Circuit Court for Baltimore County
Case No. 03-K-17-002971

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2067

September Term, 2017

ROBERT LEE FOYE

v.

STATE OF MARYLAND

Meredith,
Graeff,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: December 12, 2018

A jury in the Circuit Court for Baltimore County convicted appellant Robert Lee Foye of armed robbery, first degree assault, theft under $100, use of a firearm in commission of a crime of violence, second degree assault, and second degree assault of a law enforcement officer. Appellant presents the following questions for our review:

> "1. Did the trial court err in denying the defense motion to suppress the fruits of the officer's stop, search, and arrest of [appellant]?
>
> 2. Did the trial court err in denying the defense motion to suppress the pre-trial identification and subsequent in-court identifications of [appellant]?"

Finding no error, we shall affirm.

I.

Appellant was tried by a jury in the Circuit Court for Baltimore County and convicted of armed robbery, first degree assault, theft under $100, use of a firearm in commission of a crime of violence, second degree assault, and second degree assault of a law enforcement officer. After merging two of the convictions for sentencing purposes, the court sentenced appellant to a term of incarceration of twenty years for armed robbery, ten years concurrent, five years without parole for use of a firearm in a crime of violence, and five years, consecutive, for second degree assault of a law enforcement officer.

Before trial, appellant filed a motion to suppress a show-up identification and a motion to suppress the evidence that police officers recovered when they stopped, searched, and arrested him. The court denied the motion to suppress the identification, finding that the show-up was not "impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification." The circuit court denied the motion to supress

the evidence from the search, reasoning that "the officer's stop, detention, frisk and search were based on the requisite, legal justification and that, even if the unspecified lump did not provide a basis for a more intrusive search, that the inevitable . . . discovery rule applies."

We state the following facts as set forth at the suppression hearings. Around 10:30 p.m. on May 23, 2017, Benjamin Johnson stopped at a 7-11 store in Baltimore, Maryland. He walked out of the store and down the street. As Mr. Johnson stood near a Sunoco gas station a few hundred feet up the road from the 7-11, appellant approached him and spoke with him. Appellant was wearing a red hoodie sweatshirt and black shorts. During their conversation, which lasted several minutes, appellant punched Mr. Johnson in the face and asked repeatedly for his wallet, which Mr. Johnson refused to give up. A third man, Trayvon Queen, approached and joined the conversation. Mr. Queen wore a red jacket and black pants. Appellant suggested to Mr. Queen that they "do away with" Mr. Johnson after taking his possessions, and Mr. Queen produced a handgun. After this brief discussion, Mr. Queen walked away, and appellant pulled Mr. Johnson into the 7-11 so that Mr. Johnson could withdraw money from an ATM. Mr. Johnson gave appellant his wallet, and the two men left the store without Mr. Johnson withdrawing additional money. Outside the store, appellant asked Mr. Johnson for his keys, shoes, and shirt, and then he took them forcibly. Mr. Johnson escaped with his cell phone and called 911 from behind the Sunoco gas station.

Mr. Johnson described his assailants to the police dispatcher as two black males

wearing red hoodie sweatshirts and black pants.[1] Officer Bryant arrived minutes after Mr. Johnson's escape, and he saw appellant and Mr. Queen walking within ten feet of each other and in front of the bar between the gas station and the 7-11 store. Both men were black males wearing red tops and black pants. Appellant was wearing a red hoodie sweatshirt; Mr. Queen wore a red jacket. Officer Bryant asked the two men to stop and asked them for identification. Officers Ashley Vandervall and Strumsky joined Officer Bryant moments later. Appellant handed Officer Bryant a stack of cards, and Officer Bryant conducted a pat-down frisk of appellant. While Officer Bryant was frisking appellant, Officer Strumsky frisked Mr. Queen and discovered a gun concealed in Mr. Queen's clothing. The police officers handcuffed and arrested Mr. Queen on that basis. After hearing Officer Strumsky say that Mr. Queen had a gun, Officer Bryant felt an unidentified "lump" in appellant's pocket and removed it because he could not identify it by touch; only after removing it did he discover that it was a marijuana candy.[2] Officer

[1] The two officers who testified at the search and seizure suppression hearing differed as to what the dispatcher told them about the suspects. Both agreed, however, that the dispatcher at least told them the suspects wore red tops and black bottoms. Officer Vandervall recalled hearing that the suspects had red "hoodies" and that one had black shorts. Officer Bryant could only recall hearing that they wore "red shirts and black pants."

[2] On direct examination at the search and seizure suppression hearing, Officer Bryant testified that he performed two searches. He said that he found the candy in the first search, then Officer Strumsky found a gun in Mr. Queen's possession, and then Officer Bryant searched appellant's pockets to find the cash and bank cards. On redirect, Officer Bryant claimed that he only performed one search, contemporaneous with Officer Strumsky's search of Mr. Queen. At trial, Officer Bryant's body camera footage confirmed that there were two searches. We need not resolve this disparity in testimony (or grapple with our rule that we ordinarily consider only the record made below at the suppression hearing) because we base our decision on the inevitable discovery doctrine and not whether the initial search of appellant was lawful.

Bryant then continued his search of appellant, discovering cash and a bank card in his back pocket.

Away from the scene of the police stop, Officer Vandervall showed Mr. Johnson the bank cards recovered from appellant and asked if they belonged to him. Mr. Johnson verified that they were his cards. The police then arranged a "show-up" identification by Mr. Johnson, who testified that the police told him "they had caught somebody and they said that they needed to identify who that person was . . . based off my description." When Officer Vandervall asked Mr. Johnson if he could identify the perpetrators if he saw them, he said that he could. The police then drove Mr. Johnson past the place where appellant and Mr. Queen stood, making two passes. Appellant and Mr. Queen stood between two police cars and in the middle of other police officers with a spotlight focused on them. Mr. Queen was handcuffed; appellant was not handcuffed.[3] Mr. Johnson identified appellant as the man in the jacket who brandished a handgun, and the police arrested appellant.

As indicated, appellant was convicted by the jury and sentenced by the court.

II.

Before this Court, appellant argues first that the circuit court erred in failing to

[3] The court held two suppression hearings, one to suppress Mr. Johnson's identification of appellant and the second to suppress the evidence seized by the police. At the time the court decided the motion to suppress the identification, only Officer Carlos LeSane's and Mr. Johnson's testimony was before the court. Both testified that they were unsure but believed that appellant was handcuffed during the identification. The second hearing was for the motion to suppress the fruits of Officer Bryant's search. In that hearing, Officer Bryant testified with certainty that he did not handcuff appellant until after the identification.

suppress the fruits of the police officers' stop, search, and arrest of appellant. He argues that the police lacked reasonable articulable suspicion to stop him, that they exceeded the constitutionally permitted scope of the frisk of his person, and that they lacked probable cause to search him after stopping him—all three violations of his Fourth Amendment rights. As to the stop, appellant argues that the police lacked reasonable articulable suspicion or probable cause to stop and detain him without a warrant. Appellant emphasizes that the description of the two men's clothing and race was not particularized or specific, that there were other people in the area where the police stopped him, that the police did not have any information as to the suspects' direction of flight, and that he and Mr. Queen were several feet apart and not acting suspiciously at the time of the stop. Thus, appellant argues, the police lacked reasonable articulable suspicion to stop and detain him, and the circuit court erred in declining to suppress the fruits of the stop.

Appellant argues next that the Fourth Amendment to the United States Constitution barred Officer Bryant from removing the marijuana candy and bank card from his pocket. Citing *Terry v. Ohio*, 392 U.S. 1 (1968), and its progeny, appellant argues that a police officer's frisk of a detainee permits only a cursory search for weapons, intended to protect the officer's safety. Appellant acknowledges that under the "plain feel" doctrine, an officer conducting a lawful pat-down may remove items that the officer can easily feel to be contraband. Appellant notes that Officer Bryant could not identify the "lump" in appellant's pocket until he removed it. Therefore, appellant argues, Officer Bryant unconstitutionally expanded the permissible scope of his frisk of appellant, and the circuit court should have suppressed the fruits of the initial frisk. Similarly, appellant argues that

Officer Bryant's thorough search of his pockets after Officer Strumsky discovered a weapon on Mr. Queen was unconstitutional because Officer Bryant lacked probable cause for a full search of appellant. Appellant argues that until the show-up identification, the police lacked sufficient reliable information to reasonably believe that appellant had committed or was committing a crime and that this lack of probable cause barred a thorough search of appellant. Therefore, appellant maintains that the circuit court erred in denying his motion to suppress the cards and cash recovered from his pocket.

Finally, appellant addresses the inevitable discovery doctrine, which appellant recognizes allows the use of evidence found in an unlawful search if the State can prove by a preponderance of the evidence that the fruits of the search would have been discovered by lawful means regardless of the unlawful search. Appellant argues that the police lacked reasonable articulable suspicion to stop appellant and lacked a reason to detain him after their initial frisk; as stated below, appellant also argues that the show-up identification was unconstitutionally suggestive. On those premises, appellant argues that there was no lawful search to support the inevitable discovery doctrine. He concedes, however, that if the stop was lawful, and the show-up identification reliable and admissible, then the inevitable discovery doctrine is applicable.

Turning to the show-up identification, appellant argues that Mr. Johnson's identification was impermissibly suggestive and unreliable such that the circuit court should have suppressed it as unconstitutional. *See Perry v. New Hampshire*, 565 U.S. 228 (2012) (holding that an unduly suggestive identification procedure denies the defendant due process). Arguing impermissible suggestivity, appellant identifies two issues in the

police officers' procedure. First, appellant argues that the police tainted the identification by showing Mr. Johnson his recovered property immediately before the identification and by telling him that they "caught the man with the gun." Second, appellant claims that the way the police presented appellant—surrounded by police officers, handcuffed, and with a spotlight on his face—was itself sufficiently suggestive to make the identification unreliable and unconstitutional.

Further, appellant argues that the circuit court should have suppressed the identification because it lacked reliability. Appellant notes that at the scene, Mr. Johnson identified appellant as the man in the jacket who brandished the gun and said that Mr. Queen was not involved. At the motions hearing, Mr. Johnson testified that appellant was not present at the show-up identification. At trial, however, Mr. Johnson testified that appellant was the first assailant, the man who wore the red hoodie. Appellant argues that Mr. Johnson's "muddled testimony" as to appellant's identity and poor description of him by the police dispatcher, these despite a several-minute conversation with him, demonstrate the unreliability of the identification. Therefore, appellant argues, the circuit court erred in denying his motion to suppress the show-up identification.

The State disagrees, arguing that appellant failed to preserve these questions for our review. On the merits, the State argues that the claims fail because the police stop was valid, the property found in appellant's possession was subject to the inevitable discovery doctrine, and the show-up was neither impermissibly suggestive nor unreliable. Finally, the State argues in the alternative that any error was harmless given the video and photographic evidence entered against appellant at trial.

The State argues that appellant waived the right to challenge any issues from his motion to suppress. The general rule, the State concedes, is that a pretrial denial of a motion to suppress is reviewable on appeal under Maryland Rule 4-252(h). But the State argues that where a defendant affirmatively waives objections to the evidence, offers the same evidence himself, or fails to object to repeated testimony to the evidence at issue, the defendant loses the ability to appeal the admission of the evidence. The State argues that appellant failed to object to repeated testimony as to the evidence in question. It then argues that appellant waived his right to appeal the admission of the fruits of the searches because defense counsel objected to photos of the evidence on foundational grounds, the court overruled the objection, and counsel objected to the resulting admission solely "on the grounds stated earlier." Further, the State argues that appellant waived his right to appeal when he offered into evidence video footage from Officer Bryant's body camera depicting the stop and search at issue. Regarding the identification, the State claims that appellant waived appeal of the identification issues when counsel offered "no objection" to the admission of security footage from the 7-11 store that showed appellant's face as he assaulted and robbed Mr. Johnson, which the State says provided the same information as the identification appellant sought to suppress.

As to the initial police stop, the State argues that the police officers had reasonable articulable suspicion and could therefore stop and detain appellant and frisk him for weapons. The State argues that the description of two black males wearing red hoodies, one with shorts and one with pants, was a detailed description sufficient to justify the stop. Further, the State emphasizes that the police stopped appellant and Mr. Queen when they

walked together in the immediate vicinity of the robbery, an area where there was little foot traffic and no one else matching the two assailants' descriptions. The stop occurred shortly after the robbery, while Mr. Johnson was on the phone with the 911 operator. Considering the totality of these circumstances, the State argues, we should affirm the circuit court's denial of appellant's motion to suppress.

In the State's brief, the State assumes that appellant is correct that Officer Bryant's initial frisk exceeded the bounds of a constitutional *Terry* frisk, but it argues that the circuit court admitted the fruits of the search properly based upon the inevitable discovery doctrine. It was inevitable, according to the State, that following the lawful arrest of appellant, the police would search appellant in a search incident to a lawful arrest, and they would have discovered all the evidence in question. Contrary to appellant's arguments, the State contends that the initial stop was lawful, the two men fit Mr. Johnson's description and one possessed a gun, which provided probable cause to arrest them both, and the show-up identification was valid.

As to the admissibility of the show-up identification, the State contends that appellant misrepresents three facts: (1) that appellant was handcuffed during the identification; and that prior to the identification, the police told Mr. Johnson that (2) they had a suspect in possession of Mr. Johnson's property; and (3) caught the suspect with the gun. The State claims that the identification was not impermissibly suggestive and was admissible. Regarding reliability, the State argues that Mr. Johnson had several minutes to observe appellant before and during the crime, that he accurately described the suspects' clothing, and that he identified appellant as involved in the crime both times the police

drove him past appellant for identification. The State argues that Mr. Johnson's consistency in identifying appellant further proves the reliability of his identification, making it admissible.

Finally, the State argues in the alternative that any error in the circuit court's denial of the motions to suppress was harmless error. The State notes that a reviewing court may consider an error harmless where the State can prove beyond a reasonable doubt that the error in no way influenced the verdict. It is the State's position that because of the various security camera recordings of appellant punching Mr. Johnson, dragging him into the store, and later holding Mr. Johnson's possessions, any error in the admission of the police officers' searches and Mr. Johnson's identification was harmless beyond a reasonable doubt.

III.

When we review the denial of a motion to suppress, ordinarily we review only the evidence that was before the suppression court. *Williams v. State*, 219 Md. App. 295, 314 (2014). As the State was the prevailing party, we consider the facts in the light most favorable to the State. *Id.* We accept the factual findings of the suppression court unless clearly erroneous; however, "we make our own independent constitutional appraisal as to whether an action was proper by reviewing the law and applying it to the facts of the case." *Id.*

Before reaching the merits, we address the State's argument that appellant waived appellate review of this issue by abandoning his objection from the suppression hearing

and by introducing evidence of the seizure. Under Rule 4-252(h)(2)(C), when a circuit court denies a defendant's motion to suppress evidence, the denial is reviewable on appeal whether or not the defendant objects to the evidence at trial. *Jackson v. State*, 52 Md. App. 327, 331 (1982) (ruling based upon the identical predecessor rule to Rule 4-252(h)(2)(C)).[4]

The State cites *Scott v. State*, 64 Md. App. 311, 321 (1985), for the proposition that appellant waived the issue of the seized evidence by failing to object to its admission at trial. *Scott* is inapposite. In *Scott*, the suppression court refused to rule on the defendant's motion to suppress, and the defendant then failed to object to the evidence he sought to suppress when the State offered it at trial. *Id.* Rule 4-252(h) did not apply in *Scott* because the circuit court did not deny appellant's motion to suppress. Here, the court denied appellant's motion to suppress, which triggered the preservation protection of Rule 4-252(h)(2)(C). Unlike the defendant in *Scott*, appellant preserved his issue for appeal by filing a motion to suppress that the court denied.

The State argues that appellant waived appellate review by stating he has "no objection" at trial. The defendant can waive review by stating that he has no objection when the State offers the evidence at trial. *Erman v. State*, 49 Md. App. 605, 630 (1981). In *Erman*, the defendant filed a pretrial motion to suppress a statement to the police on *Miranda* grounds. *Id.* At trial, however, he "specifically advised the trial judge that there was no objection to the admission of the statement." *Id.* On that basis, this Court held that he waived the issue. *Id.*

[4] "A pretrial ruling denying the motion to suppress is reviewable on a motion for a new trial or on appeal of a conviction." Rule 252(h)(2)(C).

In the instant case, appellant objected at trial to a photograph of Mr. Johnson's possessions that the police recovered, including the bank card found in appellant's possession. Appellant stated that he had no objection to the pictures of Mr. Johnson's phone and wallet, but objected to the picture of the bank card because "there would need to be more foundation laid on that card." After the State addressed appellant's foundation argument and repeated objections and sought to admit the photograph, the State offered the photograph into evidence "absent any further objection." Appellant noted that he objected "[j]ust based on the grounds stated earlier." Appellant did not tell the court that he had no objection to the admission of the evidence. In the context of his repeated objections to the evidence, it appears instead that his response to the prosecutor was an attempt to ensure preservation of the foundation issue, not to waive an earlier argument. Appellant did not waive appellate review of this issue.

Finally, the State argues that we cannot review the issue because appellant offered body camera footage of Officer Bryant's search of appellant. A defendant can waive or forfeit appellate review by eliciting the same testimony that he sought to suppress. *Hunt v. State*, 321 Md. 387, 432–33 (1990); *Cantine v. State*, 160 Md. App. 391, 407 (2004). Here, appellant sought to suppress Mr. Johnson's bank card as evidence seized improperly from him. At trial, he offered body camera footage from Officer Bryant in which Officer Bryant searched appellant and seized evidence from him. Importantly, though, the body camera footage was not clear enough to show the items Officer Bryant took from appellant. Defense counsel asked Officer Bryant several questions to determine whether any of the objects in the footage "appear[ed] to be the same card that was shown to you" in the picture

of Mr. Johnson's possessions. Officer Bryant replied repeatedly that he "couldn't really say" what he seized based on the body camera footage.

Appellant apparently introduced the footage to impeach Officer Bryant's trial testimony, suggesting that he should not be believed. Impeaching a witness does not waive the objection to the evidence at issue. *See Peisner v. State*, 236 Md. 137, 144 (1964). More importantly, the lack of clarity in the body camera footage meant that it was substantively different evidence from the State's clear photograph of Mr. Johnson's bank card. The State admitted as much in its brief to this Court, acknowledging that because the footage "is not clear," we would need to infer from the combination of the body camera footage and other witness testimony that Officer Bryant seized the card in question during the search shown in the footage. We hold that appellant did not waive his suppression hearing objection to the entry of the bank card by failure to object, affirmative statement, or entry of the evidence at issue, and we turn to the merits of his issue.

Appellant argues that the police officers did not have reasonable articulable suspicion to justify their initial stop. Under the Fourth Amendment to the United States Constitution, police officers need reasonable suspicion supported by articulable facts to stop and briefly detain a person for investigation. *Terry v. Ohio*, 392 U.S. 1 (1968); *Williams v. State*, 212 Md. App. 396, 406 (2013). Any evidence seized as a result of a search violating the Fourth Amendment is "fruit of the poisoned tree" and is inadmissible as substantive evidence. *Wong Sun v. United States*, 371 U.S. 471, 484–85 (1963); *Elliot v. State*, 417 Md. 413, 435 (2010).

The Fourth Amendment applies where a person is seized, which occurs when the

person is restrained by force or yields to some show of authority. *Williams*, 212 Md. App. at 408. Both parties agree that Officer Bryant's request that appellant stop and identify himself triggered appellant's Fourth Amendment rights. Since Officer Bryant "seized" appellant, we must determine whether the seizure was reasonable. Maryland courts apply a six-factor test to determine whether police officers searching for a suspect have reasonable articulable suspicion for a stop. The factors are as follows:

> "(1) the particularity of the description of the offender or the vehicle in which he fled; (2) the size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occurred; (3) the number of persons about in that area; (4) the known or probable direction of the offender's flight; (5) observed activity by the particular person stopped; and (6) knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation."

Id. at 406. The six-factor test is not exhaustive, and courts weigh the factors using "common sense, nontechnical conception" in the totality of the circumstances. *Id.* at 406, 410. The court's goal is to determine whether the police officer had "a particularized and objective basis for suspecting legal wrongdoing." *Id.* at 406.

Officer Bryant had a sufficiently detailed description to stop appellant. He knew from the police dispatcher that the suspects were two black males, and the dispatcher told him, at a minimum, that the suspects wore red tops and black bottoms.[5] Appellant and Mr. Queen fit the description provided, and they were within feet of the scene of the crime. Officer Bryant testified at the suppression hearing that he stopped them outside B.J.

[5] We note that while race and ethnicity are factors to be considered, they are never sufficient alone to justify a stop. *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 885–86 (1975).

Mallard's bar, which sits *between* the gas station where the victim had been assaulted and the 7-11 store where he had been robbed. The stop occurred within minutes of Mr. Johnson calling 911. There was minimal foot traffic in the area, and witnesses did not recall anyone else in the area who matched the suspects' description. The facts available to Officer Bryant at the time he stopped appellant satisfied four of the six listed factors for reasonable, articulable suspicion and provided a common sense, objective basis for suspecting appellant of criminal activity.

Appellant argues next that Officer Bryant's search of appellant's pockets violated the Fourth Amendment because Officer Bryant pulled an unidentified "lump" from appellant's pocket, then further searched appellant's pockets and removed cash and Mr. Johnson's bank card. Appellant contends in the alternative that inevitable discovery does not apply because, in appellant's view, the stop, search, and show-up all violated his Fourth Amendment rights, leaving the police with no legal basis for "inevitably" arresting and searching him. We need not address the constitutionality of either part of the search because, as we indicated *supra,* the State does not contest appellant's argument that the searches of his person violated the Fourth Amendment but instead relies upon the inevitable discovery doctrine which permitted the court to admit the evidence of both searches.

We hold that, based upon the inevitable discovery doctrine, the circuit court did not err in denying appellant's motion to suppress the evidence seized from his person. Evidence discovered in an illegal search is presumed inadmissible, but the inevitable discovery doctrine allows the State to use such evidence if it can prove by a preponderance of the evidence that the police would inevitably have discovered the evidence through

lawful means. *Nix v. Williams*, 467 U.S. 431, 444 (1984); *Williams v. State*, 372 Md. 386, 415 (2002). The rationale for the rule is that "[w]hen challenged evidence inevitably would have been discovered lawfully regardless of police misconduct, the deterrence effect of exclusion is minimal, and exclusion of the evidence would put police in a worse position than they would have been without any illegal conduct." *Williams*, 372 Md. at 417. Where the police have probable cause to believe that a person committed a felony, they may arrest the person without a warrant. *Conboy v. State*, 155 Md. App. 353, 364 (2004). Police may thoroughly search an arrestee incident to a lawful arrest.

The police stopped appellant lawfully, and the victim identified appellant as one of the robbers. Once the victim positively identified appellant as one of the robbers, appellant's arrest was lawful and a lawful search incident to that arrest soon to follow. The discovery of the incriminating evidence was inevitable. Therefore, it was inevitable that the police would have discovered all of the evidence they seized from appellant when they arrested him, and the circuit court properly admitted the evidence from Officer Bryant's searches on that basis.

IV.

We next address appellant's challenge to the identification procedure. We hold that the circuit court did not err in denying appellant's motion to suppress Mr. Johnson's show-up identification.

Addressing first the State's argument that appellant waived his argument, we hold that appellant preserved the issue for our review. Where a circuit court denies a defendant's

motion to suppress evidence, the defendant need not object to the evidence at trial to preserve the issue of its admission for review. Rule 4-252(h)(2)(C); *Jackson*, 52 Md. App. at 331. The State cites *Jackson v. State* in its brief, but nevertheless argues that appellant waived his argument as to the identification because he failed to object to surveillance video evidence that the State offered at trial that showed appellant's face. As in *Jackson*, appellant's argument is preserved, both because he argued a motion to suppress and the circuit court denied it and because the video evidence in question was not evidence of the show-up identification.

We must decide whether the trial court's admission into evidence of Mr. Johnson's show-up identification violated appellant's due process rights. The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires courts to exclude pretrial identifications that are both impermissibly suggestive and unreliable, that is, identifications in which the suggestive identification procedure leads to a "very substantial likelihood of irreparable misidentification." *Manson v. Bratwaite*, 432 U.S. 98, 116 (1977). The United States Supreme Court has identified five indicia of reliability: (1) the opportunity of the witness to view the criminal; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the offender; (4) the level of certainty the witness demonstrates at the identification procedure; and (5) the length of time elapsed between the crime and the identification. *Id.* at 114–15.

In this case, appellant claims that the police impermissibly influenced Mr. Johnson's identification both before and during the show-up. He argues that Officer Vandervall suggested appellant's guilt by asking Mr. Johnson to identify his stolen bank cards and

telling him that the police caught the assailant with the gun. He also argues that the procedure itself was impermissibly suggestive because the police handcuffed appellant, surrounded him with officers and police cars, and shined a spotlight in his face. Proceeding to reliability, appellant argues that Mr. Johnson's insistence that appellant was present at trial but not at the show-up identification makes his identification unreliable.

We first inquire whether the police employed an impermissibly suggestive identification procedure. If so, the primary question becomes "whether under the 'totality of the circumstances,' the identification was reliable even though the confrontation procedure was suggestive." *Neil v. Biggers*, 409 U.S. 188, 199 (1972). If the police identification process is suggestive and unnecessary, suppressing the identification is appropriate only when the process creates a "substantial likelihood of misidentification." *Perry v. New Hampshire*, 565 U.S. at 239. The Court of Appeals in *Smiley v. State*, 442 Md. 168, 180 (2015), explained as follows:

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

(citations omitted).

We recognize that show-ups have been criticized, and are in fact inherently suggestive. *See Turner v. State*, 184 Md. App. 175, 180 (2009) (noting that by its very

nature, a one-on-one show-up is suggestive but has always been considered a perfectly permissible procedure in the immediate wake of a crime while the apprehension of the criminals is still turbulently unsettled); *Carlos M.*, 220 Cal. App. 3d 372, 387 (1990) (noting that "single-person show-ups for purposes of in-field identifications are encouraged, because the element of suggestiveness inherent in the procedure is offset by the reliability of an identification made while the events are fresh in the witness's mind, and because the interests of both the accused and law enforcement are best served by an immediate determination as to whether the correct person has been apprehended"). Nevertheless, there is no bright line rule regarding show-ups, and courts have declined to exclude all show-ups *per se*. Instead, the decisions regarding show ups are controlled by the individual facts and circumstances of each individual case, with the linchpin of admissibility being the reliability of the identification itself. Contrary to appellant's contention, suggestiveness alone does not mandate exclusion. The inquiry turns upon whether, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification. *Neil*, 409 U.S. at 199; *Smiley*, 442 Md. at 180.

Like all show-ups, the identification procedure used in this case was suggestive, but it was not impermissibly suggestive. *See Anderson v. State*, 78 Md. App. 471, 494 (1989). Our review of the record supports the conclusion that the police did not tell Mr. Johnson that they had arrested the suspect who had a gun. The police told Mr. Johnson prior to the show-up identification that they had "found somebody based off of [his] description" and needed him to attempt to identify the suspect. It was in the evening after the show-up was concluded that the police told Mr. Johnson that the second person they arrested was the

person who had the gun. As defense counsel clarified twice at the suppression hearing, Mr. Johnson's statements that "they had caught the other guy with the gun" were his narrative summaries of events, not his restatement of things the police told him prior to the identification. Regarding the bank cards, there was no evidence before the suppression court that Officer Vandervall used Mr. Johnson's bank cards to suggest appellant's guilt; rather, she simply said that the police found his cards and asked him to confirm that they were his. Finally, the fact that Mr. Johnson only identified one of the suspects he saw at the show-up identification supports the proposition that the procedure was not impermissibly suggestive.

As in all show-up identifications, the procedure the police used for Mr. Johnson's identification was suggestive. Though suggestive, it was permissibly suggestive. Mr. Johnson's attentiveness and the prompt show-up weigh in favor of the suppression court's finding of reliability. We hold that Mr. Johnson's show-up identification possessed substantial indicia of reliability which outweighed any possible tainting effect of the suggestive police procedure and eliminated the possibility of an irreparable misidentification. The circuit court did not violate appellant's due process rights by admitting the identification.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.