UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1548

September Term, 2015

PERRY ALEXANDER

v.

STATE OF MARYLAND

Krauser, C.J.,
Woodward,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: October 14, 2016

On the evening of February 24, 2013, in the 1700 block of Montpelier Street, Baltimore City, Maurice Barfield was found by Baltimore City Police Officer James Edge, lying face down in the street with gunshot wounds to his back and head. Shortly thereafter, the officer found Shauntice Evans in a Cadillac automobile parked in front of 1722 Montpelier Street. She had sustained two gunshot wounds to her left upper chest, as well as a wound to her left wrist. Both Mr. Barfield and Ms. Evans died as a result of their gunshot wounds.

In regard to the aforementioned shootings, Perry Alexander, appellant, was convicted by a jury, in the Circuit Court for Baltimore City, of second-degree murder of both Ms. Evans and Mr. Barfield; two counts of use of a handgun in the commission of a crime of violence; two counts of wearing, carrying and transporting a handgun; one count of conspiracy to murder Mr. Barfield; and one count of conspiracy to murder Ms. Evans. The trial court imposed sentences totaling life imprisonment, with all but 75 years suspended.

In this timely appeal, appellant raises three questions, *viz*.:

> 1. Did the pre-trial hearing court err by denying [a]ppellant's motion to suppress evidence of an out-of-court identification of him from a photo array?
>
> 2. Did the trial judge improperly restrict cross-examination of the most critical witness for the State, assist the prosecutor, and interfere with [a]ppellant's right to a fair trial?
>
> 3. Is the evidence legally insufficient to sustain [a]ppellant's two convictions of conspiracy to commit murder?

I.

BACKGROUND

The key witness against Alexander at trial was Timothy Veasey. He testified that on February 24, 2013 he arrived home from work at about 9:00 or 9:30 p.m. Not long afterwards, he went outside and talked to three people who were standing outside of the fenced yard of the house that he shared with his mother. He knew the three young men by their nicknames, i.e., "Dre" (Deandre Branch), "P" (appellant), and "Tone." He knew "Dre" because he had given him rides in his automobile previously. He knew appellant from having seen him hanging around outside the house next door to his house almost every day, and he knew that Tone had an aunt that lived two or three doors away. Mr. Veasey proceeded to talk to the young men for about fifteen minutes. The subject discussed was Mr. Veasey's upcoming marriage.

Mr. Veasey further testified that while he chatted with the three young men, he saw a man walking up the street toward him. When that man approached the group (i.e., "Dre," "P," "Tone," and Mr. Veasey) he said "It's on. It's going to be on like Donkey Kong[.]" The man who said this was later identified at trial as Maurice Barfield.

After hearing the words spoken by Mr. Barfield, both "Dre" and appellant almost simultaneously pulled out guns and began shooting at Barfield. As Barfield ran away, the two ran after him firing their guns. "Tone," however, ran off toward Harford Road and did not shoot anyone. Next, Mr. Veasey heard a woman scream. That woman was in a black Cadillac parked across the street from where Mr. Veasey was standing. Mr. Veasey saw

the woman shut the door to the Cadillac and attempt to climb into the back seat of the car. Mr. Veasey saw appellant go over to the Cadillac and attempt to open the door. When he could not get the car door open, appellant shot through the window at the woman. "Dre" also fired at her. Mr. Barfield although wounded, came back to the area where the Cadillac was parked, apparently to help Ms. Evans. But when he returned, both appellant and "Dre" fired at him once again. After the shooting appellant ran toward Polk Street, while "Dre" ran in the direction of Harford Road.

Although Mr. Veasey witnessed the shooting, he waited about one and one-half weeks before he contacted the homicide unit to tell them what he had witnessed. He did so at the insistence of his mother. Mr. Veasey initially spoke to Baltimore City Detective Raymond Yost and told the detective that he "saw everything." At police headquarters, Mr. Veasey identified appellant from a photographic array and signed his name above appellant's photograph. On the back of the photographic array, he wrote: "Started shooting after Deandre started shooting and went to the car and pulled on [the] door knob after shooting through the window."

According to Mr. Veasey's testimony, appellant used a revolver in the shooting and "Dre" used what Mr. Veasey called an "automatic" handgun, which he said looked like a 9mm. According to Mr. Veasey's testimony, he thought he heard a total of about 17 shots. He testified that before the shooting, he had never seen the two victims.

Detective Yost testified at trial that he received a message from Mr. Veasey several days after the murders. When he met with Mr. Veasey, the latter told Detective Yost that

"P" (appellant), who was one of the shooters, attended Harbor City High School. Detective Yost went to the high school and obtained the name Perry Alexander as that of a student who used the nickname "P." Detective Yost assembled a six picture photographic array and showed it to Mr. Veasey on March 8, 2013. Mr. Veasey identified appellant from the photographic array as one of the shooters. Mr. Veasey, however, was unable to identify "Dre" from the second photographic array that was shown to him. Additional facts will be included as needed to answer the questions presented.[1]

II.

THE HEARING ON THE MOTION TO SUPPRESS MR. VEASEY'S PHOTOGRAPHIC IDENTIFICATION.

At the motion to suppress hearing, the photographic array was introduced into evidence. All the young men depicted in the array were approximately the same age and were all young adult, African-American males. Two of the persons in the array had on white T-shirts while appellant and the remaining three men wore black T-shirts. Also, all of the persons depicted in the photographs had basically the same short hair style. Of the six persons depicted, only one appears to be looking directly into the camera when the photograph was taken. During his testimony, Detective Yost admitted that appellant's photograph differed from the other images in the photographic array in two ways. First,

[1] In Part I of this opinion, we have made no attempt to recap all of the evidence that was presented in this case because appellant does not challenge the sufficiency of the evidence as to the convictions for second-degree murder or use of a handgun in the commission of a crime of violence. He does challenge the sufficiency of the evidence in regard to the conspiracy to murder convictions; facts relevant to the conspiracy convictions will be set forth in Part V of this opinion.

with one exception, the top of appellant's head as shown in his photograph appeared closer to the top of the photograph than the tops of the heads of other persons shown in the array. The one exception was that the photo of an unidentified man, whose picture was in the bottom right of the array, showed the top of his head near the top of the photograph. Secondly, Detective Yost admitted that appellant's eyes, as shown in the photograph, although not closed, appeared "to be kind of looking downward like kind of squinted maybe."

Insofar as the photo array was concerned, Mr. Veasey's testimony and that of Detective Yost was consistent with their testimony at trial, which is summarized in Part I. In his testimony at the suppression hearing, Mr. Veasey also mentioned the fact that prior to the shooting, he had known appellant for "five or six months" and during that period would see him "every day." He knew appellant well enough prior to the shooting to give him advice: "stay in school." Moreover, according to Mr. Veasey, it was not unusual for "Dre," "P," and "Tone" to stand in front of the house where appellant lived. Both Mr. Veasey and Detective Yost denied that anyone suggested to Mr. Veasey which picture in the array he should select.

At the conclusion of the hearing, appellant's counsel argued that the photographic array, on its face, was impermissibly suggestive because appellant's "eyes were closed" and because of how the image of appellant was situated in the frame of the photograph.

The motions judge denied appellant's request to suppress the photographic identification by Mr. Veasey. The judge explained:

> All right. I don't think it's unduly suggestive even though I understand, Mr. [Defense Counsel], what you're saying, but I do agree with Ms. [Prosecutor]. The space between the other young man - - gentleman's head bottom right it's a little bit more, but it's pretty much toward the top. The eyes of all six are going in different directions. They're not - - and actually, the top middle one is also looking down. So I don't think there's anything unduly suggestive, so I'm going to deny the motion.

III.

RESOLUTION OF THE FIRST QUESTION PRESENTED

Appellant alleges that the "pre-trial hearing court erred by denying [his] motion to suppress evidence of an out-of-court identification of him from a photo array." In support of that argument, appellant asks us "to find that the photo array [shown to Timothy Veasey] was impermissibly suggestive on its face in that the distinguishing features of [a]ppellant's photograph may have conveyed to the witness that [a]ppellant's was the photograph that he should choose."

It is fundamental that "'due process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures.'" *Webster v. State*, 299 Md. 581, 599-600 (1984) (quoting *Moore v. Illinois*, 434 U.S. 220, 227 (1977)); *Gatewood v. State*, 158 Md. App. 458, 475 (2004), *aff'd on other grounds*, 388 Md. 526 (2005). Due process principles apply to remedy the unfairness resulting from the admission of evidence that is based on an identification procedure that was "unnecessarily suggestive" and conducive to misidentification at trial. *See Neil v. Biggers*, 409 U.S. 188, 197-98 (1972); *Simmons v. United States*, 390 U.S. 377,

384 (1968); *Stovall v. Denno*, 388 U.S. 293, 299 (1967); *Jones v. State*, 395 Md. 97, 108 (2006).

Courts follow a two-step inquiry to determine the admissibility of disputed identification evidence alleged to be the product of unduly suggestive pre-trial identification procedures. *Gatewood*, 158 Md. App. at 475. "The accused, in his challenge to such evidence, bears the initial burden of showing that the procedure employed to obtain the identification was unduly suggestive." *Id.* Once this showing is made, the court must then determine whether, based on the totality of the circumstances, the identification was reliable despite the suggestiveness of the confrontation procedure. *Neil v. Biggers*, 409 U.S. at 199. Although the reliability of the identification is the "linchpin" question, *see Manson v. Brathwaite*, 432 U.S. 98, 114 (1977), if the identification procedure is not unduly suggestive, then our inquiry is at an end. *See Mendes v. State*, 146 Md. App. 23, 36 (2002).

We have reviewed the photo array in question and based on that review have independently concluded that the array shown to Mr. Veasey was not "'so unnecessarily suggestive and conducive to irreparable mistaken identification that [appellant] was denied due process of law.'" *Bailey v. State*, 303 Md. 650, 662 (1985) (quoting *Stovall v. Denno*, 388 U.S. at 302). The array depicts six young men, all with roughly the same features. While, the men depicted in the photographs are not identical, due process does not require that the pictures be composed of clones. *Webster v. State*, 299 Md. at 620. *See also, e.g.*,

United States v. Arrington, 159 F.3d 1069, 1073 (7th Cir. 1998) (lineup of clones not required).

In this appeal, appellant does not contend that the judge's factual findings in regard to the photographic array were erroneous and there is good reason why no such contention has been made. First, an examination of the photographic array shows that what the motions judge found, factually, was true. As mentioned, the photograph of appellant and the photograph of the person depicted in the bottom right of the array show almost no space between the top of the photograph and the heads of the persons depicted, whereas, in the other four photographs, more space is shown. The difference in the pictures would not, in any way, suggest to Mr. Veasey which picture he should select.[2] Also, the judge was correct when he said that the eyes of all six persons depicted in the photographic array were looking in different directions. Only one person depicted appeared to be looking directly into the camera when his picture was taken. And, although it is true that appellant was looking down when his picture was taken, it certainly cannot be said that the direction in which appellant's eyes were cast when his picture was snapped would in any way provide a hint to Mr. Veasey as to which photograph he should select. For the above reasons, we

[2] In light of the uncontroverted evidence that Mr. Veasey, prior to the murders, knew appellant well, even if we agreed with appellant that the array was suggestive, it is impossible to see how the alleged "suggestiveness" would have made any difference.

conclude that the use of the photographic array was not unduly suggestive and we therefore affirm the judge's denial of the motion to suppress on that basis.[3]

IV.

CONDUCT OF THE TRIAL JUDGE

Appellant argues:

> The trial judge improperly restricted cross-examination of the most critical witness for the State, assisted the prosecutor, and interfered with appellant's right to a fair trial.

The State counters: "Alexander's complaint is not preserved because he failed to object to the trial court's conduct." The State relies on Md. Rule 8-131(a), which provides that ordinarily, except for certain jurisdictional issues, an appellate court "will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Here, as the State points out, not once during the entire trial did counsel for the appellant complain about <u>any</u> conduct of the trial judge.

Before addressing in detail the preservation issue, it should be pointed out that nothing in the record supports appellant's argument that the trial judge restricted defense counsel's cross-examination of Mr. Veasey, the State's most important witness. Our examination of the record shows that defense counsel, in commendable detail, thoroughly cross-examined Mr. Veasey. While it is true, as appellant points out, that at one point

[3] The State contends that the issue concerning the (alleged) suggestiveness of the array was not preserved even though the matter was raised prior to trial at a motion to suppress. As the State points out, appellant's counsel did not object when the array was introduced at trial. Nevertheless, having disposed of the issue on its merits, the preservation issue is moot.

during cross-examination the trial judge said that defense counsel had "ten more minutes," the record shows that the trial judge never actually held defense counsel to that time limit. In fact, once the judge made the "ten more minutes" announcement, defense counsel asked a great many additional questions, after which the trial judge adjourned court for the day at 4:30 p.m. Cross-examination of Mr. Veasey resumed the next day, during which appellant's counsel, once again, extensively cross-examined Mr. Veasey. Under such circumstances, we hold that defense counsel's cross-examination was never improperly restricted.

Secondly, our review of the trial transcript shows that the trial judge did not assist the prosecution in any meaningful sense. Appellant's argument to the contrary is principally based on the statement that the trial judge made after the prosecutor asked Mr. Veasey, on direct-examination, to point out appellant. Mr. Veasey did so. The trial judge then said, addressing the prosecutor: "I'm sorry, you would like the record to reflect what?" This prompted the prosecutor to say "Let the record reflect that Mr. Veasey has identified Mr. Alexander seated at defense counsel's trial table wearing a white shirt." That intervention by the trial judge certainly was not prejudicial to the appellant because the jury saw whom Mr. Veasey had identified. Quite obviously, what the trial judge did was done in order to make sure that the record would be clear. The other "helping the prosecutor" examples that appellant provides, were that on three or four occasions, the trial judge "sustained objections" to questions to which the prosecutor had not objected. The record reveals that the obvious reason that the judge "sustained" the objection was because,

in each instance, the questions dealt with matters that were, on their face, irrelevant. In this appeal, appellant does not claim that any of the questions dealt with relevant matters or that the questions were otherwise proper. In sum, the prosecutor was given no meaningful aid by that judge.

In regard to the claim that the trial judge showed bias or ill-will towards appellant, we turn to the preservation issue. As already mentioned, at trial appellant did not object to anything the trial judge did or failed to do. And, appellant does not ask us to review any of the issues he raises in regard to the trial judge's conduct based on the plain error doctrine. This claim, is therefore, twice unpreserved. *See Ray v. State*, 206 Md. App. 309, 351 (2012) (declining to review for plain error where appellant did not ask the court to do so): *Garner v. State*, 183 Md. App. 122, 151-52 (2008) ("In that the [defendant], strangely, does not even ask us to overlook non-preservation, this contention may qualify as an instance of non-preservation squared.").

In regard to preservation, although appellant does not explicitly ask us to apply the plain error doctrine, he does say in his brief that the case of *Diggs v. State*, 409 Md. 260 (2009), is "relevant." In that case, defendants Diggs and Ramsey were tried and convicted after separate trials conducted by the same judge in the Circuit Court for Baltimore City. *Id*. at 264. The Court of Appeals examined numerous incidents that took place during the two trials in which the trial judge questioned witnesses, acted as co-prosecutor, and disparaged Ramsey's trial attorney. *Id.* at 264-84. The *Diggs* Court reversed the convictions utilizing the plain error doctrine. *Id*. at 287. But in *Diggs*, the actions of the

trial judge were many times more egregious than the actions of the trial judge complained about in this case. All of the actions of the trial judge in the case *sub judice* about which appellant complains, took place when Mr. Veasey was testifying. Unlike the situation in *Diggs*, the trial judge only asked Mr. Veasey one question and certainly did not act as a "co-prosecutor." Moreover, unlike the situation in *Diggs*, not once did the trial judge do or say anything that could reasonably be construed as indicating that the judge believed or disbelieved Mr. Veasey.

It is true, as appellant points out, that there were four occasions when the trial judge criticized the way that appellant's counsel was conducting cross-examination of Mr. Veasey. The criticism was that the questions were repetitive and/or irrelevant. With one exception, these criticisms were all made out of the hearing of the jury and could not possibly have affected the way the jury viewed defense counsel or appellant. On one occasion, the trial judge did say, in front of the jury, that a repetitive question asked on cross-examination was "wasting the court's time." That lone comment, while it may have been ill-advised, was not the type of judicial conduct that was likely to have seriously prejudiced the defendant. After all, at the end of the evidentiary phase of the case, the trial instructed the jury:

> During the trial, I may have commented on the evidence or even asked a question of a witness. <u>You, ladies and gentlemen of the jury should not draw any inferences or conclusions from that, from my comments or questions either as to the merits of this case or as to my views regarding that witness</u>.

(Emphasis added.)

Generally, jurors are presumed to have understood and to have followed the court's instructions. *See State v. Gray*, 344 Md. 417, 425 (1997) and *Matthews v. State*, 106 Md. App. 725, 743 (1995). That presumption has not been overcome in this case.

We will assume, although the matter is not free from doubt, that appellant, by citing *Diggs*, is asking us to overlook the preservation issue and apply the plain error doctrine. For the reasons that follow, we decline to do so.

We will recognize "plain error" only in instances [that] are "compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial." *See Lawson v. State*, 160 Md. App. 602, 629-30 (2005) (quoting *Stanley v. State*, 157 Md. App. 363, 370 (2004). In *Lawson*, 160 Md. App. at 631, we said:

> "The fact that an error may have been prejudicial to the accused does not, of course, *ipso facto* guarantee that it will be noticed." *Morris* [*v. State*], 153 Md. App. [480] at 512, 837 A.2d 248 [(2003)]. This is because "[i]f every material (prejudicial) error were *ipso facto* entitled to notice under the 'plain error doctrine,' the preservation requirement would be utterly meaningless." *Id*. at 511, 837 A.2d 248.

"Plain error review is a rarely used and tightly circumscribed method by which appellate courts can, at their discretion, address unpreserved errors by a trial court which 'vitally affect[] a defendant's right to a fair and impartial trial.'" *Malaska v. State*, 216 Md. App. 492, 524, *cert denied*, 439 Md. 696 (2014) (quoting *Diggs v. State*, 409 Md. at 286). Importantly, considerations of fairness and judiciary efficiency call for assertions of error to be raised at trial so that "a proper record can be made with respect to the challenge, and . . . the other parties and the trial judge are given an opportunity to consider and respond to the challenge." *Chaney v. State*, 397 Md. 460, 468 (2007). We should engage in plain

error review only when we are confronted with an outcome-affecting error of such magnitude that it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *State v. Rich*, 415 Md. 567, 578 (2010) (some quotation marks and citations omitted).

Based on the record we are convinced that the trial judge's actions about which appellant complains, were not of the outcome-affecting variety that affected the fairness, integrity or the public reputation of appellant's trial. Essentially, the outcome of this case was determined by whether the jury believed Mr. Veasey. Defense counsel was given ample opportunity to cross-examine that witness. Nothing in the record suggests that the juror's evaluation of that witness was affected by any conduct of the trial judge.[4] For the above reasons, we hold that appellant's complaints about the behavior of the trial judge were not preserved for appellate review.

V.

THE CONSPIRACY CONVICTIONS

Appellant was convicted of conspiracy to kill both Mr. Barfield and Ms. Evans. For those crimes he received two identical sentences: life, suspend all but 30 years to run concurrent to the 75 years (total) he had received for his two convictions of second-degree murder and his conviction for use of a handgun in the commission of a crime of violence.

[4] Besides the complaint about the judge's conduct already mentioned, appellant cites several others that are so minor in the context of a "plain error" discussion that they merit no comment.

In this appeal, appellant argues, as he did below, that the evidence was insufficient to prove a conspiracy because there was "no indication of communication between the two gunmen." In support of that argument, appellant asserts:

> According to Mr. Veasey [after the shootings], [a]ppellant and "Dre" ran off in opposite directions. Appellant submits that, apart from acting in concert, there was no proof that [a]ppellant and "Dre" had entered into an agreement.
>
> In terms of the physical evidence, there were 40 caliber bullets recovered from [the body of] Maurice Barfield and 22 caliber bullets recovered from [the body of] Shauntice Evans. This evidence, together with the testimony of Mr. Veasey that the entire episode was over within one minute, suggests that each victim was shot by a different assailant, each armed with a different gun. For these reasons, [a]ppellant submits that the State's proof that he engaged in a conspiracy to commit murder fell short of the standard of proof beyond a reasonable doubt.

(References to record omitted.) (Emphasis added.)

"Conspiracy is defined as the combination of two or more persons, who, by some concerted action, seek to accomplish some unlawful purpose, or lawful purpose by unlawful means." *Rich v. State*, 93 Md. App. 142, 151 (1992). "The crime of conspiracy is complete when the unlawful agreement is reached[.]" *Anthony v. State*, 117 Md. App. 119, 126 (1997). A conspiracy may, of course, be proven through circumstantial evidence. *Seidman v. State*, 230 Md. 305, 322 (1962).

"The concurrence of actions by the co-conspirators on a material point is sufficient to allow the jury to presume a concurrence of sentiment and, therefore, the existence of a conspiracy." *Acquah v. State*, 113 Md. App. 29, 50 (1996) (citation omitted).

There was sufficient circumstantial evidence that appellant and "Dre" conspired to kill Mr. Barfield and Ms. Evans. Veasey testified that Barfield approached the men and

said, "It's on. It's going to be on like Donkey Kong[.]" In response, both appellant and "Dre," without hesitation, removed handguns hidden on their person and fired at Barfield, who immediately ran up the street, with both appellant and "Dre" in pursuit and with both firing at him. After Ms. Evans screamed and closed the door to the car she was in, appellant went to the car, followed by "Dre." The two then fired a fusillade of bullets at Ms. Evans. Once Mr. Barfield came back to help Ms. Evans, appellant and "Dre" started shooting at Mr. Barfield once again.

From the evidence, the jury could reasonably infer that "Dre" and appellant knew Mr. Barfield, and that appellant and "Dre" had armed themselves in anticipation of a violent confrontation with Barfield. What they had planned to do when the violent confrontation occurred was shown by their highly coordinated attack on Mr. Barfield. *Acquah*, 113 Md. App. at 50. Such "concurrence of actions" between appellant and "Dre" was also sufficient for a reasonable jury to infer that a conspiracy existed to kill Ms. Evans, a witness to Mr. Barfield's murder. As has been shown, the attack on Ms. Evans by appellant and "Dre" was highly coordinated. Since both gunmen fired almost simultaneously at each of the two victims, it did not matter (for purposes of the conspiracy counts) whose bullets struck which victim.

JUDGMENTS AFFIRMED; COSTS TO BE PAID BY APPELLANT.

Photographic Array Form
Form 296/07
(Page 2)

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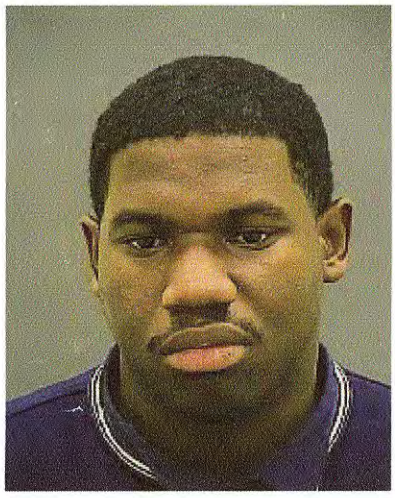

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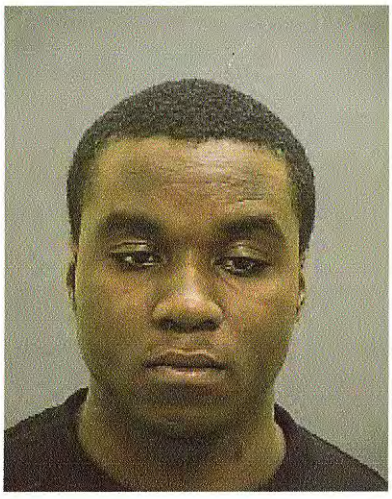

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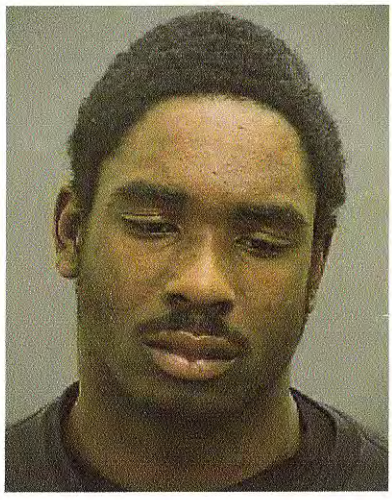

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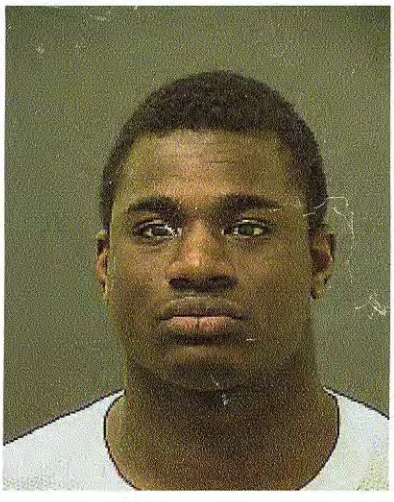

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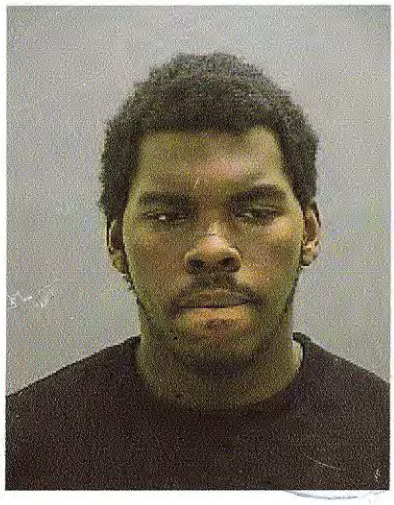

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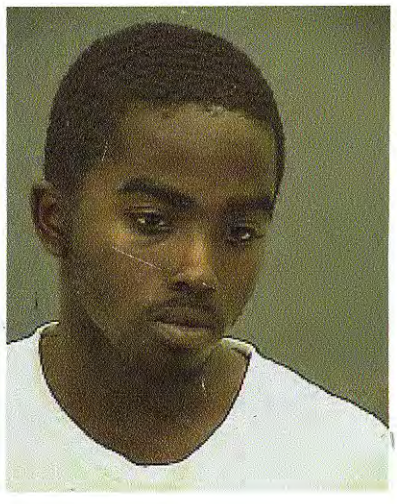

Photographic Array Form
Form 296/07

POLICE DEPARTMENT
BALTIMORE, MARYLAND

PHOTOGRAPHIC ARRAY

Central Complaint Number: 134B10503 Case Number: 13H028

Type of investigation: Homicide Date and time of incident: 2/24/13 2250

Detective/Officer's Name(Last, First, MI): Det. R. Yost Sequence Number: Assignment: CIO/Homicide

Location(Address), Date and Time Photographic Array Shown: 601 E. Fayette ST 8MARch 13

Name of Viewer(Witness, Victim, Complainant, etc.): Timothy Veasy

Read the following caption prior to showing the Photographic Array:-

The six photographs on this form may or may not contain a picture of the subject in connection with this investigation. When looking at the photographs, keep in mind that individuals may not appear exactly as they did on the date of the incident because features such as hairstyles and facial hair(beards and mustaches) may be changed. Photographs may not always depict the true complexion of the person and can be affected by the quality of the photographs. After viewing each photograph, please indicate whether you have made any identification in connection with this investigation.

Viewer's Initials T.V.

Comments:

Started Shooting after Deandre started shooting and went to the car and pulled on door knob after shooting through the window

Timothy Veasy

Det. R. Yost

Det.

If additional space is needed, use supplemental 95's