Circuit Court for Prince George's County
Case No.: CAL15-09035

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1313

September Term, 2016

CARROLL S. VENEY, *et al.*

v.

PRINCE GEORGE'S COUNTY, MD, *et al.*,

Woodward, C.J.,
Kehoe,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: April 13, 2018

INTRODUCTION

This case arises from a shooting in the parking lot of a night club in Prince George's County. Carroll S. Veney, appellant,[1] was arrested in connection with the crime and remained incarcerated for approximately four months. After being released on bond, the sole eyewitness to the incident recanted his identification and the charges were *nolle prossed*. Appellant and his wife, thereafter, filed a complaint in the Circuit Court for Prince George's County against the lead detective and Prince George's County, appellees, alleging false arrest, false imprisonment, malicious prosecution, violation of Article 24 of the Maryland Declaration of Rights, battery, negligence, gross negligence, intentional infliction of emotional distress, and loss of consortium. Appellees filed a motion for summary judgment, which was granted by the court, and judgment was entered in favor of appellees. Appellant noted a timely appeal and presents the following question for review:

> Did the trial court err in granting appellees' Prince George's County and Matthew Kaiser's Motion for Summary Judgment?

For reasons to follow, we shall answer the question in the negative and affirm the judgment of the circuit court.

BACKGROUND

On the night of November 9, 2013, appellant and his nephew, Steven White, drove to the Upscale Ballroom in Suitland, MD, where they met appellant's niece, Damani Clark, and her friend in the parking lot. The four entered the club together, where they were searched for weapons by security. They then purchased drinks, conversed, and took

[1] The suit was brought by both Carroll Veney and his wife. For simplicity's sake, we shall refer to "appellant," in the singular tense.

pictures in a photo booth. As they were preparing to leave, a fight broke out inside the club and appellant's nephew became involved in it.

During the fracas, the nephew was forcibly removed from the club by security. Appellant followed his nephew and the security guard out of the club, into the parking lot. He tried to calm his nephew and they began walking towards his car, a Mercedes Benz coupe, parked in the back of the lot. The nephew then broke away from appellant and ran towards a crowd of people gathered outside. Subsequently, the nephew got into an argument with Stephen Johnson, another patron, who punched the nephew, knocking him unconscious. Immediately after, four gunshots were fired and three people were shot, including Johnson and appellant's niece. Appellant ran to his vehicle and drove off.

Detective Matthew Kaiser of the Prince George's County Police Department responded to a call regarding the incident at the Upscale Ballroom. Once on the scene, Detective Kaiser assisted the patrol officers in photographing the scene, taking witness statements, and collecting evidence, which included two spent shell casings. Subsequently, Detective Kaiser obtained and reviewed video footage from both inside and outside the club on the night of the incident. He interviewed Stephen Johnson, who provided Kaiser with contact information for an eyewitness, Patrick Horn. Two days later, Detective Kaiser interviewed Horn, and presented him with a six-photograph array, from which Horn identified appellant as the shooter.

Thereafter, an arrest warrant was issued. Appellant was arrested by deputies from the Charles County Sheriff's Office and transported to Prince George's County, where he was taken into custody by the Prince George's County Police Department.

On December 17, 2013, a grand jury in the Prince George's County Circuit Court convened and returned indictments against appellant for multiple crimes in connection with the shooting, including attempted second-degree murder, first-degree assault, and reckless endangerment. Appellant posted bond and was released from commitment on March 12, 2014. A suppression hearing was held on June 9, 2014, where appellant moved to suppress the photographic identification on the grounds that it was impermissibly suggestive. Horn, who was present at the hearing, informed the assigned Assistant State's Attorney that he was recanting his identification of appellant, claiming that the person in court looked different from the person he identified as the shooter. The criminal case against appellant was *nolle prossed* on July 3, 2014. Appellant, thereafter, brought this action with the results that we have described. He then filed this timely appeal.

ANALYSIS

We review the circuit court's grant of summary judgment *de novo*, *Harford County v. Saks Fifth Ave. Distrib. Co.,* 399 Md. 73, 82 (2007), determining, first, whether there exists a genuine dispute as to any material fact, and second, whether the court was legally correct. *Lombardi v. Montgomery Cty.*, 108 Md. App. 695, 710 (1996); *see also* Maryland Rule 2-501. The record is examined "in the light most favorable to the nonmoving party and [we] construe any reasonable inferences that may be drawn from the facts against the moving party." *Shutter v. CSX Transp., Inc.*, 226 Md. App. 623, 634 (2016) (internal citations omitted). A material fact is "one the resolution of which will somehow affect the outcome of the case." *Lowman v. Consol. Rail Corp.*, 68 Md. App. 64, 69 (1986) (internal citations omitted).

In the case *sub judice*, appellant asserts the court erred in granting summary judgment for the following causes of action: false arrest, false imprisonment, malicious prosecution, violation of Article 24 of the Declaration of Rights, battery, intentional infliction of emotional distress, negligence, gross negligence, and loss of consortium. We shall examine each and determine whether there were any material facts in dispute and whether the court erred as a matter of law.

1. False Arrest, False Imprisonment, Malicious Prosecution, and Article 24

Appellant argues that his initial arrest and imprisonment were false, he was maliciously prosecuted, and his Article 24 rights were violated, because there was no probable cause. He argues the pretrial photo array was improperly conducted as it was not in accordance with Department policies, Detective Kaiser "twice placed his hands" on appellant's photo and Horn never made a *positive* identification of him as the shooter. Further, he avers Kaiser made a "false statement" on the photo viewing sheet and Application for Statement of Charges by representing that Horn made a positive identification. As a result, appellant contends there were genuine disputes of material fact and, thus, the court's grant of summary judgment was in error.

Conversely, appellees maintain the interview was properly conducted, Horn made a positive identification, and Kaiser's conduct was "not unduly suggestive." They argue Kaiser did not make a false statement when he characterized Horn's identification as "positive," likening this case to *Braxton v. State*, in which the Court of Special Appeals found the officer's characterization of the witness's identification as "positive" was "largely a matter of semantics." 123 Md. App. 599, 646 (1998).

The elements of false arrest and false imprisonment claims are identical as there must be proof in each, that "one unlawfully causes a depravation of another's liberty against his will[.]" *Carter v. Aramark Sports and Entm't Serv. Inc.*, 153 Md. App. 210, 248–49 (2003) (internal citations omitted). When false arrest/imprisonment claims are brought against police officers, claimants must prove "an arrest or confinement without legal authority or probable cause." *Okwa v. Harper*, 360 Md. 161, 175 (2000). Similarly, a successful claim of malicious prosecution requires that a criminal proceeding was instituted with the malicious "absence of probable cause." *DiPino v. Davis*, 354 Md. 18, 54 (1999) (internal citations omitted). Article 24 of the Declaration of Rights provides that "no man ought to be taken or imprisoned…or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." MD. CONST., DECLARATION OF RIGHTS Art. 24. Maryland courts have recognized "that a common law action for damages lies when an individual is deprived of his or her liberty in violation of [Article 24]." *Okwa*, 360 Md. at 201 (internal citations omitted). There is no basis, however, for an Article 24 claim stemming from search or seizure "if a police officer has probable cause to arrest a person." *Ashton v. Brown*, 339 Md. 70, 97 (1995) (internal citation, alterations, and quotations omitted).

Whether a "law enforcement officer had probable cause to make a particular arrest is determined on factual and practical considerations of everyday life on which reasonable and prudent people act." *Okwa*, 360 Md. at 184 (internal quotations and citation omitted). Probable cause exists if there are "facts and circumstances sufficient to warrant a prudent [person] in believing that the [suspect] had committed or was committing an offense." *Id.*

(internal citations, alterations, and quotations omitted). A witness's positive identification of a suspect may establish probable cause if it constitutes "reasonably trustworthy information." *Evans v. State*, 11 Md. App. 451, 455 (1971) (holding that an identification from a man claiming he had been robbed by a man in a red and black Buick, which drove off in a certain direction, was reasonably trustworthy when the police officer observed the described vehicle driving in the described direction).

In the case at hand, appellant first claims the pretrial identification did not constitute reasonably trustworthy information as it "was not conducted in accordance with the Prince George's County Police Policies and Procedures." He argues that the deviation from established procedures, including using an eight-year-old driver's license photograph, covering appellant's forehead and presenting the photos in a group of six at one time, resulted in a flawed identification. Appellee argues that appellant's dispute is one concerning the legal conclusion drawn from undisputed material facts, and the circuit court correctly found the identification process was not unduly suggestive.

We agree. Detective Kaiser read Horn the required instructions, presented the witness with a group of six black-and-white photos, which included appellant's eight-year old driver's license picture; he did not prompt or otherwise direct Horn to any one photo; covered appellant's forehead; and Horn chose appellant. When the Detective queried him regarding his certainty; "Are you like 90%, 95% something?" Horn replied, "Yeah." Thus, there were no genuine disputes of material fact and the court's legal conclusion that the interview was properly conducted and not impermissibly suggestive was not error.

Appellant next argues that the pretrial identification was not positive because Horn was not 100% certain. He posits the information was not reasonably trustworthy, and thus, probable cause did not exist. To be sure, Horn did not state he was 100% positive, but this single fact is not dispositive. Rather, the probable cause analysis involves examining many factors, such as "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972); *see also Bartley v. State*, 32 Md. App. 283, 290–93 (1976) (finding the photographic identification procedures used by police "did not give rise to a very substantial likelihood of misrepresentation," where police presented an array of six black-and-white photos and the witness first made a "tentative" identification and, three days later, isolated the photographs of two men, stating "as between the two, [defendant] was 'the closet one'"); *Adams v. State*, 43 Md. App. 528, 542–43 (1979) (holding that, under the totality of the circumstances, an arrest supported by the victim's selection of four to six photographs resembling the attacker and a positive voice identification, was not illegal).

The circuit court, in looking at the totality of the circumstances, found Horn's identification was supported by reasonably trustworthy information, sufficient to establish probable cause. Horn clearly had an opportunity to view the criminal at the time of the crime; surveillance tapes in the record confirm he was in a position to observe the shooting and its aftermath. He provided a detailed description of the evening in question, only two days after the shooting, explaining how the initial fight broke out and recounting the

shooter's actions. He described appellant as wearing a brown coat that night, which comported with appellant's own testimony. As in *Evans v. State*, Horn provided information regarding the suspect (i.e. he used to live on C Street in Waldorf, drove a Mercedes Benz, and was the uncle of one of the shooting victims) that, upon further investigation, was corroborated. For these reasons, we find no error.

Appellant next argues that Kaiser falsely stated Horn made a positive identification on the photo viewing sheet and in his Application for Statement of Charges. This Court's reasoning in *Braxton v. State* is instructive, where police presented the victim of an armed robbery with a six-photograph array and the victim pointed to the defendant, stating, "[T]his is the individual. Looks very close to the guy who robbed me." 123 Md. App. at 616. The interviewing officer, in completing a search warrant application, stated the victim "positively identified" the defendant as the perpetrator. *Id.* In affirming, we held there was no evidence the officer intentionally made a false statement and, as such, the inconsistency was "largely a matter of semantics." *Id.* at 646. In the case *sub judice*, there is also no evidence suggesting Kaiser intentionally made a false statement, rather he simply characterized the witness' identification of 90% -95% certainty as a positive one. We agree with appellees that, as in *Braxton*, Kaiser's characterization was a matter of semantics.

It has been recognized that probable cause initially sufficient to support an arrest, may "dissipate over time," thereby turning a valid arrest into a tortious detainment. *State v. Dett*, 391 Md. 81, 94 (2006). For example, law enforcement "may come into possession of information, not known at the time of arrest or…some earlier point in the detention" that exonerates the detained individual. *Id.* In *Dett*, an innocent woman, arrested and detained

in the Baltimore City Jail for four days under the mistaken belief that she was the person against whom an arrest warrant was issued, sued for false imprisonment and other related torts. *Id.* at 85–89. After the arrest, her prints were taken and it was found that her SID, a unique fingerprint identification number, did not match the SID on file for the actual criminal. *Id.* at 85. The Court of Appeals held that summary judgment was inappropriate because there were real disputes of material fact concerning whether there was "competent evidence to show that [Central Booking] and [the Jail] knew" that the individual detained was not the right person, "yet continued to detain her for a significant period of time." *Id.* at 100.

Here, appellant asserts that probable cause dissipated and resulted in his false imprisonment and malicious prosecution. He claims his wife, Nakeesha Veney, attempted to contact Detective Kaiser and two other police officers involved in the case on November 15, 2013. Mrs. Veney left messages for all three officers, but never received a return call. Appellant argues that, had the calls been returned, the police would have discovered exculpatory evidence, namely the statements of Damani Clark and David Magby, which would have eliminated the probable cause justifying his detainment. Appellee, conversely, contends "legal justification existed" for appellant's initial arrest and continued detainment.

In our view, probable cause did not diminish because Detective Kaiser did not return Mrs. Veney's calls, but rather, after the identification was recanted and all other avenues of investigation had been exhausted.

Further, unlike *Dett,* in which the mistaken identity was discovered and the arrestee was, nonetheless, continued to be detained, the record in the case before us demonstrates appellant was released months prior to the recantation by the eyewitness. In addition, "[i]t is ordinarily not for the arresting officer or jailer to determine whether the warrant or detainer calling for the arrest or detention of a particular person is valid, was lawfully issued, or properly named the person ordered to be arrested. Those are issues for the court to resolve." *Dett,* 391 Md. at 100.

The following exchange occurred at the August 5, 2016 hearing on appellees' motion for summary judgment:

> **The Court:** So there's no other facts on the issue of dissipation [of probable cause] other than those facts?
>
> **[A.S.A. Johnson]:** Well, there's only one other fact that I want to draw the Court's attention to and that was after the motion to suppress hearing, Patrick Horn had a conversation with the State's attorney. He had an opportunity to see [appellant] in court. He saw [appellant] in court and said he does not look like the guy that I picked out of the photo array.
>
> **The Court:** But at that point, it's nol prossed?
>
> **[A.S.A. Johnson]:** It's nol prossed after that.
>
> **The Court:** At the motion hearing?
>
> **[A.S.A. Johnson]:** No, it was not at the motion hearing. It was subsequent to the motion hearing because that conversation with the State's attorney happened after the motion to suppress hearing.
>
> **The Court:** How long after, roughly?
>
> **[A.S.A. Johnson]:** It's unclear. All we have - -
>
> **The Court:** It's a matter of record, but, again - - all right. Understood.

> And at that point, is [appellant] still incarcerated?
>
> **[A.S.A. Johnson]:** No, Your Honor. He has been out of jail. He served 120 days from the date of his arrest, which was – well, he was released on March 12th, 2014.
>
> **The Court:** Okay.
>
> **[A.S.A. Johnson]:** The motions hearing with Judge Pearson, the motion to suppress was June 9th and the nolle prosequi was entered on July 3rd.

2. Negligence, Gross Negligence, and Intentional Infliction of Emotional Distress

Appellant next contends a genuine dispute of material facts was generated regarding his claims that Kaiser acted with malice and/or gross negligence and inflicted emotional distress because Detective Kaiser "knowingly" made a false statement in the search warrant affidavit and photo viewing sheet, when he indicated Horn made a "positive identification", along with evidence that Kaiser conducted an "improper lineup." He argues the court erred in granting appellee's motion for summary judgment. Appellees disagree, maintaining Kaiser's statements were not false, the photo array was properly conducted, adhered to department guidelines, and was not unduly suggestive.

Negligence is the breach of a duty to protect a plaintiff from injury, which proximately caused the plaintiff's loss or injury. *Troxel v. Iguana Cantina, LLC et al.,* 201 Md. App. 476, 495 (2011). Public officials, such as police officers, are generally entitled to qualified immunity from negligence claims, however, they "may only avoid liability" if "their conduct was within the scope of the duties of State personnel" and they "acted without malice or gross negligence." *Hines v. French,* 157 Md. App. 536, 561–62 (2004).

A defendant's conduct may rise to the level of gross negligence if it amounts to "an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another." *Cooper v. Rodriguez*, 443 Md. 680, 708 (2015) (internal citations and quotations omitted). To support a *prima facie* claim for intentional infliction of emotional distress, a plaintiff must demonstrate the defendant intentionally and/or recklessly engaged in "extreme and outrageous" conduct. *Ford v. Douglas*, 144 Md. App. 620, 625–26 (2002).

A review of the record reveals no evidence of malice, reckless disregard of a manifest duty, or extreme and outrageous conduct on the part of Detective Kaiser. As stated above, Kaiser's characterization of Horn's statement as a "positive identification" was not false, but simply a matter of semantics. Further, the procedure employed by Kaiser were not unduly suggestive. Thus, the court did not err in granting appellee's motion for summary judgment.

3. Battery

A successful claim for the tort of battery requires evidence that "one [intended] a harmful or offensive contact with another without that person's consent." *Beall v. Holloway-Johnson*, 446 Md. 48, 66 (2016) (internal citations omitted). In the present case, appellant did not allege that Detective Kaiser, or any of the Prince George's County police officers involved in the arrest, had harmful or offensive contact with him. Thus, an essential element of appellant's battery claim against Detective Kaiser and the Prince George's County Police Department is missing, namely an offensive touching.

During his deposition, this exchange occurred[2]:

> **[Mitchell]:** In your complaint in Count I you charge Detective Kaiser with battery. What is the evidence that you have that Detective Kaiser battered you?
>
> [*objection*]
>
> **[Appellant]:** I believe Detective Kaiser, while he was just doing his job and I don't have anything bad against him for doing his job, I do believe I was badgered. I do believe I was harassed. I sat in that room for about four hours and was asked the same questions over and over and over again. One of the detectives, not Detective Kaiser himself, but one of the detective that came in to interrogate me was pretty loud with me, yelling kind of. And just doing anything that they can do to try to irritate me. And so on those grounds, this why I stated that.
>
> **[Mitchell]:** Okay. Did Detective Kaiser ever punch you?
>
> **[Appellant]:** No.
>
> **[Mitchell]:** Did he ever grab you by your shirt and push you against the wall?
>
> **[Appellant]:** No.
>
> **[Appellant]:** Did the other two detectives? Did either of them ever grab you by your shirt and put you against the wall?
>
> **[Appellant]:** No.
>
> **[Mitchell]:** Did they punch you?
>
> **[Appellant]:** No.
>
> * * *
>
> **[Mitchell]:** Was there any offensive touching by Detective Kaiser?
>
> **[Appellant]:** No touching. No touching.

[2] The deposition was part of appellant's Opposition to Defendant's Motion for Summary Judgment, filed August 1, 2016.

> **[Mitchell]:** Was there any offensive touching by any member of the Prince George's County Police Department?
>
> **[Appellant]:** I believe when I got the cuffs on, they were really tight and-
>
> **[Mitchell]:** That was Charles County, right?
>
> **[Appellant]:** You said by any officer.
>
> **[Mitchell]:** By any Prince George's County police officer.
>
> [*no response*]

4. Loss of Consortium

In Maryland, loss of consortium "arises from the loss of society, affection, and conjugal fellowship suffered by [a] marital unit as a result of the physical injury to one spouse through the tortious conduct of a third party," *Oaks v. Connors,* 339 Md. 24, 33–34 (1995), and includes "the loss or impairment of sexual relations." *Deems v. Western Maryland Ry. Co.*, 247 Md. 95, 100 (1967). Such claims "must be filed jointly by a couple and tried concurrently with the claim of the physical injured spouse in order to avoid duplication of awards." *Oaks,* 339 Md. at 34. Generally loss of consortium claims require a physical injury, however, in some cases, "certain psychological injuries [may] be no less severe and debilitating than physical injuries[.]" *Exxon Corp., USA v. Schoene,* 67 Md. App. 412, 423–24 (1986) (internal citations omitted).

Appellant alleges that, as a result of the injuries caused by appellee's tortious conduct, he and his wife jointly sustained a loss to their material relationship, loss of consortium, impairment of [appellant's] ability to perform household duties, loss of financial support, loss of services, and loss of companionship, all to the detriment of the

plaintiffs." He claims he suffered "mental anguish," "embarrassment, shame, humiliation," and "fear, nightmares, [and] flashbacks."

However, appellant admitted in a deposition that Detective Kaiser, nor any Prince George's County officer, ever touched his person. While he alleges he suffered injuries, we do not view appellees' underlying conduct as tortious and, therefore, appellant's loss of consortium claim fails.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.