David Masson did not see the face of the driver of the vehicle, that his description of the driver did not match the color of appellant's jacket and that the witness was not wearing his prescription eyeglasses when he witnessed the crime or identified appellant. We hold that appellant's argument is not preserved for our review because he did not raise this argument below.

Ordinarily, we will not decide an issue unless it plainly appears by the record to have been raised in or decided by the trial court. Md. Rule 8-131(a). The Rule serves to ensure fairness for all the parties in a case and to promote the orderly administration of law. *Elliot v. State*, 417 Md. 413 (2010). Under Rule 8-131, the failure to argue a specific theory to support a motion to suppress "constitutes waiver of that argument on appeal." *Evans v. State*, 174 Md. App. 549, 557 (2007); *see also Turkes v. State*, 199 Md. App. 96, 114 (2011) (noting that appellant waived three out of five arguments in support of his motion to suppress because they were not raised at trial).

In the case *sub judice*, appellant waived the argument that Mr. Masson's in-court identification was not admissible in evidence. He never made this argument at the trial level. Assuming *arguendo* the issue was preserved for our review, we would find that David Masson's testimony was admissible in evidence and it was for the jury to determine what

weight, if any, the testimony deserved. Appellant argues that the witness testified that he could not see the driver's face. However, he testified that he did not see the driver's face as the car passed his house, but on cross-examination, he said that he saw the driver's profile and again saw appellant repeatedly as appellant looked through the rear view mirror while the witness pursued the Lexus. The jury could conclude that the witness had a sufficient basis to identify appellant as the driver of the Lexus. The trial court was not obligated to exclude Mr. Masson's identification testimony *sua sponte*.

IV. Sufficiency of the evidence

We turn next to appellant's challenge to the sufficiency of the evidence to support the convictions. Appellant raises his sufficiency argument in a curious manner. He buries this argument within his argument that the court erred in allowing Mr. Masson's "flawed eyewitness identification into evidence; *in the alternative, the evidence was insufficient for a reasonable jury to conclude that Mr. Govan was the driver of the vehicle*." Specifically, he argues that one eyewitness identification, particularly where the witness saw the driver for two or three seconds, apparently misidentified the color of the driver's jacket, and where the witness was not wearing his eyeglasses, is insufficient for a reasonable jury to convict appellant.

The State argues that appellant's one eyewitness identification argument is not before this Court properly because appellant did not present this argument to the trial court during his motion for judgment of acquittal. Hence, it is waived. Moreover, the State maintains, it is meritless.

The standard of review, on the merits, for the sufficiency of the evidence is "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 (1979); *State v. Suddith*, 379 Md. 425, 429 (2004). We give deference to the trier of fact's findings of facts, resolution of conflicting evidence and its opportunity to observe and assess the credibility of the witnesses. *See Suddith*, 379 Md. at 430.

Before we reach the merits as to a sufficiency claim, as the State argues, we must consider the requirements of Maryland Rule 4-324(a). The Rule states as follows:

> "A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. *The defendant shall state with particularity all reasons why the motion should be granted*." (Emphasis added).

Appellant did not assert this single eyewitness argument below. He did not raise this issue in any motion for judgment of acquittal. The argument is not properly before this Court

and we will not consider it. We reiterate this black letter law frequently, explaining as follows:

> "It is a well established principle that our review of claims regarding the sufficiency of evidence is limited to the reasons which are stated with particularity in an appellant's motion for judgment of acquittal. *Taylor v. State*, 175 Md. App. 153, 159 (2007). Thus, "[a] defendant may not argue in the trial court that the evidence was insufficient for one reason, then urge a different reason for the insufficiency on appeal[.]" *Bates v. State*, 127 Md. App. 678, 691 (1999)."

Claybourne v. State, 209 Md. App. 706, 750 (2013). We will not consider his argument.

JUDGMENTS OF CONVICTION IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.