Circuit Court for Baltimore City
Case No.: 109210019

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1291

September Term, 2023

JAJUAN BARLOW

v.

STATE OF MARYLAND

Wells, C.J.,
Beachley,
Albright,

JJ.

Opinion by Wells, C.J.

Filed: March 3, 2025

*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).

Appellant, Jajuan Barlow, was indicted in the Circuit Court for Baltimore City and charged with attempted first-degree murder, first-degree assault, use of a handgun in the commission of a felony or crime of violence, and related counts. Following a jury trial, Barlow was convicted of first-degree assault, conspiracy to commit first-degree assault, use of a handgun, and reckless endangerment. He was subsequently sentenced to 25 years for first-degree assault, 25 years concurrent for conspiracy to commit first-degree assault, and five years consecutive for use of a handgun, with the reckless endangerment conviction merged at sentencing.

After a postconviction court granted Barlow's request to file a belated Notice of Appeal, he now asks us to address the following questions:

> 1. Did the trial court err in denying the motion to suppress the impermissibly suggestive and unreliable photographic identification?
>
> 2. Did the trial court err in admitting other crimes evidence as relevant to motive?

For the following reasons, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Craig Mosely, Mechelle Atkins, and Jelisa Turner were at the Your Way carry-out on Belair Road in Baltimore City on May 29 when Mosely's cousin, George, began fighting with Barlow. Mosely joined the fight to aid his cousin. Later, the police arrived and everyone left.

The next day, May 30, Mosely was with Atkins and Turner in the Pizza Mart, located across the street from Your Way, when at least two individuals came in and started

beating him. The men dragged him outside the store, and Mosely was shot. Mosely survived but could not identify the shooter.

Turner identified Barlow, in court, as the person she saw fighting with Mosely on May 29 at Your Way. On a photo array identification, Turner identified Barlow and wrote, "I saw him shoot the victim, Craig Mosely."

Atkins identified Barlow, in court, as being one of the two men who shot Mosely. Atkins also identified Barlow on a photo array, writing that he was "[t]he person who shot Craig." Barlow admitted in a statement to the police he was present for the fight on May 29 but denied knowing anything about the shooting on May 30.[1]

We shall include additional detail in the following discussion.

DISCUSSION

I. The Circuit Court Did Not Err in Admitting Two Extra-Judicial Identifications of Barlow.

A. Parties' Contentions

Barlow first contends the trial court erred in admitting two extrajudicial photographic identifications. Specifically, Barlow asserts the court erred because the photo arrays shown to Atkins and Turner were unduly suggestive, and their identifications were unreliable. The State appears to concede that the array shown to Atkins was unduly suggestive but responds that the trial court properly held her identification was reliable.

[1] In his brief, Barlow recounts portions of his statement to the police, however that statement is not included in the record on appeal. In fact, with the exception of Turner's statement to the police on June 16, 2009, the appellate record does not include any exhibits from either the motions hearing or the trial.

The State also asserts there was no impermissible suggestiveness in the array shown to Turner, and moreover, the identification was reliable. As will be explained, we concur with the State.

We note that, prior to trial, the court held a motion *in limine* hearing as to the photo arrays. We shall provide details and excerpts of testimony from both identification witnesses to provide a complete picture of the evidence as it relates to the arrays. [2]

B. Standard of Review – General Principles

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 accept factual findings and determinations unless they are clearly erroneous. *Id.* (citing *McFarlin*, 409 Md. at 403). We view the evidence and inferences reasonably drawn therefrom in the light most favorable to the prevailing party. *Id.* (citing *McFarlin*, 409 Md. at 403). Legal conclusions are reviewed *de novo*. *Small*, 464 Md. at 88 (citing *McFarlin*, 409 Md. at 403). We then apply the law to the facts to determine whether the suppression hearing denied the suspect's rights. *Id.* (citing *McFarlin*, 409 Md. at 403).

Maryland courts follow a two-step inquiry for challenges of the admissibility of an extrajudicial identification on due process grounds. *Small*, 464 Md. at 83. *First*, we determine whether the identification procedure was suggestive. *Id.* (citation omitted). The

[2] None of the arrays are included with the record despite repeated requests from counsel and this Court to the Clerk of the Circuit Court for Baltimore City to provide this evidence.

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.'" *Foster v. California*, 394 U.S. 440, 443 (1969). If the procedure was not suggestive, the inquiry ends. 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 must 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, so-called *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.

Small, 464 Md. at 92 (citing *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972)). Because the standard is the totality of the circumstances, these are not the only factors a court may consider. *Id.* at 86–87. If the identification is not reliable under the totality of these factors, then it may be excluded. *Id.* at 86–87.

C. **Analysis**

1. Testimony of Mechelle Atkins Regarding the Photo Array

Detective Sandra Forsythe conducted an initial array identification with Atkins at the police station on May 31, 2009, the day after the shooting. The detectives showed Atkins two arrays, both with six photographs each. Atkins could not identify anyone from those arrays.

Detective Forsythe met Atkins again on June 13, 2009, and June 16, 2009, showing her an array on both occasions. Detective Forsythe testified that Atkins was not afraid to speak to the police, and she was voluntarily transported to these meetings in unmarked cars to avoid suspicion.

The detective stated that Barlow's picture was included in the June 13 array based on tips from approximately three to four concerned citizens and a surveillance camera near the scene of the shooting. Detective Forsythe also testified to the procedures used to prepare the array, including the placement of the photographs in the array, the manner in which they are displayed during the interview, and the standard statement read to the witness prior to showing the array.

Atkins viewed the array in an interview room with Detective Forsythe and one other detective present. Detective Forsythe denied telling Atkins that police developed a suspect. Detective Forsythe maintained that five of the six individuals in the array shown to Atkins had facial hair, as did Barlow. The detective further testified that Barlow was a "person of interest until someone picks him out as the shooter." Atkins identified Barlow on June 13, 2009. Atkins wrote on the back of the array, "The person who shot Craig." The photo array was admitted as evidence.

Detective Forsythe testified that Atkins identified Barlow in a different array displayed to her three days later on June 16, 2009. Within "seconds to minutes," Atkins identified Barlow and wrote on the back of that array, "I saw him shoot the victim, Craig Mosely." This array was also admitted into evidence at the hearing.

On cross-examination, Detective Forsythe maintained that she did not tell Atkins who to pick and that she was trained not to say anything once the array folder is placed on the table for the witness to view. She also testified that, once a witness picks out a photograph, she asks them to point at the photo, then write any comments indicating whether they know the individual and what the person did. Detective Forsythe said that neither she, nor the other detective present, promised or threatened either Atkins or Turner in exchange for identifying Barlow.

Mechelle Atkins then testified at the motions hearing. On May 30, 2009, Atkins was in Pizza Mart when Mosely was shot. At the time, she was standing in the doorway of the store when she saw a man wearing a t-shirt, jeans and a hat assault Mosely inside Pizza Mart. She agreed there was more than just one man beating Mosely, and she also saw them drag him out of the store. She further testified that Your Way was not big, and she stood close to Mosely. There were no obstructions between her, Mosley, and the assailants.

Atkins glanced at the assailants' faces. She agreed she did not describe the shooter's face to police. Atkins agreed she did not know Barlow, but she had seen him on other occasions. Atkins maintained she saw Barlow on the night in question inside the store assaulting Mosely.

The day after the shooting, May 31, 2009, when she was taken to the police station, Atkins told police she thought she could identify the person who shot Mosely because she "had seen one of them before[.]" That person was wearing a t-shirt, jeans, and a hat. However, as mentioned, Atkins did not identify anyone in the photo array shown to her this day.

But on June 13, 2009, approximately two weeks after the shooting, Atkins identified a photo and wrote, "The person who shot Craig." Atkins testified as follows with respect to this identification:

> Q. *During that photo array session with Detective Forsythe, did the detective indicate or in any way suggest to you that Mr. Barlow was the one you should choose?*
>
> A. *I can't remember her necessarily suggesting him. She did tell me that they already had - had who -- they looked at the cameras and they had whoever they thought did it at that time in custody.*
>
> Q. *So you're relating to the Court a conversation that you had with Detective Forsythe, that she indicated to you that they already knew who the suspect was, is that right?*
>
> A. *Yes*.
>
> Q. Is that fair to say?
>
> A. Yes.
>
> Q. And that conversation, where did that take place?
>
> A. Once we got back to the police station.
>
> Q. Once you got to the police station?
>
> A. Yeah.

Q. Do you recall the words that the detective used to indicate that they already knew who the shooter was?

A. I don't. She -- I know she said that he was -- he had done something, I guess, prior to this situation, and they had him for something else, but I can't remember exactly what she said.

Q. And did--once you heard that and you were shown that photographic array, did you believe that the real shooter was in that photographic array?

A. I kind of thought I did.

Q. I'm sorry?

A. I kind of thought I did at the time.

Q. *So when they told you that they knew who the shooter was and they showed you these pictures, did you believe the shooter's picture was in there?*

A. *I believe that they put who they felt was a suspect at that time in there.*

Q. And you chose Mr. Barlow because you'd seen him in the neighborhood? You'd never seen any of those other people?

A. No.

Q. I'm sorry?

A. No.

Q. Why did you choose-

A. I mean, I haven't seen any of these other people.

Q. You had seen Mr. Barlow, right?

A. Yeah, I seen him before.

Q. *So why did you choose Mr. Barlow?*

A. *That's just because he was—that's who I saw that night*.

(emphasis added).

Atkins repeated that the photo she picked was the photo of the person "who shot Craig." On further examination by defense counsel, Atkins testified that the person in the photo was the person "fighting that night" and that she ran from the store when she heard gunshots. Asked by counsel whether she saw the shooter, Atkins answered "I guess not," but she remembered "seeing two guys. He was one of the ones who I remember seeing." She did see one gun. Asked again by defense counsel if she only "assumed that Mr. Barlow was the shooter," Atkins replied, "I guess so," and "at that time, that was what I thought." Defense counsel continued with Atkins' direct examination as follows:

> Q. That's what you thought. Did you think that because the detective had suggested to you that they had the shooter?
>
> A. I don't think that was the reason why, but more so because she was leaning to -- she was saying it was somebody that I saw that night, and he was the only person that was on here that I saw that night, and I know that's who he was fighting with.
>
> Q. *So she did indicate to you that the person you saw that night was in the photo array*?
>
> A. *A person that -- a person that was out there that night.*
>
> Q. I'm sorry?
>
> A. A person that was out there that night.
>
> Q. And she told you she found out about that through other means?
>
> A. Through - it was a blue, the police light. She said she looked at the tape.

(emphasis added).

Atkins said that Detective Forsythe was "aggressive with her," and told her "*I know you saw him out there that night*." (emphasis added). The detective tried to "scare it out of me," and "threatened to lock me up," telling her at one point, "Don't think about nobody on the streets. Think about your children. Think about if you never get to go back home to them." Atkins testified that she was "unsure" about her identification of Barlow at the time of this hearing. She agreed, however, that she picked out Barlow's photograph within three to five minutes.

At one point in her testimony, Atkins clarified that Detective Forsythe intimidated her on the first night, May 31, 2009, when she did not identify anyone in the photo arrays. The detective acted "more like trying to be a friend," on June 13, when they met again. On cross-examination by the State, Atkins testified as follows:

> Q. When you talked with the detectives on the 31st and you made your statement, isn't it true, Ms. Atkins, that you told the detectives you could probably identify the people who shot the victim?
>
> A. Um-hum.
>
> Q. Because you had seen one of them before, right?
>
> A. Yes.
>
> Q. So that was information that you gave Detective Forsythe, right?
>
> A. Yeah.
>
> Q. Okay. Detective Forsythe didn't say, "You've seen these people before. You know who they are." You gave her that information?
>
> A. Yeah, but that was -- as she -- I mean, she had said - she said, "I know you saw -I know you saw them before. I watched the tape. I know you saw them before."

Q. Okay. And you didn't know if that was a true statement or not, right?

A. No, that's (unintelligible).

Q. Ms. Atkins, if you hadn't seen the shooter or the people involved on the 30th, you would have told Detective Forsythe, "I didn't see anything," right?

A. Yes.

Q. I mean, you're an honest person.

A. Um-hum.

Q. And if you hadn't been standing right next to Mr. Mosely when he was attacked, dragged out of the store and shot, you'd have told Detective Forsythe, "I didn't see anything," right?

A. Yes.

Q. Would it be fair to say, Ms. Atkins, that even on the 31st of May, right after you had seen your friend shot, you didn't really want to participate with the police, would that be fair?

A. Yes.

Q. Fair to say you didn't want to cooperate and identify anybody?

A. Yeah.

Q. Fair to say it was a very scary thing that happened on the 30th, when Craig got shot?

A. Yes.

Q. Fair to say you were a little scared?

A. Yes.

Q. So when Detective Forsythe spoke with you, fair to say she was kind of trying to get the information out of you because she had a job to do?

A. Yeah, I guess so.

Q. And you didn't want to give her a lot of the information, did you?

A. I didn't really want to be involved in it.

Barlow's counsel argued Atkins's photo array identification should be suppressed because only five of the six suspects included had facial hair, and primarily, Atkins made her identification under duress of being threatened by Detective Forsythe, specifically being told that she might lose her children if she did not cooperate. Detective Forsythe also told Atkins that she, the detective, saw the suspect on the surveillance tape. Counsel concluded the array was impermissibly suggestive. The State replied that Atkins was a credible witness and her identification was reliable. The State argued the array was not impermissibly suggestive because at no point did Detective Forsythe tell Atkins which photograph to select.

2. Court's Ruling with Respect to Atkins

After hearing a short rebuttal from Barlow's counsel, the court denied the motion to suppress Atkins' identification. The court agreed with Barlow that the police presentation of the photo array to Atkins was impermissibly suggestive on the grounds that Detective Forsythe told Atkins she saw the suspect on the surveillance video and then asked her to make an identification. The court found Barlow's argument that only five of the six men had facial hair not persuasive and noted that Atkins' testimony with respect to the threat of not seeing her children again came before her first non-identification and not immediately before her second identification.

After considering the totality of the circumstances, we agree the array presentation was impermissibly suggestive. As did the court, the fact that there were only five men with facial hair, Barlow being one of them, did not suggest which photograph Atkins should select. *See generally, Smiley v. State*, 216 Md. App. 1, 36 (2014) (affirming suppression court's finding that array was not impermissibly suggestive where five of the six photos showed men with receding hairlines on the grounds that "the photographic array, albeit not perfect, was not fatally suggestive.").

Turning to the more problematic facts, the court found suggestive the fact that Detective Forsythe told Atkins she saw the suspect in the shooting on the surveillance video. Generally, telling a witness that the police have a suspect prior to an extrajudicial identification is not *per se* impermissible. *See Wallace v. State*, 219 Md. App. 234, 243, 246–47 (2014) (holding that, even though police told witness before showing the array that they "found the person that did it," the array was not impermissibly suggestive because "they left it to him to select the photograph of the person who robbed him"); *Gatewood v. State*, 158 Md. App. 458, 472–73, 476 (2004) (although police officer preparing the array told the witness, another police officer, that he knew the suspect, thereby "most likely suggesting that person's photograph was in the array," the array was not unduly suggestive).

Likewise, a threat such as the one to Atkins that she needed to identify someone or else face the possibility of not seeing her children again, although clearly improper, does not, standing alone, amount to an impermissible suggestion to pick someone out. Indeed,

the fact that Atkins did not identify anyone immediately after that threat was made at the first viewing supports that conclusion. As this Court explained:

> Even if it were to be assumed that the police dragged a witness screaming into the police station, rudely shoved her down in front of a "mug" book containing a thousand photographs, *and threatened her that if she did not pick out one of them within the hour they would shoot her on the spot, such behavior would no doubt be improper. It would not, however, be impermissibly suggestive*. To do something impermissibly suggestive is not to pressure or to browbeat a witness to make an identification but only to feed the witness clues as to which identification to make. THE SIN IS TO CONTAMINATE THE TEST BY SLIPPING THE ANSWER TO THE TESTEE. All other improprieties are beside the point. There is no place in the appellate syllogism for undifferentiated angst.

Conyers v. State, 115 Md. App. 114, 121 (emphasis added), *cert. denied*, 346 Md. 371 (1997).

Although there was no evidence presented that Detective Forsythe ever told Atkins which photograph to select, considering the record as a whole, we agree with the motions court that Detective Forsythe went too far. According to Atkins' testimony, which the court found to be credible, the detective not only told her that they had a suspect in custody, but they knew the suspect was there because they saw him on surveillance video. Detective Forsythe then told Atkins, "We already got him, and I know you saw him out there that night. I just need you to show me who you saw out there that night." Although Atkins did not pick anyone out immediately after the threat to her freedom and her family prior to the first time she was shown an array, as Barlow's counsel argued, this could have tainted the subsequent identification. We conclude Detective Forsythe went beyond merely suggesting the police had a suspect in custody and strayed too far towards "[t]his is the man." Accordingly, we hold that the presentation of the array to Atkins was impermissibly suggestive.

However, as the motions court recognized, that does not end our inquiry. As we summarized above in our discussion of the law, an impermissibly suggestive extrajudicial identification such as a photo array may still be admissible if the identification was reliable under the totality of the circumstances. There are multiple factors a court should consider, as the motions court did in this case. Our task is to determine whether the court's findings were supported by clear and convincing evidence.

As indicated, the factors courts consider include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Small*, 464 Md. at 92.

As for opportunity, the circuit court found:

> So there are certain factors that have been suggested by the appellate courts. First is the opportunity of the witness to view the incident at the time. Ms. Atkins testified, and the Court finds credible, that she was in the store that was rather small, as she suggested it. That she was close. That she observed the individual that she later identified, along with another individual, come into the store. That the fight was right there, while she was standing there. That she was there and saw them drag out the victim, and that she was standing in the doorway when the fight occurred. So the Court finds that she did have a significant opportunity to view the incident.

This finding is not clearly erroneous. Atkins stood in the doorway of the store when she saw a man wearing a t-shirt, jeans, and a hat, along with another unidentified man, assault Mosely inside Your Way before dragging him out to the street. Your Way was not big, and Atkins stood close to Mosely. There were no obstructions between her, Mosley, and the assailants. The facts support the court's finding that there was an opportunity to identify the suspect.

Next, the court considered Atkins' degree of attention and the accuracy of her description:

> Her degree of attention, the Court finds, would also be good. The accuracy of the prior description, the description that she gives to the police, according to her testimony now, is – there isn't much of a description that's given. She describes only the clothing. She doesn't describe the face or anything else, so it's hard to – it's hard to tell because there's no indication whether she was asked and unable to identify facial features or anything else. She just doesn't.

The hearing record supports this finding. Atkins' description of the clothing of the suspect remained consistent throughout, even though she only glanced at the assailants' faces. And, she agreed she did not describe the shooter's face to police. In addition, there was evidence that Atkins saw Barlow on prior occasions. These findings were not clearly erroneous. *Simons v. State*, 159 Md. App. 562, 572 n.1 (2004) ("Courts generally hold that when an eyewitness tells an officer shortly after the crime that he or she knows the defendant and has seen him around, this independent source of identification trumps any suggestive taint that officers subsequently use while having the eyewitness identify the defendant at the station through photos or lineups.").

Next, as to the level of certainty of the identification, the court found:

> The level of certainty demonstrated by the witness, the detective says that the array itself took seconds to minutes. It could have been up to five minutes, perhaps, though it wasn't actually five minutes. The witness says it was three to five minutes that it took her, and I guess that goes somewhat to the level of certainty, although it could go to just studying them and not necessarily conclusive on the level of certainty.
>
> However, Ms. Atkins did testify that she had seen Mr. Barlow in the neighborhood. She was familiar with him. And that, together with her vantage point within the store, the proximity within the store, the proximity when the incident took place outside of the store, and her answers to the questions as far as today – she's certainly not a hundred percent certain, but

> as she testified, she was more certain years ago when she made the identification than she is now, years later. The Court considers that as well.

Throughout the hearing and thorough examination on direct and cross, Atkins maintained that she saw Barlow on the night in question inside the store assaulting Mosely. Further, she confirmed that she picked out the photograph of the person she believed at the time of the viewing was the shooter within three to five minutes of being presented with the array. The court's finding that Atkins's identification was made with sufficient certainty was not clearly erroneous.

Finally, as to the length of time between the crime and the array, the court focused on the array when Atkins first identified Barlow:

> And length of time between the incident and the identification, I believe the second array was about two weeks - was about two weeks later? About two weeks later, which is not a terribly long period of time.

The day after the shooting, May 31, 2009, when she was taken to the police station, Atkins told police she thought she could identify the person who shot Mosely because she "had seen one of them before[.]" That person was wearing a t-shirt, jeans, and a hat. However, Atkins did not identify anyone in the photo array shown to her this day.

However, on the second photo array viewing on June 13, 2009, approximately two weeks after the shooting, Atkins identified a photo and wrote, "The person who shot Craig." And, on the next photo array viewing on June 16, 2009, Atkins identified Barlow within seconds to minutes, writing, "I saw him shoot the victim, Craig Mosely." Based on consideration of this evidence, the court's finding was not clearly erroneous.

In conclusion, Atkins' identification was trustworthy and admissible. We concur with the motion court's conclusion and uphold the admission of this evidence.

3. Testimony of Jelisa Turner Regarding the Photo Array

With respect to the second witness, Jelisa Turner, Detective Forsythe testified she showed the photo array to Turner on June 15, 2009. The detective used the same process with Turner as she did with Atkins, and Turner identified Barlow within "seconds to minutes."

Turner also testified at the hearing. The day before the shooting, May 29, 2009, Turner stated she was at Your Way with Atkins and Mosely. Turner witnessed Mosely and Barlow fighting inside that store on that date.[3] Turner explained she stood close to them while they fought, only a few feet away, and Your Way was "really tiny, like it's really no room in there." Turner testified she believed the fight was over money. According to Turner, Barlow was winning the fight until Mosely and others jumped in.

On May 30, 2009, the day of the shooting, Turner was with Atkins and Mosely at the Pizza Mart located across the street from Your Way. Turner agreed that two people came into the small store, a fight ensued, and Mosely was shot. Turner testified, "I seen everything that happened." She stated one of the men had a black shirt on, was of "medium build," and was wearing jeans. The other man was "kind of heavy." Turner was standing next to Atkins, maybe four feet away, when this all transpired. She reiterated that "[w]e

[3] On cross-examination, Turner testified that she did not know Barlow but had seen him in the neighborhood before.

was in the store, and when I turned around two guys approached him. They started fighting. That's when they took him outside the store, and that's where he got shot."

Turner also explained that she turned around to ask Mosely what he wanted and that was when she saw the men entering behind him. She heard one of the men say, "something like so you thought we wasn't going to be back." Turner saw one of the men hit Mosely in the face with a gun and then drag him out of the store. She then went outside the store and yelled for Mosely's friends across the street to come help. Turner testified that she was unable to see the faces of the people involved and that she was "trying to get to safety myself." She also testified that the shooter shot several times and then ran away down an alley with another man.

Several days later, on June 16, 2009, Turner was transported to the Northeast District for an interview. Turner agreed that she was friends with Atkins and spoke with her frequently, but she did not speak to her or Mosely about the identification. The array was presented face down, and she was told, when she was ready, to turn it over and examine the photographs. Turner turned over the array and identified a person she believed was involved in the May 29 fight on the day before the shooting.

With respect to the photo array identification, and despite her testimony that she was asked to identify who was involved in the fight on May 29, Turner wrote, "I saw him shoot the victim, Craig Mosely." Asked why she wrote that if she only saw Barlow's face the day before the shooting, Turner testified, "Because after I got asked that, the detective had told me the person that shot him was already in custody, they already had him, and that

it was the person." Turner was asked several times about this at the hearing and testified that she could not remember "word for word" what Detective Forsythe said but testified that the detective told her a few minutes before the array was presented that the suspect in the shooting was in custody on an unrelated matter and that his picture was in the array. Wanting "to get it over with," Turner then picked the photograph of the person she saw involved in the fight the day before and wrote "I saw him shoot Craig." She agreed the detective did not tell her what to write. She also repeatedly acknowledged that she did not want to get "involved" with this investigation.

Turner also agreed she did not see who shot Mosely and would not be able to identify the shooter. However, Turner maintained that she saw Barlow fighting with Mosely on May 29.

The State then recalled Detective Forsythe. Detective Forsythe denied telling any witnesses, including Turner, the police had a suspect in custody because that would "be tainting the photo array." Detective Forsythe agreed that the entire interview with Turner took about two hours, and Turner made her selection and wrote her statement towards the end of the interview. The detective testified she did not force Turner to give a statement or an identification and did not tell her what to write down on the back of the array. Detective Forsythe concluded her direct examination by saying that she would not have told Turner about having a suspect in custody because it "would interfere with the investigation."

4. Court's Ruling with Respect to Turner

The court denied the motion to suppress Turner's identification, finding that Detective Forsythe was more credible than Turner. The court distinguished Turner from Atkins:

> The testimony of Ms. Atkins and Ms. Turner, even if both are believed in terms of what is stated to them, are different. Ms. Atkins testified that she was told by the detective, before she was shown the array, a person who was there that night was in the array. We already got him. I know you saw him out there that night. We just need you to pick out who you saw. And that's what I found to be highly suggestive.
>
> Ms. Turner testified that she was told the suspect was already in custody. She said because of what happened the day before, she assumed that Mr. Barlow was the person, and she picked him out. But in terms of the array being unduly suggestive, she was, according to her, told that the suspect is already in custody. That seems to be significantly different from what Ms. Atkins was told.

The court found Turner's credibility problematic, stating:

> The Court also has difficulty with Ms. Turner's credibility. She testified to the size of the store. She testified to the distance that she was from the two men who came in. She testified that she saw them when they came in. She was five or six feet away from the door. She testified that she heard one of them saying I told you I'd be back, and she saw the two men standing next to the victim, and then she saw them dragging the victim outside, and yet she testifies that -- at one point she testifies that she did not see their face – their faces.
>
> There's nothing to indicate that she was not able to see their faces. There's absolutely nothing to indicate that their faces were in any way hidden or disguised or covered. The Court finds her testimony to not be credible, observing her demeanor on the stand as well.

The court concluded:

> Her testimony today was inconsistent on several significant points. She testified that she wrote something as specific and -- something that would probably involve her more than anything else, writing that she saw the

> Defendant shoot the victim, and yet she says she wrote that because she did not want to get involved. The Court finds it not terribly credible that someone who did not want to get involved would specifically tell the police that they saw this crime occurring.
>
> So the Court does not find that the -- that the array itself was so impermissibly suggestive as to exclude it.

Although this ends the inquiry, the court also addressed factors bearing on the reliability of Turner's identification:

> The court also finds – although that ends the inquiry, the Court notes that Ms. Turner had the opportunity to view the scene at the time. It was a small store. She was present there. She was willing to admit that she saw the two men enter the store. She saw the two men beside the victim when they said, or one of them said, I told you I'd be back. She was -- she was there when they took him outside.
>
> The -- there is no prior description. From the testimony -- or, rather, from her statement that she gives, it sounds that the statement was made with certainty, although today she does not have certainty. And she says that she does not remember quite a number of things that occurred, and the Court doesn't question that there would be a memory issue after this much time. And the identification was made within a relatively short period of time after the event itself.
>
> And so I am denying the motion with regard to Ms. Turner as well.

Our standard of review informs the outcome. Here, the motions court did not find Turner entirely credible. Considered in the light most favorable to the prevailing party, the State in this case, the record shows the court credited Detective Forsythe's testimony that she: (1) did not tell Turner the suspect involved in the shooting was included in the array; (2) did not tell her which photograph to pick; and (3) did not tell her what to write on the back of the array. It is not our function to second guess this fact-finding by the motions court. For "[i]t is the trial judge who determines the credibility of witnesses when, as in a suppression hearing, he functions as the trier of fact." *Carter v. State*, 80 Md. App. 686,

690 (1989) (affirming trial court's denial of a motion to suppress identification evidence where the court "obviously found the State's witnesses more credible than appellant"). These factual findings were supported by the testimony elicited in the hearing.

Having reached this conclusion, we need not consider whether Turner's identification was reliable. *See Small*, 464 Md. at 83 ("If the court determines that the extrajudicial identification procedure was not suggestive, then the inquiry ends, and evidence of the procedure is admissible at trial."); *see generally Wood v. State*, 196 Md. App. 146, 162 (2010) ("Reliability is quintessentially a jury question and an evidentiary issue. Even in those limited circumstances in which it might play a role in precluding pretrial suppression, it is not a catalyst for suppression but an antidote thereto."), *cert. denied*, 418 Md. 192 (2011). The motion court properly denied the motions to suppress both identifications.

II. The Circuit Court Did Not Err in Admitting Other Crimes Evidence Against Barlow.

A. Parties' Contentions

Barlow next asserts the court erred in admitting evidence that there was a fight involving himself and the victim the day before the shooting at Your Way. Specifically, Barlow contends: (1) the evidence was irrelevant to establish motive because Barlow did not "know who he was in a fight with," and (2) the trial court only gave "lip service" to the required balancing test before admitting the evidence.

The State responds that Barlow waived this issue because the same evidence repeatedly came in without objection, noting that all these instances occurred before

Barlow was granted a continuing objection. On the merits, the State responds that the evidence of the fight the day before the shooting was relevant, and the trial court did not abuse its discretion in conducting a balancing of the probative value versus the danger of unfair prejudice prior to admitting the evidence.

In reply, Barlow concedes preservation is problematic and asks us to invoke the plain error doctrine to review the issue despite any suggestion that the argument was waived. Barlow maintains his other arguments on the merits.

B. Standard of Review – General Principles

"An appellate court typically reviews a trial court's ruling on the admission of evidence for abuse of discretion." *State v. Galicia*, 479 Md. 341, 389, *cert. denied*, 143 S. Ct. 491 (2022) (citation omitted). "An abuse of discretion occurs where 'a trial judge exercises discretion in an arbitrary or capricious manner or ... acts beyond the letter or reason of the law.'" *Id.* (quoting *Cooley v. State*, 385 Md. 165, 175 (2005)). "In some circumstances, the admissibility of particular evidence is a legal question, in which case an appellate court accords no special deference to a trial court." *Galicia*, 479 Md. at 389 (citation omitted).

Maryland Rule 5-404(b) provides:

> Evidence of other crimes, wrongs, or acts, including delinquent acts as defined in Code, Courts Article § 3-8A-01, is not admissible to prove the character of a person in order to show action in the conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, absence of mistake or accident, or in conformity with Rule 5-413.

As explained by the Supreme Court of Maryland, "[t]he policy consideration underlying Rule 5-404(b) is to avoid tainting the jury into thinking that the defendant is a bad person who should be punished regardless of his [or her] guilt of the charged crime, or to infer that he [or she] committed the charged crime due to a criminal disposition." *Woodlin v. State*, 484 Md. 253, 265 (2023) (citations and quotations omitted). However, "[d]espite that prohibition, such evidence historically has been admissible to prove things other than a defendant's general propensity to commit a crime, such as 'proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, [or] absence of mistake or accident[.]'" *Id.* (alteration in original) (citing *Merzbacher v. State*, 346 Md. 391, 407 (1997)). There is a three-part test for admission of evidence of other crimes:

> First, the court must determine whether the evidence fits into one or more of the exceptions in Rule 5-404(b). This is a legal determination. Second, it must be shown by clear and convincing evidence that the defendant engaged in the alleged criminal acts. In this regard, we review the trial court's decision to determine if there is sufficient evidence to support its finding. Third, the court must find that the probative value of the evidence outweighs any unfair prejudice. This determination involves the exercise of discretion by the trial court.

Colkley v. State, 251 Md. App. 243, 273, *cert. denied*, 476 Md. 268 (2021) (citations omitted).

1. Background and Rulings

Prior to trial, Barlow moved to suppress a statement he made to police stating he was at Your Way during the May 29 fight, the day before Mosley's death across the street at the Pizza Mart. During the hearing on the motion to suppress, the State proffered several

facts to argue the May 29 fight at Your Way was relevant and admissible under Rule 404(b), which we summarize:

- Turner and Atkins, who later identified Barlow as Mosley's assailant during the May 30 incident, were at Your Way carry-out, across the street from the Pizza Mart, on May 29.
- Both Turner and Atkins saw a fight at Your Way, in which a man named "George" was being beat up.
- Barlow was one of the assailants.
- Mosely, a friend of George's, jumped in the fight and tried to assist him.
- The next day, Turner and Atkins were at Pizza Mart with Mosely when some men, including Barlow, assaulted Mosley, dragged him out and shot him.
- Barlow was arrested six days after the incident.
- After his arrest, Barlow admitted to police that he was in Your Way the day before the shooting and was present for the fight.
- According to Barlow, the fight was a dispute over $20.00.
- In his statement, Barlow admitted that someone hit him during the fight, he hit back, then left Your Way.

The State argued evidence of the May 29 fight falls under 404(b) as follows:

> All of this goes directly under 404 (b), other crimes, wrongs or acts. And, as the Court is aware, that information is admissible if it can go to motive, opportunity, intent, preparation, common scheme or plan, knowledge and identity.
>
> Of those, I would say that these witnesses specifically can give knowledge of the fight, *identity* of the Defendant. The Defendant's own statement goes to his *opportunity*, his *intent* and his *preparation* for retaliating the next day on the victim. The victim's information obviously corroborates that the witnesses say, minus the identity, but also the Defendant's statement as to what this fight was about, the fact that the police

> arrive and everybody runs and, then, again, the victim is shot in the face the next day.
>
> One of the witness's statements, in her taped statement, is specific that when the individuals came into the restaurant on the 30th, intent on harming Mr. Mosely, there is a statement made, "You thought we wouldn't be back. Well, we're back now."

(emphasis added).

Detective Forsythe testified at the suppression hearing that Barlow was interviewed on July 8, 2009, and that, after he waived his *Miranda*[4] rights, he admitted that he was in Your Way on May 29. In his statement, Barlow said a man named "Craig" and another man named "George" assaulted him. Barlow admitted "he was there and he took part in the fight." Barlow denied knowing anything about the shooting on May 30, 2009. Barlow's statement to police was played into the record at the motions hearing.

The court also heard testimony from Atkins that, although she did see Mosely involved in the fight, she could not identify with whom he was fighting. Turner, in contrast, positively and repeatedly identified Barlow as being involved in the fight with Mosely.

The court denied the motion to suppress. The court stated that evidence of the May 29 fight was relevant to motive and was not being admitted simply to "prove guilt" or show certain character traits. The court also considered the testimony of Atkins and Turner and found, by clear and convincing evidence, there was a fight the day before the shooting, and Barlow and Mosley were involved in that fight. Specifically with respect to Turner, the

[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

court stated "[s]he [was] definite that the victim was in the fight, and that the Defendant was in the fight, and she recognized him from both."

The court concluded by balancing the probative value against the danger of unfair prejudice:

> And probative value is, as I believe we all agree, that the issue of motive, that's also the concern with the undue prejudice, the establishment of motive. But, as I said, that is a legitimate exception, and it is a legitimate matter of probative value and it is necessary for the State's case and, therefore, I am not going to exclude the evidence of the fight.

C. Analysis

With the exception of certain jurisdictional defects, we will not review an issue "unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." Md. Rule 8-131(a). *Accord Lopez-Villa v. State*, 478 Md. 1, 19–20 (2022). The purpose of the preservation rule "is to 'prevent[] unfairness and requir[e] that all issues be raised in and decided by the trial court." *Peterson v. State*, 444 Md. 105, 126 (2015) (quoting *Grandison v. State*, 425 Md. 34, 69 (2012)).

The record shows that most if not all of the evidence on which the State relies as part of its other crimes evidence came in before defense counsel raised an objection. For example:

1. Turner testified, without objection, that the victim and an unidentified man named "George" were fighting with Barlow on May 29 in the Your Way store. There was no objection as Turner provided multiple details about this altercation.

2. Turner testified, without objection, that she told Detective Forsythe that the same person she saw involved in the fight with the victim and the other man on May 29 was the same man she saw come into the Pizza Mart on May 30 and shoot the victim.

3. Turner testified, without objection, that the person she picked out in the photo array as being involved in the incident in the Pizza Mart was the same person she saw the day before.

4. Atkins testified, without objection, that she saw the victim, Mosely, involved in a fight in Your Way on May 29, 2009.

5. The victim, Mosely, testified, without objection, that Barlow and "George" were fighting in Your Way on May 29, and "I just jumped in it" because Barlow "was getting the best of George."

6. Detective Forsythe testified, without objection, that Mosely told her that he, Barlow and a person named "George" were involved in a fight the day before the shooting.

Barlow only raised an objection later during Detective Forsythe's testimony. At that time, the court granted his request for a continuing objection. In light of this, we conclude this issue was not preserved.

Recognizing this procedural default, Barlow asks us to address this under issue under the plain error doctrine. "'[A]ppellate invocation of the 'plain error doctrine' 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon.'" *Winston v. State*, 235 Md. App. 540, 567 (2018) (quoting *Morris v. State*, 153 Md. App. 480, 507 (2003)). Before an appellate court will reverse for plain error, there must be legal error that: (1) was not "intentionally relinquished or abandoned"; (2) is "clear or obvious"; (3) concerns the appellant's "substantial rights" by affecting the outcome; and (4), if all three conditions are met, the appellate court may remedy the error if it affects the "fairness, integrity or reputation of judicial proceedings." *Id*. (citing *Newton v. State*, 455 Md. 341,

364 (2017)) (additional citations omitted). "Meeting all four conditions is, and should be, difficult." *Winston*, 235 Md. App. at 568 (citing *Givens v. State*, 449 Md. 433, 469 (2016)).

In light of the continuing objection, for the sake of argument only, we will assume the objection to testimony about the May 29 fight was not intentionally abandoned or affirmatively waived. If so, we would determine whether the alleged error was clear, obvious, and affected Barlow's substantial rights. And then, even if all three conditions were met, we retain discretion whether to remedy the error. In this posture, we shall briefly address the merits of this issue.

The issue presented is whether the evidence of the fight between Mosley, and Barlow at Your Way on May 29 was "specially relevant" to show motive for the shooting on May 30. Barlow argues that he did not know that the victim was involved in the May 29 fight. The State responds that "neither the trial court nor the jury needed to accept his version of events[,]" and there was sufficient evidence for the factfinders to rationally infer there was motive for the shooting.

Barlow was charged with attempted first-degree murder. Maryland appellate courts have addressed the special relevance of motive, and we conclude the following is instructive:

> Motive is not an element of the crime of murder, but, in addition to supporting the introduction of other crimes evidence, it also may be relevant to the proof of two of the other exceptions to Rule 5–404, intent or identity. To be admissible as evidence of motive, however, the prior conduct must be "'committed within such time, or show such relationship to the main charge, as to make connection obvious,' ... that is to say they are 'so linked in point of time or circumstances as to show intent or motive.'" Evidence of previous

> quarrels and difficulties between a victim and a defendant is generally admissible to show motive.

Snyder v. State, 361 Md. 580, 604–05 (2000) (citations omitted) (cleaned up); *see also Page v. State*, 222 Md. App. 648, 664 (evidence that the defendant attempted to shoot the witness two weeks before he was actually shot [by the defendant] was "specially relevant" to show motive and intent, was shown by clear and convincing evidence, did not unfairly prejudice the defendant, and was relevant to prove criminal agency, a contested issue in the case), *cert. denied*, 445 Md. 6 (2015).

We are persuaded the evidence of the May 29 fight was specially relevant to the shooting the next day. Barlow's claims that he did not know he was fighting the victim goes to weight, not its admissibility. *See Henry v. State*, 184 Md. App. 146, 168 (2009) (concluding, where the issue was whether evidence of an armed robbery two weeks before the murder was specially relevant to identity, defendant's argument that a different gun could have been used in the different incidents "goes to the weight of the evidence and not its admissibility"), *aff'd*, 419 Md. 588 (2011).

The motions court next found that the evidence of Barlow's involvement in the May 29 fight was clear and convincing. There was competent evidence to support this finding. Barlow admitted in his statement to police that he was in Your Way the day before the incident, and two men named "Craig" and "George" assaulted him. Atkins testified at the hearing that, although she did see Mosely involved in the fight, she could not identify who he was fighting with. Turner, in contrast, positively and repeatedly identified Barlow as being involved in the fight with Mosely the day before.

We disagree with Barlow's contention the trial court only gave "lip service" to the balancing test. Even if we were to agree that the circuit court's analysis was limited, we have explained:

> Although it is true that the trial court did not place its balancing of the probative versus prejudicial impact of the evidence on the record, the court was not required to do so. This is because "[t]here is a strong presumption that judges properly perform their duties."

Darling v. State, 232 Md. App. 430, 463 (2017).

In sum, we hold Barlow waived any error in the court admitting other crimes evidence when he did not object when similar evidence was admitted at trial. Further, we are not persuaded there was error, much less, plain error, in the court's ruling on the merits. The trial court properly exercised its discretion admitting evidence of the fight the day before the shooting.

THE JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY ARE AFFIRMED. APPELLANT TO PAY THE COSTS.