Circuit Court for Baltimore City
Case No. 116222009

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 21

September Term, 2017

NAMON LEGGETT

v.

STATE OF MARYLAND

Friedman,
Beachley,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: March 27, 2018

*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.

Appellant Namon Leggett, was found guilty of carjacking, robbery, second-degree assault, and theft of a motor vehicle by a jury in the Circuit Court for Baltimore City. He was sentenced to 30 years imprisonment (with all but 12 years suspended) for the carjacking, and concurrent terms of 8 years for the robbery, 3 years for the second-degree assault, and 3 years for the theft. This timely appeal followed.

Leggett presents two issues for our consideration:

I. Whether the circuit court erred in denying a motion to suppress a show-up identification; and,

II. Whether his second-degree assault conviction should have merged into the robbery conviction.

We agree that the second-degree assault conviction should have merged into the robbery conviction. Accordingly, we vacate the sentence for second-degree assault. In all other respects, we affirm.

FACTUAL BACKGROUND

On July 15, 2016 around 2 p.m., William Purnell was parked in a rented Dodge Stratus on East University Parkway in Baltimore City, when Leggett entered the passenger side of the vehicle, pulled a brown ".25 automatic" gun from his crotch, pointed it at Purnell, and said, "[e]mpty your pockets and get out of the car." Purnell gave Leggett $42 and got out of the car. Leggett then got into the car and drove off. Shortly thereafter, police found the car crashed into a pole near the intersection of Guilford Avenue and 25th Street. Police brought Purnell to a nearby alley where he saw Leggett and identified him as the man who had carjacked him.

DISCUSSION

I. THE SHOW-UP IDENTIFICATION

A. Suppression Hearing

Leggett contends that the circuit court erred in denying his pre-trial motion to suppress Purnell's "show-up" identification—the one-on-one confrontation between Leggett and Purnell, where Purnell identified Leggett as the perpetrator of the carjacking. In considering the denial of a motion to suppress, we look only to the record of the suppression hearing. *Wallace v. State*, 219 Md. App. 234, 243 (2014).

At the suppression hearing, Purnell testified that on July 15, 2016, less than 10 minutes from the time he had been carjacked, he was brought to the 2400 block of Guilford Avenue by "campus police." There, several police officers walked him through an alley to observe a suspect who police had detained there. Purnell testified that the officers told him "we got the suspect. We're going to take you around to identify him." Purnell observed someone, later identified as Leggett, who was handcuffed and in police custody sitting about 12 or 13 feet away.

A couple of police officers lifted Leggett to his feet. According to Purnell, the police "had the guy roughed up," which he explained meant that "when they w[ere] picking him up … he was … yelling and stuff like that." Purnell did not observe anyone draw a weapon or hit, shout, or yell at Leggett. The police asked Purnell if Leggett was the guy who carjacked him. Purnell testified that he "stood there. I was like—I had to be sure. I was like, 'I guess that's him.'"

Purnell stated that he recognized Leggett by his gray and black clothing, explaining, "I had to get a good look at him to make sure—I wasn't too sure about whether that's him. I had to go by the clothing, but I couldn't —the face, I didn't really look. I'm like, 'Yeah, that's the person who got the car.'" Purnell also stated that he thought Leggett was the carjacker but he wasn't "100% sure." Later, Purnell told a detective that the guy he saw "[d]efinitely was" the person who carjacked him and he identified a photograph of Leggett as the carjacker.

Baltimore City Police Officer Dennis Jones testified that Leggett was apprehended after a chase. No police officer suggested to Purnell that Leggett was the person who carjacked him. There were four to five police officers and two medics in an ambulance on the scene, and a police helicopter overhead. Two officers stood next to Leggett and two officers were in a nearby yard searching for a weapon. In contrast to Purnell's testimony, Officer Jones stated that Purnell identified Leggett from inside a police vehicle that was about 10 houses away and that he had a "clear shot straight down the alley."

At the conclusion of the suppression hearing, the court denied Leggett's motion stating, in part:

> [H]aving considered all of these factors, and the case law … I do not find that this situation is impermissibly suggestive. … but even passing over that and looking at the totality of the circumstances, I do not find that there were conditions that, to this Court, would cause concern on my part that Mr. Purnell's identification was unreliable to the point of irremediably prejudicing the defendant.

Leggett asserts that he was "unquestionably subject to an inherently suggestive 'show-up' identification procedure[.]" He argues that the police contaminated the identification by repeatedly telling Purnell that they had the suspect in custody and by presenting Leggett to him "roughed up," handcuffed, and surrounded by uniformed officers. Moreover, although Purnell said in his report to police that Leggett was "definitely" the person who carjacked him, he repeatedly testified that at the scene of the show-up identification he was uncertain and his identification appeared to have been based solely on Leggett's clothing. In addition, Officer Jones's testimony confirmed that Leggett was handcuffed and surrounded by police officers and suggested that Purnell viewed Leggett from inside a police vehicle at a distance of about 10 houses away. Thus, Leggett maintains that the suppression court erroneously concluded that the show-up identification procedure was not impermissibly suggestive and that, "particularly when viewed through the lens of the corrupting influence of the suggestive procedure," Purnell's subsequent identification was unreliable. We disagree.

B. <u>Standard of Review</u>

In reviewing a trial court's ruling on a motion to suppress we grant great deference to the suppression court's determination of the credibility of witnesses and its weighing and determination of first-level facts. *Wallace*, 219 Md. App. at 243. We consider the facts in the light most favorable to the prevailing party, in this case the State. *Id.* We review the trial court's conclusions of law without deference and make our "own … assessment by applying the law to the facts of the case." *Id.* at 243-44.

"A conviction [that] rests on a mistaken identification is a gross miscarriage of justice[,]" and courts must exclude an out-of-court identification when "the confrontation resulted in such unfairness that it infringed [the defendant's] right to due process of law." *Stovall v. Denno*, 388 U.S. 293, 297-99 (1967), *overruled on other grounds by Griffith v. Kentucky*, 479 U.S. 314 (1987); *see also James v. State*, 191 Md. App. 233, 251-52 (2010). We recognize, however, that a suggestion of guilt is inherent in any show-up. Implicit in arranging a show-up is that the police have some reason for conducting it. As the Court of Appeals has stated:

> The admissibility of an extrajudicial identification is determined in a two-step inquiry. The first question is whether the identification procedure was impermissibly suggestive. If the procedure is not impermissibly suggestive, then the inquiry ends. If, however, the procedure is determined to be impermissibly suggestive, then the second step is triggered, and the court must determine whether, under the totality of circumstances, the identification was reliable. If a *prima facie* showing is made that the identification was impermissibly suggestive, then the burden shifts to the State to show, under a totality of the circumstances, that it was reliable.

Smiley v. State, 442 Md. 168, 180 (2015) (cleaned up).[1] We have said that:

> Impermissible suggestiveness exists where the police, in effect, repeatedly say to the witness: "This is the man." To do something impermissibly suggestive is to feed the witness clues as to which identification to make. The sin is to

[1] "Cleaned up" is a new parenthetical intended to simplify quotations from legal sources. *See* Jack Metzler, *Cleaning Up Quotations*, J. APP. PRAC. & PROCESS (forthcoming 2018), https://perma.cc/JZR7-P85A. Use of (cleaned up) signals that to improve readability but without altering the substance of the quotation, the current author has removed extraneous, non-substantive clutter such as brackets, quotation marks, ellipses, footnote signals, internal citations or made un-bracketed changes to capitalization.

> contaminate the test by slipping the answer to the testee. All other improprieties are beside the point.

In re Matthew S., 199 Md. App. 436, 448 (2011) (cleaned up).

If the procedure is found to be impermissibly suggestive, the court must consider the totality of the circumstances to determine whether there is a substantial likelihood of irreparable misidentification. *Neil v. Biggers*, 409 U.S. 188, 199 (1972). "It is only where there is 'a very substantial likelihood of irreparable misidentification,' [specifically] a situation where the identification could not be found to be reliable, that exclusion would be warranted. Short of that point, the 'evidence is for the jury to weigh.'" *Turner v. State*, 184 Md. App. 175, 184 (2009) (quoting *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977)).

C. Impermissible Suggestiveness

Leggett suggests three factors indicate the suggestiveness of the show-up identification: (1) the words of the police explaining the show-up; (2) Leggett's appearance during the show-up; and (3) the security measures that the police took during the show-up. We analyze each in turn.

The record reveals that the police officer told Purnell "[w]e're going to take you and make sure that's the guy that took your car." The police also said, "we got the suspect. We're going to take you around to identify him." Rather than suggesting the outcome, we understand the police officer to have merely conveyed the procedure that was going to be employed. Moreover, Purnell testified that during the confrontation he "had to get a good look" at Leggett "to make sure." This testimony indicates that any prior comments by the police to Purnell did not suggest that Leggett was the person who committed the crime.

To the extent that Purnell testified that Leggett appeared "roughed up," it does not appear that Purnell meant it in the common sense of the phrase—that Leggett had been beaten. Rather, the record is clear that Purnell did not see police officers hit, scream at, or point their weapons at Leggett. There is nothing in the record to suggest that Leggett's appearance was attributable to police conduct. Rather, the record shows that Leggett and officers had been engaged in a foot chase on a bright day in mid-July and that Leggett was ultimately found crouching under a stoop. The record also shows that when Leggett was apprehended, he complained of pain and was offered medical treatment, which he refused.

With respect to whether the show-up was impermissibly suggestive because Leggett was handcuffed and surrounded by police officers when Purnell observed him, the suppression judge looked to our decision in *Anderson v. State* for guidance. 78 Md. App. 471 (1989). In that case, one of the defendants argued that his identification by a robbery victim was impermissibly suggestive because the victim identified him when he was face down on the ground surrounded by at least ten armed police officers. *Id.* at 494. The Defendant also asserted that the victim heard radio communications describing the suspects as he was being transported to the scene of the show-up in a police vehicle. *Id*. In addressing these arguments, we recognized that the identification at issue typified "the very nature of the one-on-one show-up at or near a crime scene in the immediate aftermath of a crime." *Id.* In addition, "[t]he reliability that is gained through the immediacy of the identification far outweighs the peripheral suggestiveness of the circumstances." *Id.* We concluded that there was nothing about the suggestiveness that was impermissible, stating:

> The radio traffic was part of necessary police work, particularly in a volatile and rapidly unfolding situation …. The police are not required to muffle the ears of a passenger in a patrol car. What is constitutionally forbidden, of course, is not all suggestiveness but only impermissible suggestiveness. Whatever happened here was permissible.

Id. With regard to the suspect's prone position and the fact that he was surrounded by police officers, we stated that "[t]he response in force to the capture of armed and dangerous men was not only permissible but imperative. *Id.*

In light of our decision in *Anderson*, we are convinced that here, the suppression court did not err in finding that Purnell's identification of Leggett at the show-up was not impermissibly suggestive. Purnell was taken directly from the scene of the crime to the show-up about ten to fifteen minutes after the crime had been committed. Although Leggett was handcuffed and surrounded by five to six officers, these facts did not even rise to the level of suggestiveness allowed in *Anderson*.

Thus, we hold that the suppression court did not err in finding that the show-up identification of Leggett was not impermissibly suggestive.

D. Reliability

Even if the show-up identification had been impermissibly suggestive, that would not necessarily compel reversal. Rather, it would compel us to next consider whether, under a totality of the circumstances, there was a substantial risk of irreparable misidentification. *Turner*, 184 Md. App. at 180-81.That requires us to consider, among others, the following factors:

> (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.

Biggers, 409 U.S. at 199-20.

As for Purnell's opportunity to view Leggett at the time of the crime and Purnell's "degree of attention," the suppression court found that there was no evidence with respect to either consideration. With respect to the accuracy of Purnell's description, there was evidence that Leggett's clothing at the time of the show-up matched the description given by Purnell. As to Purnell's level of certainty at the confrontation and the length of time between the crime and the confrontation, the suppression court noted that although Purnell was not absolutely certain, he took his time to be sure of his identification. Moreover, the crime occurred only ten to fifteen minutes prior to the show-up identification. Even though the suppression court determined that the show-up identification was not impermissibly suggestive, it considered the totality of the circumstances, including the factors set forth in *Biggers,* and properly concluded that Purnell's identification of Leggett was not inherently unreliable. We see no error here.

II. MERGER

Leggett's sentences included eight years for robbery and a concurrent term of three years for the intent to frighten form of second-degree assault. He maintains that his sentence for second-degree assault should have been merged into his sentence for robbery. The State agrees and so do we.

The jury was instructed that it could convict Leggett of second-degree assault if it found, among other things, that he "intentionally frighten[ed] another person with the threat of immediate offensive physical contact or physical harm." During closing argument, the prosecutor relied on evidence that Leggett brandished a gun and ordered Purnell out of his car, but made no specific argument with respect to the second-degree assault charge. Because there is nothing in the record to show that the criminal acts involved in the second-degree assault charge were independent from the acts involved in the robbery, and because it is well established that simple assault is a lesser included offense of robbery, the two offenses are not separate and distinct acts. *Snowden v. State*, 321 Md. 612, 616 (1991). We hold that the circuit court erred in imposing separate sentences for robbery and second-degree assault. Accordingly, we shall vacate Leggett's sentence for second-degree assault.

SENTENCE IMPOSED ON CONVICTION FOR SECOND-DEGREE ASSAULT VACATED. ALL OTHER JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE DIVIDED EQUALLY BETWEEN APPELLANT AND THE MAYOR AND CITY COUNCIL OF BALTIMORE.