UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2197

September Term, 2012

HASAN CHAMPION

v.

STATE OF MARYLAND

Meredith,
Graeff,
Leahy,

JJ.

Opinion by Graeff, J.

Filed: May 1, 2015

Appellant, Hasan Champion, was convicted by a jury, in the Circuit Court for Baltimore City, Maryland, of robbery, first degree assault, and theft over $1,000. The court sentenced appellant to fifteen years on the conviction for first degree assault, ten years, concurrent, on the robbery conviction, and it merged the conviction for theft.[1]

On appeal, appellant presents the following issues for our review, which we have rephrased slightly, as follows:

1. Did the circuit court err in failing to suppress the victim's pre-trial, extra-judicial identification of appellant?

2. Did the circuit court err in admitting into evidence improper hearsay evidence?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Motions Hearing

Detective Michael Witmer, a member of the Baltimore City Police Department, testified that he prepared multiple photo arrays relating to the assault and robbery of Anthony Reachard on June 28, 2011. On July 5, 2011, after compiling pictures using a general description of the suspect as an African-American male within a certain age range,

[1] The docket entries reflect that the circuit court subsequently granted appellant's motion to correct an illegal sentence regarding the sentence for the first degree assault conviction. The court merged his conviction for first degree assault into his conviction for robbery for sentencing purposes.

Detective Witmer showed five photo arrays to Mr. Reachard, who was unable to make an identification.

In August 2011, after further investigation, Detective Witmer prepared a sixth photo array, the only array at issue on appeal. Having developed a suspect, Detective Witmer found similar photographs in the police computer and placed those into an array. He contacted Mr. Reachard and asked him to come to the police department. When Mr. Reachard arrived at the police station, the photo array was lying face down on a table. Detective Witmer did not tell Mr. Reachard that he had a suspect in mind.

After Mr. Reachard turned the array over, he looked at it for several minutes before identifying appellant's photograph. Mr. Reachard stated: "[T]hat's him. That's the one who robbed me," and he signed the array.

Detective Witmer explained that, while Mr. Reachard was looking at the array, he was in the room, but he walked away because he did not want to be standing over Mr. Reachard's shoulder. Detective Witmer did not tell Mr. Reachard who to pick out, and he did not coerce him to pick anyone out.

Mr. Reachard then testified about the array shown to him on August 30, 2011. He testified that, within "30 seconds to a minute," he identified appellant's photograph as the person who robbed him on June 29, 2011. When asked why he picked out appellant's photograph, Mr. Reachard replied: "Recognition," explaining, "the eyebrows, the face, his

general appearance of his facial features." Mr. Reachard stated that the individual's eyebrows were "a little bushier," and his nose was wide. Detective Witmer did not tell him who to pick out.

Mr. Reachard stated that, when he was shown the array in the police department, he was in an open room, and there were two women present at different desks. More specifically, he explained what occurred, as follows:

> Q. Did Detective Witmer discuss anything with you before showing you the array?
>
> A. Uh, he would – he sat the array down so that there was print there, I didn't see the photos at first, he explained to me that [what] he wanted me to do was flip it over, take a look at the pictures and if I identified anybody that I was supposed to sign that and date it and, you know, let him know when I was done with the array.
>
> Q. Did he mention to you beforehand that he had a suspect in mind?
>
> A. No, I don't believe he did.
>
> Q. Did he talk at all about the five arrays he had shown you a month before?
>
> A. No.
>
> Q. Did he ask you if you were sure that this was the one?
>
> A. Yeah.

The photo array was admitted as Defendant's Exhibit Number 1. Mr. Reachard initialed the following advisement on the back of the form:

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

After identifying appellant's picture on the array, Mr. Reachard wrote the following on the back of the form, signing his name to the statement:

> Subject had accompanied friend to purchase motorcycle. Once motorcycle was gone up the street he said "I've got a gun, the gig is up, give me the fuckin money" As I tried to get in my van he struck [me] in the forehead. He hit me with something metal and I believe he had brass knuckles on. He kept hitting me then called for help from his friend across the street. As his friend hit me he reached into my pocket and took the money used to pay for the motorcycle. Then they both ran down an alley as a car pulled up. He took $3,275.00

At the motions hearing, defense counsel argued the photo array was impermissibly suggestive because "amongst the six, Mr. Champion's eyes are turned cast somewhat downward, you know, with the lids sort of, suggesting a slight posture of resignation or, you know, sleepiness if you will." Counsel also contended that the other five subjects had "what I should call a robust hairline," while appellant's hair was thinning.

The court denied the motion to suppress the array, stating as follows:

> The testimony that was presented to the Court was that the office[r] presented a photo array to the witness and then went behind him somewhere, walked away, not sure but certainly wasn't over his shoulder telling him what to do.

> That was the testimony from the officer, the testimony from the witness was specifically that this photo array was picture down and print up and he turned it over and took about 30 seconds to a minute to look over the pictures and was able to identify an individual that has been identified as your client. That the officer did nothing to tell him who to pick out, what to say or what to do, and of his own accord he then picked out your client.
>
> You then pointed out to the Court that there are, as you pointed out, subtle differences but you've indicated that they are important, that the hairline is different, that Mr. Champion's eyes are looking to the right where others are looking at him. I am looking at the features of these individuals, they all do have bushy eyebrows and they are all of similar complexion, similar shaped head except possibly one but it could be an angle, but again, overall, there is nothing to show this Court that the photo array was done in an impermissibly suggestive manner and your motion is denied.

Trial

On June 28, 2011, Mr. Reachard placed an advertisement on Craigslist to sell his motorcycle. That same day, a person who identified himself as "Ern" contacted Mr. Reachard about purchasing the motorcycle.[2] The two communicated by text message, and Mr. Reachard agreed to deliver the motorcycle to Baltimore. They agreed that Ern would purchase the motorcycle for a total of $3275.

Mr. Reachard loaded the motorcycle into his van, and at approximately 4:30 p.m. on June 29, 2011, Mr. Reachard arrived at the prearranged location in Baltimore. Ern and

[2] The purchaser, Raheem Johnson, testified that he gave his father's name, Aaron Williams, because it was his understanding that he was not old enough to get the title in his name. The transcript of Mr. Reachard's testimony spells the name as "Ern."

another man, whom Ern introduced as his brother, "Anthony," met Mr. Reachard. Ern showed Mr. Reachard a large amount of cash, and after filling out some paperwork related to the sale, Mr. Reachard unloaded the motorcycle from his van. At Ern's request, Mr. Reachard rode the motorcycle around for a demonstration. Ern then directed Anthony to pay Mr. Reachard, and, Ern got on the motorcycle and rode away.

Mr. Reachard then returned to his van, with Anthony close behind. When he got to the driver's side door, the person identified as Anthony said, "the gig is up, I got a gun, give me the fucking money." Mr. Reachard tried to get in his van, but Anthony struck him in the forehead. Anthony continued to hit Mr. Reachard, and then Anthony yelled for another man standing nearby to come and help him. The two men started to beat Mr. Reachard. Although he never saw a gun, Mr. Reachard believed that he was being struck with a gun or some other hard object. Anthony removed the cash from Mr. Reachard's pocket, and the two assailants ran away down an alley.

Mr. Reachard saw a police car nearby and told the officer that he had just been robbed. Although he was bleeding from his head, Mr. Reachard declined to go to the hospital. Instead, he followed the police to the police station to report the robbery.

On August 30, 2011, approximately two months later, Mr. Reachard was shown a photo array. He identified a photograph of the man introduced to him as Anthony on the day of the incident.

Detective Witmer testified that, in the course of his investigation, he spoke to Raheem Johnson about the incident. Mr. Johnson provided a nickname of another person of interest, "Little Joe," with a Muslim first name. As a result of this information, Detective Witmer developed appellant as a suspect. He showed Mr. Johnson a photo array containing appellant's photograph, and Mr. Johnson identified appellant. Detective Witmer then arranged another array with appellant's photograph, which he showed to Mr. Reachard. Mr. Reachard identified appellant's photograph, stating: "That's him."

Mr. Johnson testified that he was the person who purchased the motorcycle. When he arrived at the pre-arranged location, he saw appellant standing nearby. Appellant asked what Mr. Johnson what he was doing, and Mr. Johnson explained that he was going to purchase a motorcycle. After learning that Mr. Johnson was going to pay more than $3200, appellant asked: "[W]hy are you going to pay all that money, just give me half of it and I'll get the bike." Mr. Johnson declined.

When Mr. Reachard arrived, Mr. Johnson went to speak with him; appellant followed behind. After filling out the paperwork, Mr. Johnson paid Mr. Reachard for the motorcycle. He eventually rode it away from the scene and went home. Later that day, Mr. Johnson saw appellant, who told him that "he got the money back." Mr. Johnson and appellant then started arguing about what appellant had done. Mr. Johnson eventually spoke to police and told them about appellant's role in the robbery.

DISCUSSION

I.

Appellant contends that the court "erred in failing to suppress Mr. Reachard's pre-trial, extra-judicial identification of" him. In support, he asserts that the pre-trial identification procedure was impermissibly suggestive and Mr. Reachard's identification was not independently reliable.

The State contends that the court properly denied appellant's motion to suppress the pre-trial identification. In support, it makes three arguments: (1) the "photographic array was not conducted in an impermissibly suggestive manner"; (2) Mr. Reachard's identification was independently reliable; and (3) "[e]ven if impermissibly suggestive and not independently reliable, the circuit court's denial of the motion to suppress was harmless beyond a reasonable doubt as it in no way affected the verdict."

This Court has stated that "[t]he scope of appellate review of a trial court's denial of a motion to suppress an out-of-court identification is well-settled." *In re Matthew S.*, 199 Md. App. 436, 447 (2011). We explained:

> We view the evidence and inferences that may be reasonably drawn therefrom in a light most favorable to the prevailing party on the motion, and will uphold the motions court's findings unless they are clearly erroneous. We must make an independent constitutional evaluation, however, by reviewing the relevant law and applying it to the unique facts and circumstances of the case.

Id. (quoting *Gatewood v. State*, 158 Md. App. 458, 475-76 (2004)) (citations and quotations omitted), *aff'd on other grounds*, 388 Md. 526, (2005).

It is well-established that "'[d]ue process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures.'" *James v. State*, 191 Md. App. 233, 251-52 (quoting *Webster v. State*, 299 Md. 581, 599-600 (1989)), *cert. denied*, 415 Md. 338 (2010). Maryland law establishes "a two-stage inquiry for due process challenges to extrajudicial identifications." *Thomas v. State*, 213 Md. App. 388, 416 (2013) (quoting *Jones v. State*, 310 Md. 569, 577 (1987)), *aff'd*, 437 Md. 640 (2014). The two steps have been described as follows:

> The first [step] is whether the identification procedure was impermissibly suggestive. If the answer is "no," the inquiry ends and both the extra-judicial identification and the in-court identification are admissible at trial. If, on the other hand the procedure was impermissibly suggestive, the second step is triggered, and the court must determine whether, under the totality of the circumstances, the identification was reliable.

Upshur v. State, 208 Md. App. 383, 400 (2012) (quoting *Jones v. State*, 395 Md. 97, 109 (2006)), *cert. denied*, 430 Md. 646 (2013).

We begin with the first step, whether the pre-trial identification procedure was impermissibly suggestive. "Suggestiveness exists where the police, in effect, say to the

witness, 'This is the man.'" *Thomas*, 213 Md. App. at 417 (quoting *Jones*, 310 Md. at 577). *Accord In re Matthew S.*, 199 Md. App. at 448 ("'THE SIN IS TO CONTAMINATE THE TEST BY SLIPPING THE ANSWER TO THE TESTEE. All other improprieties are beside the point.'") (quoting *Conyers v. State*, 115 Md. App. 114, 121 (1997)).

There are three prongs to the initial inquiry concerning suggestiveness. This Court has explained the required showing:

> 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 v. State, 216 Md. App. 1, 33, *aff'd*, ___ Md. ___ (filed March 9, 2015).

Here, appellant contends that the photo array was impermissibly suggestive for two reasons: (1) "amongst the six, Mr. Champion's eyes are turned cast somewhat downward, you know, with the lids sort of, suggesting a slight posture of resignation or, you know,

sleepiness if you will"; and (2) the other five subjects had "what I should call a robust hairline," whereas appellant's hair was thinning.

We have reviewed the array and are not persuaded. As the Court of Appeals recently reaffirmed, "a photo array 'to be fair need not be composed of clones.'" *Smiley*, slip op. at 11 (quoting *Bailey v. State*, 303 Md. 650, 663 (1985)).

Here, the six men in the photographs are all of similar race and age, and they all have bushy eyebrows, a feature that was significant to the victim. We agree with the circuit court that the differences pointed out by appellant were subtle, and the array was not impermissibly suggestive.

Because the appellant has not met his burden on that threshold requirement, our inquiry ends. The circuit court properly denied the motion to suppress.

II.

Appellant next contends that the trial court erred in admitting into evidence screenshots taken of the text messages between Mr. Reachard and Mr. Johnson.[3] He asserts

[3] The Court of Appeals recently explained a "screenshot" as follows:

> A "screenshot" is an image that depicts only the content of the computer screen. Merriam–Webster's Online Dictionary (2015), available at [(on file at http://perma.cc/N5GT-WYXK)]. "Screenshot" is synonymously used to indicate a picture taken of the screen of a cellular telephone. *E.g. Richards on behalf of Makayla C. v. McClure*, 858 N.W.2d 841, 844 (Neb. 2015) (witness

(continued...)

that this evidence constituted inadmissible hearsay.

The State contends that the court "properly admitted screen shots of a text message conversation between Reachard and Johnson that pertain only to their agreement to sell and deliver the motorcycle." It asserts that the text message conversations fell within the hearsay exception for existing state of mind, i.e., Mr. Reachard's future intent to meet with Mr. Johnson to sell the motorcycle. In any event, the State asserts, even if error, it was harmless because the evidence was cumulative to both Mr. Reachard's and Mr. Johnson's trial testimony.

Both Mr. Reachard and Mr. Johnson testified regarding their discussions about the sale of the motorcycle, and that they exchanged a series of text messages regarding the sale. The State sought to admit photographs of screenshots of Mr. Reachard's cell phone, showing the contents of those text messages. Defense counsel objected, stating as follows:

[3](...continued)
took "screenshots" of text messages at issue that "show[ed] the actual screen of the text messages").

Sublet v. State, ___ Md. ___, No. 42, Sept. Term, 2014, slip op. at 1 n.3 (filed April 23, 2015).

> Your Honor, I am letting a certain amount of hearsay come in because it doesn't really matter but I think we are reaching a point now with the texts where those need to be authenticated in some way other than just the person saying because they can be tampered with. I would ask that the State not be allowed to use those texts but just to elicit this information through testimony and again try to be mindful of the hearsay restrictions.

The court overruled the objection, stating that Mr. Reachard could authenticate the photographs if he was the person who took the photographs of his cell phone. Mr. Reachard testified that he did take the photographs at issue. He further testified:

> That's basically the conversation where Ern had, the gentleman I had gotten to know as Ern had asked if I could actually bring the bike . . . down to him . . . where I told him I could bring it down, $75 and I will bring it down so that the total price would be $3275. He gave me an address where I [was] supposed to go, where he lived, and I gave him my full name and where I worked so that, you know, he would feel comfortable with me coming down and meeting a stranger.

After confirming that the photographs of Mr. Reachard's cell phone were fair and accurate portrayals of the texts he exchanged with Mr. Johnson, the State moved to admit the photographs into evidence. Defense counsel then objected on the ground of hearsay. The court overruled the objection, and the photographs were received into evidence.

Mr. Reachard then testified, without objection, as follows:

> The agreement [was] that I would meet him at 1100 Braddish Avenue in Baltimore and bring the bike and he would pay me $3,275, that would be $3,200 for the bike and $75 to bring it down to him. And I told him I was finishing up a service call so I would probably be there around 4:00, 4:30.

The photographs depict a conversation via text message between "Ern" and Mr. Reachard. That conversation took place on June 29, 2011, between 12:20 p.m. and 3:46 p.m. The contents of the conversation are essentially similar to Mr. Reachard's testimony, quoted above. The two exchanged names, agreed on where to meet to sell the motorcycle, agreed on a fee for Mr. Reachard to bring the motorcycle down from Pennsylvania, and discussed the terms of the sale, including price, and the exchange of a bill of sale and title.

Appellant's claim that he is entitled to reversal of his convictions based on the admission of the text messages fails for two reasons. First, the issue is not preserved for review. To be sure, counsel objected to the admission of the screenshots. But he did not object to Mr. Reachard's testimony on the subject. *See DeLeon v. State*, 407 Md. 16, 30-31 (2008) (defendant waived objection to alleged irrelevant and highly prejudicial testimony about his gang affiliation because evidence on the same point was admitted without objection at another point during trial). Because Mr. Reachard's testimony was essentially the same as the contents of the text messages, this issue is not preserved for this Court's review.

Even if the issue was preserved, and assuming, arguendo, that the evidence was improperly admitted, we would find that any error was harmless. As this Court has explained, for error to be harmless the appellate court must be convinced

> that there is no reasonable possibility that the evidence complained of–whether erroneously admitted or excluded–may have contributed to the rendition of the guilty verdict. To say that an error did not contribute to the

> verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record.

Frobouck v. State, 212 Md. App. 262, 284, *cert. denied*, 434 Md. 313 (2013) (citations and quotations omitted).

Here, the issue that was contested by the defense was whether appellant was the assailant, not whether Mr. Reachard had conversations with Mr. Johnson and then drove to Baltimore to sell his motorcycle. Defense counsel conceded as much, after Mr. Reachard testified to his phone conversations with Mr. Johnson and before objecting to the admission of the screenshots, stating: "I am letting a certain amount of hearsay come in because it doesn't really matter." Given that the screenshots were not relevant to the central issue at trial, i.e., the identity of the assailant, and that they were cumulative to Mr. Reachard's testimony, any error in the admission of the screenshots was harmless and does not require reversal of appellant's convictions.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.