Circuit Court for Baltimore City
Case No.: 115334019

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2546

September Term, 2016

GLENN BANKS

v.

STATE OF MARYLAND

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

JJ.

Opinion by Meredith, J.

Filed: April 18, 2018

At the conclusion of a jury trial in the Circuit Court for Baltimore City, Glenn Banks, appellant, was convicted of three charges arising out of the November 4, 2015, shooting death of Darryl Whitehead, II. Prior to trial, Banks filed a motion to suppress the identification of himself as the shooter, which had been made by Robert Butler after viewing a photographic array. Appellant also filed a motion to exclude the identification testimony by Detective Sean Suiter, who recognized Banks in a crime scene surveillance video. Both motions were denied, and Banks challenges both rulings. He presents two questions for our review:

1. Did the trial court err in denying Appellant's motion to suppress a photographic array identification?

2. Did the trial court err in denying Appellant's motion to preclude a police officer's pretrial identification testimony?

Perceiving no error, we will affirm the judgments of the Circuit Court for Baltimore City.

FACTS AND PROCEDURAL HISTORY

On the afternoon of November 4, 2015, Darryl Whitehead, II, was shot to death in front of An's Food Market in the 2200 block of Fulton Avenue in Baltimore City. Detectives from the Baltimore Police Homicide Unit began an investigation led by Detective Raymond Yost. Upon learning that Whitehead had been shot once before, and had just been released from prison the day before his murder, Detective Yost checked whether Whitehead had been involved in any prior crimes of violence in the area. Detective Yost learned that Whitehead had been a suspect in the 2012 murder of Guy

Randall. Other information received by detectives led them to begin looking at Banks and two of his associates — Antwan Figeroa (who was the late Guy Randall's nephew) and Julio Delgado — as possible suspects.

On the morning of November 5, 2015, Robert Butler was arrested for selling heroin not far from the scene of Whitehead's murder. Butler was taken to the Homicide Unit to be interviewed. Butler confirmed that he had been present on the 2200 block of Fulton Avenue on November 4 when Whitehead was shot. Over a period of four and a half hours, he was shown three separate photo arrays. Upon viewing the first array, he did not identify anyone. When Butler viewed the second array, he identified Figeroa as someone who had been present at the time of the shooting. Upon viewing the third array, Butler identified Banks as the "shooter."

Detectives were able to obtain surveillance video from the interior of An's Food Market. On November 10, Detective Yost was viewing the video on his computer monitor at his desk when Detective Sean Suiter — who had recently started working in the Homicide Unit after a decade working as a narcotics detective in the vicinity of Whitehead's murder — happened by and remarked to Detective Yost that he recognized the man seen in the video holding a gun in the doorway of An's Food Market just prior to the shooting. Detective Suiter said: "Hey. That's Glenn Banks." Detective Suiter was sure of his identification, based on the fact that, "for over ten years," he saw appellant "almost every day" and knew him "very well."

On November 13, 2015, police arrested Banks and searched his residence pursuant to a search warrant. From an upstairs bedroom, police recovered a Lacoste polo shirt matching the one worn in the surveillance video by the armed man in the doorway of An's Food Market. Police also found a copy of an obituary for Guy Randall, who had been murdered in 2012 in the 2200 block of North Fulton Avenue, the same location where Whitehead was murdered.

A grand jury indicted Banks on charges of first-degree murder, use of a firearm in a crime of violence, and possession of a firearm by a prohibited person. Prior to trial, Banks filed a motion to suppress the identification made by Butler, and a motion in limine to exclude Detective Suiter's identification of Banks as the man in the surveillance video. Both motions were heard, and denied, on October 14, 2016.

At the conclusion of a five-day jury trial, Banks was acquitted of first-degree murder, but convicted of second-degree murder and the two gun charges. He was sentenced to a total of 60 years' incarceration, and filed this appeal.

DISCUSSION

I. The motion to suppress Butler's identification

We described pertinent legal principles governing pretrial identification in *James v. State*, 191 Md. App. 233, 252-53 (2010):

> As an appellate court, in "reviewing the court's disposition of a motion to suppress, 'we look only to the record of the suppression hearing and do not consider the evidence admitted at trial.'" *Massey v. State*, 173 Md. App. 94, 100-01, 917 A.2d 1175 (2007) (quoting *In re Tariq A-R-Y*, 347 Md. 484, 488, 701 A.2d 691 (1997)). *See Prioleau v. State*, 411 Md.

629, 638, 984 A.2d 851 (2009) (quoting *Rush v. State*, 403 Md. 68, 82-83, 939 A.2d 689 (2008)).

With respect to identification testimony, courts have recognized that "'[d]ue process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures.'" *Webster v. State*, 299 Md. 581, 599-600, 474 A.2d 1305 (1984) (quoting *Moore v. Illinois*, 434 U.S. 220, 227, 98 S.Ct. 458, 54 L.Ed.2d 424 (1977)); *Gatewood v. State*, 158 Md. App. 458, 475, 857 A.2d 590 (2004), *aff'd on other grounds*, 388 Md. 526, 880 A.2d 322 (2005). Due process principles apply to remedy the unfairness that would result from the admission of evidence that is based on an identification procedure that was "unnecessarily suggestive" and conducive to misidentification at trial. *See Neil, Warden v. Biggers*, 409 U.S. 188, 197-98, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); *Stovall v. Denno*, 388 U.S. 293, 299, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); *Jones v. State*, 395 Md. 97, 108, 909 A.2d 650 (2006).

Courts follow a two-step inquiry to determine the admissibility of disputed identification evidence alleged to be the product of unduly suggestive pre-trial identification procedures. *Gatewood*, 158 Md. App. at 475, 857 A.2d 590. The accused, in his challenge to such evidence, bears the initial burden of showing that the procedure employed to obtain the identification was unduly suggestive. *Id*. Once this showing is made, the court must then determine whether, based on the totality of the circumstances, the identification was reliable despite the suggestiveness of the confrontation procedure. *Biggers, supra*, 409 U.S. at 199, 93 S.Ct. 375. Although the reliability of the identification is the "linchpin" question, *see Manson, Correction Commissioner v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), if the identification procedure is not unduly suggestive, then our inquiry is at an end. *See Mendes v. State*, 146 Md. App. 23, 36, 806 A.2d 370, *cert. denied*, 372 Md. 134, 812 A.2d 289 (2002).

. . . [With respect to the second step of the inquiry], "not all impermissibly suggestive procedures call for exclusion [of the identification], but only those impermissibly suggestive procedures that would actually give rise to a very substantial likelihood of irreparable misidentification." *Conyers v. State*, 115 Md. App. 114, 120, 691 A.2d 802, *cert. denied*, 346 Md. 371, 697 A.2d 111 (1997). If the identification is found by the court to be reliable, notwithstanding any suggestiveness in the

identification procedures employed, it "is not a misidentification" and "will not be suppressed under the due process clause. What matters is the trustworthiness of the evidence, not the propriety of the governmental conduct that produced it." *Turner v. State*, 184 Md. App. 175, 181, 964 A.2d 695 (2009).

In *Biggers, supra*, 409 U.S. at 199-200, 93 S.Ct. 375, the Court set forth a "reliability" analysis to be followed if an identification procedure is deemed to have been suggestive. The trial court must then determine

> whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include [1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness'[s] degree of attention, [3] the accuracy of the witness'[s] prior description of the criminal, [4] the level of certainty demonstrated by the witness at the confrontation, and [5] the length of time between the crime and the confrontation.

In *Turner, supra*, 184 Md. App. at 183, 964 A.2d 695, we noted that the Supreme Court, in *Manson v. Brathwaite*, *supra*, 432 U.S. at 113, 97 S.Ct. 2243, "place[d] an unmistakable seal of approval" on *Biggers*, and "g[a]ve the *Biggers* test unchallenged authoritative legitimacy." As a consequence, we observed, 184 Md. App. at 184, 964 A.2d 695:

> It is only where there is "a very substantial likelihood of irreparable misidentification," to wit, a situation where the identification could not be found to be reliable, that exclusion would be warranted. Short of that point, the "evidence is for the jury to weigh."

(Quoting *Manson, supra*, 432 U.S. at 116, 97 S.Ct. 2243.)

We have emphasized: "Until a defendant establishes impermissive suggestiveness in the first instance as a basis for presumptive exclusion . . . a court does not even inquire, by looking at the suggested reliability factors, into whether the State is entitled to an exemption from that presumptive exclusion." *Conyers v. State*, 115 Md. App. 114, 120

(1997). *Accord Thomas v. State*, 213 Md. App. 388, 416-17 (2013) ("If the out-of-court identification was not made under suggestive circumstances, the inquiry ends and the identification evidence is admissible."), *cert. denied*, 437 Md. 640 (2014).

In this case, Banks argued that Butler's identification was unduly suggestive because of the circumstances leading up to the viewing of the photo array. Butler had used heroin the morning he was arrested and taken to the Homicide Unit to view the arrays. Butler testified that he was "starting to be ill" from withdrawal on the way to the Homicide Unit, and he told detectives he felt bad. He testified that, upon his arrival at the unit, he was placed in a cell, although he was not handcuffed, and was later moved to an interview room. He was given a bottle of water, and was taken to the bathroom. He was interviewed by plainclothes detectives about the fatal shooting the previous day. At the suppression hearing, Butler professed a lack of memory about many of the questions he was asked on November 5 because, he said, he felt so sick, but he nevertheless provided useful information about the homicide.

On direct examination by defense counsel, Butler gave the following testimony:

> Q. [DEFENSE COUNSEL] Did you provide a statement about that homicide?
>
> A. [BUTLER] I basically told them that I was out there. They asked me – they said somebody said they seen me out there. I said, "Yeah. I was out there," you know. That's about the gust [sic] of it. I can't really say exactly what happened, because I was doing what I was doing at the time. You know, so I can't really say exactly what the questions was that they asked.
>
> THE COURT: When you say doing what you were doing, you were looking to score; right?

THE WITNESS: I was selling –

THE COURT: And so you could use?

THE WITNESS: I was selling to support my habit.

THE COURT: Okay.

BY [DEFENSE COUNSEL]:

Q. Did you witness a homicide?

A. It was a shooting. You know, I didn't actually – you know, wasn't right there when it happened. But, you know, it was a bunch of people out there when the shooting – heard.

I don't know exactly – you know, everybody that was out there, they heard the shots just as well. You know, but I wasn't right up on it, you know, right there to see it exactly.

* * *

Q. Did you see – the person who got shot, do you know who that was?

A. No.

Q. Did you see that person actually get shot?

A. We didn't actually see, because like I said, it was so much going on when the shots rang out. We didn't actually know what happened. We know to run.

When you out there, you selling drugs, you know to run when you hear gunshots (Inaudible . . .)

Butler acknowledged that detectives showed him three arrays of six photos each, and asked him to identify anyone that he recognized. He said: "Yeah. They asked me about any – anybody that I seen before. Yeah."

Q. [DEFENSE COUNSEL] Were they – **do you remember if they were asking you to identify one person or more than one person**?

A. [BUTLER] **Basically identify anybody that I have seen**. Do [sic] I have seen any of these people before.

Q. Do you remember –

A. You know, –

Q. Go ahead?

A. And I was like it's plenty – **the people that they showed me was people that I knew. You know, of course I've seen them before.** You know, so –

Q. **And the people that they showed you that you knew, you're saying you identified them because you saw them before?**

A. **Right**.

(Emphasis added.)

Referring to Banks, who was seated at counsel table, defense counsel asked Butler if he knew him:

Q. [DEFENSE COUNSEL] **Do you know this gentleman** sitting here at the trial table?

A. [BUTLER] **I don't know him personally, but I've seen him around the neighborhood before**.

Q. And about how many times would you say you've seen him?

A. Not very many. You know, I never took count.

Q. Okay.

A. You know, to be honest. We not friends. You know, it's just passing by each other. That's about it.

Q. Do you know his name?

A. No.

Q. Do you know a nickname or anything like that?

A. No.

Q. And when you say that you've seen him around the neighborhood, what do you mean by "the neighborhood"?

A. Right there at Fulton Avenue. You know, when I be walking through there from time to time, I would see him.

* * *

Q. Mr. Butler, again the day and time of the shooting that happened, do you have a specific recollection of seeing this gentleman in the area?

A. Not exactly.

Q. "Not exactly." Is that what you said?

A. Yes. Not exactly.

Q. Okay. Do you remember being shown his photo on the day that you were in that interview room?

A. I remember him showing me a bunch of pictures. He showed me a bunch of pictures.

Q. What did they – **was there anything told to you before you were shown the pictures, if you remember**?

A. **Is there anybody that you know?**

Q. **Just anyone that you know**?

A. **You see before that you know**.

Q. Okay.

(Pause)

BY [DEFENSE COUNSEL]:

Q. Sir, I'm going to show you what's marked Defense Exhibit Number 1 for the purposes of this motion. And I know you don't have your glasses, but do you recognize this form at all?

(Pause.)

THE WITNESS: I signed a couple different papers. I don't know exactly what it is.

BY [DEFENSE COUNSEL]:

Q. Do you see some initials on the bottom of there?

A. Uh-huh.

Q. Are those your[s]?

A. Uh-huh.

(Emphasis added.)

While admitting that the initials on the arrays were his, as was the writing identifying Banks as "the shooter," Butler explained: "I probably wrote anything. I was sick. I just wanted to get out of there."

In the presence of Banks at the suppression hearing, Butler refused to confirm the identification he had made the day after the shooting, and testified as follows:

THE COURT: Do you remember you were given a series of photographs that day and asked to look at them?

THE WITNESS: I vaguely remember them giving me some pictures to look at.

THE COURT: Okay.

THE WITNESS: But I don't know exactly who.

THE COURT: Okay. So, yes, you do remember them giving you photos to look at?

THE WITNESS: Right. But I don't know –

THE COURT: Next question?

THE WITNESS: – exactly what.

BY [DEFENSE COUNSEL]:

Q. Is – one of those has some writing on it?

A. Yeah. I see it.

Q. And is that your handwriting?

A. Yeah. It is.

Q. And –

A. I probably wrote anything. I was sick.

Q. Okay.

A. I just wanted to get out of there.

Q. All right. Which – which one is that? They are numbered. Which one is that that has the writing?

A. Wait a minute.

(Pause.)

THE WITNESS: 4.

BY [DEFENSE COUNSEL]:

Q. Number 4. And the picture in Number 4, is that your handwriting?

A. Uh-huh. Yes.

Q. And what – what is it? What's written there?

A. Say ["]he's the shooter.["]

Q. And whose pic – do you recognize the picture in there, who that is?

A. I don't know who that is.

Q. You don't know who that is?

A. Like I say, I – at the time, I was so messed up, I couldn't really tell you exactly what went on in there.

Q. So you have no idea why you wrote that on there?

A. I wrote –

[BY THE COURT]: That's not what the witness said. The witness said he just wrote because he was sick and wanted to get out of there.

[BY BUTLER]: Right.

[BY DEFENSE COUNSEL]: Do you remember why did you write this – why did you write those words on here?

A. From what they was saying to me apparently, this is – this is reason [sic] that I wrote what I had wrote on there. I was told by one of the officers that was in there, apparently, that this is what they wanted. I gave them what they wanted. It's that simple.

[BY THE COURT]: So you were told by one of the officers in there that they wanted you to identify the gentleman depicted in Picture Number 4?

A. Whatever they – right.

[BY THE COURT]: And that they told you to write ["]he's the shooter["]?

A. I wrote whatever they wanted. That's what I – I remember that was on there.

[BY THE COURT]: Well, how did you know what you wrote was what they wanted?

A. That was what I was told.

[BY THE COURT]: Any other questions?

[BY DEFENSE COUNSEL]: When did they tell you that?

A. I don't know exactly when. But that is – this is what happened on that date. That's it. I don't know exactly what time of day it was and that. All I know is I wanted to get out of there because I was sick and I needed to get well.

And it wasn't nobody trying to help me get out of there, so I did what I had to do to get out of there.

Q. Did they promise you that you can get out of there if you wrote that?

A. More or less.

Q. When they were telling you that –

A. Once we done, you can get out of there.

Q. Okay. And did they tell you those words when you were in that room or somewhere else?

A. Probably in the – more than likely in the room, I believe.

Q. And was it more than one of the officers that told you that?

A. I'm not sure. I'm not sure if it was more than one in there at that time or what. But I know it was different officers in there at different times.

Butler's November 5 interview had been videotaped, and the State played portions of it on cross-examination. The video recording showed a police officer explaining to Butler the nature of a photographic array and advising him: "The person who committed this crime may or may not [be] in the set of photographs you are about to view." The video recording also showed Butler picking out Banks's photo and saying he was the "shooter." The hearing transcript reflects the following statements recorded during Butler's review of the third photo array:

> [BUTLER:] "The shooter.
>
> [OFFICER:] "That's the shooter?
>
> [BUTLER:] "Uh-huh.
>
> [OFFICER:] "Okay. Do you know that person? Do you know their name or anything like that?
>
> [BUTLER:] "Uh-uh.
>
> [OFFICER:] "No? Can you open that back up for me, sir? All right. In your own words, can you just write it on here who that person is or what you saw him do? Sir, can you sign your name and then put the date and time" (Inaudible at 10:37:46 a.m.)
>
> "The time is 3:35 p.m. So this is the person you saw shoot somebody. Where did that happen at?
>
> [BUTLER:] (Inaudible at 10:38:18 a.m.)
>
> [OFFICER:] "Do you know who got shot?
>
> [BUTLER:] "Uh-uh.
>
> [OFFICER:] "No? Did you see where the person went after the shooting, or did they get into a vehicle or anything like that?

[BUTLER:] "They just ran up the street.["]

On cross examination, Butler testified that viewing the video did not refresh his recollection regarding the interview. In response to one of the State's questions, asking Butler to confirm that he was the person being interviewed in the video, Butler responded: "I guess. I told you, doped as I was, I couldn't say that was me or not. But I was so ill, I couldn't even tell you what happened that day." When asked if he was allowed to leave the Homicide Unit after writing "he's the shooter" on appellant's photo, Butler responded, "I have no idea."

Detective Yost testified at the suppression hearing. He said that Butler was brought to the Homicide Unit around 11:00 a.m. on November 5, following his arrest for heroin. Detectives had not identified a suspect as the shooter at that time, but they suspected that Antwan Figeroa (whose uncle may have been harmed by Whitehead) was somehow involved. Upon looking into known associates of Figeroa, police came across the name of Julio Delgado. Around 12:30 p.m. on November 5, Detective Yost put together two photo arrays. The arrays were presented to Butler in accordance with the "double blind" standard followed by the Baltimore Police Department, in which a detective who is not involved in the investigation and knows nothing about the case presents the array to the witness. The first array was shown to Butler at 12:32 p.m. That array contained Julio Delgado's photo. Butler did not identify anyone in the first array.

Homicide detectives next showed Butler an array containing Antwan Figeroa's photo. Butler identified Figaroa as "somebody who had been at the scene." Detective

Yost testified that Butler remained in the Homicide Unit while detectives continued to investigate. Later that afternoon, detectives gathered information that led them to believe that Banks might have been the shooter. Accordingly, around 3:30, Butler was presented with a third photographic array, from which he identified Banks as the shooter. Butler wrote "he's the shooter" on Banks's photograph.

Detective Yost testified that he probably told Butler prior to presenting the third array that the police would be showing Butler "another set of photographic arrays to see if you see the [shooter] in there, and then we can get you out of here[.]" But Detective Yost also testified that that was not meant as a promise to Butler that, "regardless of what the result of that photographic array was, [that] he'd be leaving right away," and that police probably would have released Butler if he had not identified anyone in the third array. Detective Yost testified that Butler had told him that he had used heroin that morning, and Detective Yost inquired into whether or not Butler was "getting sick," but he recalled that Butler was not displaying any obvious signs of physical distress. He testified that he did not threaten Butler or make him any promises in return for a positive identification of the shooter, nor did he tell Butler whom the police wanted him to identify.

The suppression court denied the motion, finding that Butler's identification of appellant as the shooter had not been procured by impermissibly suggestive means. The court found that Butler's testimony at the suppression hearing about a suggestive presentation of the third array was not credible; that the video recording of the

identification procedure contradicted Butler's testimony that he was told to say Banks was the shooter; and that Detective Yost was "far more credible with regard to the [double blind] procedure."

This Court defers to the credibility determinations made by the suppression court. "We will give deference to the trial court's factual findings, while still reviewing those findings for clear error, because we give due regard to the opportunity of the trial court to judge the credibility of the evidence." *Kusi v. State*, 438 Md. 362, 383 (2014) (internal quotation marks and citations omitted).

The court considered the video recording of the third photo array to be persuasive evidence that Butler had picked Banks's photo without prompting. The court observed:

> Mr. Butler suggested to the Court that he was so sick – my words, not his, but sick, and ill, and not feeling well to the end he just wanted to get out of that interview room, giving them whatever they wanted.
>
> And Mr. Butler testified here today under oath that what he knew what [sic] they wanted was for him to confirm as the shooter being Mr. Banks because that's what he was told to do.
>
> That testimony is unquivocably contradicted by the contents of the video. At no time during the video did any officer, Detective Yost or otherwise, suggest who should be picked out out of 18 different photographs of three separate photographic arrays as someone either present at the scene, as is the case in State's Exhibit Number 1, or who was the shooter as is the case of Defendant's Exhibit Number 1 with the photograph identified as Photograph Number 4 being the defendant in this case.
>
> The Court also notes that a double blind procedure was used . . . which resulted in Mr. Butler identifying Mr. Glenn Banks as the shooter of the decedent.

The Court would be remiss if it didn't note a picture [—] in this case, a video [—] is worth more than a thousand words. This Court did not observe in any way that Mr. Butler appeared to be in any obvious physical distress, notwithstanding he had been at Baltimore City Police Department, . . . since about 11:00 a.m. until about 3:30 p.m. or so, which would have been about four and a half hours.

Which, when the Court looks at the totality of the circumstances, is not a unconscionably lengthy time to be detained in connection with a murder investigation that's going on. . . .

He listened when the statement with regard to the procedure and the instructions as to how to conduct a photographic array were read to him. He appeared to this Court to be paying attention. And he responded. And he said, "Yes." And frankly, he was polite throughout the entire interview, unlike many individuals this Court has observed in other videos who are combative, who are hostile, and who are essentially all things that Mr. Butler was not.

The Court doesn't – I'm not saying this to say in any way that I doubt that Mr. Butler may have consumed heroin that morning to fuel his ongoing health issue of an opiate addiction.

Mr. Butler did not, in view of the Court, however, even if under the influence, equivocate when he nodded in the affirmative and said, "He's the shooter," and then said, "Did you see if he went anywhere after that," he said, "Yeah. He ran up the street," responding very spontaneously.

That testimony, through State's Exhibit 2, the video, remarkably contrasts on further review testimony that would have been given perhaps as it was today by Mr. Butler in this courtroom, it would have been safer from Mr. Butler's prospective to all of a sudden fei[g]n ignorance and not remember much because he doesn't want to be the State's witness as to a murder.

Upon consideration of those observations by this Court, noting the double blind procedure that was utilized, noting at no time whether through the videos, notwithstanding the testimony of Mr. Butler, which frankly the Court doesn't find to be credible today for purposes of this hearing as to his ability to recollect the details of what happened and the details as he recollects them, the Court finding that Detective Yost's testimony on balance was far more credible with regard to the procedure, the Court does

> not find that the procedure utilized which resulted in identification of Mr. Banks as to and through Defense Exhibit 1 was unduly suggestive or in any way impermissibly suggestive as to the identification of Mr. Banks.

Although Banks asserts that the court did not adequately explain its reasons for finding Butler's recorded statement more credible than his live testimony at the suppression hearing, we perceive no error in the trial court's ruling. The judge saw nothing in the video recording that raised concerns regarding the manner in which the photo array was presented, and he was not persuaded to make a finding of suggestiveness based on the testimony Butler gave at the suppression hearing. The court's factual findings were not clearly erroneous, and, in the absence of a finding of impermissive suggestiveness, it was appropriate for the court to deny the motion to suppress.

II. The motion in limine to exclude Detective Suiter's identification

At the pretrial hearing on Banks's motion to exclude Detective Suiter's identification of him, Banks's argument was basically that it was unfairly prejudicial, and unnecessary, to permit a police witness to identify appellant for the jury when there was other evidence of identity that the jury would hear and see, including the surveillance video from An's Food Market.

At the suppression hearing, Detective Suiter gave the following testimony describing how it came about that he recognized Banks in a surveillance video that was recorded in An's Food Market seconds before Whitehead was shot in front of that store. Detective Suiter was not involved in the investigation of the Whitehead homicide, but was at a desk near Detective Yost, who was reviewing the surveillance video on his

computer. Detective Suiter happened to notice he recognized a person in the video. The following testimony was presented at the suppression hearing:

> Q. [BY DEFENSE COUNSEL] What'd you see in the video?
>
> A. [BY SUITER] Your client.
>
> Q. How do you know him?
>
> A. Oh, man, I know him for like for over ten years when I was in narcotics. Yeah. I know Mr. Glenn Banks very well.
>
> Q. And over the ten years that – that you said you knew him, how often would you see him?
>
> A. Oh, man. Almost every day.
>
> Q. Almost every day. Okay.
>
> A. Just about, yeah.
>
> Q. And before you – you were watching this video, when was the last time you saw him?
>
> A. Oh, I can't recall. I wouldn't be able to tell you that.
>
> Q. Would it have been years before, or just like days before?
>
> A. Well, I don't know. I couldn't tell you. I mean I've seen him so many – so many times, I don't know. I seen him a lot. I mean when the last time I saw him, I couldn't tell you that.
>
> Q. Okay.
>
> A. Yeah. But I seen him a lot.
>
> THE COURT: Meaning nearly every day when you were at work in that area?

THE WITNESS: In narcotics, yeah. I been in at the Western District for 16 years [sic].

BY [DEFENSE COUNSEL]:

Q. When you see him, do you have conversations with him?

A. Yeah. Yeah, we talk.

Q. And how would you say the nature of your relationship – how would you describe that?

A. It's a working relationship. I know him and he know [sic] me. He know who I am. And sometimes we had – you know, it wasn't always a bad confrontation with him and I. We spoke. And I tried to get him out of the game that he was in, and, you know, gave him a little knowledge of he should do right. And other times, we was bump heads.

THE COURT: And for the record, when you say that the game he was in, you don't mean a sporting act or –

THE WITNESS: No. The drug game, you know, criminal activity. And –

THE COURT: I understand. I just want the record to be clear.

Appellant made the following argument in support of his motion in limine:

[BY DEFENSE COUNSEL]: The jury's going to see the video. They are going to be able to judge for themselves whether they — whether or not that they think that it's Mr. Banks in the video.

I think Detective Suiter's testimony will not be helpful to the jury. It will be more prejudicial than probative, that the jury should have the — it should be left to their — the jury to decide who it is in the video and not have Detective Suiter actually make — give[ ] an opinion as to who the person is.

There has been no testimony that Mr. Banks'[s] appearance has changed substantially since November, 2015. And they can judge for themselves. They don't need Detective Suiter to make that identification.

* * *

> I would just say that's prejudicial [e]ffect, the fact that it is a law enforcement officer giving a lay opinion as to who the person is. The State is frankly going to have other corroborating evidence as to the identity.
>
> They are going to have a shirt that was worn that's similar to the person in the video [found at] the defendant's house. They are going to have a statement where Mr. Banks doesn't actually say that it's him, but he also doesn't deny it as well.

Although defense counsel cited no legal authority in support of the motion, the court and the parties treated the motion as one made under Rule 5-403, which provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." No argument other than the claim that there would be a prejudicial effect to have a law enforcement officer give an opinion as to identity was advanced at the suppression hearing. The prosecutor surmised that Rule 5-403 was the basis of the motion, and stated:

> [BY THE STATE]: **If counsel's making her main argument in limine to preclude this ID based on essentially the [Rule 5-]403 weighing**, then I would strenuously argue for Your Honor to deny that argument, allow it to come in in terms of admissibility, and then let the jury decide what weight if any to give to this ID.
>
> * * *
>
> I don't believe counsel is making any other – or at least **I didn't hear today any other objection to it on any sort of constitutional grounds** such as the last motion we had.

> Because I'm not hearing that, I won't get into the argument that there wasn't a police procedure commenced in this identification to give rise to any sort of constitutional grounds.

(Emphasis added.)

Appellant did not rebut the prosecutor's argument, or advance a different legal theory in support of his motion for Detective Suiter's pretrial identification to be suppressed. There was no assertion that Detective Suiter's identification would be evidence of "prior bad acts," nor was there any request that the court limit what the detective might say about his prior contact with Banks.

The court denied the motion, finding that it would not be unfairly prejudicial, on balance, to permit Detective Suiter to identify Banks in the video, even though the State would have other, less direct, evidence of the identity of the person in the video. The court noted: "In the view of this Court, this is purely an issue of the weight, if any, to be afforded the evidence in the form of the testimony of Detective Suiter and does not go to the admissibility of it."

We defer to a trial judge's ruling on a motion to exclude evidence pursuant to Rule 5-403, and will not reverse in the absence of abuse of discretion. *Newman v. State*, ___ Md. App. ___, No. 2629, September Term 2016, slip op. at 22 (filed April 4, 2018); *Oesby v. State*, 142 Md. App. 144, 167-68 (2002). Banks does not provide any persuasive argument as to why it was unfairly prejudicial for the trial judge to permit a person who had known Banks for over ten years to testify as to his identity.

On appeal, however, Banks contends that the suppression court erred because it "completely failed to analyze whether the 'other crimes' evidence was admissible. Indeed, the court failed to make any Rule 5-404(b) findings on the record." Banks's appellate theory is that Detective Suiter's testimony that he knew him from the detective's prior work as a police officer is, in and of itself, evidence of "other crimes" or "prior bad acts" by appellant. But the identification itself did not require any mention of prior bad acts. (That is, Detective Suiter could say that he saw the surveillance video and immediately recognized the person holding the gun to be Glenn Banks, a person he had known for ten years, without providing any details of the nature of their prior contacts.) And Banks did not ask that the court limit the testimony as to how Suiter knew Banks.

At the hearing on the motion in limine, Banks did not ask the court to analyze Detective Suiter's anticipated identification testimony under Rule 5-404(b), which provides:

> (b) Evidence of other crimes, wrongs, or acts . . . is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

Appellant's argument to the suppression court was that Detective Suiter's identification was unnecessary (even though there was no concession that Banks was the person in the video), and the asserted prejudice was simply that the testimony would come from a police officer. The argument now being made on appeal was never made to the suppression court. (Nor was it made at the time Detective Suiter testified at trial.)

Banks contends in his reply brief that his general objection to Detective Suiter's identification "preserve[d] all possible grounds for appeal, including under Rules 5-403 and 5-404(b)." In support, Banks cites *Boyd v. State*, 399 Md. 457 (2007), and *Thomas v. State*, 413 Md. 247 (2010), both of which reaffirm "the long established Maryland practice that a contemporaneous general objection to the admission of evidence **ordinarily** preserves for appellate review all grounds which may exist for the inadmissibility of the evidence," *Boyd*, 399 Md. at 475-76. (Emphasis added.)

But, as quoted above, Banks did not simply support the motion in limine with a general objection, but argued specifically that the court should preclude Detective Suiter's testimony because the testimony "will not be helpful to the jury," and "will be more prejudicial than probative."

Nor did Banks make any effort at trial to restrict the testimony of Detective Suiter relative to the nature of their prior relationship. Nevertheless, Detective Suiter gave no trial testimony that attributed bad acts to Banks. When asked how he knew Glenn Banks, the detective testified at trial, without objection, as follows:

> A. [SUITER] It was a work relationship. I used to work up in the area of Pennsylvania and Fulton – Fulton Avenue, Woodbrook in the Western District.
>
> Q. [PROSECUTOR] And if you remember, o[r] if you can tell, how long have you known Glenn Banks?
>
> A. Ten years, a little over ten years.
>
> Q. In those ten years, approximately how many times have you seen him?

A. Almost every day. Almost. I mean that was my area.

Detective Suiter explained that they would sometimes speak, and their conversations were "cordial." He also explained that Banks's hair was formerly styled in a lower cut manner than the "bushy" style in which he was wearing it at the time of trial. No issue about "prior bad acts" was raised by Banks at trial.

During the entire direct examination of Detective Suiter at trial, the only objections lodged by defense counsel were the following:

> Q. [PROSECUTOR:] And when you would see the defendant, would you ever speak to him?
>
> A. [SUITER:] Yeah.
> Q. And could you describe the nature –
>
> Strike that.
>
> Q. Were these conversations cordial?
>
> A. Yes.
>
> Q. Were there times when they were not cordial?
>
> [DEFENSE COUNSEL]: **Objection.**
>
> THE COURT: Sustained.
>
> * * *
>
> Q. [PROSECUTOR:] Are you familiar with how generally the defendant keeps his hair?
>
> A. [SUITER:] Yes.
>
> Q. How does he generally keep his hair?
>
> A. Low cut.

Q. How, if at all, how he keeps it generally is it different from how he has his hair today?

[DEFENSE COUNSEL]: **Objection.**

THE COURT: Overruled.

[PROSECUTOR:] You can answer?

A. [SUITER:] Yes.

Q. How is it different?

A. Today it's bushy.

Q. When you've known him over this ten-year period, how would you normally see his hair?

A. A low haircut.

* * *

A. [SUITER:] . . . Detective Yost had the video footage up on his monitor at his desk. And I walked over, and I started looking at it.

Q. [PROSECUTOR:] And when you were looking at it, what, if anything did you observe?

A. I saw –

[DEFENSE COUNSEL]: **Objection.**

THE COURT: Overruled.

You may answer the question.

A. I saw Glenn – Glenn Banks in the – in the photo.

* * *

[BY PROSECUTOR:] For the record, I'm stopping it [the surveillance video from inside An's Food Market] at 15:45:57, or 3:45:57 p.m.

Q. Detective Suiter, who is that?

A. [SUITER:] Mr. Glenn Banks.

Q. And do you see him in court?

A. Yes.

Q. Could you please point to him?

A. Standing to the right of counsel.

[PROSECUTOR]: For the record, identifying the defendant, Your Honor.

THE COURT: Noted for the record.

[PROSECUTOR]: For the record, the State will continue to play State's Exhibit 9.

Q. Detective Suiter, what, if anything is the defendant holding?

[DEFENSE COUNSEL]: **Objection.**

THE COURT: Overruled.

You may answer the question.

A. Gun.

[PROSECUTOR]: For the record, the State has stopped it at 15:45:16, or 3:46:16 p.m.

Q. Detective Suiter, what, if anything, are we seeing now?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

You may answer the question.

A. The store owner locking the door.

(Emphasis added.)

None of these objections could be viewed as preserving an argument that the court was required to undertake an analysis under Rule 5-404(b) before permitting the witness to answer the question.

We perceive no error in the trial court's rejection of the claim of unfair prejudice, and we conclude that no argument was preserved regarding prior bad acts.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.