UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 541

September Term, 2016

JAMES EDWARD MAXWELL, III

v.

STATE OF MARYLAND

Krauser, C. J.,
Nazarian,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: April 5, 2017

Convicted of robbery, after the entry of a conditional guilty plea, in the Circuit Court for Cecil County, James Edward Maxwell, III, appellant, raises a single issue on appeal: whether the trial court erred in denying his motion to suppress what he claims was an impermissibly suggestive pre-trial photographic identification of him by the victim of the robbery. We affirm.

When reviewing a circuit court's ruling on a motion to suppress extrajudicial identifications, we consider only the evidence presented at the suppression hearing. *Wallace v. State,* 219 Md. App. 234, 243 (2014). "We accept the findings of fact and credibility determinations of the circuit court unless they are clearly erroneous, and we examine the evidence and inferences reasonably drawn from the evidence in the light most favorable" to the prevailing party, in this case, the State. *Id.* (citation omitted). However, "[w]e review the trial court's conclusions of law *de novo* and make our own independent assessment by applying the law to the facts of the case." *Id.* at 243-44.

In deciding a challenge to an extra-judicial identification, Maryland courts employ 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.

Smiley v. State, 442 Md. 168, 180 (2015) (citations and internal quotation marks omitted).

With respect to the first prong of the test, the Court of Appeals has explained that "[s]uggestiveness can arise during the presentation of a photo array when the manner itself of presenting the array to the witness or the makeup of the array indicates which photograph

the witness should identify." *Id*. (citations omitted). In other words, "[t]o do something impermissibly suggestive is . . . to feed the witness clues as to which identification to make[,] *Conyers v. State*, 115 Md. App. 114, 121, *cert. denied*, 346 Md. 371 (1997), or, "where the police, in effect, repeatedly say to the witness: 'This is the man.'" *In Re: Matthew S.*, 199 Md. App. 436, 448 (2011) (citations and some internal quotation marks omitted).

Maxwell contends that the photographic identification was impermissibly suggestive for two reasons: (1) the array contained only four photographs; and (2) his photograph was the only one in the array depicting an individual with a neck tattoo, a feature that was included in the victim's description of the person that robbed him.

Maxwell's first claim is not preserved for appellate review as the only challenge raised at the suppression hearing was that the other individuals in the photo array did not appear to have a neck tattoo. Maxwell did not assert before the suppression court, as he does on appeal, that the number of photographs included in the array resulted in an impermissibly suggestive identification. As we have stated, "the failure to argue a particular theory at a suppression hearing waives the ability to argue that theory on appeal." *Smith v. State*, 182 Md. App. 444, 460 (2008) (citations omitted).[1]

[1] Maxwell appears to suggest that a challenge to the number of photographs included in the array was encompassed in defense counsel's statement during oral argument that "essentially you're going into this saying, Well, here's four pictures. None of them have tattoos. Pick one of them and one has a tattoo." We disagree. There is nothing in that statement, or elsewhere in defense counsel's closing argument, or in the cross examination of the detective, that put the issue of whether the photo array was impermissibly suggestive, because it included four, rather than six photographs, before the suppression court.

Maxwell's second contention is without merit. Based on our review of the record, including an "independent appraisal of the photo array in question[,]"[2] the evidence before the suppression court, viewed in the light most favorable to the State, was that whether any of the four subjects had a neck tattoo could not be discerned from the photographs in the array. As the suppression court noted:

> The Court sees that State's [Exhibit] 5, there is a beard growth on his neck. You can't see his neck. [Exhibit] 6, it's in the shadows. [Exhibit] 7 is the defendant. [Exhibit] 8 has what appears to be something on his neck. I can't tell what it is.

Moreover, according to the detective, the victim took 15 minutes to review the array before identifying Maxwell, and then said that "he remembered him having a tattoo on his neck." That statement prompted the detective to go back to the station and return with a profile photograph of Maxwell which he showed to the victim, who then confirmed the identification "within five seconds." Contrary to Maxwell's claim that his was the only photograph in the array that "unmistakably depict[ed] an individual with a neck tattoo[,]" this evidence, in the light most favorable to the State, showed that it was not clear.

In sum, we find no error in the suppression court's finding that Maxwell's photo was not significantly different from the others such that it rendered the array impermissibly suggestive. Accordingly, the court did not err in denying the motion to suppress.

JUDGMENT OF THE CIRCUIT COURT FOR CECIL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[2] *See Gatewood v. State*, 158 Md. App. 458, 477 (2004), *aff'd*, 388 Md. 526 (2005).