Circuit Court for Charles County
Case No.: 08-K-15-000175

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 801

September Term, 2016

MAURICE DESHONTE MACKALL

v.

STATE OF MARYLAND

Graeff,
Shaw Geter,
Kenney, James, A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: October 30, 2017

This case arises from the execution of a search and seizure warrant at the residence of appellant, Maurice Deshonte Mackall, in the early morning hours of December 23, 2014. According to police, appellant pointed a rifle at them as they approached his bedroom. They subsequently recovered two firearms and ammunition from his room. Appellant was charged with first and second degree assault, use of a firearm in the commission of a crime of violence, possession of an assault weapon, possession of a regulated firearm after being convicted of a crime of violence, possession of a shotgun after being convicted of a crime of violence, and possession of ammunition after having been prohibited from possessing a firearm.

A jury in the Circuit Court for Charles County acquitted appellant of second degree assault[1] but found him guilty of the weapons and ammunition charges. He was sentenced to a term of fifteen years' imprisonment for possession of a regulated firearm after being convicted of a crime of violence, fifteen years concurrent for possession of a shotgun after being convicted of a crime of violence, and one year consecutive for unlawful possession of ammunition.[2] Appellant noted this timely appeal, presenting the following four questions:

> 1. Did the trial court err when it denied [appellant's] request for a *Franks*[3] hearing?

[1] The jury had been directed not to consider the first-degree assault and the use of a firearm charges if it acquitted appellant of the second-degree assault charge.

[2] The conviction for possession of an assault weapon merged for purposes of sentencing.

[3] *Franks v. Delaware*, 438 U.S. 154 (1978).

2. Did the trial court abuse its discretion when it permitted the State to introduce a photograph whose probative value was outweighed by its potential for undue prejudice?

3. Must [appellant's] conviction for possession of a regulated firearm after being convicted of a crime of violence be vacated in light of the fact that a verdict was not properly rendered on that count?

4. Did the trial court err when it denied [appellant's] motion to suppress a pre-trial and in-court identification?

For the reasons to be discussed, we affirm.

BACKGROUND

Upon receiving information from a concerned citizen[4] that appellant was in possession of firearms, a detective from the Charles County Sheriff's Office applied for a search and seizure warrant for appellant's residence on December 22, 2014. In the affidavit accompanying the warrant application, the detective recounted that the concerned citizen said she had been to appellant's residence many times and had seen appellant with firearms on "numerous occasions." She possessed digital photographs depicting him holding firearms between December 5, 2014, and December 11, 2014. In one of those pictures, bearing a date stamp of December 6, 2014, appellant is seen in a room with white walls and blue trim, holding an SKS assault rifle with a collapsible stock and a detachable magazine, which the detective knew to be a regulated firearm. The geographical data contained in the photograph indicated that it was taken at, or near appellant's residence.

[4] The "citizen" was appellant's ex-girlfriend, who was angry with appellant because she believed he was not faithful to her. Trial counsel mentioned this in opening statement, but then later chose not to elicit any evidence about it in front of the jury because trial counsel did not want to open the door to other evidence unhelpful to the defense.

Another digital photograph, depicting the SKS and a shotgun leaning against a wall, appears to have been taken in the same room. The officer testified that he identified appellant in the photographs "by the very distinct tattoo on his face."

In the affidavit, the officer recounted appellant's lengthy arrest record, which included drug possession charges and burglaries. He stated appellant had previously been sentenced to five years' incarceration after being convicted of second degree assault. Through his training and experience, the officer explained "that drug users will commonly burglarize homes and businesses to support their drug habit[,]" and that "firearms obtained by convicted felons are usually retained at their residence and acquired for their protection from other criminals." Based on the foregoing, the officer reasoned that there was probable cause to believe that "certain provisions of the state's Public Safety laws are being violated by people inside the residence[.]"

On December 22, 2014, a judge signed the warrant authorizing the search of appellant's residence. The following morning, a team of police officers met, before the search, to discuss their plan. The officers were shown a photograph of appellant and told where his bedroom was located. At approximately 5:30 a.m., they executed the search warrant by entering the residence shouting "police," and deploying "flashbangs" as a diversionary device.

Lieutenant Benjamin Voorhaar was one of the officers who participated in the search. As they approached the residence, Voorhaar saw someone on the front porch, and noticed that the front door was open. The officers lined up outside the residence, and Voorhaar, the "point guy," was first to enter. Several officers yelled at the man on the

porch to get on the ground, and he complied. Voorhaar believed that the man on the porch might have alerted people inside the home to their presence and was therefore concerned that the police had lost the element of surprise.

Nevertheless, Voorhaar and the officers behind him proceeded inside the house. Voorhaar walked toward appellant's bedroom, which he believed was downstairs in the split-level residence. When standing at the top of the stairs, Voorhaar saw two women "peeking out" of a downstairs room, but, because they appeared to be no threat, he continued toward appellant's room.

After reaching the bottom of the stairs and turning left, Voorhaar saw a black man wearing a white tank top pointing what he thought was an AK-47 rifle at him. Fearing that he would be shot, Voorhaar pushed back into the officer behind him and screamed several times "He has an AK." Voorhaar then heard yelling over the radio, yelling outside, and glass breaking. After Voorhaar removed his rifle from the safety position and looked around the corner a second time, he did not see anyone and began yelling "Show me your hands, drop the gun." He observed appellant lying on the ground a few feet in front of him wearing "the same white tank top." The rifle was approximately two feet from appellant's hand. Voorhaar directed appellant to crawl to him, appellant complied, and another officer handcuffed him. Voorhaar then proceeded to "clear" the remaining rooms.

Voorhaar found Joseph Keyes, who was wearing a black and white windbreaker and a red hoodie, "balled up" in the corner of a room. He then continued to search the bedroom from which appellant had crawled. In that room, Voorhaar found Alfred Williams lying on the floor wearing pajama bottoms and no shirt. He handcuffed Williams and went

outside. When Voorhaar came back inside, he told Detective Dennis Sauve, who was in charge of the investigation, that appellant pointed a gun at him. Voorhaar testified that Keyes was "smaller" and had a "lighter" skin tone than appellant, and that Williams was "heavier" and had a "darker" skin tone than appellant.

Officer Claude Clevenger was immediately behind Voorhaar when they entered the home. His testimony largely tracked Voorhaar's testimony. Clevenger stated that as the police officers entered the home, they yelled, "Get down[,] County police, get down[,]" and "County police, search warrant[,] Police search warrant[,] Sheriff's Office, search warrant." Clevenger stated that he had known Voorhaar for eighteen years and he was confident that Voorhaar was scared after he peeked around the corner the first time, stating that Voorhaar looked like he had "seen a ghost."

Corporal Joseph Piazza also participated in the execution of the search warrant. His initial role was to throw a "diversionary device," which he said was commonly referred to as a "flashbang," outside of the residence as the group of officers entered. After doing so, Piazza looked through a window on the left hand side of the lower level of the home and saw appellant's face. He was able to recognize appellant's distinctive facial tattoo upon shining his flashlight. Appellant then disappeared. Piazza heard Voorhaar yell, "Gun," and he then shattered the window as a distraction. Piazza went inside and told Voorhaar that he saw appellant in the window. Piazza said that Voorhaar looked "distraught, a little pale-faced, and anxious," and that he had never seen him look like that before.

Detective Sauve also testified that he had known Voorhaar for over twelve years, and that Voorhaar's voice that morning was "totally different than [he had] ever heard [ ]

even in high stress situations[.]" According to him, Voorhaar was visibly shaken and pale. Sauve then interviewed appellant in an unmarked police car once the residence was cleared. A portion of the interview, which was audio recorded, was played for the jury. Appellant explained that when the police entered the house, he was in bed. He denied going to the window. Appellant said that he did not own the rifle, did not know who had the rifle downstairs, and did not know how it got on the floor. After Sauve mentioned the possibility of DNA testing, appellant stated that he may have touched the rifle "once upon a time." Appellant admitted that he possessed a shotgun, which was not loaded and could be found in his room behind his door.

There were thirteen people in the house when the warrant was executed. Two firearms were recovered. One was the rifle found in the bedroom on the floor near appellant. It was described as a Yugoslavian made SKS. The SKS's detachable magazine had eighteen rounds in it, and there was a single round loaded in the chamber. The other firearm was a 12 gauge Savage shotgun which was found behind the door in appellant's bedroom with a spent shell casing lodged in the barrel. Both firearms were test fired and found to be operable. Officers recovered appellant's driver's license and a picture of appellant and his friends from appellant's bedroom. No DNA evidence connected anyone who was tested to the firearms.

At trial, the State played for the jury two recordings of telephone calls appellant made from jail in which he asked others to discourage Alfred Williams from testifying for the State. The State and appellant stipulated that appellant had been convicted of second

degree assault, a disqualifying crime under Maryland law, and therefore, he was prohibited from possessing a firearm.

Appellant called several witnesses and testified on his own behalf. Some of the witnesses were present in the home when the warrant was executed. They explained what occurred from their respective vantage points. None of the witnesses saw appellant holding a weapon that morning. Kenneth Williams, appellant's cousin, testified that he legally owned the shotgun that was recovered, and that, at some point, he put it in appellant's room to keep it away from his little cousins. Two witnesses testified to appellant's good character and honesty.

Appellant testified that most of the time, he did not live at the residence where the search warrant was executed, and other people, including his cousins, used his room. Appellant explained that he had recently moved back home after he had a disagreement with his then girlfriend. He said that on the day of the raid, there were thirteen people in the house, and there were seven or eight people downstairs. He testified that he was awakened by a loud bang and he immediately rolled onto the floor and heard yelling, footsteps, and cursing. Appellant said he crawled out of the room after being directed to do so. Although he admitted that he had once touched the SKS rifle, he testified that he never pointed any gun at the police and never went to the window.

When appellant was asked about the jail calls, he admitted that he had been talking about whether "Cut," referring to his cousin Alfred Williams, had been issued a subpoena to testify for the State. However, appellant explained that he had been tricked and lied to by the police and explained that he did not want Alfred Williams to be tricked because

appellant knew that Williams also had a disqualifying conviction. He acknowledged that he told his mother to drive a vehicle that the police would not recognize when she went to tell Alfred Williams that "if he doesn't get served, he doesn't have to show up." Nevertheless, appellant denied that he had been trying to discourage his cousin from coming to court. Alfred Williams did not testify during appellant's trial.

Appellant acknowledged that he told Detective Sauve that he had a shotgun and how he came into possession of it. He testified that he knew the shotgun was in his room two days before the raid, but that he had never fired the shotgun, never cleaned it, loaded it, or used it in any way. Appellant said that when he noticed the shotgun was in his room, he asked how it got there, and was told it was there because there were kids in the house.

Additional facts will be addressed as they become relevant to the following discussion.

DISCUSSION

I.

Appellant contends that the trial court erred when it denied his request for a *Franks* hearing. He argues that he was entitled to the hearing because he proffered a sufficient "good faith basis" to show that the warrant affidavit contained reckless or deliberate falsehoods and lacked probable cause. According to appellant, Detective Sauve, who signed the affidavit in support of the warrant, made a false statement, or acted with reckless disregard for the truth, when the detective said he identified appellant by his distinctive facial tattoo in a photograph he was shown. In support of his argument, appellant relies on

a black-and-white photograph given to him in discovery in which it is not possible to see a facial tattoo because of the poor quality of the photograph.

The State argues that the court did not err because appellant did not satisfy the standard for obtaining a *Franks* hearing, *i.e.* a substantial preliminary showing of intentional or reckless falsehood in the affidavit. Specifically, the State maintains there is a reasonable inference that, even if the tattoo could not be seen on the paper black-and-white copy of the photograph relied on by appellant, the tattoo could have been seen on the color digital photograph that the informant showed Detective Sauve. The State also argues that, even if Detective Sauve's statement about the photograph were excised from the warrant, the warrant still contained sufficient probable cause to support the search. We agree with the State.

The Fourth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, provides that "no Warrants shall issue, but upon probable cause[.]" Absent certain exceptions not relevant here, the police must obtain a search warrant before conducting a search, and the warrant must be based upon probable cause "to justify its issuance as to each person or place named[.]" *Holland v. State*, 154 Md. App. 351, 385 (2003) (quotation marks and citations omitted). When reviewing an issuing judge's approval of an application for a search warrant, a court ordinarily is limited to the "four corners" of the affidavit supporting the warrant. *Abeokuto v. State,* 391 Md. 289, 338 (2006). The "four corners" doctrine is firmly established and rigorously applied. *Fitzgerald v. State*, 153 Md. App. 601, 639 (2003), aff'd, 384 Md. 484 (2004).

The U.S. Supreme Court in *Franks v. Delaware*, however, created an exception to the four corners doctrine. In *Franks*, the Court set out the following procedure when a defendant can stray beyond the four corners of a warrant application to examine live witnesses to establish that a warrant application was tainted by falsehoods or a reckless disregard of the truth.

> [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.

438 U.S. at 155–56. The Supreme Court added:

> There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations 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. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course, another issue.

Id. at 171–72 (footnote omitted).

In the case at bar, the circuit court found that, because the black-and-white printed photograph was not the color digital photograph Detective Sauve was shown when he identified appellant by his distinctive facial tattoo, appellant had not made the requisite showing to be entitled to a *Franks* hearing. As the court pointed out, the photograph relied on by appellant was a black-and-white paper copy of a color digital photograph. The court reasonably inferred, based on everyday experiences, that the color photograph portrayed the tattoo far more distinctly than the black-and-white copy proffered in court.

Further, even if the detective's alleged falsehood was excised from the warrant application, the application contained sufficient probable cause based on the statements and photographs presented by the citizen to Detective Sauve. "'The rule of probable cause is a non-technical conception of a reasonable ground for belief of guilt, requiring less evidence for such belief than would justify conviction but more evidence than that which would arouse a mere suspicion.'" *Johnson v. State*, 142 Md. App. 172, 190 (2002) (quoting *Doering v. State*, 313 Md. 384, 403 (1988)).

The citizen said she had been to appellant's residence many times and had seen appellant with firearms on "numerous occasions." She showed the detective a digital photograph, bearing a recent date stamp, depicting a person she identified as appellant holding an assault rifle with a collapsible stock and a detachable magazine. Moreover, the geographical information contained in the digital photograph indicated that it was taken at, or near, appellant's residence. That digital photograph was taken in a room with white walls with blue trim, and in another digital photograph that appears to be in that same room,

the assault rifle and a shotgun are shown leaning up against a wall. In conjunction with that information, the detective learned that appellant had been convicted of a crime that disqualified him from lawfully possessing any firearm. As a result, the warrant application contained probable cause that appellant was illegally in possession of one or more firearms. Appellant, thus, did not establish sufficient facts to require the court to conduct a *Franks* hearing.

II.

Appellant next contends that the trial court abused its discretion when it admitted into evidence a photograph removed from his bedroom, which, according to appellant, depicts him "making gang signs." Appellant claims that the probative value of the photograph was "greatly outweighed by its potential for unfair prejudice" because it "suggested to the jury" that appellant was, "at worst, a gang member" or, "at best, a person with an affinity for gangs." The State argues that the photograph was relevant in establishing that the shotgun found was in appellant's bedroom. They contend the photograph was only minimally prejudicial because it was unclear whether appellant was displaying a "gang sign."

The trial court made the following ruling regarding the admissibility of the photograph:

> One, I don't know that it's a gang sign. Two, it's him. It's his photo. There's nothing illegal going on in the photo. There are no weapons, no guns. There's nothing about the photo that's illegal. It was found in his room. I think it's more probative than a [driver's] license because I have my license on me right now, but this isn't my room. Certainly, pictures of me and my friends are more indicative or would tend to demonstrate that it is my room. … And I haven't seen any other real evidence that ties him to the room.

Maryland Rule 5-401 provides that "relevant evidence" means evidence having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 5-402 provides that: "Except as otherwise provided…all relevant evidence is admissible, [and] [e]vidence that is not relevant is not admissible." Rule 5-403 provides that: "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" "[E]vidence is considered unfairly prejudicial when 'it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is being charged." *Burris v. State*, 435 Md. 370, 392 (2013) (quoting *Odum v. State*, 412 Md. 593, 615 (2010)).

Rulings on Md. Rule 5-403 are reviewed for abuse of discretion. *Pantazes v. State*, 376 Md. 661, 687 (2003). In *Smith v. State*, 232 Md. App. 583 (2017) we stated:

> "Abuse of discretion" has been said to occur "'where no reasonable person would take the view adopted by the [trial] court,' or when the court acts 'without reference to any guiding rules or principles.'" *Nash v. State*, 439 Md. 53, 67 (2014) (quoting *North v. North*, 102 Md. App. 1, 13 (1994)). A ruling reviewed for an abuse of discretion will not be reversed "simply because the appellate court would not have made the same ruling." *Norwood v. State*, 222 Md.App. 620, 643 (2015) (citation omitted). Rather, a trial court's "decision is an abuse of discretion when it is well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Id.* (citation omitted).
>
> *Id*. 598–99.

In the present case, we perceive no error or abuse of discretion in the court's decision to admit the photograph into evidence. As the court noted, the evidence was relevant and highly probative in establishing that the room where the shotgun was found was appellant's

room. In addition, because there was no evidence that appellant was actually making a "gang sign" in the photograph, the photograph is only minimally prejudicial. During the hearing on the motion *in limine*, the following relevant exchange transpired:

> THE COURT: Yeah, and I don't even know that it's a gang sign[.]
>
> DEFENSE: It looks like one. That's more the problem.
>
> THE COURT: Sure.
>
> DEFENSE: I mean, I couldn't tell you what gang, o[r] if it's just, you know, people, fake gang signs.
>
> THE COURT: Or he's just being silly.
>
> DEFENSE: It's being silly, but it has sort of an implication that he leads the type of lifestyle that's inappropriate. The picture was taken when he was much younger.

Given the highly probative value of the photograph, coupled with the minimal prejudice, we cannot say that the court's ruling was "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Smith*, 232 Md. App at 599. As such, the court did not abuse its discretion.

III.

Appellant contends that his conviction and sentence for illegal possession of a regulated *firearm* after being convicted of a crime of violence must be vacated because the jury never properly rendered a verdict on that count. The defective verdict made the resulting sentence illegal, according to appellant, because the jury's foreperson never orally announced a verdict on that count, and instead, twice announced a verdict for illegal possession of a *shotgun* after being convicted of a crime of violence.

The State responds that, because the alleged procedural gaffe did not render appellant's sentence illegal, appellant was required to preserve the issue for appeal, which he did not. The State also contends that, while the clerk may have mistakenly failed to initially ask the jury's foreman about the verdict on the particular count, there was no ambiguity about the jury's verdict after the foreman and the remainder of the jury were individually polled and the verdict was hearkened.

The verdict sheet used by the jury in the instant case listed the following offenses:

1. Assault – 2nd Degree
2. Assault – 1st Degree
3. Firearm Use in a Violent Crime
4. Illegal possession of an Assault Weapon
5. Illegal possession of an Assault Weapon with a Disqualifying Conviction
6. Illegal possession of a Shotgun with a Disqualifying Conviction
7. Illegal possession of Ammunition

The verdict sheet reflected that appellant was acquitted of counts 1, 2, and 3, and he was found guilty of counts 4, 5, 6, and 7. The following transpired when the jury returned its verdict:

> CLERK: Ladies and gentlemen of the jury, have you agreed upon your verdict?
>
> THE JURORS: Yes.
>
> THE CLERK: Who shall say for you?
>
> COURT/JURORS: Our foreperson.

CLERK: Madam Foreman, as [to] question one, how do you find the Defendant as to Assault Second Degree?

MADAM FOREMAN: Not guilty.

CLERK: As to question four,[5] how do you find the Defendant as to Illegal Possession of an Assault Weapon.

MADAM FOREMAN: Guilty.

CLERK: As to question ***five***, how do you find the Defendant as to Illegal Possession of ***Shotgun*** with a Disqualifying Conviction?

MADAM FOREMAN: Guilty.

CLERK: As to question ***six***, how do you find the defendant as to Illegal Possession of Ammunition?

MADAM FOREMAN: Guilty.

CLERK: I'm sorry . . . Illegal Possession of a ***Shotgun*** with Disqualifying Conviction.

MADAM FOREMAN: Guilty.

COURT: Which one was that again? Can you. . . let's make it clear.

THE STATE: She asked the wrong question on five.

CLERK: Five. Okay. As to question *five,* how do you find the Defendant as to Illegal Possession of a *Shotgun* with Disqualifying Conviction?

MADAM FOREMAN: Guilty.

CLERK: As to question *six,* how do you find the Defendant Illegal Possession of *Shotgun* with a Disqualifying Conviction?

MADAM FOREMAN: Guilty.

CLERK: As to question seven, how do you find the Defendant as to Illegal Possession of Ammunition?

[5] The verdict sheet instructed the jury to skip questions 2 and 3 on the verdict sheet if the jury found appellant not guilty of question 1.

MADAM FOREMAN: Guilty.

COURT: Would you like them polled?

DEFENSE COUNSEL: Yes, Your Honor.

COURT: Okay. Ladies and gentlemen, I'll just ask each of you to sit down and then Madam Clerk will call you one at a time and she will go…she'll restate the verdict and ask is that your individual verdict. So we'll start with Madam Foreman.

CLERK: As your number is called, please rise and remain standing. Juror Number Sixty-one. Madam Foreman, you announced the verdict as to question one as not guilty to Assault First…I'm sorry…Assault Second Degree.

MADAM FOREMAN: Yes.

CLERK: You announced the verdict as guilty to question number four, Illegal Possession of Assault Weapon. **You announced the verdict as guilty to Illegal Possession of *Assault Weapon* with a Disqualifying Conviction. You announced the verdict as guilty for Illegal Possession of a *Shotgun* with a Disqualifying Conviction.** And, you announced the verdict as guilty to Illegal Possession of Ammunition.

MADAM FOREMAN: Yes.

COURT: And, is that your…

CLERK: Is this your individual verdict?

MADAM FOREMAN: In the whole…yes, that's my, yes.

COURT: But, it…is it also your individual verdict?

MADAM FOREMAN: Yes. Yes.

The Clerk then polled the remaining jurors and each juror confirmed that the foreman's verdict was their individual verdict. After the polling was complete, the clerk hearkened the verdict as follows:

Ladies and gentlemen of the jury, hearken to your verdict as the Court has recorded it. Your Foreman says as to question one as not guilty to Assault

> Second Degree. As to question two…four, Illegal Possession of Assault Weapon, guilty. **As to question five, Illegal Possession of *Assault Weapon* with a Disqualifying Conviction, guilty. As to question six, Illegal Possession of *Shotgun* with a Disqualifying Conviction, guilty.** As to question seven, Illegal Possession of Ammunition, guilty.
>
> And so say you all?
>
> THE JURORS: Yes.

Initially, we note that the alleged error of the court that Mackall complains of is not the sort of error that is cognizable under Maryland Rule 4–345(a), which permits the courts of this State to correct an illegal sentence at any time. As in *Colvin v. State*, 450 Md. 718, (2016), the alleged error in the instant case was a procedural error which "does not come within the narrow meaning of Rule 4–345(a) and therefore is not a cognizable claim under that rule." *Id*. at 721.

> An illegal sentence, for purposes of Rule 4–345(a), is one in which the illegality "inheres in the sentence itself; i.e., there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed and, for either reason, is intrinsically and substantively unlawful.

Chaney v. State, 397 Md. 460, 466 (2007).

Colvin suggests that, while a lack of unanimity among the jurors might support a claim under Md. Rule 4-345(a), a mere procedural error will not. *Colvin*, 450 Md. at 728–29. The defendant in *Colvin*, challenged the legality of his sentence based on the fact that the jury foreperson was not polled. *Id*. at 726–27. The Court of Appeals concluded that the alleged procedural flaws did not automatically implicate the jury's unanimity because the verdict was hearkened. *Id*. at 728. The Court explained:

> The most that can be said of Colvin's alleged claim is that the record does not reflect, at least as Colvin would argue, a properly conducted polling

> process. Yet, that allegation, even if true, does not make a substantive allegation of a lack of juror unanimity without more: the additional lack of a proper hearkening of the jury to the verdict. The alleged lack of unanimity of the verdict is the lynchpin of Colvin's argument that the verdict, as rendered, is unconstitutional and therefore a "nullity" upon which no legal sentence can be imposed. Without that lynchpin, the fragile structure of Colvin's allegation of an illegal sentence collapses of its own weight.

Id. The Court concluded by stating that "an alleged procedural error in the taking of the verdict must be preserved by contemporaneous objection and, if not cured at the time, be raised on direct appeal[.]" *Id*. at 728–29. In the instant case, as in *Colvin*, Mackall alleges a procedural error in the taking of the verdict. Mackall never alleges that the jury's verdict was not unanimous. As a result, his claim is not preserved because he did not object to the taking of the verdict at trial.

Nevertheless, even if his claim were preserved or cognizable as an illegal sentence under Md. Rule 4-345(a) we would still find his allegation meritless. Appellant relies heavily on *Jones v. State*, 384 Md. 669 (2005) to support his position that the jury did not orally announce its verdict. Appellant's reliance is, however, misplaced. In *Jones*, no verdict was read on a particular count even though the verdict sheet indicated that it had found Jones guilty of that count. Unlike the instant case, in *Jones*, the jury was neither polled nor hearkened on the count for which the jury returned no verdict. In *Jones*, the Court of Appeals emphasized that the reason that Jones' conviction could not stand was because the jury could not be polled and hearkened on the count for which no verdict was taken, and Jones was therefore deprived of his right to ensure the jury's unanimity. *Id*. at 685-86. The *Jones* court stated:

> Therefore, we conclude that for a verdict to be considered final in a criminal case it must be announced orally to permit the defendant the opportunity to exercise the right to poll the jury to ensure the verdict's unanimity. This was not done with respect to Count nine[.] Therefore, because the jury was not polled and hearkened to that Count in absence of its oral announcement, the verdict of guilt cannot stand and any sentence apportioned thereto must be vacated. We hold that Jones's sentence [on that count] is an illegal sentence.
>
> *Id*.

In the instant case, it is clear that the court clerk mistakenly did not initially ask the foreperson about the jury's verdict on illegal possession of an assault weapon with a disqualifying conviction, and therefore, the verdict on that count was not initially announced. It is equally clear from the record, however, that the verdict sheet indicated that the jury found appellant guilty on that count, that the jury was polled on that count, that the jury's verdict was hearkened on that count, and that appellant never objected to the verdict on that count. Under the circumstances, we believe the jury unanimously, and unambiguously, found appellant guilty, and therefore appellant was not denied his right to ensure the jury's unanimity. As a result, his sentence is not illegal and, therefore, his conviction and sentence for illegal possession of an assault weapon with a disqualifying conviction must stand.

IV.

Appellant finally contends that the trial court erred when it denied appellant's motion to suppress both a pre-trial and an in-court identification of him by Lieutenant Voorhaar because, the pre-trial identification,[6] made about a week after the search, was

[6] Although the court denied appellant's motion to suppress the pre-trial identification, the State never elicited that identification during the trial.

impermissibly suggestive, and the in-court identification was the fruit of the earlier identification. Appellant contends that the identification procedure was impermissibly suggestive because Voorhaar identified appellant by viewing a single photograph.

Testimony adduced during the motion to suppress hearing revealed that, in a briefing on the morning the warrant was executed, Detective Sauve showed all of the officers, including Voorhaar, a picture of appellant. Voorhaar testified that he was already familiar with appellant prior to that date. After the warrant was executed and the officers had cleared the house, Voorhaar told Sauve that appellant was the individual who had the rifle. A few days after the search warrant had been executed Sauve showed Voorhaar the same picture of appellant that he had shown him during the briefing before the search. When Sauve asked Voorhaar "if this was the same guy," Voorhaar said "Yes."

The circuit court denied appellant's motion to suppress the identifications stating, *inter alia*, the following:

> [Appellant] has a very distinguishing feature, which is the facial tattoo. And that would even be another reason that someone would want to show this particular photograph. I don't believe that the procedure used with Lieutenant Voorhaar is impermissibly suggestive. It's at best sort of a confirmatory procedure. He's already identified the person. He identified the person minutes after coming into contact with him. He's already seen the photo. He saw the photo, sees the person a couple of time[s]. Then he makes the identification. And I think that's fine. I think, and you know maybe I'm incorrect on this but I think if someone identified someone in a photo array and a few days later an officer showed up and said I just want to make sure, are you sure this is the person? I don't think that would be impermissibly suggestive[.] So it's not too suggestive is the point I'm trying to make. Even if it was, based on the officer's testimony that he's been -- he's had contact with [appellant] before. Although he readily admits that he …wasn't sure if he was at the home on one or two occasions where he was at the home. That he had the chance to observe the photograph. That he saw him in enough light on multiple occasions within the home and he made the

> identification on the spot. I think the identification is reliable and I don't think it taints any in-court identification. So Madam Clerk, we're going to deny the Defense motion as it relates to a pre-trial identification and any in-court identifications.

In reviewing a lower court's denial of a motion to suppress an extrajudicial identification, we consider only the evidence presented at the suppression hearing. *Wallace v. State*, 219 Md. App. 234, 243 (2014). We extend great deference to the factual findings of the suppression court unless clearly erroneous, giving due regard to its unique opportunity to assess the credibility of witnesses and weigh first level facts. *Id*. To the extent that the motions court's factual findings are ambiguous, incomplete, or non-existent, the evidence and all reasonable inferences from the evidence are viewed in the light most favorable to the party who prevailed on the motion, in this case the State. *Id*. We make our own independent constitutional appraisal of the law and how it applies to the facts of the case. *Id*. at 243-44.

> Extrajudicial identifications obtained through impermissibly suggestive procedures are not admissible. *James* [*v. State*, 191 Md. App. 233, 251–52 (2010)]. We look at the circumstances of [the] identification… through a two-step process:
>
> The first is whether the identification procedure was impermissibly suggestive. If the answer is "no," the inquiry ends and both the extra-judicial identification and the in-court identification are admissible at trial. If, on the other hand, 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.
>
> *Jones v. State*, 395 Md. 97, 109 (2006) (citations omitted). "The defendant bears the burden of proof in the first stage of the inquiry, and, if the defendant meets this burden, then the prosecution has the burden in the second stage of the analysis." *Upshur v. State*, 208 Md. App. 383, 400–01, (2012) (*citing In re Matthew S.*, 199 Md. App. 436, 447–48 (2011)), *cert. denied*, 430 Md. 646 (2013); *see also James*, 191 Md. App. at 252 ("Although the reliability of the

> identification is the linchpin question, if the identification procedure is not unduly suggestive, then our inquiry is at an end.") (Internal citation and quotation marks omitted.))

Wallace v. State, 219 Md. App. at 244. (Some citations omitted. Alterations from original.) To determine the reliability of an identification, courts will consider the totality of the circumstances. In *Neil v. Biggers*, 409 U.S. 188 (1972), the Supreme Court listed several factors to be considered in evaluating the likelihood of misidentification, including "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." *Id*. at 199-200.

We are persuaded that, however suggestive, *vel non*, the identification procedure may have been, the identifications were admissible because they were so reliable. Voorhaar's identification of appellant was reliable because when Sauve showed Voorhaar the photograph a few days after the search, Voorhaar was already familiar with appellant. In fact, appellant was known to Voorhaar before the search took place. Voorhaar then encountered appellant inside the residence and identified him to Sauve as the person who had the rifle. Under the totality of the circumstances, we believe that there was little likelihood that Voorhaar mis-identified appellant at trial as a result of being shown a single photograph of him just days after the search warrant was executed.

JUDGMENTS OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.