UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1228

September Term, 2014

MARCUS J. NICKENS

v.

STATE OF MARYLAND

Wright,
Reed,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: November 18, 2015

Appellant, Marcus J. Nickens, was indicted in the Circuit Court for Anne Arundel County, and charged with armed robbery, first degree assault and related offenses. Following a jury trial, appellant was convicted of two counts each of robbery, second degree assault, reckless endangerment, and theft under $1,000. After his motion for new trial was denied, the court dismissed the two convictions for reckless endangerment and sentenced appellant to eight years, with all but four years suspended, for one count of robbery, and a consecutive eight years, with all but four years suspended, on the second count of robbery, with the remaining counts merged.

Appellant's timely appeal presents the following questions for our review:

> 1. Did the hearing court err by denying the motion to suppress evidence of the identification made by Devin Middleton from a photo array?
>
> 2. Did the trial court err by denying Appellant's motion for a new trial?

For the following reasons, we shall affirm.

BACKGROUND

Suppression Hearing

In August 2013, Devin Middleton and Divine Gomez were robbed at nighttime while walking near a hotel in Linthicum, Anne Arundel County. Later that same day, Middleton was transported to a police station where he was shown two photo array sheets, prepared by Corporal Fredrick Bethea, containing a number of photographs. Middleton explained that there was a driver and a passenger involved in the robbery.

When Bethea handed him a photo array sheet, Middleton testified that the officer told him "is the person there that, you know, committed a crime as on the sheet. And he didn't want me, he didn't want me, you know, to pick somebody I didn't know, and I told him that." Middleton agreed the officer told him "they had suspects, but he didn't say the suspects was on the sheet." The officer did not direct him to pick any photograph. Middleton was unable to identify the driver that was involved.

Middleton was then shown an array in court and identified his name and handwriting on the document. However, Middleton was unsure if this was the same array he was shown in the police station. Middleton then testified that he recognized photo numbers 3 and 5 on the array shown to him in court. He also testified that he looked at the array for five to seven minutes before he selected a photograph. Middleton told the officer at the police station that he was approximately 90 percent sure that he selected the perpetrator.

In his testimony, Bethea, of the Anne Arundel County Police Department, explained that he prepared an array that included appellant's photograph. Using a computer database of photographs, Bethea obtained appellant's photograph and found five others that "closely resemble[d]" that photo. Bethea identified the array containing appellant's photograph at the hearing, and testified that the photo array used at the suppression hearing was a photocopy of the original that he prepared.

Bethea then was asked about the photos themselves in the array. Appellant's photo was located in position number 5 on the array. He agreed that the photo of the individual's head in position number 2 appeared bigger than the others. He also agreed that some of the head sizes of the remaining individuals appeared different. And, that the photo of appellant's head was smaller than the others.

Bethea was then asked what instructions he gave to Middleton before showing him the array, and Bethea testified:

> I told him that I would be showing him a photo array of six individuals. It may not be the individual that he saw the night of the incident, and if it is the individual, that the person could have changed because it could have been an older photo or more recent photo, but just remember to look at the facial features like right in the center of the face here, and took him in the back, and showed him the photo array.

Middleton looked at the array briefly, and then "pointed right to the individual." Bethea heard Middleton say "That's him right there." Middleton indicated he was "pretty sure." Middleton then signed on the line underneath the picture.

Bethea agreed that he did not suggest any photograph to Middleton, nor did he direct him to a particular photograph. He also told Middleton that "it could be a possibility that he is there, and he may not be," but he did not tell Middleton that the suspect was in the array. Bethea also testified that he tried to select photographs of men of the same age, race, and appearance for inclusion in the array.

After hearing argument, the court denied the motion to suppress, finding that appellant had not met his initial burden of showing anything impermissibly suggestive about the photo array, as follows:

> Well, Counsel, I'm looking at this, and it seems to me if anything would jump out at someone, it would be the person in number two whose head is much larger and takes up almost the whole frame. All the other persons' heads are more similar in size.
>
> And then I'm looking at – it appears to me that number four has on a white T-shirt and happens to have something over top of it. Number five has on a white T-shirt. Number six appears to have on a white T-shirt, although that might be a V-neck. Number three could also have on a white T-shirt, but it's black and white and sort of grayer. It looks like number one has a light T-shirt, again, under something. So someone easily could have thrown something over their shirt.
>
> You know, I don't think there's anything – if I were looking at this, my eyes are not at all directed to number five. So I don't see anything about the photo itself that is suggestive. And the testimony didn't indicate that there's anything about the process that was suggestive.
>
> I'm happy for you to return your witness to the stand. But I don't think that, at this point, you've met the burden to show anything was unduly suggestive, unless there's something else that the witness has to say about that. And again, I'm happy for you to do that, but I don't think we're to step two at this point.

Trial

On August 24, 2013, Divine Gomez and Devin Middleton were walking home from a Dunkin Donuts, through the parking lot of a Comfort Inn hotel, when a white Ford sports utility vehicle ("SUV"), possibly an Excursion, with tinted windows pulled into the lot. The

vehicle stopped and, according to Middleton, appellant, who was wearing a white T-shirt at the time, got out of the vehicle and approached them.

Appellant asked Gomez and Middleton if they had any change. When they replied that they did not, appellant directed them to "empty your pockets." As he did so, appellant pulled out a handgun. Gomez handed over her purse and some bags, and Middleton handed over his wallet. By this time, Middleton noticed that there was another person inside the Ford SUV. When appellant went back to the vehicle, Gomez and Middleton ran from the scene.

Gomez contacted the police and told them the direction the vehicle had taken after the robbery. After a short pursuit to Baltimore City, the police stopped the white Ford SUV. Middleton identified a photograph of that vehicle during trial.

Both Gomez and Middleton were taken to the police station that same evening. Gomez was unable to identify anyone in a photo lineup. Middleton testified that he was taken to a room with one police officer and shown a photo array. Middleton identified photo number 5 "[b]ecause that's who robbed me." Middleton confirmed that photograph was of appellant, testifying that he was one hundred percent sure at trial that appellant was the man who robbed him.

The parties stipulated that Corporal Thomas Palmer was looking for the suspect SUV after the robbery and that the suspects were two African-American males. A vehicle matching the description was spotted, pursued, and then stopped in Baltimore City. Only

one person, Damika Hicks, was in the vehicle at the time of the stop. Hicks testified at trial that a person she knew as "Black Marcus," had asked her to park the vehicle for him. A cellphone was found on the ground next to the vehicle. A photo of this cellphone was admitted at trial. Depicted on the screen of the cellphone is a photograph of two unknown African-American males standing arm in arm.

After Middleton identified appellant, police obtained a search warrant for the Ford SUV, which actually was a Ford Expedition. The Expedition was registered to Rhoda Nickens, and the parties stipulated that she was appellant's wife. In addition, fingerprints were recovered from inside and outside the Expedition. Appellant's palm print was found on the rear passenger door of the Expedition.

An ID card with appellant's name and photograph was found in the front console of the Expedition. A red notebook, as well as hair gel, jewelry, and lip gloss were also recovered on the floor near the front passenger seat. One of the victims, Gomez, identified a photograph of these latter items and confirmed they were inside the purse that was taken from her during the robbery. And, three additional cellphones were found inside the Expedition.

Finally, a fingerprint expert testified that the police also recovered the known prints of James Sydney Towns and Damika Tiana Hicks from the windows of the Ford Expedition. No other latent prints of comparative value were recovered, including a cellphone found outside the vehicle after the police chase into Baltimore City.

We shall include additional detail in the following discussion.

DISCUSSION

I.

Appellant maintains that the photo array shown to Devin Middleton was impermissibly suggestive. The State responds that the array was not impermissibly suggestive, and the motions court properly denied the motion to suppress. We agree.

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

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

In re Matthew S., 199 Md. App. at 447 (quoting *Gatewood v. State*, 158 Md. App. 458, 475-76 (2004) (quotations and citations omitted), *aff'd on other grounds*, 388 Md. 526 (2005)).

It is well-established that "[d]ue process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures." *James v. State*, 191 Md. App. 233, 251-52 (quoting *Webster v. State*, 299 Md. 581, 599-600 (1984) (in turn quoting *Moore v. Illinois*, 434 U.S.

220, 227 (1977)) (internal quotation marks omitted), *cert. denied*, 415 Md. 338 (2010). We look at the circumstances of [the] identification of [appellant] through a two-step process:

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

Jones v. State, 395 Md. 97, 109 (2006) (citations and footnote omitted).

The defense must initially show "some unnecessary suggestiveness in the procedures employed by the police." *Brockington v. State*, 85 Md. App. 165, 172 (1990), *cert. denied*, 322 Md. 613 (1991). Suggestiveness exists where the police, in effect, say to the witness, "This is the man." *Jones v. State*, 310 Md. 569, 577 (1987) (citing *Foster v. California*, 394 U.S. 440, 443 (1969)). If the out-of-court identification was not made under suggestive circumstances, the inquiry ends and the identification evidence is admissible. *Jones*, 310 Md. at 577; *accord In re Matthew S.*, 199 Md. App. at 447-48; *James*, 191 Md. App. at 252.

Here, the photo array, included with the record on appeal, shows six individuals, all of similar age, all bald, all attired similarly, and all with full facial hair, including a beard and mustache. Their appearances are substantially similar and we are unable to conclude that the motion court was clearly erroneous in its overall assessment of the array.

With respect to appellant's primary argument, it does appear that appellant's head in photo number 5 is slightly smaller than most of the rest. However, it appears to be the same

size as the individual depicted in photo number 3, and is only slightly smaller than those individuals depicted in photos 4 and 6. Indeed, the only photograph that remotely stands out is the individual in photo number 2, whose head appears larger than the rest.

We are not persuaded that these slight differences made the array unduly or impermissibly suggestive. Because the appellant has failed to meet his initial burden, we need not consider the issue any further. The motions court properly denied the motion to suppress the photo array.

II.

Appellant next contends the court erred in denying his motion for new trial because trial counsel rendered ineffective assistance of counsel in connection with his handling of a photograph of a cellphone wallpaper introduced into evidence during trial.[1] The State initially responds that this collateral attack should be best left for post-conviction proceedings. Even if addressed, the State also contends that appellant did not receive ineffective assistance of counsel as that is understood under *Strickland v. Washington*, 466 U.S. 668 (1984).

[1] "A wallpaper or background (also known as a desktop wallpaper, desktop background, desktop picture or desktop image on computers) is a digital image (photo, drawing etc.) used as a decorative background of a graphical user interface on the screen of a computer, mobile communications device or other electronic device. On a computer it is usually for the desktop, while on a mobile phone it is usually the background for the 'home' or 'idle' screen. Though most devices come with a default picture, users can usually change it to custom files of their choosing." https://en.wikipedia.org/wiki/Wallpaper_(computing)

At the new trial motion hearing, the court first heard from appellant's trial counsel, Ronald Resetarits. Resetarits had been a criminal defense attorney for 16 or 17 years, and, at the time of appellant's trial, had been employed with the Public Defender for 14 months.

As part of pre-trial discovery, Resetarits received a computer disk containing a number of photographs. Although Resetarits printed out photographs that he believed were relevant to the case, and showed those specific photos to appellant, he did not, prior to trial, print out all the photographs on that disk.

Approximately two days prior to the new trial hearing, Resetarits went back to the original computer disk and printed out all the photographs. The photographs were found in two computer files, grouped together and identified as A1 and A2. From that overall print out of all the photographs, Resetarits prepared a subset of the photos that he actually showed to appellant, identified as group B. He clarified that, only the photos in group B were shown to appellant and, that any that remained in groups A1 and A2, were never shown to appellant prior to trial.

The primary issue in the motion for new trial was a photograph on the cell phone that was found outside the Expedition after it was stopped following the robbery. The photograph on the cell phone, *i.e.*, the wallpaper, and depicting two unknown African-American males standing arm in arm, was never shown to appellant prior to trial. That photograph was admitted. Resetarits testified at the hearing that, when the photograph at

issue was introduced, he glanced at it, but did not show it to appellant, and did not offer any objection to its admission.

Resetarits then testified that his defense theory of the case was one of misidentification, based on the fact that one of the victims did not identify appellant in a photo array as one of the robbers. Resetarits agreed that he did not "consider a theory that there was an identifiable third person who was the perpetrator of the robbery." He acknowledged that fingerprints matching James Sidney Towns were found on the outside front driver's side door, but Resetarits testified that he never pursued a theory that Towns was the actual robber.

Resetarits explained that, although he performed a Case Search of Towns, he did not ask his investigator to look into Towns, nor did he obtain a photograph of Towns before trial. Resetarits also did not try to find out who the cellphone belonged to, nor did he do anything to try to identify the two individuals depicted in the wallpaper photograph at issue.

Resetarits first became concerned that there was a problem with respect to this cellphone wallpaper photograph when, during closing argument, the prosecutor held up the photo and declared that the photo depicted appellant. Only after deliberations had begun, did Resetarits first show the photo to appellant and appellant "was adamant that it wasn't him." Resetarits then contacted his investigator, Tom Lancaster, and asked him to compare the photos to a photo of Towns from the Department of Motor Vehicles. Resetarits also asked Lancaster to use his expertise in facial recognition to complement his investigation.

Resetarits then testified at the hearing that, knowing what he knew after trial, he would have called Tom Lancaster as a witness at trial. He also would have admitted photographs of Towns, encouraged the jury to compare that photo with the cellphone wallpaper photograph, and would have argued that the phone actually belonged to Towns. Resetarits continued at the hearing, that it "must have been James Sidney Towns' phone and thus, he must have been involved. It's corroboration that he was involved in the robbery because then you have the cell phone in conjunction with the fingerprints." Resetarits also testified that he believed Towns' photograph matched a description given by one of the victims and that he would have also made that argument at trial.

Finally, on direct examination, Resetarits admitted that it was alleged that two people were involved in the robbery. When asked if the State could have argued that appellant was nevertheless involved with Towns, Resetarits pointed to the evidence that Damika Hicks was the only person in the vehicle when it was stopped by police. Thus, it was possible that Hicks and Towns were the real robbers.

On cross-examination, Resetarits acknowledged that he argued misidentification to the jury, that Gomez did not identify appellant, and that there was fingerprint evidence matching Towns. He also agreed that he argued there were unidentified fingerprints on the vehicle. Further, considering there was evidence that two African-American males were involved in the robbery, Resetarits agreed the jury could reach the conclusion that both appellant and Towns were involved.

Tom Lancaster, a private investigator, also was called by the defense to testify at the hearing on the new trial motion hearing. After hearing evidence of his expertise, the prosecutor initially accepted that Lancaster was an expert in facial recognition, but objected to his opinion testimony on the grounds that she did not receive notice prior to the hearing that such expert testimony would be offered. Defense counsel proffered that Lancaster would testify, to a reasonable degree of scientific certainty, that Towns could not be excluded as the person on the cellphone wallpaper photograph, but that appellant could. After the court advised the prosecutor that maintaining her objection could create an issue for post-conviction proceedings, the prosecutor maintained her objection to Lancaster's testimony. The court then ruled that Lancaster could not offer the proffered expert opinion testimony.

Lancaster then testified generally that, after the verdict in this case, he obtained photographs, from the Motor Vehicle Administration, of Towns, as well as known images of appellant. He compared those images to the cellphone wallpaper image, specifically the man on the right side of the image, and reached an opinion based on that comparison. However, in light of the court's ruling, Lancaster was not permitted to offer that opinion at the hearing.

After hearing argument, the court denied the motion for new trial, finding as follows:

> Let me thank both Counsel for a good presentation of this question. Let me initially say that I think it would be a no-brainer if the Court would instantly grant a new trial if there was only one problem, one person in the car

and that would, I think, create a stronger question of if the fingerprint matched the cell phone, et cetera, et cetera.

But in this instance, there are two folks involved in the robbery, both of them males, both of them black males, according to the testimony, and I think it would be speculative on the Court's side to guess that, in fact one of the black males was, in fact, a female, in fact, Ms. Hicks. And I don't think the Court should speculate in order to grant the Motion of this nature. It shouldn't be based on speculation.

So if it was two black males and everything in the Defense's Motion for New Trial is correct, I think what it all adds up to is that you are making a strong case that the second guy involved in the robbery was Mr. Towns, and that doesn't prove that Mr. Nickens is not the other one of the two, and in effect prove who the second person is. I understand the sinking feeling that Mr. Resetarits would get when his client, you know, smacked the table and said, "That's not me on the cell phone," but the most that could have been done if he were thinking fast and saying, Your Honor, I want a curative instruction as the Court would have told the jury what the Court already had told the jury which is what the lawyers say is not evidence. You have to decide for yourself. You have to look at the evidence and consider that yourself.

The court continued:

And when you look at this evidence yourself which is the cell phone picture, Exhibit 12, I don't think, A, that it's terribly much in resemblance of the Defendant on either the left or the right side, but it's also a tiny, tiny picture. I think the jury would have to have decided on its own and they already had the instructions that they should decide on their own.

Plus, in addition to that, I think that the evidence was very, very strong against Mr. Nickens in that A, it's his car; B, it's got his ID in it which normally one thinks one doesn't, you know, one carries with one or has nearby handy, which he had nearby handy in the car; C, he's in hot pursuit, chased down into his own neighborhood.

> And when the person standing by the car, Ms. Hicks, says, you know, did you drive this car, you know, how did you get this car, she says, I got it from Black Marcus, and that he booked and he ran off.

After addressing questions concerning Hicks's credibility, the court turned to the identification made by the victim, Middleton, the subject of the first question presented in this case:

> And yet, I think putting all of those things together with the 100 percent positive identification by the victim, this is not a cross racial identification. This is an identification by a gentleman who was very careful and deliberate and came to that conclusion. I think that there's not a, quote, "substantial likelihood of different results." I think there's a slim chance of a different result. A slim chance is not the verdict and sinking feeling in one's stomach when the client says, you know, that's not right. That does not create a substantial likelihood either.

The court then concluded:

> So for all those reasons, the Court is going to deny the Motion at this point. And I would add one other comment which is even if, again, we had the facial recognition testimony, which I don't have, but I'm just saying, assuming for the sake of argument if I had that and the facial recognition testimony said the guy on the right in the cell phone picture is Mr. Towns. I don't think that would change my decision having considered all the weight of the evidence in the case because I think at best it would prove that Mr. Towns perhaps had a great likelihood of being the other person in the car.
>
> It doesn't prove that the second person, that the actual robber was not Mr. Nickens. The fact that the cell phone could be passed back and forth, that it could be on this side or that side of the car depending on who had it in their hands, I don't think that actually makes a difference in the evidence either, so I think the jury understood the identification question very well. They understood the questionableness of the testimony of Ms. Hicks and the fact that there were multiple people's fingerprints on the car and it was their decision beyond a reasonable doubt. I don't think that this will change it, considering again that there are two people involved.

So the Court denies the Motion and we should go on to sentencing. . . .

Initially, the State questions the issue of whether this claim should have been presented at the new trial hearing and whether we should decide it on direct appeal. Ordinarily, an ineffective assistance claim is more appropriately resolved in a collateral proceeding initiated under the Postconviction Procedure Act. *See* Md. Code (2001, 2008 Repl. Vol., 2014 Supp.), § 7-101 through 7-301 of the Criminal Procedure Article. *See Robinson v. State*, 404 Md. 208, 219 (2008) ("[A] claim of ineffective assistance of counsel should be raised in a post-conviction proceeding, subject to a few exceptions"); *accord Mosley v. State*, 378 Md. 548, 558-59 (2003); *see also Washington v. State*, 191 Md. App. 48, 71 ("[T]he appropriate avenue for the resolution of a claim of ineffective assistance of counsel is a post-conviction proceeding"), *cert. denied*, 415 Md. 43 (2010). In *Mosley*, the Court of Appeals reaffirmed that:

> When a defendant attacks a criminal judgment on the basis of denial of effective assistance of counsel, the Act thus provides the defendant with the possibility of an evidentiary hearing, reflecting a recognition that "adequate procedures exist at the trial level, as distinguished from the appellate level, for taking testimony, receiving evidence, and making factual findings thereon concerning the allegations of error." Post-conviction proceedings are preferred with respect to ineffective assistance of counsel claims because the trial record rarely reveals why counsel acted or omitted to act, and such proceedings allow for fact-finding and the introduction of testimony and evidence directly related to allegations of the counsel's ineffectiveness.

Mosley, 378 Md. at 560 (citations and footnote omitted).

It is only in unusual circumstances that an appellate court will consider an ineffectiveness claim on direct appeal. In *Robinson*, *supra*, although the Court ultimately found that the issue presented was not unusual, the Court recognized that "[t]he rule is not 'absolute and, where the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim, there is no need for a collateral fact-finding proceeding, and review on direct appeal may be appropriate and desirable.'" *Robinson*, 404 Md. at 219 (quoting *Smith v. State*, 394 Md. 184, 200 (2006)); *see also Mosley*, 378 Md. at 562 (recognizing that "there may be exceptional cases where the trial record reveals counsel's ineffectiveness to be 'so blatant and egregious' that review on appeal is appropriate").

In this case, but for the State's objection to the testimony of the facial recognition expert, it would appear that the critical facts were not in dispute. And, even without the expert testimony, the photographs of Towns, appellant, and the cellphone wallpaper are all included with the record and were presented to the motions court for its independent consideration. The new trial motions court heard much, if not all, of which would have been offered at a post-conviction hearing, including extensively from appellant's trial counsel. Thus, we are persuaded that this is one of those exceptional cases where the record is sufficiently developed for a fair evaluation of the claim.

In making that evaluation, we begin with the recognition that this was a motion for new trial. In *Washington v. State*, 424 Md. 632, 667-68 (2012), the Court of Appeals explained the extent of a trial court's discretion in denying a motion for new trial:

> Ordinarily a trial court's order denying a motion for a new trial will be reviewed on appeal if it is claimed that the trial court abused its discretion. Generally, we will not disturb a circuit court's discretion in denying a motion for a new trial. We have held that [t]he abuse of discretion standard requires a trial judge to use his or her discretion soundly and that discretion is abused when the judge exercises it in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of the law. A trial judge's discretion to grant or deny a motion for a new trial is not fixed and immutable; rather, it will expand or contract depending upon the nature of the factors being considered, and the extent to which the exercise of that discretion depends upon the opportunity the trial judge had to feel the pulse of the trial and to rely on his own impressions in determining questions of fairness and justice. Notably, [a] ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling.

(Quotations and citations omitted) (alterations in original).

In considering the motion, it is apparent that the primary basis for the motion for new trial was that trial counsel rendered ineffective assistance by not conducting further investigation of the cellphone wallpaper photograph that was admitted at trial. Therefore, as the circuit court effectively was operating as a post-conviction court, our standard of review is further delineated and we will not "disturb the factual findings of the post-conviction court unless they are clearly erroneous." *Arrington v. State*, 411 Md. 524, 551 (2009) (quoting *Wilson v. State*, 363 Md. 333, 348(2001)). Nevertheless, "we make an

independent determination of relevant law and its application to the facts." *Id*. (internal quotations and citations omitted).

In order to prevail on a claim of ineffective assistance, a defendant must satisfy a two part test. *Taylor v. State*, 428 Md. 386, 399 (2012) (citing *Strickland v. Washington*, 466 U.S. 668, 687-89 (1984)). Pursuant to *Strickland*, a prisoner claiming ineffective assistance of counsel rendered his conviction or sentence invalid must show (1) "counsel's representation fell below an objective standard of reasonableness," and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 688, 694.

Regarding the first component of the test of *Strickland*, which is often referred to as the "performance" component, the reviewing court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct," *Strickland*, 466 U.S. at 690. All circumstances are to be considered. *Id*. at 688. And, the reviewing court's scrutiny of counsel's conduct "must be highly deferential." *Id*. at 689. To prevail, the prisoner "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id*. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)); *accord Oken v. State*, 343 Md. 256, 283 (1996), *cert. denied*, 519 U.S. 1079 (1997); *see also Gilliam v. State*, 331 Md. 651, 665 (1993) (in order to be deficient, counsel's acts or omissions must be "outside the wide range of professionally competent assistance")(quoting *Strickland*, 466 U.S. at 690)).

Further, even if counsel commits a professionally unreasonable error, under the second component of the *Strickland* test, which is frequently referred to as the "prejudice" component, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. This is so because "[a]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial." *Id*. at 693. Maryland case law characterizes the showing necessary to establish prejudice as "a substantial possibility that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Oken*, 343 Md. at 284.

We are not persuaded that trial counsel's performance was deficient on the record before us. Based on our review of the trial, we conclude that Resetarits advocated effectively, professionally and competently on appellant's behalf. Moreover, counsel did make a strong case of misidentification to the jury, noting that one of the victims, Gomez, did not identify appellant as one of the robbers. Counsel also noted that the person who parked the Expedition, Damika Hicks, never identified appellant at trial as the person who asked her to do so.

And, twice during closing argument, counsel reminded the jury that the Expedition was registered in appellant's wife's name. Counsel also argued that it was "normal" that appellant's fingerprints would be on his wife's car. More specifically, counsel argued:

> And the State's going to say that you should convict this man because his fingerprint is on the rear outside of the door. Of course it is. Why wouldn't his fingerprint be there? This is a family car. He's touching that car all over the place. The reasonable inference is he's using the car. He's a passenger in the car. He's opening up the car to get kids out or the groceries. My fingerprints are all over my wife's car. Her fingerprints are all over my car. That's normal. The State spent a lot of time today with their expert, their fingerprint expert. To prove what? To prove that Marcus Nickens had a connection to his wife's car? Course he did. That his ID might have been in the car or his cell phone? Does that – is that weird? That's normal.

Counsel continued:

> [A]ll of these different fingerprints were analyzed and compared and the one that's so important is the one that was lifted from this red notebook because we know this was taken from the victim. There was a fingerprint lifted from this red notebook that did not match Marcus Nickens. Now whose fingerprint was on there? We don't know. Did they do an adequate job? I would submit to you not. Because we heard no testimony about comparing the prints of Devine Gomez or Devin Middleton. Was the print that was lifted from the back of this notebook, was it Devin Middleton's? Was it Devine Gomez's. That would be normal. We would expect that. But we don't have that information. We don't know. Because they didn't do an adequate investigation here. They didn't seem to compare the known prints of Devin Middleton and Devine Gomez as elimination prints.

Finally, counsel did suggest that James Towns was the real robber:

> And then the other document you'll see here. Who is this individual? James Sydney Towns' fingerprints were on the car. Did they investigate who Sydney (sic) Towns is? Did they question him? That guy might be the robber. We don't know. I don't know who the robber is. But I know it wasn't Mr. Nickens because there's no proof. The proof helps him.

The cellphone at issue was found outside the Expedition following the car chase. No suitable fingerprints were found for comparison on that cellphone. The parties have not informed us, nor have we been able to discern who that cellphone belonged to. Nor was it

clear who the individuals were on the cellphone wallpaper image. Although the prosecutor argued appellant was depicted on the image, the jury was instructed that closing arguments were not evidence and that it was their job to determine the case on the evidence in light of their own experiences, as well as their reasonable inferences and conclusions. Even recognizing that the cellphone would have been an additional piece of evidence to support the defense theory, we can not conclude that counsel's performance, especially given the presence of Towns' fingerprints on the Expedition and the non-identification by Gomez, was so deficient as to amount to ineffective assistance.

Moreover, we are not persuaded that counsel's performance prejudiced the defense, as prejudice is understood under *Strickland*. Assuming *arguendo* that Towns' photo was depicted on the cellphone wallpaper, that did little to undermine the strong identification by Middleton in this case. And, neither the cellphone photo wallpaper standing alone, nor the record for that matter, clearly establishes ownership of the cellphone itself. Although the argument presented assumes that Towns' photo on the wallpaper suggests ownership, we note that a wallpaper photo may represent many things. For instance, a parent could have a photo wallpaper of their child on their cellphone, but that does not mean the cellphone belongs to the child.

Ultimately, there was sufficient evidence, apart from the cellphone, to suggest, at minimum, that appellant was an accomplice in the robbery. That includes his relationship to the subject vehicle, the presence of his identification card and fingerprints on that vehicle,

and his apparent flight and the testimony that he asked Damika Hicks to park the vehicle for him. Coupled with direct evidence of a positive identification of appellant as the robber by Middleton, as well as the victim's stolen property inside the vehicle, we conclude that appellant has failed to establish that there was a substantial possibility of a different result. The court properly denied the motion for new trial.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED.

COSTS TO BE ASSESSED TO APPELLANT.