Circuit Court for Baltimore City
Case No.: 205355035-037

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1816

September Term, 2017

AUBREY EUGENE CORPORAL

v.

STATE OF MARYLAND

Woodward C.J.,
Friedman,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: October 3, 2018

On April 4, 2006, appellant, Aubrey Eugene Corporal, was convicted by a jury sitting in the Circuit Court for Baltimore City of three counts of robbery with a deadly weapon, three counts of robbery, three counts of first-degree assault, three counts of second-degree assault, three counts of theft under $500, and three counts of theft under $100. The court sentenced him to a total of forty-five years of incarceration. In 2017, the post-conviction court granted appellant the right to file a belated appeal, and this appeal followed wherein he argues that the trial court should have suppressed pre-trial photo identifications as too suggestive on three grounds: 1) that police indicated that the suspect was among those in the photo array; 2) that the suspect was the only one wearing a black t-shirt; and 3) because one witness may have told the other who to pick. We disagree and affirm.

BACKGROUND

At approximately 11:00 p.m. on October 6, 2005, Loyola College students Alexander Hutter and John Curran went to Murphy's Bar and Grill in the 5900 block of York Road in Baltimore. Soon after they arrived, they received a call from their friend, Ryan Quinn, who announced that he had just arrived from Philadelphia. Hutter and Curran exited the bar and entered the nearby parking lot to meet with Quinn who was driving into the parking lot in his vehicle. Once parked, Quinn advised that he wanted to go to the college campus to clean up after his drive. Quinn exited his car and opened the rear passenger side door to retrieve a jacket. Curran entered the front passenger seat and Hutter entered the rear driver's side passenger seat. As Quinn retrieved his jacket, he was approached by appellant who asked if he had a lighter. When Quinn responded that he did

not, appellant asked if Quinn's friends inside the car had one. Quinn then turned his attention to Hutter and Curran seated in the car and asked if they had a lighter. Just then, appellant stuck a gun to Quinn's waist and told him to give him money. Quinn put his hands up in the air, and appellant went through Quinn's pants pockets, whereupon Quinn told appellant that his wallet was in the car. Hutter then exited the car and put his hands up in the air. Appellant pointed the gun at Hutter, and Curran then exited the car. Hutter and Curran gave their wallets to appellant, and Quinn entered the car, retrieved his wallet, and held it up for appellant. Quinn then took approximately $70 from his wallet and gave it to appellant. Quinn and appellant then "tussled" with the wallet before appellant turned and ran away.

During the robbery, Officer Louis Nanna and his partner Keith Rowe of the Baltimore City Police Department were in an unmarked police vehicle patrolling the 5800-6000 block of York Road. As they came upon a parking lot near Murphy's Bar, they saw Hutter, Quinn, and Curran with their backs to them standing with their hands raised. As they continued to watch, they saw a man standing directly in front of them who appeared to be talking "very adamant[ly]" at the three men with their hands up. Believing they were witnessing a robbery in progress, Officer Nanna stepped out of the police vehicle near a field bordering the parking lot. Officer Rowe remained in the vehicle and continued down the block in an effort to pin the robber in. As Officer Nanna crossed the field, he observed the robber begin to run away from the three men. Officer Nanna began to chase the robber, identified himself as a police officer, and yelled for him to stop. The robber continued to run away, and while running, pointed something in the direction of Officer Nanna, who

believed it to be a gun. The robber got into a vehicle that was parked nearby. The vehicle then sped away from the scene, and Officer Rowe attempted to pursue it, but was unable to stop the vehicle. Officers Nanna and Rowe then returned to talk to the three victims in the parking lot as did a number of other responding police officers, including Detectives Tom Wolf and Myrna Sexton.

In the days after the robbery, Detectives Wolf and Sexton received information from the Baltimore County Police Department regarding a suspect they had developed in a separate case. The Baltimore County suspect matched the description of the robber given by Hutter, Curran, and Quinn. The suspect was appellant, whose photo was placed in a photo array, and ultimately identified by Hutter and Curran as the person who had robbed them.

A motion to suppress the photo array was held prior to trial. Hutter testified during the motion's hearing that on October 12, 2006, he was contacted by the police who advised him that they wanted to show him a photo array. Hutter then met with Detectives Wolf and Sexton. Prior to being shown the photo array, Detective Sexton advised Hutter to read the instructions at the top of the photo array prior to viewing the photos. Detective Sexton asked him to view the photos, and if he recognized the person who had robbed him, to so indicate. Hutter testified that Detective Sexton never indicated to him who was the target of their investigation. Hutter "immediately" recognized appellant's photo as the person who robbed him. He immediately recognized the photo because he had been "face-to-face" with the robber. At Detective Wolf's request he then contacted Curran and asked

him to call the police regarding the investigation. Hutter testified that Detective Wolf instructed him not to discuss the photo array with Curran when he spoke with him.

Curran testified that Hutter told him that he had identified someone in a photo array, but did not tell him who he had selected. Curran then went to the police station and met with Detectives Wolf and Sexton. There he was told that he was going to be shown a photo array and to indicate if he recognized the person who robbed him. Curran testified that he recognized appellant within seconds of viewing the photos. Curran testified that the police officers did not indicate to him which photo, if any, Hutter had selected, nor did they suggest any photo for him to select.

DISCUSSION

Appellant argues that the lower court erred in admitting the results of the photo array. Specifically, he asserts that, "[d]ue to the knowledge that both witnesses possessed that the suspect was in the array, combined with the black t-shirt worn by Appellant in the photograph, the procedure was contaminated and impermissibly suggestive." We disagree.

We review the denial of a motion to suppress "de novo," and make "our own independent constitutional evaluation." *Jones v. State*, 139 Md. App. 212, 219 (2001). In doing so, "we look only to the record of the suppression hearing and do not consider any evidence adduced at trial." *Id.* "We extend great deference to the findings of the hearing court with respect to first-level findings of fact and the credibility of witnesses unless it is shown that the court's findings are clearly erroneous." *Id.*

"The admissibility of an extrajudicial identification is determined in a two-step inquiry." *Smiley v. State*, 442 Md. 168,180 (2015). First, we must determine "whether the

identification procedure was impermissibly suggestive." *Jones v. State*, 395 Md. 97, 109 (2006). "If the answer is 'no,' the inquiry ends and both the extra-judicial identification and the in-court identification are admissible at trial." *Id*. If the "procedure was impermissibly suggestive, the second step is triggered, and the court must determine whether, under the totality of the circumstances, the identification was reliable." *Id.*

"The inquiry is not whether the police acted improperly, but whether there was police conduct that 'tipped off' the witness in making the identification." *Small v. State*, 235 Md. App. 648, 673 (2018). "The identification procedure must not only be suggestive, but *impermissibly* suggestive." *Id.* at 674. As this Court explained in *Conyers v. State*:

> To do something impermissibly suggestive is not to pressure or to browbeat a witness to make an identification but only to feed the witness clues as to which identification to make. THE SIN IS TO CONTAMINATE THE TEST BY SLIPPING THE ANSWER TO THE TESTEE."

115 Md. App. 114, 121 (1997).

Appellant argues that there "was evidence here that the police slipped the answer to the witnesses," and as a result the "procedure was contaminated and impermissibly suggestive." Appellant asserts that both Curran and Hutter knew that the suspect was in the photo array they were shown. Further, he asserts that the procedure was impermissibly suggestive because Curran described the suspect to the police as wearing a black t-shirt and the photo array depicted appellant wearing a black t-shirt. His claims are without merit.

At the hearing on the suppression motion, Hutter testified that after the robbery he tried to contact the police "several times" to get updates on the case. Appellant asserts that for the officers "to suddenly appear at Mr. Hutter's dorm to show him a photo array was a

clear indication to Mr. Hutter that the police had a suspect and that suspect would appear in the photo array." Appellant further maintains that Hutter then told Curran that the police had a suspect and that the police needed him to identify him.[1] Hutter testified that when he was shown the photo array, Officer Sexton asked him to look at the photos and see if he recognized the person who had robbed him. He did not testify that he was told the suspect was in the photo array. Similarly, Curran testified that the police never gave him any indication whom to pick.

That a witness may have deduced that the police have identified a suspect, and that suspect may be in the photo array, does not render the procedure impermissibly suggestive. It would be reasonable to assume that in nearly all police investigations, witnesses are not asked to identify photos unless a suspect has been identified by the police. Otherwise, as the State points out, "photo arrays would just be random assortments of photographs presented to witnesses for no reason." It is also reasonable to assume that most witnesses are aware that the police have identified a possible suspect at the time they are shown a photo array. That mere awareness does not suggest whom the witness should identify. In short, the procedure here was not impermissibly suggestive.

[1] Appellant also alleges that when Curran went to the police station, "the police told Mr. Curran that they had a suspect and they wanted to see if Mr. Curran could identify him." The hearing transcript, however, indicates that Curran was testifying as to what Hutter had told him the police said. When asked what he was told directly by the police, Curran testified that once at the police station the police officers told him that he was going to be shown a photo array and that he should indicate if "any of those persons [in the photo array] are the one who robbed [him]."

Appellant further argues that the procedure was impermissibly suggestive because, after the robbery, Curran had described the robber to the police as wearing a black t-shirt. He asserts that "Curran looked at the photo array knowing that his roommate had already made an identification and where Appellant was the only person wearing clothing that was the same color as the clothing described during the incident." Appellant argues that this is evidence "that the police slipped the answer to the witnesses." The suppression court heard this argument and concluded:

> Of the six photographs, all six individuals are African-American males of similar complexion and hairstyle. The photograph of the [appellant] appears to be the only photograph in which an individual is wearing a black T-shirt. However, four of the six individuals are wearing black – strike that – dark-colored tops, which are almost indistinguishable from the black T-shirt worn by [appellant]…To the extent that Mr. Curran remembered that the suspect as wearing a black T-shirt, he did not testify that this was a factor in his identification of the [appellant]…The testimony from Mr. Curran was that he picked the individual out because he remembered having the gun pointed at his chest, and he knew this person was the person instantaneously.

Upon review of the record, we are not persuaded that these findings are clearly erroneous. There was no evidence that the police suggested whom Curran was to pick from the photo array. The tops worn by four of the six individuals were substantially similar. Curran testified that he instantly recognized appellant not from the shirt he was wearing, but rather from the close proximity in which appellant robbed him. In sum, the court did not err in failing to suppress the pre-trial photo identifications.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.