UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 668

September Term, 2016

DARRIEL BRAITHWAITE

v.

STATE OF MARYLAND

Woodward, C.J.,
Graeff,
Berger,

JJ.

Opinion by Berger, J.

Filed: July 14, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Following a jury trial in the Circuit Court for Baltimore City, Darriel Braithwaite, appellant, was convicted of various offenses arising out of his involvement in a double-stabbing that occurred in the early morning of February 22, 2015. On appeal, appellant presents the following questions for our consideration, which we have slightly rephrased as follows:

1. Whether the trial court erred by sentencing appellant separately for two counts of conspiracy.

2. Whether the suppression court erred by denying appellant's motion to suppress the photographic identifications.

3. Whether the trial court abused its discretion by declining to reinstruct the jury on mitigation of assault in light of its reinstruction on conspiracy and assault.

For the reasons that follow, we shall vacate one of the conspiracy sentences but otherwise affirm the judgments.

FACTUAL BACKGROUND

At about 2:00 a.m. on February 22, 2015, Lindsey Edwards, Alexander Podsedly, and Erich Herbermann went to the Pizza Boli's on Cross Street in the Federal Hill area of Baltimore after going to a few bars nearby. While they were waiting to place their order, a man, later identified as Nicholas Keating,[1] "cut the line" by going to the front of the store to order. Edwards and Herbermann told Keating that there was a line and that "everyone's been waiting." The situation became "confrontational" when Podsedly "exchanged a few

[1] Mr. Keating was appellant's co-defendant at trial, but he is not a party to this appeal.

words" with Keating, and also with appellant, who was standing near the front door waiting for Keating. As Edwards and her friends began leaving the store with their pizzas, Edwards passed appellant and said to him, "let's be cool."

Edwards, Podsedly, and Herbermann left Pizza Boli's with friends and walked in the direction of Edwards' apartment. Edwards noticed appellant and Keating had also left Pizza Boli's, and she told her friends to pick up the pace and keep walking. Suddenly, Herbermann turned around and was punched in the face by Keating two to three times, resulting in a broken nose. Herbermann and Keating proceeded to fight in an alley for two to three minutes. Edwards called 9-1-1 and was trying to break up the fight between Herbermann and Keating when she heard Podsedly say, "Linds, I think I've been stabbed." Podsedly lifted up his shirt and blood was "gushing out." Podsedly suffered multiple stab wounds, including a laceration to his liver that caused internal bleeding, stab wounds to his back and arm that required stitches, and a stab wound to his face. Herbermann was also stabbed in the upper back.

Keating testified at trial that he entered the Pizza Boli's and went to the front of the store to order food. The store owner and employees knew him because he was a regular customer. Edwards and Herbermann approached Keating and told him that he could not cut in line. Then Podsedly told him that there were twelve people there who would "fuck [him] up." The group continued arguing with Keating after they got their pizza. Keating went outside to smoke a cigarette with appellant when he heard someone from Edwards' group say, "Fuck them, I'll kill one of those fucking niggers." Keating walked over to the group and asked, "What the fuck did you just say to me?" Then Herbermann swung at

Keating but missed, Keating returned the punch to Herbermann, and the two men fought until Edwards broke it up. Keating testified that he did not fight with Podsedly and did not stab Herbermann because he did not have a weapon. Keating did not see appellant fight anyone.

Appellant was convicted of: (1) one count of attempted second-degree murder; (2) two counts of first-degree assault; (3) two counts of second-degree assault; (4) two counts of conspiracy to commit second-degree assault; and (5) two counts of carrying a dangerous weapon openly with intent to injure. For sentencing purposes, the court merged one count of first-degree assault (of Podsedly) into the attempted second-degree murder conviction (of Podsedly), and sentenced appellant to ten years' incarceration as to that charge. As to the conviction for first-degree assault (of Herbermann), appellant was sentenced to seven years' incarceration, to run consecutive to the ten year sentence. For each conspiracy to commit second-degree assault conviction, the court sentenced appellant to ten years, all suspended, with a period of three years of probation upon release, to run consecutive to the ten year sentence for attempted second-degree murder. The court also merged, for sentencing purposes, the convictions for openly carrying a dangerous weapon into the attempted second-degree murder conviction and first-degree assault conviction. We shall provide additional facts as necessitated by our discussion of the issues presented.

DISCUSSION

I.

Appellant contends that the circuit court erred by sentencing him separately for the two counts of conspiracy to commit second-degree assault because the two counts should have merged for sentencing purposes. The State agrees, and so do we.

A "criminal conspiracy" has been defined as "'the combination of two or more persons, who by some concerted action seek to accomplish some unlawful purpose, or some lawful purpose by unlawful means.'" *Savage v. State,* 212 Md. App. 1, 12 (2013) (quoting *Mason v. State,* 302 Md. 434, 444 (1985)). The Court of Appeals has held that "[i]t is well settled in Maryland that only one sentence can be imposed for a single common law conspiracy no matter how many criminal acts the conspirators have agreed to commit. The unit of prosecution is the agreement or combination rather than each of its criminal objectives." *Tracy v. State,* 319 Md. 452, 459 (1990); *accord Savage,* 212 Md. App. at 13.

Here, there was only one agreement between appellant and Keating to commit assault, and therefore one conspiracy. The two conspiracy charges should have merged for the purposes of sentencing. Accordingly, we shall vacate one of the sentences for conspiracy to commit second-degree assault. *See Carroll v. State,* 202 Md. App. 487, 518 (2011) ("[W]here merger is deemed to be appropriate, this Court merely vacates the sentence that should be merged[.]"), *aff'd*, 428 Md. 679 (2012).

II.

Appellant contends that the suppression court erred in failing to suppress the pre-trial photographic identifications by Edwards and Herbermann because both

identifications were the result of highly suggestive processes. He argues that by first showing Edwards the surveillance video from Pizza Boli's, then showing her still photographs that were part of the Baltimore Police Department's "Attempt to Identify" bulletin ("police bulletin") that referred to the co-defendants as "suspects" who were "armed and dangerous," and finally, by showing her the photographic arrays, police made it "impossible" for Edwards to independently identify the individuals she had seen in the altercation. Moreover, appellant claims that the placement of each co-defendant's photograph in the same numerical position in the photographic arrays presented to Edwards and Herbermann was unnecessarily suggestive.

In reviewing the denial of a motion to suppress extrajudicial identifications, we are limited to the record of the suppression hearing. *Wallace v. State*, 219 Md. App. 234, 243 (2014) (citations omitted). "We accept the findings of fact and credibility determinations of the circuit court unless they are clearly erroneous, and we examine the evidence and inferences reasonably drawn from the evidence in the light most favorable to the party prevailing before the circuit court, in this case the State." *Id*. (citation omitted). We make our own independent constitutional appraisal by applying the law to the facts of the case. *Id*. at 243-44.

At the suppression hearing, Edwards testified that on February 22, 2015, she was at the Pizza Boli's in Federal Hill with friends waiting in line to get pizza when a man entered the Pizza Boli's, "cut the line," and went straight to the front of the store to order. Edwards and her friend, Podsedly, told the man that there was a line and they were all waiting. On

her way out of the Pizza Boli's, Edwards passed the friend of the man who had cut the line and she said to him, "let's just be cool."

Edwards and her friends began walking in the direction of her apartment when, suddenly, Herbermann was grabbed and punched in the face. Herbermann then began fighting with the man who had punched him. Edwards was calling 9-1-1 when she heard Podsedly say, "Linds, I think I've been stabbed."

When police arrived, Edwards told them to check the surveillance video at Pizza Boli's for video footage of the suspects. As Edwards was preparing to leave for the hospital with Herbermann and Podsedly, police asked her to return with them to Pizza Boli's to view the video footage. Edwards identified appellant and Keating on the video footage. At the hospital, police showed Edwards a still frame of the video footage from Pizza Boli's, and asked her to identify appellant and Keating again.

The following day, police showed Edwards two photographic arrays. In the first array, she identified Keating in photograph number two as Herbermann's assailant. She wrote on photograph number two, "Recognize him from Saturday night's assault, he was the initial person to attack Erich Herbermann - came up behind us and grabbed Erich & punched him in the face." She explained that she recognized Keating in the photograph from his facial tattoo of teardrops under one eye and a second tattoo under the other eye, as well as his "skinny dread locks," his eyes, and his lips. In the second photographic array, Edwards identified appellant in photograph number two as Podsedley's assailant because she remembered his eyes, which "stood out" to her, especially when she spoke to him.

In the first of two photographic arrays shown to Herbermann, he identified Keating in photograph number three as the individual at Pizza Boli's who "tried to cut the line," and with whom Herbermann had spoken before he "charged" Herbermann and punched him in the face repeatedly. Herbermann explained that he was able to identify Keating because he was very close to Keating during the incident, and he was able to see "his face, bone structure, hair, tattoos on his face, all those characteristics."

Herbermann testified that in the second photographic array, he identified appellant in photograph number three as the individual "attacking Alex on the sidewalk by Pizza Boli's with the guy who attacked me." He said that he was able to identify appellant because appellant opened the door for his friends when they were leaving Pizza Boli's, and he saw the characteristics of appellant's face very closely.

Detective Ryan O'Connor testified that his only role in the investigation was to show photographic arrays to the witnesses, and that he did not know who the suspects were in the arrays presented.[2] The detective showed two sets of photographic arrays to Edwards. In the first photographic array, Edwards selected photograph number two, which was Keating. In the second array, Edwards selected photograph number two, which was appellant. In both arrays shown to Edwards, she selected the photographs in position number two in the array.

In the first photographic array shown to Herbermann, Detective O'Connor testified that Herbermann selected photograph number three, which was Keating. From the second

[2] Detective O'Connor referred to this procedure as a "double blind photo array."

photographic array, Herbermann selected photograph number three, which was appellant. Detective O'Connor confirmed that Herbermann selected the photographs in position number three in both arrays.

In the first photographic array, Podsedly was unable to make an identification or select a photograph. In the second photographic array, Podsedly selected photograph number two, which was Keating.

Detective William Bailey testified that on February 22, 2015, he interviewed Edwards and Podsedly at the shock trauma center. Detective Bailey testified that he was unaware that Edwards had already seen the security video from Pizza Boli's when he showed her and Podsedly the police bulletin containing the still photographs from the surveillance video. Detective Bailey confirmed that he showed the police bulletin to Edwards before she viewed the photographic array. Detective Bailey had not noticed that the photographs of appellant and Keating appeared in the same numerical position in each set of arrays until defense counsel brought it to his attention.

At the conclusion of the hearing, defense counsel argued that the police bulletin photographs shown to Edwards and Podsedly were unconstitutionally suggestive because they contained information indicating that the individuals depicted in the photographs were suspects in criminal investigations. Moreover, defense counsel argued that it was highly suggestive for police to show Edwards the photographic arrays after she had observed the video footage and still photographs because it predisposed her to select the individuals in the photographic arrays whom she had observed in the security video and photographs.

Finally, defense counsel argued that the placement of appellant's photograph in the same numbered position in each array was unduly suggestive.

The suppression court denied appellant's request to suppress the photographic identifications of appellant by Edwards and Herbermann,[3] finding that the actions taken by police were not impermissibly suggestive. The suppression court found that there was no police action involved in Edwards' viewing of the security video, and, therefore, there was no suggestiveness on the part of the police. The court found that the still photographs were not suggestive because they simply represented a still photograph of what Edwards had already identified on the video. With respect to the photographic arrays, the court found that there was nothing suggestive in the array booklets, and there was an independent basis for both Edwards and Herbermann's identifications of appellant.

Police often use photographic arrays as an investigative tool to identify suspects, and, when properly conducted, the identification evidence has been held to be admissible. *Jones v. State*, 395 Md. 97, 107 (2006). The principles of due process protect criminal defendants from "the unfairness that would result from the admission of evidence that is based on an identification procedure that was 'unnecessarily suggestive' and conducive to misidentification at trial." *James v. State*, 191 Md. App. 233, 252 (2010).

We determine the admissibility of disputed identification evidence using a two-step inquiry. *Smiley v. State*, 442 Md. 168, 180 (2015) (citation omitted). First, we must determine whether the identification procedure was impermissibly suggestive. *Id*. (citation

[3] The suppression court allowed appellant's request to suppress Podsedly's pretrial identification of appellant, but permitted Podsedly to testify as to the video footage.

omitted). If the procedure used was not impermissibly suggestive, then the inquiry ends. *Id*. If the defendant establishes that the procedure employed to obtain the identification was impermissibly suggestive, then the court must determine whether, based on the totality of circumstances, and despite the suggestiveness of the procedure, the identification was nonetheless reliable. *James v. State*, 191 Md. App. at 252. *Accord Smiley*, 442 Md. at 180. "Suggestiveness can arise during the presentation of a photo array when the manner itself of presenting the array to the witness or the makeup of the array indicates which photograph the witness should identify." *Id.*

To be impermissibly suggestive, there must be some police conduct that "tips off" the witness as to which photograph is the suspect's photograph. *Conyers v. State*, 115 Md. App. 114, 121 (1997) ("The sin is to contaminate the test by slipping the answer to the testee.") (emphasis omitted). In *Wallace*, *supra*, the defendant challenged the identification procedure where the victim testified that prior to being shown the photographic array, the detectives informed him that "they had the person." 219 Md. App. at 245. We held that the identification procedure was not impermissibly suggestive "because the detective 'did not in any way suggest which photograph or photographs were of the suspect or give any indication why the person in the photograph was suspected of having committed the robbery.'" *Id.* at 246-47 (quoting *State v. Bolden*, 196 Neb. 388, 243 N.W.2d 162, 164 (1976)).

The fact that Edwards viewed the surveillance video and the photographs on the police bulletin, which indicated that appellant was a "suspect" who was "armed and dangerous" prior to her viewing of the array, did not render the array impermissibly

suggestive. Edwards had identified appellant and Keating on the video in the moments following the altercation. The still photographs used in the bulletin were duplicates of the images that Edwards had already seen, and there was no evidence that the police said anything suggestive to Edwards about which photographs to select from the array. Moreover, Edwards explained that she identified appellant based on her independent recollection of his appearance, especially his eyes, when she spoke to him as she was leaving the Pizza Boli's.

Appellant also contends that the actual array was impermissibly suggestive because his and Keating's photographs were placed in the same position for both arrays. We are not persuaded. The placement of the photographs in the same numeric position for each array would only be permissibly suggestive if there was some evidence that Edwards and Herbermann had any reason to notice it. *See Morales v. State*, 219 Md. App. 1, 18 (2014) (concluding that the identification procedure was not impermissibly suggestive where there was nothing in the record to suggest that the witnesses had any reason to notice the repeated use of appellant's photograph in the array) (citing *Jenkins v. State*, 146 Md. App. 83, 128 (2002) (noting that although it may be a factor that appellant was included in both a line-up and photo array, the procedure "would only be suggestive if there was some reason for [the witness] to notice it.")).

Here, there was no evidence that the placement of appellant's photograph in the same numeric position in both arrays was anything more than a coincidence. "[N]o matter where in the array a defendant's photograph is placed, he can argue that its position is suggestive." *People v. Johnson*, 3 Cal. 4th 1183, 1217, 842 P.2d 1, 17 (1992) (rejecting

defendant's claim that the photographic array created two "suggestive subsets of photos" where three "new" photographs that the witness had not previously seen were placed in the top row of the array and a more recent photograph of defendant was placed in the bottom row of the array alongside two photographs that the witness had seen previously) (citation omitted). Based on our review of the evidence introduced at the suppression hearing, we conclude that the court did not err in finding that the pretrial identification process and the photographic arrays were not impermissibly suggestive.

We also note that even if the suppression court erred in denying the motion to suppress, such an error would be harmless. *See Dionas v. State*, 436 Md. 97, 108 (2013) (an error is harmless when a reviewing court is "satisfied that there is no reasonable possibility that the evidence complained of – whether erroneously admitted or excluded – may have contributed to the rendition of the guilty verdict") (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). As the State points out, appellant's identity was not an issue in this case. Appellant and Keating acknowledged that they were involved in an altercation, and their defense was that they were provoked. Keating testified that he was with appellant at the Pizza Boli's on February 22, 2015, and that he was waiting outside the store with appellant when he was struck by Herbermann.

At trial, Herbermann identified appellant and Keating in court as his assailants, without objection. Podsedly also identified appellant in the security video and still photographs at trial, without objection. The State introduced into evidence the surveillance video from Pizza Boli's and the video from the parking lot outside, which showed appellant involved in the altercation outside Pizza Boli's. Accordingly, we conclude that the pretrial

identifications of appellant were cumulative of other more prejudicial evidence presented at trial, and the admission of the pretrial identification evidence was harmless beyond a reasonable doubt. *See McClurkin v. State,* 222 Md. App. 461, 484-85 (2015) (holding that erroneous admission of evidence was harmless where the evidence was cumulative of other more prejudicial evidence in an "overall" strong case against appellant).

III.

During deliberations, the jury sent a note to the court that read, "Can we please have clarification on the law pertaining to conspiracy to commit assault (1st and 2nd second degree) – Count 4 and Count 6 for Mr. Braithwaite." The court explained to counsel that it intended to respond to the jury's question by reading the instruction for conspiracy and incorporating that instruction into second-degree assault and first-degree assault. In response, defense counsel requested that the court respond to the jury question as follows:

> Your Honor, in response to that question, the question about conspiracy. I'd ask that the instruction for conspiracy be read to the jury and not the instruction for assault. But if the Court is going to read the instruction for assault, I'd ask that -- and the reason being that they were read the instructions yesterday afternoon, this is another day, they may or may not remember -- if they are going to be refreshed as to the elements of assault, I'd ask that their memory also be refreshed as to the instructions of mitigation of assault, for assault.

The court refused defense counsel's request and provided the jury with the definition for conspiracy and then incorporated the elements of first-degree assault and second-degree assault into conspiracy. The court noted defense counsel's objection and explained, "I did the best I could to answer the specific question that was asked and it is my policy in answering questions from the jury to answer what they're asking for."

Maryland Rule 4-325(a) permits the court to supplement jury instructions "when appropriate." The trial court's decision to give a supplemental jury instruction is within the discretion of the trial court and will not be disturbed except on a clear showing of an abuse of discretion. *Appraicio v. State*, 431 Md. 42, 51 (2013) (citations omitted). "[T]rial courts have a duty to answer, as directly as possible, the questions posed by jurors." *Id*. at 53. In addition, a "court must respond to a question from a deliberating jury in a way that clarifies the confusion evidenced by the query when the question involves an issue central to the case." *State v. Baby*, 404 Md. 220, 263 (2008). In responding to juror questions, the court must "walk a fine line," because "[a]ny answer given must accurately state the law and be responsive to jurors' questions without invading the province of the jury to decide the case." *Appraicio*, *supra*, 431 Md. at 44.

Appellant contends that the trial court abused its discretion in failing to reinstruct the jury on mitigation for assault in addition to the elements of conspiracy and first and second-degree assault. He asserts that because the jury requested clarification of the charges of conspiracy to commit first and second-degree assault, a reinstruction on mitigation of assault was also required.

In its initial instruction, the court had instructed the jury on the elements of all of the crimes charged, including conspiracy and first and second-degree assault. The court also instructed the jury that the attempted murder charges could be mitigated if the jury found that appellant acted in "hot-blooded response to legally adequate provocation." *See* Maryland Criminal Pattern Jury Instruction 4:17.4 (2d ed. 2016 Supp.) (hot-blooded response to legally adequate provocation). The court further explained to the jury that the

only "legally adequate provocation" in this case was "a fight between the victim and [appellant]," that is "sometimes referred to as a mutual affray." In closing argument, appellant's trial counsel argued that appellant was provoked by Podsedly and Herbermann, and that it was the words, "I don't care, I'll kill those fucking niggers," combined with the fact that Herbermann threw the first punch, that caused the fight that night.

A reinstruction on mitigation of assault may have been appropriate if the jury had asked about the effect of appellant's claim that he was provoked on the charges of conspiracy and assault. *See Williams v. State*, 232 Md. App. 342, 359 (2017) (holding that the trial court did not abuse its discretion when it reinstructed the jury only as to the definition of second-degree assault, which the jury requested, and it refused to reinstruct the jury on the defense of property, which appellant claimed was one of his defenses). In this case, the jury requested clarification on conspiracy as it related to first and second-degree assault only, and the trial court responded by providing the definitions requested. The trial court did not abuse its discretion in declining to reinstruct the jury as to mitigation of assault, which was beyond the scope of the jury's request.

CASE REMANDED WITH INSTRUCTIONS TO VACATE ONE OF THE CONSPIRACY SENTENCES. JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE PAID 2/3 BY APPELLANT AND 1/3 BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.