Circuit Court for Harford County
Case No.: 12-K-18-000288

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 821

September Term, 2018

MICHAEL FREEMAN SAUNDERS, JR.

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: April 23, 2019

Appellant, Michael Freeman Saunders, Jr., was indicted in the Circuit Court for Harford County, Maryland, and charged with possession of heroin with intent to distribute, possession of heroin, possession of cocaine, illegal possession of marijuana, possession of paraphernalia, two counts of illegal possession of a regulated firearm, two counts of possession of a firearm with a sufficient nexus to a drug trafficking crime, and illegal possession of ammunition. After his motion to suppress was denied, appellant entered a not guilty plea on an agreed statement of facts and was convicted of possession with intent to distribute heroin and one count of possession of a firearm with a sufficient nexus to a drug trafficking crime. Appellant was sentenced to concurrent sentences of twenty years, with all but seven years suspended, as to both counts. Upon this timely appeal, appellant asks:

> Did the lower court err in denying Appellant's motion to suppress the fruits of a search conducted pursuant to a warrant when, with reckless disregard for the truth, the affiant omitted and mischaracterized crucial information as to the identification of the Appellant?

For the following reasons, we shall affirm.

BACKGROUND

Search Warrant

The search warrant was to search appellant's residence, located at 1494 Harford Square Drive, in Edgewood, Maryland, in connection with the July 22, 2017 shooting and attempted murder of Edward Trafton. Pertinent to the issue on appeal, the application in support of the warrant provided as follows:

> On August 8th, Detective Culver and Cpl. G Dietz had occasion to interview an eye witness. At this time, the witness will remain nameless due

> to the nature of the crime, what was witnessed and the witnesses' [sic] safety. It was reported that the shooter knocked on the victim's door and he answered it. A short time later, the suspect drew a handgun from his waist while still inside of the victim's residence. The witness seeing the handgun fled the scene and while running away heard subsequent gunshots.
>
> The shooter was described to be a black male, in his twenties to thirties, average height, a muscular build and a bald head with tattoos on it. Said shooter drives a white BMW passenger vehicle and goes by "Mike". Assisting detectives of the Criminal Investigation Division were able to tentatively identify the shooter as Michael Saunders from various law enforcement resources which met the above mentioned criteria.
>
> A recent Parole and Probation image of Michael Saunders was shown to the witness who positively identified him as the suspect drawing the handgun.
>
> Detective Culver learned from Parole and Probation that Michael Saunders is a current client and listed his home address as 1494 Harford Square Drive "C" Court in Edgewood, Maryland.
>
> Detective Culver also learned through the Maryland Vehicle Administration that Michael Saunders is a registered owner of a white 2007 BMW 750LI four door sedan displaying Maryland registration plates 8CK0362.

Motions hearing

Prior to trial, appellant moved to suppress evidence seized as a result of the search warrant on the grounds that the application was based on an improper identification of appellant as the shooter by a witness, Lawrence Gannon.[1] More specifically, appellant's counsel argued that the affiant, Harford County Sheriff's Detective Seth Culver,

> basically provides the information that he wants Mr. Gannon to recite. He shows the witness[,] Mr. Gannon[,] one photograph of my client and prefacing that with the statement this is who I think the shooter is and then

[1] Appellant also contested whether the warrant needed to be a "no knock" warrant. That issue is not raised on appeal.

> shows a photograph to Mr. Gannon. He says he tells Mr. Gannon who he thinks the shooter is. He tells the shooter [sic] does the name Mike ring a bell, Michael Saunders. He tells the witness when the witness says he was driving a fancy car, the suspect was driving a fancy car, Detective Gannon provides the make of the car, a BMW.
>
> So, Detective Gannon is basically filling in a lot of gaps here. Your Honor, we feel that Mr. Gannon's testimony is not nearly sufficient. It is so tainted by Detective Culver's process of questioning him that the affidavit should fail.

At the hearing, Harford County Sheriff's Detective Seth Culver confirmed that, prior to the application for the search warrant, he and Corporal Dietz interviewed Lawrence Gannon, a person of interest who ultimately disclosed that he witnessed the shooting.[2]

During that interview, Gannon initially denied seeing the shooting, but he agreed he knew the victim and had been with him at his residence earlier in the day. The detective told Gannon that a number of people were "saying you were there" but that he did not think he was the shooter. Detective Culver told Gannon that he had a "theory of who the shooter is," and that Gannon was going to be charged with attempted murder, and that, during the interview Gannon had "an opportunity to go from a suspect to a witness." He also told Gannon that, ordinarily anyone charged with attempted murder was not going to make bail and would stay incarcerated until trial.

Culver further agreed that he intended to show Gannon a single photograph of the shooter, stating that it was the person "who I think actually did the shooting." Culver also told Gannon "[y]ou can help yourself out by IDing the shooter. That's the only way you

[2] Transcripts of that interview were admitted at the motions hearing without objection.

start digging yourself out of the grave. You didn't shoot anybody; he did. No need for you to rot for his sins. The time is now." Detective Culver also agreed then stated: "Tell me who the shooter is. Shit, I'll show you a picture. All you gotta do is point. He's not gonna get bail. He's not gonna get out. You and your family will be safe. This isn't snitching bullshit." Gannon maintained that he did not know who the shooter was.

After again reminding Gannon that witnesses placed him at the scene of the shooting, and that "[y]ou're going to jail for him," the following ensued:

> GANNON: I'm not going to jail for him. I'm not going to jail for nobody.
>
> CULVER: Okay.
>
> GANNON: You say got pictures and shit.
>
> CULVER: The only way I can show you a picture is if you're gonna cooperate and give me a name. I'm not gonna show you random pictures. What if you're in cahoots with this guy, right? And you tip him off.

Detective Culver then told him, "[n]ame the shooter or don't name the shooter and take your chances with the criminal justice system." Gannon replied that he did not know the name of the shooter and that he was not involved. It was at this point that Gannon affirmatively asked for the photograph:

> GANNON: Where the picture at? Go ahead and pull . . . come on, cause I don't. . .
>
> CULVER: You gonna ID a shooter?
>
> GANNON: Yeah, I don't . . . I don't know nothing. Come on; show me something. I don't talk to nobody; none of that. I be in the house sir. That' what I'm telling you. This shit right here shouldn't even be on these papers period. I don't have nothing.
>
> CULVER: You gonna ID the shooter?

> GANNON: Put it. . . I don't . . . yeah, go ahead cause I don't know nothing about none of this. That's something new to me. I came by myself and left by myself. I know you probably . . . he got in an argument same day with somebody earlier and I don't know nothing about nothing sir.

After a short break, Gannon told the detective that he had "heard of a name" of the shooter "floating in the street." Asked what name he heard, Gannon volunteered the names "Two" and "Mike." Gannon stated that he did not know anyone named "Two," but that he knew a "Mike" from school. Gannon heard on the street that the victim was arguing with someone who was bald. According to Gannon, "Mike" was bald, African-American, somewhat short and stocky, and had been at the victim's house on a prior occasion. Asked by the detective if "bald[-]headed Mike" had any tattoos, Gannon answered that he had a tattoo on his head. Gannon confirmed that the word on the street was that "Mike" was the shooter. However, at this point during the interview, Gannon maintained that although "Mike" may have come to the victim's house, Gannon did not see him that evening.

Gannon was then asked if "Mike" owned a car, and Gannon replied that he owned a "white car." Detective Culver asked about the vehicle's make, inquiring whether the car was a Ford, Lexus, Infinity or BMW, and Gannon replied "[l]ike fancy shit" with "curtains on the window" that "roll up or something." Detective Culver testified at the motions hearing that he then showed Gannon a photograph of a white BMW.

At this point, the detective offered Gannon a cigarette. While Gannon was taking a break, apparently outside the interview room, the recording continued. The detective then stated "[i]f I can find a picture of bald[-]headed Mike . . . [y]ou think you could say yeah, that's bald[-]headed Mike?" Appellant replied in the affirmative. The detective continued

by telling Gannon that when people identify suspects, they typically make a proffer that could be presented to the State's Attorney to obtain a reduced sentence or possibly dismissal of the charges. However, the detective continued, the person making the identification has to be willing to testify in court. And, he continued that, sometimes, cases with good identifications do not go to trial.

When Detective Culver and Gannon returned to the interview room after the smoke break, the detective asked Gannon, hypothetically, if he happened to see "bald[-] headed Mike" at a convenience store, would he recognize him. Gannon replied that he would and that "I seen him more than t … I just … I seen him 2 times sir" at the same location.

After another short break, the interview resumed. Detective Culver showed Gannon a photograph and asked "[i]s that bald Mike with the white car you're talking about?" and Gannon replied "Yeah, no tattoo on his head" and "[i]t look just like him." Gannon explained that "I seen him 2 times and this the name that I heard and they, they said they got into an argument so . . ."[3]

After this, Gannon asked if he could go home, and the detective replied that he could not make promises or deals, and that would be up to the State's Attorney. Corporal Dietz, who had been present the entire time, then spoke and told Gannon that "[t]his is your chance to tell us what happened." Gannon replied, "I'm not trying to be on no stand pointing nobody out and that . . ." Detective Culver informed him that the case may not even go to trial. But, Corporal Dietz told Gannon that, because there was an arrest warrant

[3] Culver agreed that he did not show Gannon any other photographs.

for him, that he was going to be arrested for attempted murder and "probably gonna spend the night in jail tonight definitely." And, both detectives maintained, throughout the interview, that they did not have the authority to make any deal with Gannon, but they could tell the State's Attorney whether he cooperated, whether they believed that Gannon was telling the truth, and whether they thought he was a witness or a suspect.

Thereafter, after Corporal Dietz exhorted Gannon to "tell us the truth" and after Detective Culver told him that "[w]e believe you but we need . . . facts," Gannon admitted that he was present at the victim's house when appellant pulled out a gun and started shooting. Specifically, Gannon came by the residence late to drink with the victim and a few other individuals. Shortly after he arrived, appellant came to the door and was admitted by the victim. Gannon continued:

> Next thing you know you just see him whip out. Everybody run out the house. V run out the house. That's when you hear shots. We, um . . . I'm already gone; I'm making it to the other side. So I don't have nothing to do with that period. He didn't come with me. And then I came by myself. And everybody got out the house. I didn't see nobody get shot; none of that. . . .[4]

Gannon confirmed that he saw "Mike" pull out a black gun and that "Mike" was the same man he identified in the photograph. He explained that he could identify "Mike" "cause I could see the outline of a tattoo right there on this forehead right there. And that's all."

On cross-examination, Detective Culver confirmed that Gannon was the only witness to formally identify appellant. However, he also testified that, although the

[4] Gannon agreed that he knew Edward Trafton by his nickname, "Little V."

surviving victim provided him with the name "Mike," the victim was "uncooperative" and was not "comfortable providing the official I.D." of appellant as the shooter.

With respect to the issue raised, Detective Culver explained that he only showed Gannon a single photograph because his information was that Gannon came into the victim's residence at the same time as the shooter and that "[i]n my mind they know one another." Therefore, instead of using a photo array, it was simply "a verification of I.D. at that point. We show them a known photograph of the person in question and they verify their identity."[5] In addition, and consistent with Gannon's statement, Culver confirmed that it was Gannon who initially provided a description of the suspect's vehicle as a white, four door luxury car with curtains on the windows, before the detective asked if the car was a BMW.[6]

Finally, Detective Culver testified that, prior to the interview, he read Gannon his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and that Gannon agreed to speak with him after waiving those rights. Detective Culver also maintained that he did not make any deals with Gannon, nor did he make him any promises, threats or inducements. The detective confirmed that the attempted murder case against appellant

[5] On further cross-examination, and over defense objection, Detective Culver testified that, before the interview with Gannon, the victim's girlfriend gave a description of the shooter, including that he was bald and had a tattoo on the top of his skull, along with the first name "Mike." After relaying that information to another police officer, Detective Culver developed appellant as a suspect. Detective Culver further testified that it was the victim who told him that Gannon arrived with the shooter on the night in question and that Gannon was not the shooter.

[6] The detective testified that appellant's car matched that description.

ultimately was nol prossed, and that this case concerned the narcotics and guns found during the course of execution of the search warrant.

After the testimony was received, appellant's counsel argued that the information in the warrant was "tainted" because

> Detective Culver tries to get Mr. Gannon to move from a suspect to a witness and does pretty much whatever he needs to do to get him there. He tells him about the proffer procedure, assures him that if he were to cooperate, if he names the shooter that everything will be just fine.

Appellant's argument concluded on this issue as follows:

> [DEFENSE COUNSEL]: Your Honor, overall I think Detective Culver was used [sic] misleading methods to get the information that he got from Mr. Gannon. So, we feel, Your Honor, the warrant should fail because of the lack of veracity from Mr. Gannon.
>
> THE COURT: Well, you are claiming there was some false information in the affidavit and now you are saying lack of veracity. So, point me to the false information.
>
> [DEFENSE COUNSEL]: Your Honor, what you see or what you get if you read all of the transcript from the beginning to end, Mr. Gannon is totally all over the place. At first he denies being there. He denies any involvement and then —
>
> THE COURT: Well, that never happens. So, your allegation of falsehood is based on what you have just argued?
>
> [DEFENSE COUNSEL]: Correct, Your Honor. And in the memo I think it sums it up pretty succinctly that the leading questions, Detective Culver filling in the blanks so to speak make this —
>
> THE COURT: Primarily leaning on the one picture and this is the guy.
>
> [DEFENSE COUNSEL]: Correct. And the BMW and this is the guy and all of that, yes. Thank you.

In response, the State argued that, considering the totality of the transcribed interview, Gannon may not have known appellant's name, but he knew appellant and, therefore, the warrant was valid. The court denied the motion, finding as follows:

> [I]s this so tainted that it included false information and that it was an affidavit intentionally and recklessly produced including false information as set forth in the Defendant's memo[?] Obviously that centers around two major areas; one is the photo, use of the photo and, number two, the description of the car.
>
> Well, on the car as [the Prosecutor] has just argued and as was pointed out during the testimony is Mr. Gannon certainly described the vehicle. The only thing that he left out is he was having trouble naming the exact brand. I would have the same problem. So, was the name of the vehicle, the BMW, spoon fed? It certainly was in helping Gannon fill out the other description that he had given which did describe the Defendant's car. I don't find that as problematic.
>
> Then we go to I guess the major issue, and that is the photo I.D. Obviously when we talk about photo I.D.s, prefacing it as saying, well, here is the guy I think did it and only showing one picture, that can be a gigantic problem when you are dealing with the issue of a photo I.D.
>
> That's not what we're dealing with in this case however. What we're dealing with here is is there probable cause for the search and seizure warrant, not whether certain identification gets into evidence. And when you are dealing with I.D. issues, it does make a difference. If it is a stranger I.D. versus somebody who knows him. Now, this is not a stranger I.D. If this was a stranger I.D., I think we have major problems, but it is not.
>
> Were they best friends? Certainly not. The testimony today and the information I think in the – I forget which volume of the transcript here, but Gannon indicates that he had been with the person two different times. So, this is not a stranger. The detective through his investigation before he is talking to Gannon is aware or is led to believe that Gannon showed up at this home with the shooter. So, this is a known person. Whether he knows his name – I mean, how many people have we had – I mean, in thirty years of doing this I have had countless murder cases where people don't know other people's names and they are committing crimes together. It's not uncommon.

> He doesn't know his name, but you can know somebody without knowing their name. This is somebody that he had met twice before, showed up at this scene with, it is not a total stranger where you're identifying, gee, I'm standing in a bar and somebody came and started shooting. You know, there you don't do a one picture show up.
>
> In this case they had information from the victim's girlfriend. She gave a description. They took that information and gave that information to the Gang Suppression Unit and they said, oh, that's Mr. Saunders. And then in interviewing Mr. Gannon they have identified the Defendant's or come up with the Defendant's identity at that point and they used that.
>
> So, I don't find that as bad faith. That certainly would supply probable cause. So, I don't feel that the defense has met its burden. The Court will respectfully deny the Defendant's motion.

Plea hearing

In order to preserve his appellate rights on the suppression motion, appellant agreed to plead not guilty on an agreed statement of facts to possession with intent to distribute heroin, and possession of a firearm with sufficient nexus to constitute a drug trafficking crime. In support of that plea, and after defense counsel maintained that appellant was objecting to admission of any evidence seized as a result of the search warrant, the parties agreed to the following facts:

> The warrant service was related to an attempted murder incident that occurred on July 22nd, 2017. Detective Culver was assigned the investigation and identified a suspect as Michael Saunders standing to the left of counsel today.
>
> Detective Culver verified Mr. Saunders reside the [sic] at 1494 Harford Square Drive through his assigned Parole and Probation agent, Jaime Monmonier. Mr. Saunders was also verified to be a registered owner of a BMW.
>
> During the search warrant service, illegal items were seized from Saunders bedroom and vehicle that did not pertain to the primary

investigation. Those items were seized in accordance with the search and seizure warrant.

These items have been noted as from the BMW center console, a black plastic bag containing six clear plastic bag that held fifteen vials each. The vials contained suspected heroin.

The rear floorboard of the vehicle[,] from a book bag[,] contained five suspected marijuana buds, one sandwich sized baggie containing suspected marijuana, one small baggie containing suspected cocaine, and thirteen empty nickel bags, five empty dime bags and five plastic bags containing empty nickel bags, three plastic bags containing empty dime bags, one blue container with fourteen sandwich sized bags, one torn plastic bag and one blue plastic bag.

From 1494 Harford Square Drive underneath a couch cushion in the main living room a loaded black high point Smith & Wesson 40 caliber semiautomatic handgun with serial number 7235783 was found inside Saunders bedroom underneath the bed, an unloaded black .22 caliber semiautomatic handgun was also found displaying serial number 070457.

On August 9th, Detective Culver had the occasion to interview Michael Saunders after the search warrant service where Michael Saunders was advised of his rights and waived them. During the interview Michael Saunders admitted to being a drug dealer and confirmed that the CDS belonged to him and confirmed that the handguns also belonged to him and were used for his protection for his drug dealing.

The suspected heroin was properly packaged and sent to the Maryland State Police Crime Lab where it was analyzed by a forensic chemist Brooke Welsh and did come back to 108 grams of heroin.

If called to testify witnesses would identify the person standing to the left of counsel as being the person in possession of the heroin and the black Smith & Wesson handgun.

All of the events did occur in Harford County, Maryland.

Upon showing defense counsel, the State would offer the lab results into evidence.

The court found a factual basis for the plea and found appellant guilty on both charges. Appellant was sentence to concurrent sentences of twenty years with all but seven years suspended on both charges.

DISCUSSION

Appellant's sole contention on appeal is that his motion to suppress should have been granted because the affiant on the search warrant, with reckless disregard for the truth, omitted and mischaracterized the facts surrounding appellant's identification by the witness to the attempted murder. Relying primarily on *Franks v. Delaware*, 438 U.S. 154 (1978), appellant asserts that "the interview was conducted in a manner so suggestive as to be unable to provide the necessary probable cause to support issuance of the warrant." The State disagrees and argues that the motions court properly concluded that appellant failed to meet his burden under *Franks*. We agree with the State.

"When reviewing the denial of a motion to suppress, the record at the suppression hearing is the exclusive source of facts for our review." *Darling v. State*, 232 Md. App. 430, 445, *cert. denied*, 454 Md. 655 (2017). We consider the evidence and all reasonable inferences drawn from that evidence in the light most favorable to the party prevailing on the motion, in this case, the State. *Barnes v. State*, 437 Md. 375, 389 (2014). Ordinarily, we give great deference to a hearing judge's factual findings, and we will not disturb them unless they are clearly erroneous. *Henderson v. State*, 416 Md. 125, 143-44 (2010); *Darling*, 232 Md. App. at 445. We review the motions court's factual findings for clear error, but we make our own independent constitutional appraisal of the record, "reviewing

the relevant law and applying it to the facts and circumstances of th[e] case." *State v. Luckett*, 413 Md. 360, 375 n.3 (2010); *accord Moore v. State*, 422 Md. 516, 528 (2011).

"The Fourth Amendment to the United States Constitution protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *State v. Johnson*, 458 Md. 519, 533 (2018) (quoting U.S. Const. amend. IV). "Reasonableness within the meaning of the Fourth Amendment 'generally requires the obtaining of a judicial warrant.'" *State v. Johnson*, 458 Md. at 533 (quoting *Riley v. California*, 573 U.S. 373, 382 (2014)). Because of this preference for warrants, the question before us ordinarily is "whether the issuing judge had a substantial basis to conclude that the warrant was supported by probable cause." *Greenstreet v. State*, 392 Md. 652, 667 (2006) (citation omitted); *see also Barrett v. State*, 234 Md. App. 653, 666 (2017) (explaining that probable cause "exists where the facts and circumstances within the knowledge of the officer at the time of the arrest, or of which the officer has reasonably trustworthy information, are sufficient to warrant a prudent person in believing that the suspect had committed or was committing a criminal offense") (citation omitted), *cert. denied*, 457 Md. 401 (2018). To determine whether the issuing judge had a "substantial basis," we do not apply "a *de novo* standard of review, but rather a deferential one." *Id.* And, generally, "[t]he ambit of our review, precisely the same as the suppression hearing judge's review, is bounded by the four corners of the warrant application." *State v. Johnson*, 208 Md. App. 573, 581 (2012).

One exception to the substantial basis test is when the appellant establishes, pursuant to *Franks v. Delaware*, *supra*, that the affiant intentionally or recklessly included false statements in the supporting affidavit. In *Franks*, the Supreme Court stated:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Franks, 438 U.S. at 155-56.

Further, "[a]llegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant." *Franks*, 438 U.S. at 171. And, "[t]he burden is on the defendant to establish knowing or reckless falsity by a preponderance of the evidence before the evidence will be suppressed. Negligence or innocent mistake resulting in false statements in the affidavit is not sufficient to establish the defendant's burden." *McDonald v. State*, 347 Md. 452, 471-72 n.11 (1997) (citations omitted). And, "a defendant must make a threshold showing that a governmental affiant has perjured himself on a material matter." *Holland v. State*, 154 Md. App. 351, 388-89 (2003) (internal citations and quotation marks omitted); *see also Yeagy v. Maryland*, 63 Md. App. 1, 8 (1985) ("[W]e will not invalidate a search warrant unless the omissions were material") (citation and internal quotation marks omitted).

Here, there does not appear to be any dispute that there was a substantial basis for the court to find that the application for the search warrant, on its face, provided probable cause to search appellant's residence. Instead, appellant's contention concerns whether that probable cause was based on material omissions from the application and whether those omissions were made deliberately or with reckless disregard for the truth.

In our view, the application may be divided into two areas: (1) description of the crime and the assailant; and, (2) the specific identification by the witness of that assailant. The first pertinent section of the application included that a witness, who wished to remain anonymous, was present in the residence when another person was admitted. When that person then drew a handgun from his waist, the witness fled. As he fled, the witness heard gunshots. The application continued that this witness gave a description of the shooter, and identified him by a distinctive tattoo on his head and the name "Mike." Upon our review of the entire record, we now know that the unnamed witness was Gannon. And, looking to this first delineated section of the application, we discern no material omission or misrepresentations between the information in the warrant and the information gleaned from the detective's testimony and Gannon's transcribed interview as set forth above in the background of this case.

Turning to the specific focus of appellant's challenge, *i.e.*, the actual identification of a single photograph of appellant, the application provided that "[a] recent Parole and Probation image of Michael Saunders was shown to the witness who positively identified him as the suspect drawing the handgun." Appellant's argument is that this statement in the application omits further information that establishes that the identification procedure

was impermissibly suggestive such as to invalidate any probable cause to support the warrant.

Recognizing that we are concerned in this case with a search pursuant to a warrant, and not simply a question of suppression of an out-of-court identification, we begin with the general law on identifications. Ordinarily, "what triggers due process concerns is police use of an unnecessarily suggestive identification procedure, whether or not they intended the arranged procedure to be suggestive." *Perry v. New Hampshire*, 565 U.S. 228, 232, n.1 (2012). "The admissibility of an extrajudicial identification is determined in a two-step inquiry." *Smiley v. State*, 442 Md. 168, 180 (2015). "'The first question is whether the identification procedure was impermissibly suggestive.'" *Id*. (citation omitted). "If the procedure is not impermissibly suggestive, then the inquiry ends." *Smiley*, 442 Md. at 180. "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.'" *Id*. (citation omitted).

Here, Detective Culver told Gannon during the interview that he had a "theory of who the shooter is," and that he was going to show Gannon a single photograph of the shooter, stating that it was the person "who I think actually did the shooting." There can be little dispute that this was suggestive. However, when considering the separate question of suppression of an identification, "mere suggestiveness does not call for exclusion." *State v. Hailes*, 217 Md. App. 212, 267 (2014), *aff'd*, 442 Md. 488 (2015). Furthermore, as the Supreme Court has recognized, "[d]espite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law

enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs." *Simmons v. United States*, 390 U.S. 377, 384 (1968) (concluding that "each case must be considered on its own facts").

To the extent that the procedure here was akin to a show-up, the case of *Turner v. State*, 184 Md. App. 175 (2009), is instructive. In conducting a show-up within two hours of the crime, the police told the witness that the police "'had a subject at the building that was possibly involved in the altercation.'" *Id.* at 186 (quoting police officer). In upholding the identification, this Court observed:

> We would be similarly hard-pressed to decide that what [the officer] said to the witness was particularly suggestive. What [the officer] said was that the police "had a subject at the building that was possibly involved in the altercation." He did not say, "We have one of the assailants," let alone, "We have the assailant who actually wielded the golf club." In conducting a show-up, the police are not required to engage in a speechless pantomime or dumb-show. It is implicit that the police want the witness to look at and see if he can identify a possible participant in a crime. *McDuffie v. State*, 115 Md. App. 359, 366-67, 693 A.2d 360 (1997). The words spoken here were about as innocuous as they could be in the context of conducting a show-up. How else do the police conduct the show-up? They have to say something. *See, e.g., Davis v. State*, 13 Md. App. at 396 ("The officer in charge of the cruiser then asked the victim to look inside the cruiser through the window to see if the person inside was one of the boys who had robbed him."); *Spencer v. State*, 10 Md. App. at 4 ("Is this the one?" was unoffending.). . . .

Turner, 184 Md. App. at 185-86; *see also Martin v. State*, 51 Md. App. 142, 151 ("It is, . . ., implicit in any photographic viewing that the police are not engaging in an exercise in sheer futility, which would be the case if they did not 'possibly have the person involved'") (citation omitted), *cert. denied*, 293 Md. 547 (1982).

Although the detective indicated that he had a "theory" of who the shooter was in this case, and that he wanted to show Gannon a photograph of that person, thereby suggesting a person that he wanted the witness to consider, as we review the transcribed interview of the witness, as well as the testimony of the detective at the hearing, we are not persuaded that the detective told Gannon whom to identify. And, if the question before us were strictly whether the identification was "impermissibly suggestive," we likely would not be persuaded. *See, e.g.*, *Gatewood v. State*, 158 Md. App. 458, 476 (2004) (even though the police officer who prepared photo array told the undercover officer witness that he knew the suspect, suggesting that the suspect's photo was in the array, the selection of the suspect's photograph was left to the determination of the undercover officer), *aff'd*, 388 Md. 526 (2005).

Moreover, we would not agree that suppression would be the proper remedy where it was clear that Gannon knew appellant. When a witness knows the suspect, that is generally considered sufficient to remove any taint from a suggestive identification procedure. In such cases:

> 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.

Simons v. State, 159 Md. App. 562, 572 n. 1 (2004) (citations omitted); *see also State v. Greene*, 240 Md. App. 119, 134 (2019) ("[A] mere 'confirmatory identification' does not generate the myriad risks of misidentification that frequently attend a selective identification made under suggestive circumstances").

And, this is not a case where the court was simply asked to suppress an out-of-court identification; this was a case involving a judicially-approved search warrant. Both parties

cite *Holland v. State*, 154 Md. App. 351 (2003), and we agree that case is instructive. There, the affiant omitted information from eyewitnesses that they did not see the suspect's entire face during the crime, and that they failed to identify Holland in a photo array. *Holland*, 154 Md. App. at 379. Despite this, the affiant acknowledged that the affidavit provided that Holland was identified as the person who committed the robbery. *Id.* That the affidavit indicated Holland was positively identified by at least one person was corroborated by the affiant's testimony at the suppression hearing. *Id.* at 381.

Holland challenged the omissions regarding the failure of some witnesses to identify him and failure to inform the magistrate that the suspect's face was not entirely visible on the grounds that there was a lack of probable cause in support of the warrant. *Holland*, 154 Md. App. at 383. This Court agreed with the motions court's determination that these omissions were not made deliberately or recklessly. *Id.* at 389. And, we concluded:

> Although the affiants omitted information that certainly was relevant at trial, and the affiants could have been more forthcoming in regard to their affidavit, the court was entitled to conclude that the affiants did not purposefully act to mislead the issuing judge, nor did they act with reckless disregard in omitting the information from the affidavit. [The affiant] testified that he merely included information he believed to be relevant to a finding of probable cause for the search warrant, but did not deliberately omit damaging information in the affidavit. More important, even if the disputed information had been included, the court was quite satisfied that the affidavit would have established probable cause. We perceive no error in regard to that finding.

Id. at 390; *see also Braxton v. State*, 123 Md. App. 599, 645-46 (1998) (agreeing with motions court that any dispute over whether affiant misrepresented the strength of the witness's identification during a photo array was "largely a matter of semantics" and not a deliberate falsehood); *Emory v. State*, 101 Md. App. 585, 632-33 (1994) (rejecting

appellant's claims that there were four instances where evidence differed from assertions in affidavit in support of search warrants because there was an inadequate demonstration of deliberate disregard for the truth on the part of the affiant), *cert. denied*, 337 Md. 90 (1995).

Under the circumstances, we are not persuaded that omission of the fact that Detective Culver had a suspect in mind, prior to Gannon's positive identification of a photograph of appellant, notably a person he already knew, from the application amounted to a material omission that undermined the probable cause set forth in the warrant. Furthermore, we are unable to conclude that, even if the omission was material, that there was a sufficient showing that Detective Culver did so deliberately or with a reckless disregard for the truth. *See United States v. Hare*, 772 F.2d 139, 141 (5th Cir. 1985) ("A statement in a warrant affidavit is not false merely because it summarizes or characterizes the facts in a particular way") (citation omitted); *see also United States v. Davis*, 617 F.2d 677, 694 (D.C. Cir. 1979) ("[W]e cannot require officers to describe in minute detail all matters surrounding how they have obtained statements, for such a requirement would make the process of applying for a search warrant a cumbersome procedure inimical to effective law enforcement"), *cert. denied*, 445 U.S. 967 (1980).

Finally, appellant argues that the court erred by considering information outside the warrant, namely an identification from the victim's girlfriend and corroboration by the Gang Suppression Unit, in concluding that probable cause supported the warrant. But, appellant ignores that this was a *Franks* hearing and the court is permitted to go outside the four corners of the warrant to conduct its assessment. *See generally, Greenstreet*, 392 Md.

at 669 (2006) ("One instance where evidence outside of the warrant and its affidavit may be considered is where a defendant makes a required showing for a *Franks* hearing"). We also note that the motions court concluded, immediately following its recitation of the information from the girlfriend and the gang unit, that there was no "bad faith" on the part of the affiant. This suggests that the court considered the admittedly inculpatory information for the purpose of determining whether appellant met his burden of establishing that any omission from the application for the search warrant was done so deliberately or with reckless disregard for the truth. We hold that the

circumstances surrounding the identification, as set forth in the application, did not undermine the probable cause supporting the search warrant.[7]

JUDGMENTS AFFIRMED.

COSTS TO BE ASSESSED TO APPELLANT.

[7] We note that a separate issue was raised in the motions court concerning the suspect's vehicle. The application indicated that "[s]aid shooter drives a white BMW passenger vehicle." According to the interview, it appears that Gannon volunteered that the shooter drove a white luxury car, and Detective Culver asked if that the car could be, among other makes, a BMW. We tend to agree with the motions court that supplying the make of the vehicle was not particularly problematic in this case and that there was an insufficient showing that the omission was deliberately false or made with a reckless disregard for the truth.