UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2435

September Term, 2012

BRANDEN LAMAR WILLS

v.

STATE OF MARYLAND

Eyler, Deborah S.
Kehoe,
Sonner, Andrew L.
(Retired, Specially Assigned),

JJ.

Opinion by Sonner, J.

Filed: June 11, 2015

This case results from a seven-count criminal information filed in the Circuit Court for Washington County of appellant, Branden Lamar Wills, based upon two separate incidents. One occurred on March 2, 2012 and the other on March 6, 2012. Eventually, the counts resulting from the separate incidents were severed. Following a mistrial, Wills was re-tried by a jury and found guilty of possession of cocaine and possession of paraphernalia resulting from the March 2 incident.[1] Prior to severance, Wills moved to suppress a pretrial identification of him made after the March 2 incident, any in-court identification which may have resulted, and the photo used to identify him. That motion was denied. Wills presents one question for our review, which we have re-cast:[2]

> Did the motions court properly deny Wills's motion to suppress the pre-trial identification, any in-court identification which may result, and the photo used to identify him?

For the reasons discussed below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

As the sole issue before us arises from the suppression hearing, we shall recount the facts as discussed at that hearing.

[1] Wills pleaded guilty to distribution of cocaine in relation to the March 6 incident.

[2] Appellant presented the issue: "Whether the Circuit Court erred by denying Mr. Wills' Motion to Suppress i) the introduction of the photograph that the police showed to Mr. Dustin Lamier and ii) the in court identification of Mr. Wills by Mr. Lamier?"

Agent David Fortson of the Washington County Narcotics Task Force obtained the telephone number of a person named "Merck,"[3] Wills's street name, from a parallel investigation. Agent Fortson provided "Merck's" telephone number to a Confidential Narcotics Informant (CNI) later identified as Dustin Lamier who placed a call to "Merck" for the purchase of two hundred dollars' worth of cocaine. Lamier arranged for the transaction to occur on or about Indiana Avenue in Hagerstown. Lamier wore a covert camera and audio system to the meeting.[4] When Lamier arrived, he was directed to walk up an alley and make contact with "Merck" inside a Kia automobile. Lamier entered the vehicle and sat in the rear seat behind the driver and received the cocaine from a person seated in the passenger seat. The exchange lasted approximately one minute after which Lamier left and met Agent Fortson at the State Line Motel and surrendered the suspected cocaine which he field tested and tested positive as cocaine. The cocaine was later tested in a laboratory whose tests revealed that the substance purchased was one gram of cocaine. Lamier indicated that he received the cocaine from the person inside the automobile.

[3] Wills's street name is alternatively spelled "Merk" in the transcripts. We adopt the spelling used by both parties.

[4] The recording equipment provided live audio, but the video was recorded and available for viewing later, which Agent Fortson did.

Agent Fortson then showed Lamier a single photo of Wills, whom he had never met before. Lamier identified Wills as "Merck," and said Wills was the one who sold him the cocaine.[5]

Lamier, a paid CNI, who had prior convictions for making a false statement to a police officer,[6] robbery, and criminal mischief, had been referred to the Washington County Narcotics Task Force by the Franklin County (PA) Narcotics Task Force and had performed twenty buys with Agent Fortson. The Hagerstown Police Department had also used Lamier as a CNI. Agent Fortson continued to use Lamier as a CNI and had found him to be honest.

Following argument, the court denied the motion to suppress:

> Lots of CNI's have some taints to their reliability that they, ah, you know, might have charges themselves. Ah, that would be the least reliable thing about, ah, a CNI. Ah, lots of them are working for money. . . . All those, again, are jury questions.
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> * * *
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> So, at any rate that's . . . that's the burden for the State to overcome at a later time. But, I'm satisfied Agent Fortson found this CNI to be credible and felt he was reliable enough to use in this investigation and, in fact, used him in several other investigations.
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> * * *

[5] Agent Fortson arranged for Lamier to purchase cocaine from Wills again on March 6, however the facts of that transaction are not relevant to the issue presented.

[6] Lamier was stopped at a checkpoint and questioned as to whether he was legally in the United States. The officer questioning him had Lamier's identification in his hand and asked Lamier his name. Lamier responded sarcastically with a fake name and the officer subsequently charged him with making a false statement.

[I]f an identification where there's a photo array or one on one, ah, or, ah, a line up is unduly suggestive, ah, or impermissibly suggestive, that's the correct word, impermissibly suggestive then it's . . . that identification is to be suppressed.

Ah, I think showing only one photograph to, ah, the CNI at the parking. . . at the parking lot at most, maybe a half hour or twenty minutes after the. . . after the individual, ah, is said to have purchased the cocaine, ah, **could be suggestive**.

* * *

There [are] factors that go into whether that's impermissibly suggestive or not. [Defense Counsel] has cited the case law. Ah, one is the opportunity to view the person. This was in a Kia, a small. . . you know, a small area, a motor vehicle, ah, that he was within reach of the individual he's identifying.

* * *

The degree of attention. . . .[H]e's in a dangerous situation. People get, you know, killed, beaten up, ah, in drug situations. . . . [H]e knows it's important to make an identification. . . . This was somebody who he was being paid to focus his attention on. So, I think the degree of attention favors the State.

Accuracy of description. Obviously, none. That favors the defense.

* * *

The time between the confrontation, ah, and the effect being shown the photo i.d. and the, ah, the crime. At most and there was no testimony on this, but at most a half hour; I think probably more like ten or twenty minutes[.]

* * *

Ah, the witness's level of certainty. I think it was fairly certain[.]

(Emphasis added).

DISCUSSION

Wills asserts that the court should have granted his motion to suppress, excluding Lamier's pre-trial identification, his in-court identification, and the photo used to identify him pre-trial, known as State's Exhibit 3. Specifically, he contends that showing a single photograph is suggestive and that the motions court erred in not finding that the State proved the reliability of the identification by clear and convincing evidence. The State counters that the motions court never found the use of a single photograph to be impermissibly suggestive, and that, even if it had done so, the court explained why it found the identification to be reliable in its ruling.

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

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

Id. (quoting *Gatewood v. State*, 158 Md. App. 458, 475-76 (2004) (quotations and citations omitted), *aff'd on other grounds*, 388 Md. 526, (2005)). We further discussed the review of an allegedly impermissibly suggestive identification:

> Extrajudicial identifications obtained through impermissibly suggestive procedures are not admissible. *James [v. State]*, 191 Md. App. at 251–52. 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.

Wallace v. State, 219 Md. App. 234, 244 (2014) (quoting *Jones v. State*, 395 Md. 97, 109 (2006)).

There are three prongs to the initial inquiry concerning suggestiveness. We have discussed:

> The first requirement is that the photographic array or other extrajudicial identification procedure be *suggestive*. It is further required that even if the procedure were suggestive, it must be *impermissibly* (or unnecessarily) suggestive. *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). The third requirement, at least where the defendant seeks to exclude a subsequent in-court identification as the "fruit of the poisonous tree," is that even an impermissibly suggestive identification procedure must have been *so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification*. Not a mere "likelihood" but a "very substantial likelihood"! Not a mere "misidentification" but an "irreparable misidentification"! That's a hard furrow to plow. These are three integral parts of a single definition. It is not the case that a defendant need establish only the first and second elements and then sit back and enjoy a presumption as to the third element, which the State must then try to rebut. The proponent of exclusion carries the burden of justifying exclusion.

Smiley v. State, 216 Md. App. 1, 33 (2014), *aff'd.* No. 37 SEPT.TERM 2014, 2015 WL 1000055, at *5 (Md. Mar. 9, 2015) (emphasis in original).

We further explained:

> "The defendant bears the burden of proof in the first stage of the inquiry, and, if the defendant meets this burden, then the prosecution has the burden in the second stage of the analysis." *Upshur v. State*, 208 Md. App. 383, 400–01 (2012) (citing *In re Matthew S.*, 199 Md. App. 436, 447–48 (2011)), *cert. denied*, 430 Md. 646 (2013); see also *James*, 191 Md .App. at 252 ("Although the reliability of the identification is the linchpin question, if the identification procedure is not unduly suggestive, then our inquiry is at an end." (Internal citation and quotation marks omitted.)).

Wallace, 219 Md. App. at 244 (concluding a photo array was not impermissibly suggestive even though police officer told victim before showing the array that "they had the person," where the police "left it to [the victim] to select the photograph of the person who robbed him").

We begin by noting that the motions court did not find the identification procedure used here to be impermissibly suggestive. It found, "Ah, I think showing only one photograph to [Lamier]. . . **could** be suggestive." (Emphasis added) The court then applied the factors set forth in *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972), implying that, even if the identification were suggestive, the identification was nonetheless reliable. We agree with the motions court that showing a single photograph as a means of identification *could* be suggestive, but is not suggestive *per se*. *See Green v. State*, 79 Md. App. 506, 516 (1989) ("The showing of a single photograph of a suspect to a witness is not, without more, grounds for excluding evidence of an extrajudicial identification.") (Citation omitted).

Even assuming that the court did find the identification impermissibly suggestive, appellant's argument still fails. If we were to assume, for the sake of argument, that appellant's identification was impermissibly suggestive, we must move to the second prong

of analysis, namely, whether the identification was reliable under the totality of the circumstances. Those circumstances include:

> 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.

Upshur v. State, 208 Md. App. 383, 401 (2012) (quoting *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972)), *cert. denied* 430 Md. 646 (2013).

We agree with the motions court that Lamier had an "excellent opportunity" to see Wills, as their meeting was within the small space of an automobile. In addition, Lamier's attention would naturally be heightened in this situation, as drug transactions can be dangerous. Moreover, Lamier knew he would be called on to identify Wills at some point, because he was acting as a confidential informant. These factors all serve to bolster Lamier's identification. Lamier did not provide a description prior to identifying Wills. However, Agent Fortson was able to identify him when repeatedly viewing the video taken from the camera Lamier wore during the transaction. Lamier identified Wills as "Merck" "pretty immediate[ly]" upon being handed the photo. The motions court found that the identification was "fairly certain." The motions court estimated that there was no more than 30 minutes between Lamier seeing appellant and the photo identification.

Viewed in totality, we are persuaded that, even if the photo identification had been impermissibly suggestive, there was sufficient evidence to support the motions court's

finding that the identification was still reliable. Consequently, we affirm the motions court's ruling regarding suppression of the pre-trial identification.

Appellant also contends that the identification procedure was impermissibly suggestive because Lamier has a criminal record and was paid for his information. Credibility, however, is an issue for the jury to decide. *See Smiley v. State*, 138 Md. App. 709, 718 (2001) ("[I]t is the jury's task to resolve any conflicts in the evidence and assess the credibility of witnesses.") (citing *State v. Albrecht*, 336 Md. 475, 478 (1994)).

We move to the second issue raised by appellant: the suppression of any in-court identification of Wills by Lamier and the photo used to identify Wills, State's Exhibit 3. As above, the court also denied this motion. Here, the State contends that this issue is not properly preserved for our review, as Wills did not object to Lamier's identification of him at trial, nor did he object when the State offered State's Exhibit 3 into evidence. Wills asserts that he was not required to make an objection contemporaneous with Lamier's in-court identification, because these issues were brought to the court's attention during *voir dire* and jury selection.

Maryland Rule 4-323(a) governs this issue and provides:

> **(a) Objections to Evidence.** An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived. The grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs. The court shall rule upon the objection promptly. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court may admit the evidence subject to the introduction of additional evidence sufficient to support a finding of the fulfillment of the condition. The objection is waived unless, at some time before final argument in a jury trial or before

> the entry of judgment in a court trial, the objecting party moves to strike the evidence on the ground that the condition was not fulfilled.

Relying on *Clemons v. State*, 392 Md. 339 (2006), appellant asserts that he raised these two issues during *voir dire* and jury selection, and argues that this obviated the need for him to raise them again when the evidence was introduced at trial. We disagree.

In *Clemons*, the State questioned a witness and offered him as an expert in comparative bullet lead analysis (CBLA) to which Clemons objected. *Id.* at 362. The trial court permitted Clemons to conduct a *voir dire* examination of the witness without ruling on the objection. *Id.* After the State asked several more questions on re-direct, it again proffered the witness as an expert in CBLA without objection from Clemons. *Id.* The trial court then accepted the witness as an expert. *Id.* Relying on *Watson v. State*, 311 Md. 370 (1988), the Court of Appeals held that the issue regarding the witness' expertise was preserved for appellate review. The Court in *Watson*, held that because the court affirmed its pre-trial ruling on the use of a previous conviction immediately prior to the prosecutor's cross-examination regarding that issue, a renewal of Watson's objection was unnecessary. *Clemons*, 392 Md. at 362. In *Clemons*, the objection to the witness' acceptance as an expert occurred immediately prior to the witness testifying at trial. *Id.* at 349, 362.

The circumstances presented here are not the same as those presented in either *Clemons* or *Watson*. Wills asserts that, because he brought these issues up during *voir dire* and jury selection, and the in-court identification was made and States Exhibit 3 offered on the same day, that the events were close enough in time to warrant an exception to Maryland Rule 4-323(a). The temporal relationship between the objection to the witness'

testimony and the moment where Clemons "should" have renewed that objection was very small. Not so in this case. Though Wills raised these issues prior to the beginning of trial on the same day as the trial, the temporal relationship was not nearly as close as that in *Clemons*. In fact, the two events were separated by opening statements and the testimony of two witnesses. Furthermore, when the State offered State's Exhibit 3 into evidence, appellant offered no objection. Accordingly, we hold that the issues regarding Lamier's in-court identification and the admissibility of State's Exhibit 3 are not preserved for our review.

In any event, we would affirm the court's denial of appellant's motion to suppress on these two issues for the same reasons we outlined above. Specifically, we are persuaded that, even if the identification procedure had been impermissibly suggestive, the circuit court properly found that the pre-trial identification was nonetheless reliable. We hold that such a finding applies additionally to State's Exhibit 3, the photo Lamier used to identify Wills, and Lamier's in-court identification. Consequently, even if this issue had been properly preserved, appellant would be afforded no relief. We affirm.

JUDGMENTS OF THE CIRCUIT COURT FOR WASHINGTION COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.