UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1472

September Term, 2015

CHARLES NEWMAN

v.

STATE OF MARYLAND

Leahy,
Beachley,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: January 24, 2017

On October 21, 2014, Charles Newman, appellant, and Devin Marbury, both males, and Diona Thomas and Jade Cooper, both females, were indicted on fourteen counts. The counts in each indictment were identical and charged the co-defendants, *inter alia*, with the September 12, 2014 armed carjacking of Charles Douglas, III, and the September 13, 2014 armed robbery of Mohan Burujukadi.[1] At a pre-trial motions hearing, the co-defendants moved to sever the armed carjacking counts involving Mr. Douglas from the armed robbery counts involving Mr. Burujukadi. The court denied the motions. The co-defendants also noted that their cases were never formally joined. In response, the State made an oral motion to join, and the court ordered the State to file a written motion to join. Thereafter, the State emailed a written motion to join the cases, and the court granted the State's motion in a written order.[2]

Following a jury trial, appellant was convicted of armed carjacking, armed robbery, and conspiracy to commit armed carjacking and related lesser counts involving Mr. Douglas, III, and convicted of armed robbery and conspiracy to commit armed

[1] On March 17, 2016, this Court consolidated the cases for argument. *See Thomas v. State*, No. 1767, September Term, 2015, and *Marbury v. State*, No. 2657, September Term, 2015. One of the four co-defendants, Jade Cooper, did not note an appeal. *See* Maryland Judiciary Case Search, *State of Maryland v. Cooper*, Case No. CT141414D (Prince George's County).

[2] The State's motion to join is not referenced in any of the docket entries. However, it is included as an attachment to the court's order granting the motion to join in this record and in Marbury's record in this consolidated appeal. *Marbury v. State*, No. 2657, September Term 2015. The court's order was stamped as filed with the clerk on April 8, 2015. The order notes that, on April 1, 2015, the court mailed copies to trial counsel of record.

robbery on the counts involving Mr. Burujukadi. Appellant was sentenced, in a separate disposition hearing from his co-defendants, to thirty years for armed carjacking, a concurrent twenty years for armed robbery and a concurrent thirty years for conspiracy to commit armed carjacking of Mr. Douglas, and – consecutive to the sentences imposed for the crimes against Mr. Douglas – to concurrent sentences of twenty years, with all but ten suspended, for armed robbery and conspiracy to commit armed robbery of Mr. Burujukadi. Appellant timely appealed and presents the following questions for our review:

> 1. Did the trial court err in refusing to sever the charges related to the carjacking of Charles Douglas from the charges related to the robbery of Mohan Burujukadi?
>
> 2. Did the trial court err in failing to suppress the out-of-court identification by Mohan Burujukadi?
>
> 3. Did the court err in failing to address Newman's post-trial letter in which he requested to discharge his counsel prior to sentencing?

For the following reasons, we shall affirm the judgments but remand for resentencing.

BACKGROUND

On September 12, 2014, at around 3:00 p.m., Mr. Douglas was at a 7-Eleven convenience store in Forestville, Maryland, when he was approached by two females who asked him for a ride. When Mr. Douglas agreed, the females got inside his vehicle, a green 1997 Chevy Lumina, with Maryland tag 8BA1246. After Mr. Douglas drove away from the 7-Eleven, the females asked him to pull over so they could talk to two males.

Mr. Douglas did so, and then overheard one of the females ask one of the males about a purchase of marijuana.

At that point, one of these males, a dark-skinned man with his hair in dreadlocks, opened Mr. Douglas's car door. Mr. Douglas tried to put the car in gear to escape. However, "the female in the right passenger, pulled my arm down. The guy pushed my neck up, put the knife to my neck and the female in the back held my shoulder." Mr. Douglas's assailants then went through his pockets, took his blue Nokia cell phone, approximately $300 in cash, and his identification card. The males then pulled Mr. Douglas out of his vehicle, hopped in, and "pulled off" in Douglas's car. Mr. Douglas went home and reported the crime to the police.

The next day, the police showed Mr. Douglas several photo arrays. Mr. Douglas identified a photograph of one of the females involved in the carjacking and wrote on the back of the array that the female depicted "[p]ulled my hand away from the steering wheel and proceeded to go into my pants pocket." Mr. Douglas identified another female in a different array and wrote on the back of that one that "[s]he was in the car while one of the guys had the knife to my neck."

Mr. Douglas also viewed photo arrays containing pictures of males and identified the person who held a knife to his neck. Mr. Douglas wrote on the back of the array that this person "[h]eld a knife to my neck while pushing my head up" and "took the money out of my pocket, pulled me out of the vehicle with the help of the other guy. Then he drove off." Mr. Douglas also identified a person in another array and testified that "[h]e looks real familiar" and was the person who pulled him out of his car. At trial, Mr.

Douglas identified all four co-defendants as the individuals who were involved in the crimes. The photo arrays were admitted into evidence, without objection.[3]

On September 13, 2014, the evening after the carjacking, Mr. Burujukadi was delivering pizza in Temple Hills, Maryland when another vehicle, driven by two African-American men, flagged him down and told him to stop. Mr. Burujukadi did so, and the two men, one with long "dread" hair and the other with short hair, got out of their green-colored vehicle and approached Mr. Burujukadi's vehicle. One of the men then reached into Mr. Burujukadi's vehicle, grabbed him by the collar, and forced him to exit. The men took Mr. Burujukadi's wallet, containing his credit cards, his iPhone 5S in a "butterfly case," and the remaining pizzas he was scheduled to deliver.

After the men let him go and drove away in the same vehicle in which they had arrived, Mr. Burujukadi went to a friend's house and reported the robbery to the police. Mr. Burujukadi testified that the license plate on the assailants' vehicle was Maryland 8BA1246. He identified a photograph of the vehicle for the jury.

A few days after the robbery, the police showed Mr. Burujukadi photographs to see if he could identify anyone involved. He identified a photo of the person he believed attacked him during the robbery. He signed the back of the photo and wrote, "I'm not sure I'm suspecting this guy. His face looks like the man who robbed me." Mr. Burujukadi also looked at a separate array of photographs and selected a photograph of

[3] Although these exhibits were admitted and available for the jury's consideration, they are not included in the record on appeal. The court ordered all exhibits returned at the end of the trial.

the second individual involved in the robbery. Mr. Burujukadi signed the back of this photo and wrote, "I just think he may be the guy, because I was not sure, because it was dark. And the idea which I have I based on this idea, I think he may be but I'm not sure." Mr. Burujukadi further testified as follows:

> Q. What about this photograph is similar to the person that attacked you, can you tell the ladies and gentlemen of the jury?
>
> A. His face looks like the same, and as it was dark, I was not clear. But still when I close my eyes and I think of the person on that day, I thought when among those photographs I have seen nothing was close, only this photograph was somebody because his face cut was like this. So I had a rough idea based on the rough idea. I told the cops that this photo looks familiar, but I'm not sure.

On cross-examination, Mr. Burujukadi agreed that he told the police on the day of the incident, and prior to being shown photographs, that he could not identify anyone involved in the robbery. He testified, however, that he provided the police with a description of the suspects. He further explained that, when he originally described one of the individuals as having "curly" hair, he had since learned that the hairstyle was referred to as "dread" hair. He also agreed that he still was "[d]efinitely not sure" who the persons were that robbed him.

About two hours after the robbery of Mr. Burujukadi on September 13, 2014, Officer Joshua Boutaugh, of the District of Columbia Metropolitan Police Department, was on patrol and using a license plate reader near the 2500 block of Benning Road when the reader "hit" on a vehicle that was suspected to have been taken in an armed carjacking. Officer Boutaugh testified that the vehicle was a 1997 green Chevy Lumina with Maryland tags 8BA1246, which was then occupied by four individuals. Officer

Boutaugh activated his emergency equipment and pursued the vehicle through the District of Columbia, eventually stopping it.

Various officers with the Metropolitan Police Department confirmed that all four co-defendants were present inside the Lumina at the time of the stop. Ms. Cooper was the driver, and Mr. Newman, described as having "long dreads," was the front seat passenger at the time. Inside the Lumina, the police found pizza boxes, with a "flip or switch-blade knife laying on top of them," as well as an open, silver folding knife resting on Newman's lap.

Mr. Burujukadi's Virginia driver's license was recovered from the vehicle; a credit card from the rear driver's side floor; four cellphones, including an iPhone 5S with a "butterfly cover"; a blue Nokia cellphone; and a black, hoody sweatshirt. Mr. Burujukadi earlier testified at trial that his credit card and iPhone were returned to him by the police. He also testified that one of his assailants was wearing a hoody. Photographs of the co-defendants were taken on the night of the arrest and were used to prepare the photo arrays that were shown to both victims in this case, Messrs. Douglas and Burujukadi.

We shall include additional detail in the following discussion.

DISCUSSION

I.

Appellant first contends a new trial is required because the charges related to the carjacking of Mr. Douglas should have been tried separately from the charges related to the armed robbery of Mr. Burujukadi. The State responds that evidence concerning both

of these offenses was mutually admissible, and the cases were properly joined for trial. We concur.

At the pretrial motions hearing, held on March 30, 2015, the clerk called all four cases involving the four co-defendants, and, along with the State, each counsel entered an appearance on their respective clients' behalf. The court then heard argument on co-defendants' joint motion to sever as to whether evidence relevant to the charges involving the armed carjacking victim, Mr. Douglas, and evidence relevant to the charges involving the armed robbery victim, Mr. Burujukadi, was mutually admissible.

The State set forth its reasons for the joint trial, arguing judicial economy but primarily arguing that the evidence was admissible to prove identity, as follows:

> [PROSECUTOR]: So, as to mutual admissibility, Your Honor, the State's case is a theory of basically a crime spree that began on September 12 and concluded on September 13, that these four individuals agreed to and carried out a carjacking. Again, the first victim, Charles Douglas, the theory is that Ms. Cooper and Ms. Thomas lured Mr. Douglas to an area where Mr. Marbury and Mr. Newman, then with physical force, took the vehicle of Mr. Charles Douglas. That vehicle was a gray [sic] 1997 Chevrolet Lumina. They took this vehicle. All four defendants drove away. They also took Mr. Douglas's cell phone and some cash.
>
> They take this vehicle, is our theory of the case. They drive it around, they hang out, they party in the car. Then, the next day, less than 30 hours later, they rob[,] Mr. Newman and Mr. Marbury again pretending like they need help lured Mr. Burujukadi. Mr. Burujukadi gets out of his vehicle – he's delivering pizza. He's again robbed. Ms. Cooper is the driver. She drives away the vehicle. The robbery – during the robbery, Mr. Marbury and Mr. Newman take pizza boxes out of Mr. Burujukadi's vehicle, his wallet, his identification, and a credit card, his cell phone and cash.
>
> So, this happens just about again 30 hours after that carjacking. Two hours after the armed robbery, the four suspects are pulled over in the green 1997 Chevy Lumina, which is the device that was used in the second

> attack. It was obviously the car that was taken from Mr. Douglas the day before, the first day on September 12.

In response, counsel for Mr. Newman argued the test for mutual admissibility was "could you get in all evidence you want to against each defendant respectively," and that "if you separate each defendant, could you right there and then know that every evidence that you want to admit will be admissible against the defendant?" The court replied, "[w]hat would be admissible?" Mr. Newman's counsel responded that the "phones will be admissible," specifically, "[t]he phone evidence that they used plotting (phonetics) on cell phones recovered in the vehicle." Counsel continued that the State had evidence from Ms. Cooper's cell phone that placed her in the area of the robbery at the time it happened, and that this should not be used against Mr. Newman. Counsel also proffered that the armed robbery victim, Mr. Burujukadi, was not able to identify anyone in connection with the crime.

The court denied the codefendants' motion to sever. It ruled that, based on "the analysis put forth, the arguments of counsel, the Court's examination of the facts in this case, or alleged facts in this case, the motions to sever are denied." Thereafter, a written motion to join was filed, which the court granted. *Marbury v. State*, No. 2657, September Term 2015.

Maryland Rule 4-253 (a) provides that "[o]n motion of a party, the court may order a joint trial for two or more defendants charged in separate charging documents if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." "[T]he decision to join or sever

charges ordinarily lies within the sound discretion of the trial court." *Galloway v. State*, 371 Md. 379, 395 (2002); *see also Harper v. State*, 162 Md. App. 55, 88-89 (2005) ("Decisions regarding the joinder or severance of charges for trial are committed to the sound discretion of the trial court"). Moreover:

> This discretion applies unless a defendant charged with similar but unrelated offenses establishes that the evidence as to each individual offense would not be mutually admissible at separate trials. In such a case, the defendant is entitled to severance. Nevertheless, where a defendant's multiple charges are closely related to each other and arise out of incidents that occur within proximately the same time, location, and circumstances, and where the defendant would not be improperly prejudiced by a joinder of the charges, there is no entitlement to severance. In those circumstances, the trial judge has discretion to join or sever the charges, and that decision will be disturbed only if an abuse of discretion is apparent.

Carter v. State, 374 Md. 693, 705 (2003) (citations omitted); *see also Day v. State*, 196 Md. 384, 395 (1950) ("Under ordinary circumstances, where two parties are accused of the same crime, it is in the interest of both justice and economy that they should be tried together"); *Ogonowski v. State*, 87 Md. App. 173, 187 ("Where the crimes arise out of a single, indivisible series of events, a common scheme or other such circumstances, however, no presumption is applied, and the defendant shoulders the burden of demonstrating prejudice"), *cert. denied*, 323 Md. 474 (1991). We have explained the pertinent law in this area as follows:

> Md. Rule 4-253(c) provides that the court "may" order a separate trial for different counts "[i]f it appears that any party will be prejudiced by the joinder for trial of counts[.]" Joinder issues are determined by use of two questions. *Conyers v. State*, 345 Md. 525, 553, 693 A.2d 781 (1997). The first question is, whether evidence as to each of the accused's individual offenses would be "mutually admissible" at separate trials concerning the offenses? *Id.* Because this question requires a legal conclusion, we give no deference to a trial court's ruling on appeal. *Id.* To

> resolve this question, the trial court is to apply the "other crimes" analysis announced in *State v. Faulkner*, 314 Md. 630, 552 A.2d 896 (1989) and its progeny. *Id.* Originally a list of five substantially relevant "exceptions" to the general rule excluding other crimes evidence – motive, intent, absence of mistake or accident, identity, or common scheme or plan – the list is not exclusive. *Oesby v. State*, 142 Md. App. 144, 160, 788 A.2d 662 (2002) (citations omitted) and *Solomon v. State*, 101 Md. App. 331, 353–56, 646 A.2d 1064 (1994), *cert. denied*, 337 Md. 90, 651 A.2d 855 (1995). Over the years the list has grown with inevitable overlap. *Oesby*, 142 Md. App. at 162, 788 A.2d 662.
>
> The second question is, whether "the interest in judicial economy outweigh[s] any other arguments favoring severance?" *Conyers*, 345 Md. at 553, 693 A.2d 781. This question requires a balancing of interests by the trial court, and we will only reverse if the trial judge's decision "was a clear abuse of discretion." *Id.* at 556, 693 A.2d 781. To resolve this second question, the trial court weighs the likely prejudice against the accused in trying the charges together against considerations of judicial economy and efficiency, including the time and resources of both the court and the witnesses. *Frazier v. State*, 318 Md. 597, 608, 569 A.2d 684 (1990) (citing *McKnight v. State*, 280 Md. 604, 609-10, 375 A.2d 551 (1977)). We note that "once a determination of mutual admissibility has been made, any judicial economy that may be had will usually suffice to permit joinder unless other non-evidentiary factors weigh against joinder." *Conyers*, 345 Md. at 556, 693 A.2d 781. "If the answer to both questions is yes, then joinder of offenses . . . is appropriate." *Id.* at 553, 693 A.2d 781.

Cortez v. State, 220 Md. App. 688, 694-95 (2014), *cert. denied*, 442 Md. 516 (2015); *see also State v. Hines*, __ Md. __, No. 4, Sept. Term, 2016 (filed November 10, 2016) (slip op. at 26-27) (clarifying that "the application of the analysis for joinder and severance of defendants differs from the analysis applicable to joinder and severance of offenses in the context of a jury trial").

At the pretrial hearing, the State summarized the facts concerning the armed carjacking of Mr. Douglas and the subsequent armed robbery of Mr. Burujukadi. The

State contended joinder was appropriate in this case because the evidence as to both crimes was specially relevant to show identity. Identity was at issue throughout this trial.

Evidence of other offenses may be received to establish identity if it shows any of the following:

> (a) the defendant's presence at the scene or in the locality of the crime on trial;
>
> (b) that the defendant was a member of an organization whose purpose was to commit crimes similar to the one on trial;
>
> (c) the defendant's identity from a handwriting exemplar, "mug shot," or fingerprint record from a prior arrest, or his identity through a ballistics test;
>
> (d) the defendant's identity from a remark made by him;
>
> (e) the defendant's prior theft of a gun, car or other object used in the offense on trial;
>
> (f) that the defendant was found in possession of articles taken from the victim of the crime on trial;
>
> (g) that the defendant had on another occasion used the same alias or the same confederate was used by the perpetrator of the present crime;
>
> (h) that a peculiar modus operandi used by the defendant on another occasion was used by the perpetrator of the crime on trial;
>
> (i) that on another occasion the defendant was wearing the clothing worn by or was using certain objects used by the perpetrator of the crime at the time it was committed;
>
> (j) that the witness' view of the defendant at the other crime enabled him to identify the defendant as the person who committed the crime on trial.

Emory v. State, 101 Md. App. 585, 610-11 (1994) (quoting *Faulkner*, 314 Md. at 637-38), *cert. denied*, 337 Md. 90 (1995).

Several of these factors are present in this case, including, but not limited to, the prior theft of the car used in the subsequent crime, the possession of articles from both crimes when appellant was arrested, and the presence of the same confederates from the time of the crime to the moment of arrest. The proffers sufficiently informed the court that appellant was involved in the armed carjacking of Mr. Douglas's vehicle. As supplemented by facts from the State's written response to Mr. Marbury's motion to sever, *see Marbury v. State*, No. 2657, September Term 2015, that vehicle was then used, approximately 30 hours later, in the armed robbery of Mr. Burujukadi. When the co-defendants were arrested, in the vehicle stolen from Mr. Douglas, evidence from both crimes, including, but not limited to, knives, cellphones, pizza boxes, and credit cards, was recovered. *Marbury v. State*, No. 2657, September Term 2015. This is not a situation in which there are confessions or other statements that might be admissible only as to some of the defendants. As the Court of Appeals has explained, in a case upholding a denial of severance:

> [T]he charges grew out of the same occurrence, the parties were arrested together, and to try the cases separately would involve needless duplication. This is not a case where the defenses were hostile, or where confessions had been obtained, which might be inadmissible as to some of the defendants.

Williams v. State, 226 Md. 614, 621 (1961) (citing, in contrast, *Day v. State*, 196 Md. 384 (1950)), *cert. denied*, 369 U.S. 855 (1962); *see also Tichnell v. State*, 287 Md. 695, 712-13 (1980) (upholding joinder of charges where the offenses were closely related to each other and occurred within a fifteen minute period within a tightly confined area); *Hamwright v. State*, 142 Md. App. 17, 34-36 (2001) (permitting one trial for several

incidents, which included two separate armed robberies of two Royal Farms stores, and an earlier carjacking incident involving robbery, kidnaping, and sexual offense, where proof that appellant robbed the two stores was probative to establishing that he was one of the carjackers), *cert. denied*, 369 Md. 180 (2002); *Solomon*, 101 Md. App. at 370-71 (identity satisfied for mutual admissibility where "unities of time and place among the three assaults helped to establish the identity of the perpetrators" where all offenses occurred on same morning in same area). Further, the two crimes were mutually admissible to show a common scheme or plan. That exception applies when there is "evidence that the crimes involved were conceived of by the defendant as part of one grand plan; the commission of each is merely a step toward the realization of that goal." *Emory*, 101 Md. App. at 613. *Cf. Bussie v. State*, 115 Md. App. 324, 334-35 (1997) (concluding that the proximity of the offenses in time and location was not legally sufficient to meet the test of mutual admissibility); *Wieland v. State*, 101 Md. App. 1, 18 (1994) (holding, in a case where identity was not at issue, that evidence concerning a display of a handgun at a convenience store was not mutually admissible in a case charging defendant with shooting his brother with that same handgun at a different location a short time later).

The evidence, which showed that the co-defendants carjacked one victim and then used that stolen vehicle in an armed robbery roughly a day later, was specially relevant and mutually admissible. Notably, there were no statements to counter, and no evidence of contrasting theories of the case to refute. Generally, this was a case where the parties primarily questioned the witnesses' identification of assailants and recollection of the

pertinent evidence. That evidence tended to show that the co-defendants carjacked one victim and then used that stolen vehicle in an armed robbery roughly a day later. The court did not abuse its discretion.

II.

Next, appellant contends that the extra-judicial identification of him by Mr. Burujukadi was impermissibly suggestive and unreliable; thus, the court erred by not granting a motion to suppress. The State responds that this issue was waived when counsel did not object to the photo array at trial. As to the merits, the State maintains that the array was not impermissibly suggestive and, in any event, was reliable.

Prior to trial, Mr. Newman's counsel moved to suppress the photo identification made by Mr. Burujukadi. Pertinent to this issue, on September 13, 2014 at approximately 9:15 p.m., after the robbery, Mr. Burujukadi provided a written statement to the police[4] Mr. Burujukadi told the police that two "black colored people and a guy with a curly hair," wearing hoodies and dark clothing, were involved.

At the suppression hearing, Mr. Burujukadi testified that, when police asked him if he could identify a suspect, he told them "no, because it was dark. I couldn't see them clearly." When asked whether he could identify Mr. Newman, Mr. Burujukadi replied, "I don't think so. I am not sure." Mr. Burujukadi then described his photo identification, agreeing that the police showed him some pictures, but he was "not sure because it's been

[4] Although admitted at the motions hearing, the circuit court ordered all exhibits returned at the end of the hearing. Mr. Burujukadi's statement and the pertinent photo array are not included with the record on appeal.

a long time. I think it's almost six months from now." When shown a set of photo arrays in court, Mr. Burujukadi testified that he could not identify the robbers. Asked whether he made an identification for the police the day of the robbery, Mr. Burujukadi testified as follows:

> I don't remember. I just told him that there was some that were related, but I'm not sure because if I could remember the face, I could tell him that this is the guy. I was not sure regarding the identifying of the person, the person that they have shown me. I mean, the police have shown me photographs and was not sure of the photographs. I told him – there was one, guy, I guess, I showed him that this may be, but I am not sure because I was not clear.

On cross-examination, Mr. Burujukadi remembered seeing the photographs on September 17, 2014. Mr. Burujukadi recognized his handwriting on the back of the array and agreed that he wrote "I am not sure. I am suspecting him. His face cut looks like the robber." Mr. Burujukadi explained:

> Actually, they showed me these photographs which you showed me, I remember. Based on my idea they showed me these photographs, and I told them I was suspecting one or two guys in those photographs, but I was not sure. I told him very clearly that I'm not sure, but I suspect these guys because they look maybe on the idea that I have on – I had robbery. I told them that this may be the guys, may be the possible persons, but I was not sure.

Mr. Burujukadi continued:

> I told them the cops I have a little idea. The people who rob me, so they showed me some photographs, and they showed me eight to ten photographs. Out of those photographs I thought maybe two persons did that. I was not sure, this is what I told to the cops. They ask if you have any suspects, write it on the back. That is the thing which I did on the photographs.

On recross-examination, the State elicited the following testimony from Mr. Burujukadi:

> Q. Mr. Burujukadi, on September 13, 2014, that was the day you were robbed?
>
> A. Correct.
>
> Q. That day after the robbery you went to the police station, and you gave a written statement?
>
> A. Yes.
>
> Q. Correct? Then approximately three days later, September 17, you were contacted by the police again?
>
> A. Yes.
>
> Q. They asked you to look at some photographs?
>
> A. Yes.
>
> Q. And you looked at two sets of photographs, correct?
>
> A. Yes.
>
> Q. That was all of the contact you had with the police. Is that right?
>
> A. Yeah, exactly.
>
> Q. Those are the only photographs they showed you?
>
> A. Yes.

The court then questioned Mr. Burujukadi about his communications with the police. Mr. Burujukadi admitted that he spoke to the police at some point between September 13th and 17th, testifying as follows:

> THE COURT: Regarding what?

THE WITNESS: Did they find the – regarding the people who had robbed me, did you identify them regarding – regarding the robbery case? I used to call the cops. I speak to chief investigator Detective McDermott. I asked him about the case. He used to say something like this, told me about those guys who robbed you that were caught somewhere in D.C. We have got them. So, they are under custody. So, I will let you know the date, regarding the dates, is what they said to me.

THE COURT: Okay. I need you to answer my questions.

THE WITNESS: Okay.

THE COURT: You spoke to the police between the 13th and 17th, correct?

THE WITNESS: Yes.

THE COURT: When you spoke to the police during that period, before they showed you any photos –

THE WITNESS: Okay.

THE COURT: – did the police tell you they had arrested someone?

THE WITNESS: Actually, they told me that there was a robbery before the guys who robbed me before, also robbed a car. So, they asked me how did they come. I told them that they came in a car, and I don't remember the dates exactly, the car, but I told them that the date the description of what I have known and the date. So, I gave the same description, and they have showed me a car. I said, I think this the car. They had come in a car, and they robbed me.

THE COURT: Before they showed you the pictures of any person –

THE WITNESS: No, no.

THE COURT: Listen to my question.

THE WITNESS: Okay.

THE COURT: Before they showed you the pictures of any person, did the police officers, any officer, tell you an arrest had been made?

THE WITNESS: Yeah, yes.

THE COURT: They told you the arrest had been made?

THE WITNESS: Yes.

THE COURT: Before you were shown photographs?

THE WITNESS: Yes. They said, I would like to show you some photographs and so they showed me some photographs.

THE COURT: They said suspects?

THE WITNESS: Yes.

THE COURT: Or arrest had been made?

THE WITNESS: Yes, because I told them I lost my driver's license, and my phone, and my wallet. They gave it back so –

At this point, the court asked counsel if anyone had any questions. The prosecutor then inquired as follows:

Q. Mr. Burujukadi, the fact that the officers told you that they had arrested somebody in reference to your case, does that affect the identifications you made when you looked at the photos?

A. No, not at that time.

Q. Did you believe that you had to identify somebody out of the photos?

A. No.

Counsel for Mr. Newman then asked the witness:

Q. Mr. Burujukadi, you just told the Court that they told you before they showed the photos they arrested someone, right?

A. Yeah.

Q. Now, so you knew that the person – I am sorry. Did you know that the person who they arrested was in the photos?

A. No, I don't know.

Q. You didn't know? But they did tell you they had arrested someone, right?

A. Yes.

Q. Before they showed you the photos?

A. Yes.

The State called additional witnesses on the issue of suggestiveness, beginning with Detective Racheal Jacob. Detective Jacob showed the array to Mr. Burujukadi on September 17, 2014, at the request of the lead detective, Detective Derek McDermott. Detective Jacob had no knowledge of the underlying investigation. She simply showed Mr. Burujukadi photographs included in the array that had been given to her. She explained that this was a new police procedure so that the officer showing the photo array "has no knowledge of the investigation." Detective Jacob then identified the particular array at issue, and identified her handwriting and Mr. Burujukadi's handwriting. Detective Jacob testified that she did not know whether anyone had been arrested or whether anyone in the photo array was a suspect. Detective Jacob testified that Mr. Burujukadi had not been advised that the suspects' pictures were included in the group of photos.

Detective McDermott, the lead investigator with respect to the charges involving Mr. Burujukadi, testified that he did not tell Mr. Burujukadi that anyone was arrested in connection with his case. Specifically, and acknowledging that he spoke to Mr.

Burujukadi on September 13th, 17th, and some unknown date in between, the detective testified that "I never told him people were arrested." Instead, the detective "just told him if he could come to view some photos" and asked him "if he recognized anybody." Detective McDermott did not meet Burujukadi on September 17th, the day the photo array was shown to him by Detective Jacob.

On cross-examination, Detective McDermott agreed that when he met with Mr. Burujukadi on September 13th, Mr. Burujukadi gave a statement indicating that he could not identify anyone in connection with his robbery. When asked by Mr. Newman's counsel why he decided to show Mr. Burujukadi photos anyway, Detective McDermott testified as follows:

> Sometimes, you know, it's the same as anything that would happen even to me. The day that the incident happens, if it's a stressful situation like that, you may not – you tend to forget things or you tend to just may not be thinking clearly about everything that happened. So, we always get people, even if they say, that's a question I always tend to ask – would you obviously be able to identify the suspect?
>
> * * *
>
> Sometimes they say yes. Sometimes they say no. Whether or not they say yes or no, I am still going to show you lineups if I develop suspects. The reason why is because, you know, two days later, after he's had time to try to calm down, collect his thoughts, and everything, he may remember certain things about a person that at the time when I am initially interviewing, which is directly after an incident occurs, you know, he may not be thinking so clearly at that point.

After Detective McDermott's testimony concluded, the court made the following findings on the identification suppression motion:

> Okay. So, this is an unusual circumstance in that I think we have a language issue here with respect to the civilian witness. In fact, I know we

> have a language issue. And at first glance, I would say that the civilian witness interchanged the use of arrest and suspect to the point in his mind that they meant the same thing.
>
> Normally, the Court would not be swayed by the subjective interpretation of the civilian witness. Whether or not he believed an arrest was done is really not the analysis. The analysis is whether or not there was some type of unduly suggestive police procedure – did the police do something that suggested an identification?
>
> So, whether or not the civilian interpreted that an arrest had been made based on the fact that he was called and asked to come down and told that they have suspects, and in his mind that meant there was an arrest? Normally that wouldn't be enough for me to say the first prong has been met.
>
> But we have the added component here of in writing the civilian saying, no, I have not – I cannot identify anybody and that kind of ambiguity that the police detective applied to his answer regarding why he continued to pursue an identification once he had been told that the witness could not do an identification, it's borderline at best. I am going to go ahead and say that first prong has been met.

After further argument, the State then recalled Mr. Burujukadi to testify about the second prong of the identification test, *i.e.*, the reliability of the identification. [5] Mr. Burujukadi then testified to details of the September 13, 2014 robbery. He was delivering pizzas near 5955 Fisher Road at around 9:15 p.m. when he was stopped by two men driving a vehicle. One man grabbed him by the collar and told him to get out of his car. According to Mr. Burujukadi, that man said, "give away whatever you have. If not,

[5] As will be explained in more detail, there is a two-pronged test for the admission of identification evidence. Summarizing, the first prong asks if the identification procedure was impermissibly suggestive. The second prong asks whether the identification was otherwise reliable. However, the second prong is applied only if a *prima facie* case is made on the first prong. *See Smiley v. State*, 442 Md. 168, 180 (2015).

I'm going to shoot you." The men took Mr.Burujukadi's wallet and iPhone and then drove away in their own vehicle.

Mr. Burujukadi testified that the incident lasted approximately one to two minutes, and that it was "clearly dark" outside. The area was residential, with apartments nearby. The incident happened in a parking lot. Mr. Burujukadi did not remember any lighting in the parking lot. On cross-examination, Mr. Burujukadi testified as follows:

> Q. Now, did you have an opportunity to see the individuals?
>
> A. Actually one guy had come back of me.
>
> Q. He was behind you?
>
> A. Yeah.
>
> Q. You could see him looking this way?
>
> A. Yes. He was behind me, so I couldn't see him. And the other guy, he was talking to me. And the other guy has come inside my car, and he took all my belongings. They just were in a hurry and just left.
>
> Q. You couldn't ID properly any two?
>
> A. I'm not sure.

Mr. Burujukadi agreed that his prior description of the suspects was that they were both male "[b]lack colored people" and that one was "[t]hin with curly hair." Mr. Burujukadi was then asked by Mr. Newman's counsel:

> Q. How certain are you that you cannot identify the alleged suspect in this case?
>
> A. Even after three or four days – after the robbery, after two days I couldn't remember their faces. After six months definitely cannot.

Q. So, what you're saying is, in fact that your initial statements are essentially inaccurate then?

A. Inaccurate, yes.

Mr. Burujukadi was given an opportunity to explain this testimony on the following redirect examination:

Q. Just briefly. [Newman's Defense Counsel] just asked you if your initial statements are inaccurate, and you said, yes. What do you mean by that?

A. I mean – In accurate [sic] means I was not pretty sure about what exactly, whether these guys are the exact ones or not, yes.

Q. As to the specific people?

A. Yeah, exactly.

Q. But as to your general description that you gave – dark clothing, black colored people, curly hair and fat –

A. Yes.

Q. – are those accurate descriptions of whoever the people may be who robbed you?

A. Yes. That is the reason I could remember. That's the reason I told them. These are the reasons.

After hearing argument, the court denied the motion to suppress the identification, as follows:

At best I think it was a stretch to say there was some type of impermissibly suggestive conduct by the police officers in this case, but I gave the benefit of the doubt to the defense. The Court finds that based upon the most recent testimony presented there is clear and convincing evidence to establish that there is reliability independent of whatever possible taint there was. And as such, the motion to suppress identification is denied. . . .

The State first contends that this issue is not properly presented for appellate review because, when the photo arrays that were the subject of the pre-trial motion to suppress were admitted at trial, counsel for Mr. Newman stated that he had no objection. Maryland Rule 4-252 (h) (2) (C) clearly provides: "If the court denies a motion to suppress evidence, the ruling is binding at the trial unless the court, on the motion of a defendant and in the exercise of its discretion, grants a supplemental hearing or a hearing de novo and rules otherwise." We conclude that the issue was preserved for our review. *See Jackson v. State*, 52 Md. App. 327, 331 (1982) (lower court's ruling on motion to suppress is preserved even if no contemporaneous objection at trial).

As for the merits, our standard of review is as follows:

> " '[W]e look only to the record of the suppression hearing and do not consider the evidence admitted at trial.' " *James v. State*, 191 Md. App. 233, 251, 991 A.2d 122 (2010) (quoting *Massey v. State*, 173 Md. App. 94, 100, 917 A.2d 1175 (2007)). 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 party prevailing before the circuit court, in this case the State. *McFarlin v. State*, 409 Md. 391, 403, 975 A.2d 862 (2009). We 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*.; *see also Gatewood v. State*, 158 Md. App. 458, 475-76, 857 A.2d 590 (2004), *aff'd*, 388 Md. 526, 880 A.2d 322 (2005).

Wallace v. State, 219 Md. App. 234, 243-44 (2014).

On review, we consider the following:

> The admissibility of an extrajudicial identification is determined in a two-step inquiry. [*Gregory*] *Jones* [*v. State*], 310 Md. [569,] 577, 530 A.2d [743,]747[(1987)]. 'The first question is whether the identification procedure was impermissibly suggestive.' *Id*. 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.' *Id*. 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. [*Kevin*] *Jones v. State*, 395 Md. 97, 111, 909 A.2d 650, 658 (2006).

Smiley v. State, 442 Md. 168, 180 (2015).

It is well settled that "where the record in a case adequately demonstrates that the decision of the trial court was correct, although on a ground not relied upon by the trial court and perhaps not even raised by the parties, an appellate court will affirm. *Robeson v. State*, 285 Md. 498, 502 (1979), *cert. denied*, 444 U.S. 1021 (1980). On the issue of suggestiveness, this Court has explained that there are three prongs to the initial inquiry:

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

Smiley, 216 Md. App. 1, 33 (2014) (emphasis in original), *aff'd*, 442 Md. 168 (2015).

The only real dispute about the identification is whether Mr. Burujukadi was told that the police had arrested someone before he was shown the array. Assuming that he had been told, we are not persuaded that it made the identification impermissibly

suggestive. Simply telling the witnesses that the police had a "suspect" does not rise to the level of "slipping the answer to the testee." *Conyers v. State*, 115 Md. App. 114, 121 (1997), *cert. denied*, 346 Md. 371 (1997).

Further, in *Wallace, supra*, this Court addressed a factual scenario similar to the one here. There, the victim identified the defendant in a photo array. The defendant moved to suppress that identification on the ground that the procedure used was impermissibly suggestive. At the suppression hearing, the victim "testified that prior to being shown the photo array, the detectives informed him 'they had the person.'" The detective who testified at the motions hearing denied it. We assumed the statement was made. *Wallace*, 219 Md. App. at 245 n.6. We held that, "because the detective 'did not in any way suggest which photograph or photographs were of the suspect or give any indication why the person in the photograph was suspected of having committed the robbery,'" the identification procedure was not impermissibly suggestive. *Id.* at 246-47 (quoting *State v. Bolden*, 196 Neb. 388, 243 N.W.2d 162, 164 (1976)).

In *Gatewood, supra*, a police officer acted as an undercover drug buyer as part of a controlled buy of narcotics. *Gatewood*, 158 Md. App. at 471. While that officer was seated in a car, another officer filmed the transaction as Gatewood stood beside the officer's vehicle. Gatewood was not arrested that day. The police reviewed the videotape. When Gatewood appeared on the screen, the officer who acted as an undercover drug buyer pointed to him and described him as the person who sold him the drugs. *Id.* at 471-72. Another officer who was viewing the videotape recognized Gatewood from prior contacts, and prepared a six-person array to show to the officer who

acted as an undercover drug buyer. Before the time of the array, he contacted the officer who acted as the undercover drug buyer and told him that he believed he knew who it was who had sold him the drugs. *Id.* at 472.

Gatewood argued that the identification procedure was unduly suggestive, claiming that the prior contacts with the other officer prompted him to choose Gatewood's photograph. *Id.* at 473. This Court rejected that argument:

> [W]e reject the contention that Wadsworth effectively prompted Wilson's choice of appellant's photograph from the array. We are mindful, as was pointed out by Justice Harlan in *Simmons v. United States*, 390 U.S. 377, 383-84 (1968), that "[t]he chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime." (footnote omitted). Each case must nevertheless be judged on its own facts, *id.* at 384, and the facts before us do not depict a "photographic identification procedure [that] was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.* Wadsworth said he knew who the suspect was, most likely suggesting that person's photograph was in the array. Nevertheless, he left it to Wilson to select the photograph of the person who had sold him drugs in a controlled narcotics buy. We also believe that the circuit court was entitled to consider that Wilson could reasonably expect that the array shown to him would have contained a suspect.

Id. at 476. This Court also noted in a footnote:

> The United States Court of Appeals for the District of Columbia Circuit, in a case involving an allegedly suggestive lineup procedure, observed that
>
> > Law enforcement personnel should avoid telling a witness that a definite suspect is in a lineup but it is not absolutely impermissible . . . It must be recognized, however, that any witness to a crime who is called upon to view a police lineup must realize that he would not be asked to view the lineup if there were not some person there whom the authorities suspected.

> *United States v. Gambrill*, 449 F.2d 1148, 1151 n.3 (D.C. Cir. 1971). Although the lineup procedure is less likely than a photo array to suffer from this tactic, *see id.*, we are confident that Judge MacKinnon's observation applies as well to procedures such as that before us *sub judice*.

Id. n.6.

Here, the appellant does not suggest that a police officer told Mr. Burujukadi which of the six photographs, if any, he should select, and there was no evidence presented to support that conclusion. If the witness were told that a suspect had been arrested, it would make the extra-judicial identification suggestive but, under the circumstances, not impermissibly so.

Having reached this conclusion, we need not consider the reliability of the identification. As this Court has stated, "[r]eliability thus does not even become an issue for a suppression hearing until impermissible suggestiveness has been shown. The quality of the lifeboat does not become an issue until the torpedo of impermissible suggestiveness hits the ship." *Wood v. State*, 196 Md. App. 146, 161 (2010); *see also Mendes v. State*, 146 Md. App. 23, 35 (suggesting "that the reliability of an extra-judicial identification procedure is not placed in issue unless the procedure was impermissibly or unnecessarily suggestive"), *cert. denied*, 372 Md. 134 (2002); *Conyers*, 115 Md. App. at 120-21 ("[R]eliability was never put forth by the Supreme Court as an additional ground for excluding an extrajudicial identification. It was, by diametric contrast, a severe limitation on such exclusion"). Accordingly, we hold that the court properly denied the motion to suppress.

III.

Finally, appellant argues that the court erred by not considering his motion to discharge counsel filed after he was convicted but prior to sentencing. The State asks that we not consider this issue because appellant's *pro se* request did not include a proper certificate of service. On the merits, the State responds that the court was not required to inquire into appellant's request because no meritorious reason was stated in appellant's letter.

After the jury returned its verdict, and prior to sentencing, appellant sent a letter to the trial judge, asking to discharge his defense counsel. That letter, docketed on June 19, 2015 by the Clerk of Court, provided, in pertinent part, "I want to fire my lawyer for ineffective assistance of counsel." The letter set forth several reasons including, but not limited to, defense counsel's failure to (1) challenge the statement of charges and the indictment; (2) communicate with and to provide appellant with all the evidence against him; (3) discuss trial strategy; (4) correct the guidelines such that appellant might consider a guilty plea; and (5) file a motion for new trial. The letter from appellant concluded:

> Honorable [court], it's for the above reasons why I no longer want [Defense Counsel's] assistance. I feel he was ineffective, and I feel that a lot of things I asked him to do that he didn't played a big part of me being found guilty in trial. Thank you for your time.

The letter was initialed by the trial court, with the handwritten notation, "To be heard on 7/24/15," *i.e.*, the date set for sentencing. The letter was not discussed at the sentencing hearing, however. The record reflects only the following:

> [DEFENSE COUNSEL]: Thank you, Your Honor. I have spoken to my client extensively about the charges and sentencing guidelines.
>
> And from what occurred at trial and based on his intention to appeal the matter, Your Honor, I have instructed him to note his appeal as to per the 30 days notice, Your Honor, and to what he testifies or what he would like to say in this setting as well, Your Honor, given his intention to –
>
> THE COURT: That's very smart advice. Not say anything about the offense, that's for sure.
>
> [DEFENSE COUNSEL]: We would just ask that he is not required under note to make a decision since we would just ask Your Honor that given what transpired at trial, as Your Honor remembers and recalls, given what was said and not said, there are some repercussions as to Mr. Smalls' involvement per situation of some people that was absent the entire trial.
>
> But we will submit on those grounds, Your Honor, as to any issue raised at trial based on his intention to handle the matter.
>
> We would just ask that Your Honor remind herself as to what was proven at trial and what was not proven at trial in that case and revisit the guidelines from a more downward perspective as what's intended here between for 26 years that the State seeks.
>
> And I will submit on those grounds, Your Honor, in light of our appeal intention.[[6]]

On the merits, neither party has directed us, nor have we found, a case directly on point. Appellant argues that his position is supported under the Sixth Amendment constitutional right to counsel and cases interpreting requests to discharge counsel under Maryland Rule 4-215. The State replies that we need not reach that constitutional question because there was a failure to comply with proper procedural requirements

[6] The record does not indicate anything further with respect to the identity of "Mr. Smalls."

contained in Maryland Rules 1-321, 1-323. *See Lovero v. Da Silva*, 200 Md. App. 433 (2011).

The mailing of pleadings and other filed documents is controlled by Maryland Rule 1-321, which states:

> [e]xcept as otherwise provided in these rules or by order of court, every pleading and other paper filed after the original pleading shall be served upon each of the parties. . . . Service upon the attorney or upon a party shall be made by delivery of a copy or by mailing it to the address most recently stated in a pleading or paper filed by the attorney or party, or if not stated, to the last known address.

In addition, Maryland Rule 1-323 provides that:

> The clerk shall not accept for filing any pleading or other paper requiring service, other than an original pleading, unless it is accompanied by an admission or waiver of service or a signed certificate showing the date and manner of making service. A certificate of service is prima facie proof of service.

In *Lovero v. Da Silva, supra*, this Court considered whether we could consider an appeal, filed with the court clerk, in the absence of a properly served notice of appeal. *Lovero*, 200 Md. App. at 438. Although we recognized that the clerk could accept deficient pleadings and papers under certain circumstances, *id*. at 443, a defectively served pleading was not one of those circumstances. We stated:

> The only exception to the duty of the clerk to file a pleading or paper, regardless of a defect or deficiency, is the requirement of Rule 1-323 that the "clerk shall not accept for filing" a pleading or paper requiring service that does not contain "an admission or waiver of service or a signed certificate showing the date and manner of making service."

Lovero, 200 Md. App. at 443-44 (citation omitted). We concluded that, because the notice of appeal should not have been accepted for filing by the clerk without a certificate of service, the appeal had to be dismissed. *Id*. at 446-47.

We recognize that appellant's letter was not "filed" with the clerk, but instead, was mailed directly to the judge's chambers. Under such circumstances, the court, and not the clerk, may accept the letter for filing, as provided in Maryland Rule 1-322:

> The filing of pleadings, papers, and other items with the court shall be made by filing them with the clerk of the court, except that a judge of that court may accept the filing, in which event the judge shall note on the item the date the judge accepted it for filing and forthwith transmit the item to the office of the clerk. On the same day that an item is received in a clerk's office, the clerk shall note on it that date it was received and enter on the docket that date and any date noted on the item by a judge. . . .

We are not persuaded that the analysis in *Lovero* is applicable to the instant case. The court expressly referenced appellant's letter and stated its intention to consider it at sentencing.

We also acknowledge that, after "meaningful trial proceedings," Maryland Rule 4-215 does not apply and that the standard of review is whether the court abused its discretion. *See State v. Brown*, 342 Md. 404, 428 (1996) ("[W]e hold that Rule 4-215 applies up to and including the beginning of trial, but not after meaningful trial proceedings have begun"). S*ee Gray v. State*, 368 Md. 529, 565 (2002) ("[O]ur cases hold that the actual failure to exercise discretion is an abuse of discretion"). Despite its stated intention, the court did not consider appellant's letter. Thus, it exercised no discretion. We conclude that the court erred in failing to consider appellant's letter.

With respect to the appropriate remedy, the State requests that we remand and request the circuit court to consider and rule on the request contained in appellant's letter. We disagree. We conclude that *Catala v. State,* 168 Md. App. 438 (2006) is analogous. In that case, Catala was represented by counsel at trial, counsel withdrew prior to sentencing, and he appeared at sentencing without counsel. *Id*. at 444. At sentencing, Catala stated that he had been looking for counsel and he requested a postponement. The court denied the request, stating that the defendant did not have an absolute right to counsel. *Id*. at 469. We held that the court could not force the defendant to sentencing without giving him an opportunity to explain why he had not retained new counsel and, accordingly, remanded for a new sentencing hearing. We grant the same relief in this case.

JUDGMENTS OF CONVICTONS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY FOR RESENTENCING.
COSTS TO BE PAID 75% BY APPELLANT AND 25% BY PRINCE GEORGE'S COUNTY.