Circuit Court for Washington County
Case No. C-21-CR-22-000527

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1226

September Term, 2023

SHILOH CALVIN GLOVER

v.

STATE OF MARYLAND

Leahy,
Reed,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: December 4, 2024

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

On June 30, 2022, an individual stole merchandise from a North Face clothing store at the Hagerstown Premium Outlets. The State charged Shiloh Glover, Appellant, in the Circuit Court for Washington County with robbery, assault in the second degree, and theft of property valued between $100 and $1,500 for the incident. Before trial, Appellant brought a motion to suppress both the pre-trial identifications and any in-court identifications of Appellant by two store employees. The court ruled that the police engaged in impermissibly suggestive identification procedures and barred the admission of the pretrial identifications, but ruled the State's witnesses could still identify Appellant at trial. At the first trial on April 11, 2023, the eyewitnesses identified Appellant in court without objection, but the jury could not reach a unanimous verdict and the judge declared a mistrial. The second trial was held on August 15, 2023, and the eyewitnesses again identified the Appellant in court and the Appellant's counsel affirmatively introduced additional evidence related to these identifications. The jury found Appellant guilty of all three counts and Appellant was sentenced to fifteen years of incarceration for the robbery charge, with all but nine years suspended, along with probation. Appellant then appealed his conviction.

In bringing his appeal, Appellant presents one question for appellate review:

> I. Did the circuit court clearly err when it allowed witnesses to make an in-court identification of Appellant after excluding an extrajudicial identification?[1]

[1] Appellant's question, as originally phrased was "Did the circuit court abuse its discretion by permitting witnesses for the State to identify Appellant in court during the trial because their identifications were unreliable?"

For the following reasons, we affirm the decision of the Circuit Court for Washington County.

FACTUAL & PROCEDURAL BACKGROUND

On June 30, 2022, a man entered the North Face clothing store in the Hagerstown Premium Outlets, grabbed a backpack and twenty to thirty t-shirts and left the store. The man was observed by two employees at the store. Two deputies from the Washington County Sheriff's Office arrived at the scene shortly after the shoplifting and interviewed the two employees. Graci Johnson, a supervisor at the store, had seen the shoplifter before and identified Appellant as the individual who stole from the store. Ashley Myers was working on the floor and was shoved by the shoplifter, whom she later identified as Appellant, before he left with the merchandise.

On July 2, 2022, Appellant was arrested carrying a North Face backpack. In the backpack, there were four North Face shirts. The State charged Appellant in the Circuit Court for Washington County with robbery, assault in the second degree, and theft of property valued between $100 and $1,500.

On February 6, 2023, a motions hearing was held before the Honorable Joseph S. Michael of the Circuit Court for Washington County. The defense brought a motion to suppress the pre-trial identifications of Appellant by two North Face store employees and barred them from making any in-court identifications. At the hearing, Deputy Nikolas McKoy testified to his actions on June 30, 2022. Bodycam footage from that day was played. Deputy McKoy responded to the scene with Master Deputy Malloy, and they spoke to Graci Johnson and Ashley Myers. The eyewitnesses described to the deputies how the

shoplifter came into the store and stole merchandise. Deputy McKoy showed a photo on his phone to the two women to try and identify the shoplifter. This first photo was a photo of the Appellant from the MVA. The women noted that the shoplifter looked different from the photo because he had a buzz cut, he did not "have facial hair anymore," and he looked "a lot skinnier." Neither woman felt comfortable saying that Appellant was the shoplifter based on the first photo.

The deputies then left to get a new photo of the Appellant. The second photo came from the computer dispatch system. Deputy McKoy took a photo of the most recent picture of the Appellant on his phone to show to the witnesses. They brought the photos back to the store and separated the witnesses and showed them the photo.[2] When presenting the photo, Deputy McKoy asked "do you recognize him" or "is this him" but did not say Appellant's name. Both women immediately gave a positive identification from the second photograph.

The defense argued that the identification procedure was impermissibly suggestive. The defense argued that the deputies went into the store looking for Appellant and as a result only showed a photo of Appellant alone to the two employees. The State argued that while the identification may have been a little suggestive it was not impermissibly suggestive under the totality of the circumstances based on the ability of the two employees to interact with and observe Appellant. The court then ruled that the identification at the

[2] While bodycam video was available for the showing of the first photograph, the body cameras of both deputies had turned off before the second interview was conducted. Deputy McKoy instead testified to the second interaction where the positive identification was made.

store was "impermissibly and unconstitutional[ly] suggestive" because the deputies only showed a single photo to the witnesses.[3]

The next issue was whether the eyewitnesses could identify Appellant at trial. On this issue, the defense argued that issues related to suggestiveness relate to the reliability of the witnesses' identifications and therefore they should also be excluded. The defense said that there would be an issue with sitting in court with a client who is only there because of a highly suggestive photo array and then have these witnesses identify the person. The court said that the witnesses had described the shoplifter independently from the photos "as short, as white, as having no facial hair" and that they were particularly focused on the shoplifter. Based on these facts and other factors, the court suppressed the out-of-court identification but held that "neither witness is precluded from identifying or making an in court identification."

At the first trial on April 11, 2023, both eyewitnesses identified Appellant in-court without objection. Deputy McKoy testified, but in keeping with the pretrial ruling, there was no discussion of the witnesses' identifications at the store. The judge declared a mistrial after the jury failed to reach a unanimous verdict.

The second trial was held on August 15, 2023, again before the Honorable Joseph S. Michael. At this trial, the defense planned on entering the suppressed body camera footage and identifications from the eyewitnesses. Both employees again identified the

[3] There was also testimony elicited at the hearing that Appellant's name was broadcasted over the police radios in front of the witnesses. However, the court did not place any great weight on this testimony related to a physical identification since neither of the photos had Appellant's name beneath them.

Appellant in court. On cross-examination, the defense asked about the out-of-court identifications made by both eyewitnesses. The defense then called Deputy McKoy to the stand and played the body camera footage for the jury. The defense asked Deputy McKoy about the identifications made in the video. Before closing statements, the jury was instructed regarding the identifications made in the video and in court along with instructions on the accuracy and reliability of a witness identification. The defense did not object to any of these instructions. In closing, the defense argued that the eyewitness testimony was unreliable based on the issues with the out-of-court identifications.

The jury found Appellant guilty of all three counts. The judge sentenced Appellant to fifteen years of incarceration for the robbery, suspending six years of that, followed by unsupervised probation. The other two counts were merged into the robbery count. Appellant appealed this conviction.

DISCUSSION

Preservation of Issues

Before analyzing the arguments regarding the witness identifications, it must be determined whether the Appellant's arguments were properly preserved.

A. Parties' Contentions

The State argues that the Appellant failed to preserve the issue first because there was no objection at trial to the eyewitnesses identifying Appellant in court. If the issue was preserved, then the State argues that plain review error is unavailable because of the affirmative decision to introduce the evidence as a matter of trial strategy. Appellant argues that no objection at trial was needed to preserve these arguments based on the pre-trial

hearing. Additionally, the strategy adopted by Appellant in trial did not waive the argument.

B. Standard of Review

Interpreting the Maryland Rules is a question of law. *State v. Taylor*, 431 Md. 615, 630 (2013). When reviewing the Maryland Rules, we follow the canons of construction set out by the Supreme Court of Maryland for statutes. *Green v. State*, 456 Md. 97, 125 (2017) (quoting *Fuster v. State*, 437 Md. 653, 664 (2014)). We start by considering the plain language of the Rule in light of "(1) the scheme to which the rule belongs; (2) the purpose, aim or policy of this Court in adopting the Rule; and (3) the presumption that this Court intends the Rules and this Court's precedent to operate together as a consistent and harmonious body of law." *Id.* (quoting *Fuster*, 437 Md. at 664). If the plain language is ambiguous or not consistent with the Rule's purpose, then we look for intent in other sources subject to "(1) the structure of the Rule; (2) how the Rule relates to other laws; (3) the Rule's general purpose; and (4) the relative rationality and legal effect of various competing constructions." *Id.* (quoting *Fuster*, 437 Md. at 665).

C. Analysis

Maryland Rule 4-252 outlines the rules for motion practice in the circuit court. The rule sets out mandatory motions that must be raised before trial and will be waived unless the court orders otherwise for good cause. Md. Rule 4-252(a). One of the mandatory motions is "[a]n unlawful . . . pretrial identification." Md. Rule 4-252(a)(3).[4] Any other

[4] The text of this portion of the Rule states in full:

objections capable of determination before trial shall be raised by motion filed any time before trial. Md. Rule 4-252(d). A pretrial ruling denying a motion to suppress evidence is reviewable "on appeal of a conviction." Md. Rule 4-252(h)(2)(C). This rule is intended for issues that will not lend themselves to quick rulings in the presence of the jury. *Huggins v. State*, 479 Md. 433, 445–46 (2022) (citing *Sinclair v. State*, 444 Md. 16, 28 (2015)).

Maryland Rule 4-323 defines how to make objections during a criminal trial. The rule states that objections to 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." Md. Rule 4-343(a).[5] This rule is meant for on-the-spot objections and rulings.

> (a) Mandatory Motions. In the circuit court, the following matters shall be raised by motion in conformity with this Rule and if not so raised are waived unless the court, for good cause shown, orders otherwise:
>
> (1) A defect in the institution of the prosecution;
> (2) A defect in the charging document other than its failure to show jurisdiction in the court or its failure to charge an offense;
> (3) An unlawful search, seizure, interception of wire or oral communication, or pretrial identification;
> (4) An unlawfully obtained admission, statement, or confession; and
> (5) A request for joint or separate trial of defendants or offenses.
>
> (b) Time for Filing Mandatory Motions. A motion under section (a) of this Rule shall be filed within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213(c), except when discovery discloses the basis for a motion, the motion may be filed within five days after the discovery is furnished.

Md. Rule 4-252(a)–(b).

[5] The Rule states:

Huggins, 479 Md. at 447.

When a motion *in limine* is denied prior to trial and the evidence at issue is then offered at trial, the party seeking to exclude that evidence must still object under Rule 4-323(a) to preserve the issue. *Reed v. State*, 353 Md. 628, 638 (1999); *see also Huggins*, 479 Md. at 447 n.7 (reiterating this distinction). However, any objections made under Rule 4-252 are still preserved even if there is no objection when the evidence is entered. *Huggins*, 479 Md. at 448. Together, these two rules "address different and mutually exclusive

(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.

(b) Continuing Objections to Evidence. At the request of a party or on its own initiative, the court may grant a continuing objection to a line of questions by an opposing party. For purposes of review by the trial court or on appeal, the continuing objection is effective only as to questions clearly within its scope.

(c) Objections to Other Rulings or Orders. For purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court. The grounds for the objection need not be stated unless these rules expressly provide otherwise or the court so directs. If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection at that time does not constitute a waiver of the objection.

Rule 4-323(a)–(c).

grounds for objecting," with Rule 4-252(a) applying to the issues that must be raised in mandatory pre-trial motions and Rule 4-323(a) applying to any other ground for objecting to the admission of that evidence. *Id.* at 447–48. This means that when someone fails to object under Rule 4-323(a), issues are waived other than the denial of the motion at the suppression hearing, since that is the issue that is preserved under Rule 4-252(a).

By way of example, in *Huggins v. State*, there was a pre-trial motion to exclude evidence found during a warrantless search, filed under Rule 4-252(a), which the court denied. 479 Md. at 436. At trial, the evidence at issue was entered and defense counsel said there was "no objection." *Id.* at 438. The then-Court of Appeals of Maryland ruled that by saying "no objection" defense counsel did not waive the right to review the denial of the motion to suppress under Rule 4-252. *Id.* at 455.

Turning to this case, the initial motion made by Appellant was to exclude both the witnesses' extrajudicial identifications[6] and any in-court identifications that may be made. Regarding the extrajudicial identification, that falls within the definition of a mandatory motion for an "unlawful . . . pretrial identification." Md. Rule 4-252(a)(3). A motion to exclude an in-court identification would be a non-mandatory motion under Rule 4-252(d), assuming that the attorney knows the basis to object to the in-court identification before the trial itself. Both of these issues were raised by Appellant as pre-trial motions under Rule 4-252. Therefore, under Rule 4-252(h)(2)(C) no further objections would have been

[6] An extrajudicial identification is an identification that is made outside of the courtroom. *Webster v. State*, 299 Md. 581, 589–90 (1984). A judicial or in-court identification occurs when the witness identifies the accused inside of the courtroom. *Id.*

needed at trial to preserve these precise issues. *Huggins*, 479 Md. at 448.

Then at trial, both eyewitnesses made in-court identifications of Appellant, and on neither occasion did defense counsel reassert her objections to this testimony. As a result, any *additional* issues related to these identifications were not preserved under Rule 4-323(a). For the purposes of this appeal, what this means is that the ruling at the suppression hearing denying the motion to suppress in-court identifications is the only basis for the appeal, not any additional issues arising out of the trial itself. *See Huggins*, 479 Md. at 447 n.7 (describing how objections after denied motions *in limine* are meant to give "the court the opportunity to make a more informed decision with the benefit of the evidence adduced since the initial ruling").

Given that we hold that the narrow issue of the pretrial ruling was preserved under Rule 4-252, the remaining question is whether the issue was waived through the Appellant's actions. The *Huggins* court noted that "[w]e are not foreclosing the possibility that, having fully preserved the issue under Rule 4-252, words or actions taken by defense counsel could potentially result in a waiver of the previously preserved . . . issue." *Huggins*, 479 Md. at 454.

If trial counsel believes that evidence was admitted erroneously, that does not mean they must do nothing beyond objecting. As this court said in *Mayor and City Council of Baltimore v. Smulyan*:

> When a party makes a clear objection to specific evidence and that objection is plainly overruled, he is not required to play the ostrich and simply ignore the evidence, or its potential effect upon his case, for fear of losing his ground for appeal. He may cross-examine (or, in this instance, re-directly examine) the witness about the evidence, and make other reasonable efforts to show

> that the evidence, admitted over his objection, should nevertheless be discounted or disregarded by the trier of fact.

41 Md. App. 202, 219 (1979) (citation omitted); *see also* Joseph F. Murphy, Jr., Maryland Evidence Handbook § 106[B] (5th ed. 2024) (asserting this same point for evidence admitted over objection). The Appellant followed this principle in this case, arguing that the "extrajudicial identifications went hand-in-hand with challenging the in-court identifications." As a result, Appellant inquired into the out-of-court identifications made by the eyewitnesses on their cross-examinations, called Deputy McKoy to the stand to play the body camera footage for the jury, and then cross-examined Deputy McKoy about the identifications made in the video. These actions were taken in response to the admissibility of the in-court identifications to allow Appellant to argue that the eyewitness testimony overall was unreliable in closing arguments. We are not ruling on the advisability or effectiveness of this strategy, but instead whether these choices waived the preserved objection to the identifications, and we hold that this trial strategy did not waive the preservation of the prior motions, though we do note that this case is much closer to the line.[7]

[7] In *Madrid v State*, there was a suppression court ruling that was denied and then the defendant did not object to its admission at trial. 247 Md. App. 693, 713 (2020), *aff'd*, 474 Md. 273 (2021). The court, relying on Rule 4-252(h)(2)(C) said that "[t]he current language of the rule of court not be more explicit" and a pretrial ruling denying a motion to suppress could be reviewed on appeal of a conviction. *Id.* The court then noted that "[t]he result might be otherwise if the defendant moved first (i.e., before the prosecutor) to offer the evidence at trial." *Id.* at 713–14. This specific ruling was not reconsidered on appeal. *See Madrid v. State*, 474 Md. 273, 322 (2021) ("In this case, we decline the State's invitation to refuse to consider certain of Madrid's contentions on the ground of lack of preservation for appellate review."). This case does not reach the level described by

Suppression of In-Court Identifications

The issue then is whether the circuit court properly ruled that the eyewitnesses could make in-court identifications. We hold that the trial court properly allowed for in-court identifications to take place.

A. Parties' Contentions

Appellant argues the trial court erred in admitting the in-court identifications because there was a substantial risk that there could be an irreparable misidentification. Since there was an impermissibly suggestive identification procedure, the burden shifts to the State to show there was independent reliability in the identifications made by the eyewitnesses. Appellant argues that there was no independent reliability because the incident was brief, there was missing evidence related to showing the photos, and there was a risk of weapon-focus distracting the eyewitnesses. Appellant contends that the circuit court abused its discretion by allowing any in-court identifications.

Appellee argues the trial court properly considered the evidence in front of it. Appellee pointed to factual findings that supported the eyewitnesses' abilities to make in-court identifications. Then, applying the relevant factors to the case, Appellee argues that there were sufficient indicia of reliability in the identifications. Based on these factors, the in-court identifications were not clearly erroneous.

Madrid. Even though the Appellant did enter the out-of-court identifications first by calling the Deputy to the stand to show the body camera footage, it was in response to the already entered in-court identifications and was entered to respond to and combat those identifications. As a result, despite *Madrid*'s language we will hold that the issue still was not waived.

B. Standard of Review

In reviewing a suppression hearing court's decision on a motion to suppress, we are limited to the record of the suppression hearing. *Small v. State*, 464 Md. 68, 88 (2019) (citing *McFarlin v. State*, 409 Md. 391, 403 (2009)). We will accept factual findings and determinations unless they are clearly erroneous. *Id.* (citing *McFarlin*, 409 Md. at 403). Findings will not be clearly erroneous "[i]f there is any competent material evidence to support the factual findings of the trial court[.]" *Id.* (citing *YIVO Institute for Jewish Research v. Zaleski*, 386 Md. 654, 663 (2005)). We will view the evidence and inferences reasonably drawn therefrom in the light most favorable to the prevailing party. *Id.* (citing *McFarlin*, 409 Md. at 403). Where one party prevails on one issue in a motion to suppress but not on the motion in its entirety, "the appellate court views the trial court's findings of fact, the evidence, and the inferences that may be drawn therefrom in the light most favorable to the party that prevailed on the issue insofar as the appellate court considers the issue." *Hailes v. State*, 442 Md. 488, 499 n.5 (2015). Legal conclusions will be reviewed *de novo*. *Small*, 464 Md. at 88 (citing *McFarlin*, 409 Md. at 403). We then will apply the law to the facts to determine whether the suppression hearing denied the defendant's rights. *Id.* (citing *McFarlin*, 409 Md. at 403).

C. Discussion

Maryland courts will follow a two-step inquiry when challenging the admissibility of an extrajudicial identification on due process grounds. *Small*, 464 Md. at 83. The first step is to evaluate whether the identification procedure was suggestive. *Id.* (citing *Jones v. State*, 310 Md. 569, 577 (1987)). The defendant has the burden to show suggestiveness. *Id.*

(citing *Smiley v. State*, 442 Md. 168, 180 (2015)). "'Suggestiveness' exists where '[i]n effect, the police repeatedly said to the witness, '*This* is the man.'" *Jones*, 310 Md. at 577 (quoting *Foster v. California*, 394 U.S. 440, 443 (1969)) (emphasis in original). If the procedure was not suggestive, the inquiry ends, but if the procedure was suggestive, the court must move onto the second step. *Small*, 464 Md. at 83.

The second step of the due process inquiry is for the court to weigh whether the identification was reliable under the totality of the circumstances. *Id.* at 83–84. The State then needs to provide clear and convincing evidence that the identification was reliable. *Id.* at 84 (citing *Smiley*, 442 Md. 180). In assessing reliability, the suppression court may consider the five *Biggers* factors:

(i) the opportunity of the witness to view the criminal at the time of the crime;

(ii) the witness' degree of attention;

(iii) the accuracy of the witness' prior description of the criminal;

(iv) the level of certainty demonstrated by the witness at the confrontation; and

(v) the length of time between the crime and the confrontation.

Id. at 92 (citing *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972)).[8] If the identification is not reliable under the totality of these factors, then it may be excluded. *Id.* at 86–87.

Here, the trial court found that the extrajudicial identification was unduly suggestive because the deputies only showed photos of the Appellant by himself to the witnesses. This

[8] The standard is the totality of the circumstances. *Small*, 464 Md. at 86–87. Therefore, these are not the only factors a court may consider. *See id.* at 87 (discussing how the *Biggers* factors along with factors outlined in *State v. Henderson*, 27 A.3d 872, 920–21 (2011), and any other factors like related expert testimony may be considered).

kind of single-photo identification can be unduly suggestive as it could influence a witness into mistakenly identifying an innocent person who may only merely resemble the perpetrator. *Reyes v. State*, 257 Md. App. 596, 619 (2023) (citing *Simmons v. United States*, 390 U.S. 377, 384 (1968)). Because of the improper procedure used by the deputies, the extrajudicial identification was inadmissible.

Even when an extrajudicial identification is inadmissible, an in-court identification may be permitted when the State can show "by clear and convincing evidence that a courtroom identification had a source independent of the prior" illegal conduct. *Alston v. State*, 177 Md. App. 1, 32 (2007) (quoting *Barrow v. State*, 59 Md. App. 169, 186 (1984)). Reliability is "the linchpin in determining the admissibility of identification testimony." *Barrow*, 59 Md. App. at 185 (quoting *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977)). The relevant factors to determine whether there was an independent source includes:

> [W]hether the witness knew the defendant prior to the crime, the witness' opportunity to view the defendant at the time of the crime, the description or identification of the criminal made by the witness prior to the illegal confrontation or viewing, and the facts surrounding the identification at the illegal confrontation or viewing.

Alston, 177 Md. App. at 32 (quoting *Barrow*, 59 Md. App. at 186). These factors overlap with the considerations of the *Biggers* factors.

The trial court below properly made findings of fact related to the *Barrow* factors for an in-court identification. We start with whether the witnesses knew the defendant prior to the crime. *Alston*, 177 Md. App. at 32 (quoting *Barrow*, 59 Md. App. at 186). Ms. Johnson said that she had previously seen the shoplifter take t-shirts. Ms. Myers said it was the first time she had seen the individual. The trial court found that the witnesses referenced

"a log or something of prior interactions of people to be on the lookout for" and referenced being on the lookout "for someone of his distinction." As a result, there is evidence for Ms. Johnson at least, of knowing the Appellant prior to the crime.

The next factor is the opportunity of the witnesses to view Appellant at the time of the crime. *Alston*, 177 Md. App. at 32 (quoting *Barrow*, 59 Md. App. at 186). The trial court noted that the witnesses "not only [had] time to perceive him, but they were specifically trying to perceive him, and he was acting in a suspicious fashion" and caused the witnesses to tune in. Ms. Johnson described the interaction with the shoplifter as around "five to ten minutes" long.[9] Ms. Johnson said she saw the shoplifter come in and then "we were all watching him." Initially, Ms. Myers was not really watching the shoplifter, but then the shoplifter approached her and was "shoving into [her] arm." They were then close enough to be able to speak to each other. Judge Michael found that Ms. Myers would have "had to be within . . . arms length or face to face" with the shoplifter. As a result, both eyewitnesses had the opportunity to observe the shoplifter and this factor would weigh in favor of reliability.

The third factor is whether the eyewitnesses gave a description or identification of the Appellant before the illegal confrontation. *Alston*, 177 Md. App. at 32 (quoting *Barrow*,

[9] Appellant argued that this incident was "brief." Judge Michael noted that the shoplifter was in the store "long enough to get a . . . backpack and to go to two different racks of clothes and put t-shirts in it." Given that finding and Ms. Johnson's description we do not find that this alleged brevity should weigh heavily against the reliability of the identification, especially given the focus the employees described on the shoplifter during the time he was in the store.

59 Md. App. at 186). Many of the details of the description came when the deputies showed the initial MVA photo of the Appellant to the eyewitnesses. Ms. Johnson said, "we think his name might be Shiloh" before the deputies ever said the name.[10] When the photo was shown, the employees mentioned that the shoplifter had a "buzz cut," that he "doesn't have facial hair anymore," and that he is "a lot skinnier," but that "the eyes and the nose and everything look the same."[11] Ms. Johnson also described the shoplifter as "very short." Judge Michael said that the witnesses described the shoplifter "as short, as white, as having no facial hair" by the eyewitnesses. The eyewitnesses were able to identify key differences between the photo shown to them and the individual they observed. The reason the deputies needed to get a second photo is because the eyewitnesses specifically stated that they were not comfortable making an identification using the MVA photo. There was evidence at the suppression hearing showing there was a description made before the illegal confrontation that weighs in favor of reliability.

The final factor is the facts surrounding the identification at the illegal confrontation or viewing. *Alston*, 177 Md. App. at 32 (quoting *Barrow*, 59 Md. App. at 186). This

[10] In the body camera footage, Dispatch can be heard saying "Shiloh's last known address." Appellant contended this was overheard by the eyewitnesses. However, Judge Michael said that the name on the radio was not relevant and found that the name was generated by the employees independently from the radio transmission. Additionally, knowing a name would not have helped in making an identification based on a photo when the photos had no names attached.

[11] The Appellant says that these descriptions are "generally vague." While we will acknowledge these features are not the most distinctive characteristics, Appellant does not argue whether a threshold of features is required, and we must defer to the conclusion of the trial court in finding these descriptions sufficient for making an in-court identification.

interaction occurred in a "brightly lit" store when it was "daylight outside." There was no cross-racial identification since Appellant and both witnesses were Caucasian. The identification occurred minutes after the actual shoplifting occurred, when the eyewitnesses' recollection of the shoplifter would have been fresher. Appellant does not contest these findings in his brief or argue they were clearly erroneous, but instead points to other facts surrounding the identification the trial court should have considered. This included that there was missing evidence related to showing the photos, and there was a risk of weapon-focus distracting the eyewitnesses.

As for the body camera being turned off, Deputy McKoy could not remember why the camera shut off, but instead testified to the second photograph being shown to the two eyewitnesses. Judge Michael found that there was "no reason to believe that Deputy McKoy's interaction with the . . . witnesses . . . is any different in demeanor or interaction than the interaction that was on the recording." While the procedure of showing a single photo instead of a photo array or line-up was improper, there were no facts that pointed to additional improper behavior by either deputy that would weigh against the reliability of the identifications.

Appellant's final point was a failure by the trial court to consider weapon-focus, where a weapon being present can distract and prevent them from focusing on identifying characteristics of the person with the weapon. "[W]eapon-focus may be a circumstance that suppression courts consider within their reliability assessment." *Small*, 464 Md. at 96 (citing *United States v. Greene*, 704 F.3d 298, 308 (4th Cir. 2013)). However, "we would need facts from which we could infer that the weapon distracted" the eyewitness. *Id.* In this

case, the shoplifter put his hand in his pocket, making a fist-like shape. Ms. Myers said she "got nervous" because she did not know what he was doing, but she did not think "he had a firearm or anything like that" but thought it could have been a "pocketknife." As the Appellant acknowledged, neither eyewitness definitively saw a weapon. As a result, this case involves only a *risk* of weapons-focus, which was not clear error for Judge Michael to not explicitly consider at the suppression hearing. Therefore, the facts surrounding the identification do not show that it was clearly erroneous to admit the in-court identifications.

Based on the evidence present at the suppression hearing, it was proper for the court to rule that the eyewitnesses could have identified the Appellant in-court. We will not find that there was clear error in the court's decision.

CONCLUSION

Accordingly, we affirm the judgment of the Circuit Court for Washington County.

JUDGMENT OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.