Circuit Court for Prince George's County
Case No.: CT160936A

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2612

September Term, 2018

JULIO LISANDRO LOPEZ GOMEZ

v.

STATE OF MARYLAND

Fader, C.J.,
Gould,
Battaglia, Lynne, A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Battaglia, J.

Filed: May 18, 2020

Appellant, Julio Lisandro Lopez Gomez, was convicted of robbery by a jury in the Circuit Court for Prince George's County. Gomez was sentenced to fifteen years' imprisonment with all but ten years suspended and five years' probation. Before us, Gomez raises questions related to the impeachment of a witness by evidence of a criminal conviction, an in-court identification, and the sufficiency of evidence, as reflected in the following questions:

> 1. Did the trial court err in precluding the defense from inquiring about Damas Valenzuela's prior conviction for robbery or theft?
>
> 2. Did the trial court err in allowing Jose Arias, who had previously failed to make an out-of-court identification of appellant, to make an in-court identification?
>
> 3. Is the evidence insufficient to sustain the robbery conviction?

For the reasons set forth below, we shall answer Gomez's questions in the negative and affirm the judgment of the Circuit Court.

IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

Damas Valenzuela, referred to as the "Witness" herein, testified at trial that, while he and a friend, Juan Carlos Vasquez, had been walking home in the early hours of March 13, 2016, after visiting a bar, two men approached them and, without saying anything, began to strike them. The Witness stated that the altercation between the four men lasted for about fifteen minutes and ended when a "taxi driver," identified as Jose Arias, who also testified at trial, arrived, which prompted the assailants to leave the scene. He further indicated that, during the course of the quarrel, his cellphone fell out of his sweater pocket and the assailants took it and retreated. The Witness, during his testimony, identified

Gomez as one of his assailants. Police officers testified that they had tracked the Witness's phone to an apartment in Hyattsville where Gomez resided and found it under a mattress.

Mr. Vasquez, who had identified Gomez as one of his assailants in a photo array shortly after the incident, which was admitted at trial, also testified at trial and, again, identified Gomez as one of the assailants. Mr. Vasquez further testified that he had been "drunk" at the time of robbery.

Gomez was charged with robbery against the Witness based upon the theft of his cellphone by use of force, of which the jury found him guilty, but was acquitted of attempted robbery against Mr. Vasquez.

At the onset of trial, though, before the Witness testified, defense counsel requested that he be permitted to question the Witness outside the presence of the jury to learn more about a conviction of the Witness for robbery referenced in a "Fusion report."[1] Defense counsel, acknowledging that he had been unable to find a record of a robbery conviction for the Witness on the Maryland Judiciary Case Search,[2] posited that the report provided a "good faith basis" to "make an inquiry" about it. He contended that if facts confirming the

[1] The term "Fusion report" is not identified in the record; its admissibility or use in impeachment, however, is not in issue before us.

[2] The "Maryland Judiciary Case Search" is the Judiciary's web-based application that "provides public access to the case records of the Maryland Judiciary." Maryland Judiciary Case Search, http://casesearch.courts.state.md.us/casesearch/ [*archived at* https://perma.cc/EV5Y-FH2P]. "Case Search is readily available and accessible to the public through any device with an internet connection." *Won Bok Lee v. Won Sun Lee*, 466 Md. 601, 635 n.13 (2020).

existence of a conviction were elicited from the Witness, he could ask him about the conviction in the presence of the jury in order to attack his credibility:

> I'm handing the Court a Fusion report from this case, wherein they list the various victims and witnesses, and there's a place for each person for their – basically their biographical information and the possible criminal history.
>
> You can see that [the Witness], one of the victims, it says robbery prior. Now, my concern is this, I believe the State has done a case search, I've done a review of case search, I don't show an arrest for anything related to theft or robbery, so I haven't been able to assure myself one way or the other if there's a conviction that could be – would fall under the impeachment rule or not, and I don't want to do it on the stand in front of the jury unless I had a little bit more information.
>
> So all I'm asking is before [the Witness] testifies, that I'm able to do a brief voir dire before court, because I don't know if maybe he had another name. But if he was – even – let's say he pled down to something less than robbery, he would at least have, you know, an entry in case search and I can't find anything.

The prosecutor, in response, informed the court that she had, at the behest of defense counsel, asked the Witness about the conviction in question prior to trial, who, in turn, "confirmed he had no robbery convictions." The prosecutor further stated, "I've done my due diligence insofar as checking his criminal history along with the police, and they found no robbery convictions or felony convictions." She argued that counsel for Gomez should be precluded from conducting a voir dire of the Witness about the proffered conviction as "this case has been going on for two yours" and "[d]iscovery was provided shortly after the indictment," providing the defense "adequate time to do their investigation."

In the absence of a public record, Senior Judge C. Philip Nichols, sitting specially assigned, presiding over this case, permitted the prosecutor to ask the Witness about the

alleged prior conviction[3] in advance of his direct examination, outside the presence of the jury:

> [THE STATE]: Okay. Now, do you recall whether or not I asked you in the presence of Detective DeLeon whether or not you have ever been convicted of a robbery?
>
> [WITNESS]: Yes.

The Witness proceeded to describe an event which took place at a Hyattsville Royal Farms in 2007, when he took Tylenol pills from the store but "forgot to pay for them," after which he had been arrested:

> [THE STATE]: Okay. And you remember what you responded that you had gone to the Royal Farms convenience store and that you had taken some Tylenol.
>
> [WITNESS]: Yes, I – well, I got some pills and I went out and I forgot to pay for them.
>
> [THE STATE]: Okay. Now, at this time when did this happen, this incident?
>
> [WITNESS]: Like in 2007.
>
> [THE STATE]: When this happened, were you arrested by the police?
>
> [WITNESS]: Yes.
>
> [THE STATE]: Okay. Where was this?
>
> [WITNESS]: It was in Hyattsville.

[3] The prosecutor requested that she, rather than defense counsel, question the Witness, "given that this is a State witness. I'm going to ask the State be allowed to ask the question as to his record." Judge Nichols agreed.

The Witness also testified that he spent five days in jail for "robbery," but could not recall the name of the judge who may have heard the case, the attorney who may have represented him, or whether he pled guilty or stood trial:

> [THE STATE]: Okay. Did you admit to taking the Tylenol without paying?
>
> [WITNESS]: Yes.
>
> [THE STATE]: Okay. Did you receive any jail time for this incident?
>
> [WITNESS]: Yes.
>
> [THE STATE]: How much?
>
> [WITNESS]: Five days.
>
> [THE STATE]: Okay. Now, do you remember whether or not you were convicted – the term was either theft or robbery?
>
> [WITNESS]: For robbery.
>
> [THE STATE]: Okay. Now, do you have any paperwork or anything about that?
>
> [WITNESS]: No.
>
> [THE STATE]: Now, I asked you about a conviction, were you charged with robbery?
>
> [WITNESS]: Yes.
>
> [THE STATE]: Now, did you – when this happened, what name were you charged under, was it Damas Valenzuela?
>
> [WITNESS]: I had the ID from my country and the name is Damas Antonio Valenzuela Hoya [phonetically].
>
> [THE STATE]: Okay. Now, do you know whether – what the – who the judge or who the attorney was that dealt with this case with you?
>
> [WITNESS]: I don't remember all of that.

[THE STATE]: Okay. All right. And did you ever go through a trial?

[WITNESS]: Yes.

[THE STATE]: With a jury?

[WITNESS]: No, no.

[THE STATE]: With a judge?

[WITNESS]: With a judge.

[THE STATE]: Okay. And did you plead guilty or did you have a trial?

[WITNESS]: I don't know anything about that.

After the prosecutor completed her voir dire of the Witness, defense counsel posited that his testimony sufficiently provided a basis to impeach his credibility on cross-examination, pursuant to Rule 5-609.[4] Judge Nichols disagreed, ruling:

> This is so off the mark, I'm not inclined to allow it. We don't have a copy of anything. It happened here. He is doing this in a different language, I understand – you don't have to quote the rule to me yet. I understand what the rule says. I don't think he knows what he's talking about for starters. I don't think he understands what's going on here[.]

[4] Rule 5-609 governs the admissibility of prior convictions for the purpose of impeaching a witness's credibility and provides, in pertinent part:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness, but only if (1) the crime was an infamous crime or other crime relevant to the witness's credibility and (2) the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or objecting party.

Judge Nichols, however, allowed defense counsel "to find some record of" the conviction over the "lunch hour," noting that a record of it should be available in the Circuit Court for Prince George's County. He further stated that, "if it doesn't exist, then I'm not going to allow it." Defense counsel pressed, reiterating that the testimony adduced from the Witness provided sufficient evidence of a criminal conviction, and further, that the probative value of admitting the evidence "far outweigh[ed]" the danger of unfair prejudice to the Witness or the State. Judge Nichols, again, disagreed:

> I totally disagree with you. I think that the probative value – the prejudicial value far outweighs the probative value. Nobody knows for sure what he got convicted of. I'm assuming that it's here, and it occurred in our county, you can't find any Maryland record whatsoever covering this. I think we're done [with] this, you've made the record, I'm satisfied that's the case, I'm not going to allow the testimony.

After lunch, defense counsel informed the court that he was unable to find any record of a conviction under the name "Damas Antonio Valenzuela Hoya," explaining, "I did not have any internet. The State did some research, I went to the clerk and tried a few variations[.]" Judge Nichols again explained that he was not satisfied that the Witness's testimony provided sufficient facts to support the introduction of a prior conviction for impeachment purposes:

> I'm concerned that based on what he told me, it sounds like a . . . case where there's really no record of anything, whether he's represented by counsel or not, and the facts that he gave us led me to believe that it was a shoplifting case, not a robbery case. But if you can't find some indication or court record of it, I'm just not prepared to . . . let you go forward, as I view it more prejudicial than probative at that stage. . . . Not that a robber can't be robbed, but I just think it's unfair, because I don't think what he's saying is accurate.

Accordingly, he precluded defense counsel from questioning the Witness about the 2007 arrest before the jury.

Our review of a trial court's application of Rule 5-609 is deferential. *King v. State*, 407 Md. 682, 696 (2009) (citation omitted). "The conduct of the trial must of necessity rest largely in the control and discretion of the presiding judge[,] and an appellate court should in no case interfere with that judgment unless there has been an abuse of discretion by the trial judge of a character likely to have injured the complaining party." *Id.* (quoting *Kelly v. State*, 392 Md. 511, 531 (2006) (further citation omitted)). We review these types of evidentiary rulings under an abuse of discretion standard and reverse only when the court exercised "discretion in an arbitrary or capricious manner or . . . act[ed] beyond the letter or reason of law." *Id.* (quoting *Kelly*, 392 Md. at 530–31 (further citation omitted)). Our determination of whether a trial court abused its discretion "usually depends on the particular facts of the case [and] the context in which the discretion was exercised." *Id.* (quoting *Myer v. State*, 403 Md. 463, 486 (2008)).

Gomez posits that the trial judge erred in precluding defense counsel from questioning the Witness about his 2007 arrest in the presence of the jury because, as he argues, the prerequisites of Rule 5-609 had been satisfied. He contends that the testimony elicited from the Witness during his voir dire examination sufficiently established that he had been charged and convicted of robbery or theft, so that a public record was not required to impeach his credibility. Gomez further avers that the trial judge erred in concluding that "the prejudicial value of the impeachment evidence far outweigh[ed]" its probative value.

The State, conversely, argues that the judge properly precluded defense counsel from cross-examining the Witness about the 2007 incident because, without a public record of the proffered conviction, the Witness's testimony failed to establish that he had been convicted of any crime for which he could be impeached. The State further contends that the trial judge properly concluded that the probative value of the proffered impeachment did not outweigh the danger of unfair prejudice to the Witness or the State because the "circumstances of the offense, as described by [Witness], entailed no force, use of violence or deception; he merely walked out of a convenience store with a couple of dollars' worth of pain reliever for which he forgot to pay."

To attack the credibility of a witness pursuant to Rule 5-609, "evidence that the witness has been convicted of a crime" may be proven by public record or elicited from the witness during his examination. In the present matter, in the absence of a public record, we are asked to determine whether the Witness's testimony regarding his 2007 arrest, standing alone, reliably established that he had been convicted of robbery or theft under Rule 5-609.

To qualify under the Rule, a conviction must be final; "pending charges themselves are not admissible to attack credibility." *Peterson v. State*, 444 Md. 105, 135 (2015). A witness may also not be impeached by a *nolle prosequi*, *Burgess v. State*, 89 Md. App. 522, 539 (1991), a juvenile delinquency adjudication, *Williams v. State*, 342 Md. 724, 741 (1996), or a probation before judgment, *see* Maryland Code, (2001, 2018 Repl. Vol.), Section 6-220(g)(3) of the Criminal Procedure Article, *Molter v. State*, 201 Md. App. 155, 171–73 (2011).

In the present matter, Judge Nichols properly exercised his discretion in precluding defense counsel from asking the Witness about the 2007 incident in the presence of the jury, as the Witness's testimony did not establish that he knew "what he [was] talking about" or understood "what [was] going on." The Witness's testimony failed to establish that any charges had been filed or, if any had, whether a *nolle prosequi* had been entered, or a juvenile delinquency adjudication filed, or a probation before judgment rendered.

The other inquiry under Rule 5-609 that was not satisfied through the Witness's testimony was whether any provable conviction was "constitutionally infirm" where achieved without representation of counsel. *von Lusch v. State*, 279 Md. 255, 258 (1977); *see also Loper v. Beto*, 405 U.S. 473, 483, 92 S. Ct. 1014, 31 L.Ed.2d 374 (1972) (stating that the "rule against use of uncounseled convictions 'to prove guilt' was intended to prohibit their use 'to impeach credibility,'" because "[t]he absence of counsel impairs the reliability of such convictions just as much when used to impeach as when used as direct proof of guilt."). A conviction following a constitutionally infirm guilty plea also may not be used to impeach the credibility of a witness where accomplished "without counsel or a waiver of counsel[.]" *Thomas v. State*, 422 Md. 67, 75 (2011). The Witness could not and did not testify regarding whether he was represented at all.

Accordingly, we hold that the trial judge acted within his discretion in precluding defense counsel from inquiring of the Witness about the 2007 incident, in the presence of the jury.

IN-COURT IDENTIFICATION

Gomez also contends that the trial judge erred in allowing Jose Arias, a taxi driver who witnessed the robbery, to make an in-court identification of Gomez as one of the assailants, two years later. Gomez avers that the in-court identification was impermissibly suggestive based upon Mr. Arias' failure to identify him from a photo array that police officers showed him shortly after the robbery.

At trial, Mr. Arias testified that, in the early morning hours of March 13, 2016, he had been sitting in his parked taxi when he noticed an individual kicking someone who was on the ground and another individual hitting another person with a brick. He then drove his car, with the headlights on, toward the men and stopped about three to four feet away, got out of the vehicle and yelled "what's going on." Mr. Arias explained that the assailant who had been holding the brick then gestured toward him as if he was going to throw it at Mr. Arias; the two assailants then left and Mr. Arias called 911. Mr. Arias described the assailants as "Hispanics" and "[l]ike 18, 20 or 22 years old, something like that." He further explained that six or seven minutes had lapsed from his first observation of the fight until the two assailants fled.

During Mr. Arias' direct examination, defense counsel objected to the prosecutor's in-court identification inquiry because there was only one Hispanic male in the courtroom:

> [THE STATE]: Thank you. Now, do you see one of the aggressors that was on the scene and that you described earlier in the courtroom today?
>
> [DEFENSE COUNSEL]: Objection, Your Honor, may I approach?
>
> (Counsel and defendant approached the bench and the following occurred:)

[DEFENSE COUNSEL]: Your Honor, in the discovery there is a photo line-ups of three separate photo line-ups that were done, one of which had a photo of my client and [Mr. Arias] failed to identify him that same day.

THE COURT: Okay.

[THE STATE]: Which I'm sure will be a subject of cross-examination.

THE COURT: And your point is?

[DEFENSE COUNSEL]: The fact that he couldn't identify him the day of, and he's going to be allowed to identify my client who's sitting in court, she's already said the defense attorney is going to ask you questions next, which is going to be me, which is the only other attorney in the courtroom, and there's only one Hispanic male here.

[THE STATE]: Okay.

THE COURT: Objection is overruled, go ahead.

The prosecutor then, again, repeated her question, asking if Mr. Arias was able to identify anyone in the courtroom as one of the assailants to which he replied, Gomez, but with different hair length:

[THE STATE]: Is one of the two aggressors that you described earlier in the courtroom today? Are you able to recognize him?

[MR. ARIAS]: Yes.

[THE STATE]: Can you please identify him for the record by pointing to where he is seated?

[MR. ARIAS]: This is the gentleman in the blue shirt but he has – his hair is short.

[THE STATE]: Okay. When you said he had his hair short, I want to make sure I understand. Do you mean that his hair was different in 2016 than it is today?

[MR. ARIAS]: Yes, it was shorter. It was more or less shaved.

With regard to the earlier photo arrays, Mr. Arias testified that he was unable to identify anyone, but that his in-court identification was based on his courtroom visuals:

> [THE STATE]: Okay. Now when [police officers] showed you the photographs, were you able to identify anybody?
>
> [MR. ARIAS]: Not exactly.
>
> [THE STATE]: Okay. But you have made an identification in court today; is that right?
>
> [MR. ARIAS]: Yes.
>
> [THE STATE]: Okay. Now, your identification in court today, is it – it's not based on a photograph, it's based on seeing somebody in court.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled, answer if you can.
>
> [MR. ARIAS]: Yes.

On cross-examination, defense counsel proffered a form from the Prince George's Police Department which indicated that Mr. Arias was unable to identify a suspect from the photo array he had been shown shortly after the robbery; the form was admitted into evidence.

Gomez contends that Mr. Arias should not have been permitted to identify him in court, arguing that the identification was impermissibly suggestive in light of the two-year lapse between the trial and Mr. Arias' observation of the robbery. He further posits that the identification was impermissible based upon Gomez's position in the courtroom as the "lone defendant" and because Mr. Arias, who provided only a general description of the assailants, had "previously failed to identify [Gomez] from photographs." He posits that, under these facts, the court was required to conduct an analysis pursuant to *Neil v. Biggers*,

409 U.S. 188, 93 S. Ct. 375, 34 L.Ed.2d 401 (1972),[5] in assessing the reliability of the identification before allowing its introduction. He argues that the unreliability of Mr. Arias' identification was not harmless given the weakness of the identification evidence against him and the extent to which the State relied on it in closing arguments.

The State, conversely, contends that a *Biggers* analysis[6] is inappropriate here because such an analysis is reserved for situations where the in-court identification follows a suggestive out-of-court identification, and because Gomez makes no allegations of pre-trial identification improprieties, the trial judge properly permitted the credibility of the in-court identification to go to the jury. The State argues that the testimony of Mr. Arias

[5] The Supreme Court, in *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L.Ed.2d 401 (1972) established a five-factor test that a court should consider in evaluating the reliability of a photo array identification and the likelihood of misidentification:

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Id. at 199–200, 93 S. Ct. 375.

[6] In *Small v. State*, 464 Md. 68 (2019), the Court of Appeals explained the two-step inquiry applied in cases where an accused challenges the admissibility of an extrajudicial identification procedures. First, the court "must evaluate whether the identification procedure was suggestive." *Id.* at 83. At this state, "[t]he defendant bears the burden of making a *prima facie* showing of suggestiveness." *Id.* "If the court determines that the extrajudicial identification procedure was not suggestive, then the inquiry ends and evidence of the procedure is admissible at trial." If, however, the defendant satisfies his or her burden, the State must establish by clear and convincing evidence, based on the totality of the circumstances, that the identification was reliable, utilizing the factors announced in *Biggers*, *supra*. *Id.* at 83–84.

supported the introduction of his in-court identification as he had ample time during the altercation to observe the assailants when buttressed by his answer that the identification was "based on seeing somebody in court."

In *Coleman v. State*, 8 Md. App. 65, 75 (1969), we addressed whether a witness's "in-court identification was properly admitted as having a source independent of [a] pretrial identification." There, an eyewitness to the crimes of assault with intent to murder and robbery with a deadly weapon, failed to identify the suspect in a pre-trial photo array and line-up presented to her by investigating police officers. *Id.* at 68–70. The officers, then, arranged for the witness to be present when Coleman was brought before a magistrate for a preliminary hearing, at which, she, for the first time, identified Coleman as the suspect. *Id.* at 70. The witness also identified Coleman as the suspect in-court. *Id.* at 68. Before us, Coleman argued that, under the totality of the circumstances, the witness's observation of him at the preliminary hearing "had the effect of being so impermissibly suggestive as to taint her in-court identification and render it inadmissible." *Id.* at 72.

The witness testified that, at the time of the robbery, she had observed the suspect for about three to four minutes from a distance of two to three feet, and was able to describe the clothing he wore. *Id.* at 75–76. When asked, on cross-examination, whether there was "anything distinctive about the face of the man you saw rob the bank that would make you remember it? Was there a scare? W[ere] there any marks on him? Was there any difference in his haircut? Or his mustache? Or anything that would make you recognize this man above all other[,]" she could not. *Id.* at 76. We also considered the several occasions in which the witness failed to identify the suspect from various photo arrays

presented to her by police following the robbery. *Id.* She explained that, although she had been unable to identify the suspect at the pre-trial line-up, she had been able to do so at Coleman's preliminary hearing:

> The conditions were quite different at the lineup. They were standing on the platform and he had lights above him, all around him. I stated at the time I did think that was the individual, though he appeared taller in the lineup. And, a lighter complexion when I saw him [at the preliminary hearing]. He was facing the exactly—excuse me—at the hearing—what you would call it, he was facing me exactly as he did [during the robbery], and when he turned around I also remember seeing a full-view face of him and I was positive.

Id. at 69–70.

Our task was to determine whether the witness's in-court identification, which had followed her illicit identification of Coleman as the suspect at his preliminary hearing, had "been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 75 (quoting *United States v. Wade*, 388 U.S. 218, 241, 87 S. Ct. 1926, 1939, 18 L.Ed.2d 1149 (1967)). As an initial matter, we noted that the "State must show by clear and convincing evidence that the in-court identification was based upon observations of the appellant other than the illegal confrontation at the preliminary hearing." *Id.* We adopted the test set forth in *Wade*, *supra*, which requires consideration of various factors:

> for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification.

Id. (quoting *Wade*, 388 U.S. at 241, 87 S. Ct. at 1940, 18 L.Ed.2d 1149).

Based on our analysis of the *Wade* factors as applied to the witness's identification, we held that the State failed to meet its burden "of showing by clear and convincing evidence that the in-court identification of the appellant by [the witness] was based on observations of him other than the illegal confrontation at the preliminary hearing." *Id.* at 77. The in-court identification, we reasoned, resulted from "the impermissibly suggestive confrontation at the preliminary hearing rather than by means sufficiently distinguishable to be purged of the primary taint." *Id.*

In remanding the case for a new trial, we explicated that the State could have attempted to overcome a showing that the pre-trial confrontation was impermissibly suggestive were it to "adduce more comprehensive evidence as to the circumstances attending the confrontation of the appellant by [the witness] at the preliminary hearing[.]" *Id.* at 78. If the State failed to overcome such a showing, however, we noted that it "may be able to adduce evidence which would be clear and convincing that an in-court identification . . . was based on observations of the appellant by her other than the illegal confrontation identification, in which event her in-court identification would be properly admissible." *Id.*

In the present case, the State followed the *Coleman* recommendation and adduced from Mr. Arias that his in-court identification was based on his observations of Gomez during the commission of the robbery and seeing him in court, rather than having had seen Gomez's picture in a pretrial photo array. Mr. Arias' in-court identification was before the jury, "which is able to weigh it for what it is. Counsel, moreover, is freely permitted to argue such weight or lack thereof to the jury." *Conyers v. State*, 115 Md. App. 114, 123,

cert. denied, 346 Md. 371 (1997). Accordingly, we hold that the trial judge properly exercised his discretion in permitting Mr. Arias to identify Gomez as one of the robbers.[7]

SUFFICIENCY OF THE EVIDENCE

At the close of all evidence, defense counsel moved for a judgment of acquittal on the sole charge of robbery:

> [DEFENSE COUNSEL]: [T]he evidence in this case surrounds a photo ID of someone who admittedly was beaten severely, no question about that, but had 20 beers, and the evidence is severely deficient in identifying my client as the one who committed these robberies. So based on that, we're asking for a judgment of acquittal before this goes to the jury.

The case was submitted to the jury.

When reviewing the sufficiency of the evidence, we must determine, after viewing the evidence in the light most favorable to the State, *Moulden v. State*, 212 Md. App. 331, 344 (2013), whether "*any* rational trier of fact could have found [the defendant] guilty of the crimes charged based upon the evidence presented at trial," *State v. Albrecht*, 336 Md. 475, 502 (1994). In weighing the sufficiency of the evidence, we recognize that the finder of fact is permitted to choose "'among differing inferences that might possibly be made from a factual situation,' . . . and we therefore 'defer to any possible reasonable inferences the [trier of fact] could have drawn from the admitted evidence[.]" *Titus v. State*, 423 Md. 548, 577–58 (2011) (quoting *Smith v. State*, 415 Md. 174, 183 (2010) and *State v. Mayers*, 417 Md. 449, 466 (2010)). We give "due regard to the [fact finder's] findings of facts, its

[7] Gomez's argument emphasizes the impermissible suggestiveness of Mr. Arias' in-court identification. Insofar as the *Biggers* factors are concerned, Mr. Arias' testimony satisfied its reliability concerns.

resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses." *State v. Suddith*, 379 Md. 425, 430 (2004) (quoting *Moye v. State*, 369 Md. 2, 12 (2002)). If the evidence "'either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt[,]' then we will affirm the conviction." *Bible v. State*, 411 Md. 138, 156 (2009) (quoting *State v. Stanley*, 351 Md. 733, 750 (1998)).

Gomez contends that the State failed to prove that he was one of the robbers because Mr. Vasquez's pre-trial identification of him was unreliable as the latter was admittedly "drunk" at the time of the robbery. He further avers that the in-court identifications by Mr. Vasquez, the Witness, and Mr. Arias were "also inherently questionable" as they were made two years after the incident in issue. Gomez also takes the position that, "[i]t is hard to imagine how in streets [where] cameras are ubiquitous the State presented no other evidence placing [Gomez] at or near the crime scene."

The State, conversely, posits that sufficient evidence was presented from which the jury could reasonably infer that Gomez was one of the two men who robbed the Witness, as he had been identified as such by the Witness, Mr. Vasquez, and Mr. Arias. The State further points out that, hours after the robbery, police discovered the Witness's cellphone hidden under a mattress in an apartment where Gomez had been staying, and contends that Gomez's "unexplained possession of recently stolen property permits the jury to infer guilt *by itself*."

"Robbery in Maryland is governed by a common law standard." *Spencer v. State*, 422 Md. 422, 428 (2011); *see* Maryland Code (2002, 2012 Repl. Vol., 2019 Supp.), Section 3-401(e) of the Criminal Law Article. Robbery retains its judicially determined meaning, which is "the felonious taking and carrying away of the personal property of another, from his person or in his presence, by violence, or by putting him in fear." *Coles v. State*, 374 Md. 114, 123 (2003) (quotation omitted). "The hallmark of robbery, which distinguishes it from theft, is the presence of force or threat of force, the latter of which also is referred to as intimidation." *Id.* (citing *Spitzinger v. State*, 340 Md. 113, 121 (1995)).

The evidence of robbery was clearly proven, as testimony adduced at trial showed that the cellphone was taken by means of force by two people. The crux of Gomez's argument, therefore, is that the evidence presented by the State failed to demonstrate, beyond a reasonable doubt, that he was one of the robbers. His assertion, however, fails.

Police officers traced the Witness's cellphone to the apartment where Gomez had been staying. Additionally, Gomez had been identified in court as one of the robbers by three witnesses, and the State entered into evidence the pre-trial photo identification of Gomez by Mr. Vasquez. After viewing the totality of the evidence in the light most favorable to the State, we hold that any rational trier of fact could have found Gomez guilty of robbery, as he had been charged.

Accordingly, we affirm Gomez's conviction for robbery.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.