Circuit Court for Prince George's County
Case No. CT180380B

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3004

September Term, 2018

KEVIN SPARROW BEY

v.

STATE OF MARYLAND

Kehoe,
Nazarian,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: June 1, 2020

Kevin Sparrow-Bey[1] was convicted in the Circuit Court for Prince George's County on fourteen of seventeen criminal counts, including carjacking, armed robbery, first-degree assault, and use of a firearm in the commission of a felony. The court imposed a sentence of fifty years, all but twenty-five suspended. He argues on appeal that (1) the motions court erred by denying his Motion to Suppress the show-up identification, (2) the trial court abused its discretion by permitting video evidence showing him in custody, and (3) the evidence is legally insufficient to sustain each of his convictions. We disagree and affirm.

I. BACKGROUND

A. The Carjacking And Assault

On the night of December 13, 2017, Marteaco Anthony went out of his home to retrieve something from his car, which was parked across the street. As he opened the car, two assailants, both wearing masks and carrying handguns, ran up on him. He fled on foot but tripped and fell at the end of the block, and the men caught up to him.

The first man to catch up to Mr. Anthony was identified later as Tavon Wright. Mr. Wright went through Mr. Anthony's pockets, but when Mr. Anthony told him that he didn't have any cash, Mr. Wright struck him with his gun. Mr. Sparrow-Bey arrived next. The two men took Mr. Anthony's cell phone and wallet and asked for his email address and passwords so that they could access the contents of the phone. Mr. Sparrow-Bey held Mr. Anthony at gunpoint as Mr. Wright got into Mr. Anthony's car, and then the two

[1] Although this case was docketed as "*Kevin Sparrow Bey v. State of Maryland*," the State informs us that the appellant's surname is hyphenated.

assailants, who were wearing gloves, drove off, with Mr. Sparrow-Bey in the passenger seat.

As the two men drove away, radio reports of the carjacking brought the car to the attention of another officer, who began following them, verified the tag number, and pursued them over the border into the District of Columbia, where they crashed the car into a curb. Police captured them after they bailed out and tried to run away. A silver semi-automatic handgun was recovered from Mr. Sparrow-Bey and a pair of latex gloves were removed from his hands. Mr. Anthony's cell phone and watch were recovered from the scene; when Mr. Anthony logged into Instagram from his phone a few days later, the app was open to Mr. Sparrow-Bey's account. When Mr. Anthony went to the police impound lot to retrieve belongings from his car (the car itself was a total loss), he found latex gloves (which had not been there before) in the driver's side door.

B. The Show-Up And Suppression Hearing

Shortly after the assailants drove off, Mr. Anthony called the police. When they arrived, he described his assailants by their approximate height and weight and gave a statement about the details of the attack. After taking Mr. Anthony's statement, and approximately forty minutes after the incident, Detective Michael Lembo took Mr. Anthony to the site in the District of Columbia where the two men were being held to attempt show-up identifications of two possible suspects. He was taken separately to each suspect and identified both Mr. Sparrow-Bey and Mr. Wright as the men who assaulted him and took his car.

Mr. Sparrow-Bey's counsel moved to suppress evidence of the out-of-court identification. At a hearing on the motion, Mr. Anthony testified that Detective Lembo told him the police had arrested two people and that they "had reason to believe the two people that they had arrested were the two people involved in [the] carjacking." When asked what statements Detective Lembo made about where he was going, Mr. Anthony recounted that he was to try and identify the suspects based on his memory:

> After we went over everything, he just said he was going to – well, I guess we took notes. We pretty much went over everything. He said he was going to take me to the crime scene so that I could identify just off of what I had seen when the crime took place.

Mr. Anthony was shown Mr. Wright first, then driven a block away, where Mr. Sparrow-Bey was escorted by two officers from a police van, in handcuffs, to the car where Mr. Anthony was sitting with Detective Lembo. Mr. Anthony identified Mr. Sparrow-Bey from his physical appearance, clothing, size, height, and age as the taller of the two men who carjacked him. Further questioning revealed the show-up procedure:

> [THE STATE]: In terms of verbally, how did you indicate to the authorities that the second person they were showing you was involved or was the second person?
>
> [MR. ANTHONY]: I basically said that based off what I seen, he had the clothes description, the size and height, and he was asking me pretty much was this the person who did it, based off of what I seen when it took place.
>
> [THE STATE]: So when the second individual, when they bring him out from the police van in handcuffs and he's there in front of you, Detective Lembo asked you, is this the second individual?

[MR. ANTHONY]: Yes.

On cross-examination, defense counsel probed unsuccessfully whether the officers had suggested the outcome of the show-up:

> [DEFENSE COUNSEL]: Did he tell you that they knew for sure that the people they had stopped were the ones that carjacked you?
>
> [MR. ANTHONY]: No, he didn't say it. He didn't forcefully say anything. It was just based off of my opinion. Nothing was pushed or forced on me whatsoever.
>
> ***
>
> [DEFENSE COUNSEL]: Were you all, when you were speaking prior to leaving or during the car ride there or even while you were looking at either one of the defendants, the defendant or co-defendant Tayon, did Detective Lembo ever tell you that you had to positively ID either one of them?
>
> [MR. ANTHONY]: He didn't say I had to. He just said this is basically your opinion. Just basically tell me is this the person or not.

Detective Lembo also testified about the show-up. He stated that he took Mr. Anthony to the scene of the accident to identify the men after taking Mr. Anthony's statement at his house:

> [THE STATE]: Did you ever say to him at that point that they had stopped people or that people that were stopped, you were sure they had done it?
>
> [DETECTIVE LEMBO]: No.
>
> [THE STATE]: Or that you knew that they had done it?
>
> [DETECTIVE LEMBO]: No.

> [THE STATE]: What did you tell him about who he was going to be looking at?
>
> [DETECTIVE LEMBO]: I confirmed that he heard that they had stopped two people and I would be taking him to look at them. But they didn't necessarily mean that they were the people who had carjacked him.

Detective Lembo stated he did not tell Mr. Anthony it was important to identify Mr. Sparrow-Bey positively, nor did he say Mr. Anthony had to identify him at all. Immediately after Mr. Anthony identified Mr. Sparrow-Bey, Detective Lembo took Mr. Anthony home.

C. The Trial

During the two-day trial, the prosecution sought to admit video evidence showing Mr. Sparrow-Bey in police custody. The State proffered that the video was relevant to show the jury Mr. Sparrow-Bey's size and the clothing he was wearing and to establish his date of birth. Defense counsel objected. The trial judge allowed a twenty-second clip of Mr. Sparrow-Bey in custody to be shown to the jury, and the parties stipulated to Mr. Sparrow-Bey's date of birth.

We include additional facts below as appropriate.

II. DISCUSSION

Mr. Sparrow-Bey identifies three issues on appeal.[2] *First*, he argues that the motions

[2] Mr. Sparrow-Bey phrased the Questions Presented in his brief as follows:

> 1. Did the pre-trial hearing court err by denying Appellant's motion to suppress identification evidence?
>
> 2. Did the trial judge abuse discretion by permitting the prosecutor to play a video recording showing Appellant in

court erred when it denied his motion to suppress Mr. Anthony's "show-up" identification, which occurred approximately one hour after the assault and carjacking occurred and showed him to the victim while handcuffed and being escorted from the police van. *Second*, he argues that the trial court abused its discretion by admitting video evidence of him in custody on the night of the arrest. *Third*, he contends that the evidence was legally insufficient to sustain his convictions.

A. The Circuit Court Did Not Err In Denying The Motion To Suppress The Pre-Trial Identification.

First, Mr. Sparrow-Bey contends the extrajudicial show-up was impermissibly suggestive and that the motions court erred in denying his motion to suppress it. "Upon reviewing a suppression hearing court's decision to grant or deny a motion to suppress, we limit ourselves to considering the record of the suppression hearing." *Small v. State*, 464 Md. 68, 88 (2019). "On appeal, 'we extend great deference to the fact finding of the

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> custody?
>
> 3. Is the evidence legally sufficient to sustain Appellant's convictions?

The State phrased the Questions Presented as follows:

> 1. Did the circuit court properly deny Sparrow-Bey's motion to suppress the victim's pre-trial identification of him because the "show-up" at which the identification was made was not impermissibly suggestive?
>
> 2. Did the trial court properly exercise its discretion in admitting a 20-second video clip showing Sparrow-Bey in a police interview room, wearing the clothing he was wearing when he was arrested?
>
> 3. Was the evidence sufficient to convict Sparrow-Bey?

suppression hearing Judge with respect to determining the credibilities of contracting witnesses and to weighing and determining first-level fact.'" *McDuffie v. State*, 115 Md. App. 359, 366 (1997) (*quoting Perkins v. State*, 83 Md. App. 341, 346 (1990)). We review the evidence and reasonable inferences in favor of the prevailing party, here, the State. *Vargas-Salguero v. State*, 237 Md. App. 317, 336 (2018). We review conclusions of law *de novo*. *Small*, 454 Md. at 88.

An impermissibly suggestive pre-trial identification violates the Due Process Clause of the Fourteenth Amendment. *Mendes v. State*, 146 Md. App. 23, 34 (2002). The defendant has the initial burden of demonstrating that an extra-judicial identification was impermissibly suggestive. *Brockington v. State*, 85 Md. App. 165, 172 (1990), *cert. denied*, 322 Md. 613 (1991). If a *prima facie* taint is established, the State must "prove by clear and convincing evidence the existence of reliability in the identification that outweighs the corrupting effect of the suggestive procedure." *Brockington*, 85 Md. App. at 172 (*quoting Loud v. State*, 63 Md. App. 702, 706 (1985)).

An impermissibly suggestive identification is one in which a police officer "feed[s] the witness clues as to which identification to make." *Conyers v. State*, 115 Md. App. 114, 121 (1997), *cert. denied*, 346 Md. 371 (1997). In this case, the potential opportunity for officers to shape Mr. Anthony's identification came as Detective Lembo drove him to the crash scene and in the short time after they arrived. After considering both the Detective's and Mr. Anthony's testimony, the trial court found that the officers had exerted no pressure on Mr. Anthony and had not given Mr. Anthony clues or suggestions that swayed his

identification:

> [THE COURT]: I heard the testimony of the victim and officer in this case. Counsel, I am denying your motion.
>
> Again, the show up, by nature of what it is, is suggestive. . . . [B]ut the issue is whether it was impermissibly suggestive, whether the police officer did something to say this was the person who did this crime. And based on the testimony, I thought the witness was clear about he didn't know. He was just being taken to the scene. There may have been some comments made by police, but I don't think it rose to the level of pick this guy. This is the guy to pick. So I don't think the show up was impermissibly suggestive, so I'm going to deny the motion with respect to the in-court identification.

It's true that Detective Lembo told Mr. Anthony that suspects had been apprehended. But beyond that generic and obvious fact—why else would they be driving to a show-up?—nothing in the testimony from Mr. Anthony or Detective Lembo suggests that the Detective gave any clues about the identity of the suspects or coerced Mr. Anthony into making positive identifications. We agree with the trial court that the show-up identification was not impermissibly suggestive and, as the trial court did, we end the inquiry there. *Conyers*, 115 Md. App. at 121.

B. The Circuit Court Did Not Abuse Its Discretion In Admitting Video Of Mr. Sparrow-Bey In Custody The Night Of The Arrest.

Second, Mr. Sparrow-Bey contends that the trial court abused its discretion in admitting into evidence a video clip of him while he was in police custody on the night of the incident. The State sought to admit the clip, and the court admitted it, for the purpose of establishing Mr. Sparrow-Bey's size, the clothing he was wearing, and his date of birth. We review decisions regarding the admission of evidence for abuse of discretion.

McKnight v. State, 33 Md. App. 280 (1976) ("[T]he conduct and direction of a trial is always within the sound discretion of the presiding judge.").

Evidence is admissible in a criminal case if there's a "connection of the fact proved with the offense charged, as evidence which has a natural tendency to establish the fact at issue." *Dorsey v. State*, 276 Md. 638, 643 (1976) (*quoting MacEwen v. State*, 194 Md. 492, 501 (1950)). The court's discretion does not reach so far as to allow admission of facts that are obviously irrelevant or unfairly prejudicial. *Merzbacher v. State*, 346 Md. 391, 404 (1997); *Pearson v. State*, 182 Md. 1, 13 (1943). Evidence is unfairly prejudicial if it will tend "to substantiate the witness on an immaterial point in the minds of a jury, and to correspondingly discredit the defendant as to his credibility on the main issue." *Pearson*, 18 Md. at 14. This is especially true in criminal cases, in which the defendant is presumed innocent and "[t]he right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment." *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (*citing Drope v. Missouri*, 420 U.S. 162, 172 (1975)). Evidence that could undermine the presumption of innocence in the eyes of the jury is particularly risky, and visual evidence of an accused in prison attire is particularly fraught with constitutional implications. *Id.* at 504.

After a back-and-forth between the parties, and over a defense objection, the trial court allowed the State to show the jury a twenty-second portion of the video that showed Mr. Sparrow-Bey in his own clothing. He analogizes the decision to admit this video clip to requiring him to sit at trial wearing identifiable prison clothing, but the analogy fails: he was not wearing prison attire, nor was he visibly restrained in the video, nor did the clip

contain his *Miranda* warnings or any other indicia of criminality.[3] The video was over in twenty seconds, and the probative value of the evidence—Mr. Anthony recognized his assailants by their build and clothing, not their faces—far outweighed the video's negligible reinforcement of the (undisputed) fact that Mr. Sparrow-Bey was in custody on the night of the offense.

Beyond the analogy to a trial in prison garb, there is no suggestion that briefly showing the jury how Mr. Sparrow-Bey looked in police custody had any greater influence on the outcome of the trial. Although the video did remind the jury that Mr. Sparrow-Bey was arrested in connection with the crime, he never disputed that he was picked up by police—to the contrary, the defense conceded throughout its case-in-chief that Mr. Sparrow-Bey was in the vehicle during the car chase (they argued that he had not been present at the time the crime was committed). His theory of the case made the video all the more relevant, and the trial court did not abuse its discretion in admitting the portion it did.

C. The Evidence Was Legally Sufficient.

Finally, Mr. Sparrow-Bey argues that the evidence was insufficient to support his convictions. But he offers no specificity: he claims only that none of his fourteen convictions can stand, and grounds this blanket theory only in the premise that the prosecution failed to "prove that the accused is the criminal agent." Mr. Sparrow-Bey is wrong.

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966). The State had sought to admit a second clip in which Mr. Sparrow-Bey stated his date of birth, but the court allowed him instead to stipulate to his birthdate and the second clip was never shown.

In reviewing the sufficiency of the evidence to support a conviction, we ask "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Taylor v. State*, 346 Md. 452, 457 (1997) (*quoting Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "We do not second-guess the jury's determination where there are competing rational inferences available" and we give deference in regard to the inferences a fact-finder may draw. *Smith v. State*, 415 Md. 174, 183 (2010).

Here, the evidence presented at trial was more than sufficient for a jury to find that Mr. Sparrow-Bey was the "criminal agent" who committed these offenses. Mr. Anthony identified his assailants, including Mr. Sparrow-Bey, approximately an hour after he was assaulted. He gave a statement to police describing each individual by height, weight, and clothing. He described guns that matched the guns found on each assailant. He stated that both men were wearing gloves, and gloves matching the description were taken from Mr. Sparrow-Bey's hands. Mr. Anthony's identification was valid for the reasons we already have discussed, and was corroborated by Mr. Sparrow-Bey's presence in the car after it crashed, by screenshots demonstrating that Mr. Sparrow-Bey had logged into his own Instagram account on Mr. Anthony's phone, and by the match between Mr. Anthony's description of Mr. Sparrow-Bey's clothing and the video clip from the stationhouse.

Mr. Sparrow-Bey claims that he was misidentified as one of the carjackers and was simply in the wrong place at the wrong time. But that argument goes to the credibility of the testimony, not its sufficiency to support the convictions. The jury had ample evidence

from which it could draw, or reject, the conclusion that Mr. Sparrow-Bey was present for the crime and participated throughout, and thus the evidence was legally sufficient to support the convictions.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. APPELLANT TO PAY COSTS.