Circuit Court for Montgomery County
Case No. 132974C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3354

September Term, 2018

ANTHONY HEWITT

v.

STATE OF MARYLAND

Kehoe,
Berger,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: January 22, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Following an armed robbery, Anthony Hewitt, appellant, was arrested and charged, in the Circuit Court for Montgomery County, in connection with the crime. Prior to trial, appellant filed a motion to suppress statements he made to the police while in custody. Appellant also filed a motion to suppress a police officer's out-of-court identification of appellant. Both motions were denied. A jury ultimately convicted appellant of four counts of first-degree assault, two counts of armed robbery, two counts of conspiracy to commit first-degree assault, two counts of conspiracy to commit armed robbery, three counts of use of a firearm in the commission of a crime of violence, and one count of possession of a firearm by a disqualified person. The Court sentenced appellant to a total of 85 years' imprisonment, with all but 38 years suspended. In this appeal, appellant presents two questions for our review:

1. Did the suppression court err in denying appellant's motion to suppress statements he made to the police?
2. Did the suppression court err in denying appellant's motion to suppress a police officer's out-of-court identification of appellant?

For reasons to follow, we answer both questions in the negative and affirm the judgments of the circuit court.

BACKGROUND

In the early morning hours of October 25, 2017, Almaz Debreyohanes and her daughter, Lydia Assefa, were outside of their home when two men carrying guns approached them and demanded their purses. Ms. Debreyohanes's son, Degol Assefa, who was standing nearby, ran over and, when he tried to intervene, was shot in the leg. The two

assailants then grabbed Ms. Debrehohanes's and Ms. Assefa's purses, ran to a nearby parked car, and drove away.

Around the same time, Washington, D.C. Metropolitan Police Officer Donnie Washington was on patrol in his vehicle when he received information that a shooting had just occurred and that he should be on the lookout for "a black, four-door Nissan, later model, occupied by two black males." Shortly thereafter, Officer Washington observed a vehicle matching that description traveling "at a high rate of speed." Officer Washington followed the vehicle and initiated a traffic stop. As he approached the vehicle on foot, Officer Washington observed the driver stick his head out of the vehicle's driver's side window and then drive away. Officer Washington then got back in his vehicle and gave chase. During the ensuing chase, the black Nissan crashed into an embankment, and the vehicle's occupants fled on foot. Officer Washington again gave chase but was unable to apprehend the driver.[1] Officer Washington was later shown a photographic array, from which he identified appellant as the driver of the black Nissan.

After a warrant was issued for his arrest, appellant turned himself in and was taken into custody. While appellant was in custody, one of the investigating officers, Detective Kevin Decker, observed that appellant "had a noticeable limp." When Detective Decker asked appellant how he had gotten hurt, appellant responded that it had happened "when he wrecked the car … when he ran from the police."

[1] The passenger of the vehicle was apprehended at the scene.

Motion to Suppress Statements to Police

Prior to trial, appellant filed a motion to suppress the statements he made to Detective Decker while he was in custody. At the hearing on that motion, Detective Decker testified that he was the initial detective on the scene of the crash following the robbery and that he was the one who had issued the arrest warrant for appellant. Detective Decker testified that, a few weeks after the crash, he received a call informing him that appellant "had turned himself in" at a local precinct and that "he was going to be transported" to another precinct. Approximately 45 minutes after receiving that call, Detective Decker came in contact with appellant at the cell block where appellant was being held. At the time, appellant was being questioned by a "cell block tech." During that conversation, which was video recorded and played for the suppression court, the cell block tech can be heard asking appellant about his injury:

[TECH]: You were limping because you had an MCL injury previously?

[APPELLANT]: Yeah.

[TECH]: Okay. And you had been limping like that before?

[APPELLANT]: (Unintelligible).

[TECH]: Before you got arrested?

[APPELLANT]: Yeah.

* * *

[TECH]: How do you know it's your MCL?

[APPELLANT]: It's (unintelligible) I know that, I know it is, the doctor told me that.

[TECH]:	Oh, so you did go to the doctor for it?
[APPELLANT]:	I did go to the doctor.
[TECH]:	Okay.
[APPELLANT]:	When he told me that, then I, I rolled out.
[TECH]:	Oh, okay. So you didn't, you chose not to get it treated?
[APPELLANT]:	I, I couldn't. I ain't, I mean, I, if I could have, I would have, but I, I couldn't, you know, because at the time, I was running, so I would just –
[TECH]:	Okay.
[APPELLANT]:	- you know –
[TECH]:	I got you.
[APPELLANT]:	- but if I could have, I would have.

Detective Decker testified that, in the recording, he could be seen walking into the shot at "the tail end of the conversation" between appellant and the cell block tech. Detective Decker testified that, although he "wasn't there for too much" of the conversation, he "did hear the part about the on the run [sic]."

After appellant's conversation with the cell block tech, Detective Decker took appellant "upstairs to attempt to interview him." Detective Decker testified that, at the time, he knew that appellant "was the driver," that "he had wrecked pretty badly because the car was totaled," and that "he had run off from the scene." Detective Decker also testified that he "didn't think [appellant] would have a limp" because one of the officers that had chased appellant on the night of the crash was "not exactly slow" and appellant had "outran him for at least a good piece."

During his walk with appellant from the holding cell to the interview room, Detective Decker observed that appellant "had a bad limp." Detective Decker then asked appellant "if he was okay, if he needed to go to the hospital, and if he was even going to be able to make it up the stairs because it was a very noticeable limp." Detective Decker testified that he was concerned about appellant's welfare because, "at that point, I'm taking him into custody and I mean, if he's, if something is wrong with him and I didn't check on him, that's on me." Detective Decker also testified that he was concerned because "it's not right to try and interview someone if they're physically unable" and because "it's just common decency to make sure someone's okay when they have a noticeable injury." Detective Decker further testified that he "didn't know the, all the details for how [appellant] was arrested" and that he "didn't know if [appellant] had run," only that "he was under arrest." Detective Decker added that he "didn't know how exactly [appellant] got injured, if it was, you know, right then and there, or if it had happened earlier." Detective Decker explained that, if appellant had been injured by another officer, that officer would "have to do a use of force report" and appellant would "have to go to the hospital and be cleared by, you know, medical staff before he could even be processed by us."

Detective Decker testified that, after observing appellant's limp, he asked appellant "how he had gotten injured, if it had, you know, just happened or how the injury had happened." According to Detective Decker, appellant responded that "it was from the crash when he ran from the police" and that "he had gone to the doctor, he had torn his MCL."

In the end, the suppression court issued an oral ruling denying appellant's motion to suppress.

Motion to Suppress Out-of-Court Identification

As noted, appellant also filed a pretrial motion to suppress Officer Washington's out-of-court identification of him as the driver of the black Nissan that crashed following the robbery and subsequent chase. At the hearing on that motion, Officer Washington testified that he was the officer that initiated the traffic stop of the black Nissan in the early morning hours of October 25, 2017, after receiving information that the vehicle's occupants were involved in a robbery. Officer Washington testified that, in effectuating the traffic stop, he approached the vehicle on foot, came within "about four and a half to five feet" of the driver, and glimpsed the driver for "a matter of seconds." Around that time, the driver sped away, and Officer Washington gave chase in his vehicle. Eventually, the black Nissan crashed, and the driver escaped on foot.

Officer Washington testified that, after his unsuccessful foot pursuit of the driver, he went back to the police station, where "the detectives prepared a photo array." Upon being shown that photo array, Officer Washington identified appellant as the driver of the black Nissan. Officer Washington testified that he then went back to the scene of the crash to assist another officer in locating that officer's body-worn camera, which he had lost during the chase. In so doing, Officer Washington discovered, in the area where the black Nissan had crashed, a Delaware driver's license with appellant's picture. Officer Washington testified that he had not seen the driver's license prior to that time.

The suppression court ultimately denied appellant's motion to suppress the identification. The court found that the photo array shown to Officer Washington was not unduly suggestive. The court also found that Officer Washington's identification was not "so unreliable that it should be suppressed."

STANDARD OF REVIEW

"Our review of a circuit court's denial of a motion to suppress evidence is limited to the record developed at the suppression hearing." *Pacheco v. State*, 465 Md. 311, 319 (2019) (citations and quotations omitted). "[W]e view the evidence presented at the [suppression] hearing, along with any reasonable inferences drawable therefrom, in a light most favorable to the prevailing party." *Davis v. State,* 426 Md. 211, 219 (2012). Moreover, "[w]e 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." *Daniels v. State,* 172 Md. App. 75, 87 (2006). "We give no deference, however, to the question of whether, based on the facts, the trial court's decision was in accordance with the law." *Seal v. State,* 447 Md. 64, 70 (2016). In short, "[w]e accept the trial court's factual findings unless they are clearly erroneous, but we review *de novo* the court's application of the law to its findings of fact." *Pacheco*, 465 Md. at 319 (citations and quotations omitted).

DISCUSSION

I.

Appellant first contends that the suppression court erred in denying his motion to suppress the statements he made to Detective Decker regarding the nature of his injury.

Appellant maintains that the statements were made pursuant to a custodial interrogation, but before he had been properly "Mirandized," and thus were inadmissible. Appellant also maintains that any exceptions to the *Miranda* requirement, including the "routine booking question exception," did not apply in his case because Detective Decker's questions came after the booking process had been completed and because the questions were reasonably likely to elicit an incriminating response.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the United States Supreme Court held that the police must "advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation." *Lee v. State*, 418 Md. 136, 149 (2011) (citations and quotations omitted). "These well-known *Miranda* warnings require an individual to be informed that 'he has a right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.'" *Reynolds v. State*, 461 Md. 159, 178 (2018) (quoting *Miranda*, 384 U.S. at 479). "The obligation to give *Miranda* warnings arises whenever an individual is subjected to 'custodial interrogation.'" *Hughes v. State*, 346 Md. 80, 87 (1997). "If the warnings are not given or the police officers fail to respect the person's proper invocation of their rights, 'the prosecution may not use statements, whether exculpatory or inculpatory, stemming from the custodial interrogation of the defendant.'" *Vargas-Salguero v. State*, 237 Md. App. 317, 336 (2018) (citing *Miranda*, 384 U.S. at 474).

"In the years since this landmark decision, however, a number of exceptions to *Miranda*'s requirements have been recognized." *Hughes*, 346 Md. at 87. For instance, in

Pennsylvania v. Muniz, 496 U.S. 582 (1990), the United States Supreme Court "held that questions reasonably related to the police's administrative concerns fall outside the protections of *Miranda* [] and the answers thereto need not be suppressed." *Maryland v. King*, 569 U.S. 435, 456 (2013) (citations and quotations omitted). Known as the "routine booking question exception," this exception exempts from the requirements of *Miranda* "certain routine questions asked during the booking process[.]" *Hughes*, 346 Md. at 87, 94. "Examples of questions to which the routine booking question exception will ordinarily extend include the suspect's name, address, telephone number, age, date of birth, and similar such pedigree information." *Id.* at 95.

"In order for this exception to apply, however, the questions must be directed toward securing 'simple identification information of the most basic sort;' that is to say only questions aimed at accumulating 'basic identifying data required for booking and arraignment' fall within this exception." *Id.* at 94-95 (citations omitted). "Conversely, questions that are 'designed to elicit incriminatory admissions' do not fall within the narrow routine booking question exception." *Id.* at 95 (citations omitted). "Even if a question appears innocuous on its face, [] it may be beyond the scope of the routine booking question exception if the officer knows or should know that the question is reasonably likely to elicit an incriminating response." *Id.* "Assessment of the likelihood that an otherwise routine question will evoke an incriminating response requires consideration of the totality of the circumstances in each case, with consideration given to the context in which the question is asked." *Id.* "Therefore, courts should carefully scrutinize the factual setting of each encounter of this type, keeping in mind that the critical inquiry is whether

the police officer, based on the totality of the circumstances, knew or should have known that the question was reasonably likely to elicit an incriminating response." *Id.* at 95-96 (citations omitted).

In *Hughes*, for example, the Court of Appeals held that a police officer's question as to whether the defendant was a "narcotics or drug user" violated *Miranda* and that, as a result, the defendant's negative response to the question should have been suppressed. *Id.* at 100-01. The Court explained that, although the question was posed during the booking process and in conjunction with other innocuous questions related to the defendant's biographical information, the totality of the circumstances suggested that the question fell outside of the routine booking question exception. *Id.* at 85, 98-99. The Court reasoned that, because the defendant had been arrested for his suspected involvement in the distribution of cocaine, his negative answer to the "drug use" question was inculpatory "in that it supported the charge that he intended to distribute, as opposed to consume, the cocaine." *Id.* at 98. The Court further reasoned that, had the defendant answered the question in the affirmative, such a response "would have amounted to an admission that he engages in criminal behavior." *Id.* at 99.

Finally, the Court of Appeals rejected the State's argument that the question was "a valid means of redressing certain administrative concerns" in that it "enable[ed] the police to provide necessary medical treatment to the suspect, and to protect others from harm[.]" *Id.* The Court explained that the State's argument was flawed because there was "nothing in the record to suggest [] that [the defendant] might have been under the influence of 'narcotics or drugs' or that he otherwise might have been in need of medical services." *Id.*

The Court also noted that, "if the police department [was] concerned about violence or illness resulting from drug use or other such concerns, the appropriate question would appear to be whether the suspect is *currently under the influence of* any narcotics or drugs, as opposed to whether the suspect is generally a narcotics or drug user." *Id.* (emphasis in original). The Court went on to note that "a question directed toward the present physical state of the suspect seems better-suited to redress the 'administrative concerns' cited by the State." *Id.*

Against that backdrop, we hold that Detective Decker's questions regarding the nature of appellant's injury were reasonably related to the police's administrative concerns and thus fell within the routine booking exception to the *Miranda* requirement. Unlike the "drug use" question posed in *Hughes*, the questions posed by Detective Decker were "directed toward the present physical state of the suspect," namely, the nature and extent of appellant's "noticeable limp." Moreover, Detective Decker testified that, given his observations regarding appellant's limp, he was concerned as to whether appellant was physically able to be interviewed. Detective Decker also testified that he was unsure how the injury had occurred; that he thought it unlikely that the injury had occurred during the crash; and that it was possible that the injury had been caused by another police officer, which would have required certain administrative steps to be taken.[2] Thus, under the

[2]Appellant asserts that Detective Decker "knew" that "appellant had not been injured by the police." This claim is not supported by the record. Although Detective Decker admitted that he was aware that appellant had "turned himself in," there is nothing in the record to show that appellant's entire arrest, which included the time between when he turned himself in and when Detective Decker came into contact with him, was (continued)

totality of the circumstances, it was reasonable for Detective Decker to ask appellant about the injury.[3]

We also conclude that Detective Decker's questions into the nature of appellant's injury were not reasonably likely to elicit an incriminating response. Unlike in *Hughes*, the questions posed by Detective Decker were not related to the crimes charged. Furthermore, it is reasonable to infer, based on his testimony, that Detective Decker was unaware that appellant had been injured during the crash following the robbery. Thus, we cannot say that Detective Decker knew or should have known that his rather benign questions regarding appellant's injury were, under the circumstances, reasonably likely to elicit an incriminating response.

Assuming, *arguendo*, that the suppression court erred in admitting the statements, any error was harmless. At most, appellant's statements established that he was the driver of the black Nissan that crashed following the robbery. That fact was more than established by other evidence properly admitted at trial, namely, Officer Washington's testimony

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completely without incident. Moreover, appellant's reliance on his conversation with the "cell block tech," in which he informed the tech that he had been injured before his arrest, is misplaced. Detective Decker testified that he "wasn't there for too much" of that conversation and that he came in at "the tail end." Thus, it is unclear whether Detective Decker actually heard the portion of the conversation on which appellant relies.

[3] Appellant argues, in part, that the routine booking question exception did not apply because Detective Decker's questions came after the "booking" process had been completed. We disagree, as the Court of Appeals made clear in *Hughes* that it is the nature of the question and the circumstances under which it is asked that determines whether the exception applies. *Hughes*, 346 Md. at 94-98; *See also State v. Conover*, 312 Md. 33, 39 (1988) ("There seems to be general agreement … that *Miranda* does not apply to 'administrative questioning,' the routine questions asked of all arrestees who are 'booked" *or otherwise processed*.") (citations omitted) (emphasis added).

identifying appellant as the driver. In addition, the State presented evidence establishing that appellant's driver's license was found at the scene of the accident and that appellant's DNA was found on a handgun recovered from the floor of the black Nissan following the crash. Thus, we are able to declare, beyond a reasonable doubt, that any error the suppression court may have made in admitting the statements no way influenced the verdict. *Dorsey v. State*, 276 Md. 638, 659 (1976).

II.

Appellant next claims that the suppression court erred in refusing to suppress Officer Washington's out-of-court identification of appellant as the driver of the black Nissan. Appellant argues that Officer Washington "saw the driver's face, at night, for only a matter of seconds." Appellant further argues that "it was the discovery of appellant's driver's license, somewhere in the area of the crashed Nissan Sentra, that caused Officer [Washington] to conclude that the driver must have been appellant." Appellant contends, in other words, that Officer Washington "knew, in advance, that the same photograph that he saw on the driver's license, shortly beforehand, would be included in that array, and he identified that photograph, again."

The right of due process of law, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article 24 of the Maryland Declaration of Rights, "protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures." *Small v. State*, 464 Md. 68, 82-83 (2019) (citations and quotations omitted). "The admissibility of an extrajudicial identification is determined in a two-step inquiry." *Smiley*

v. State, 442 Md. 168, 180 (2015). "In step one of the due process inquiry, the suppression court must evaluate whether the identification procedure was suggestive." *Small*, 464 Md. at 83. "If the court determines that the extrajudicial identification procedure was not suggestive, then the inquiry ends and evidence of the procedure is admissible at trial." *Id.* If, however, the suppression court determines that the identification procedure was suggestive, the court moves to step two of the due process inquiry, and the court "must weigh whether, under the totality of the circumstances, the identification was reliable." *Id.* at 83-84.

"Suggestiveness can arise during the presentation of a photo array when the manner itself of presenting the array to the witness or the makeup of the array indicates which photograph the witness should identify." *Smiley*, 442 Md. at 180. "The impropriety of suggestive police misconduct is in giving the witness a clue about which photograph the police believe the witness should identify as the perpetrator during the procedure." *Small,* 464 Md. at 88-89. That is, "[t]he sin is to contaminate the test by slipping the answer to the testee." *Morales v. State*, 219 Md. App. 1, 14 (2014) (quoting *Conyers v. State*, 115 Md. App. 114, 121 (1997)). Thus, "it is not a Due Process violation *per se* that an identification procedure is suggestive." *Id.* Rather, "[t]he procedure must be *impermissibly* suggestive, and it is the impermissibility of the police procedure that warrants exclusion." *Id.* (emphasis in original). "The defendant bears the burden of making a *prima facie* showing of suggestiveness." *Small*, 464 Md. at 83.

Here, we hold that appellant failed to make a *prima facie* showing of suggestiveness. The only argument appellant makes in support of his claim is that Officer Washington had

viewed appellant's driver's license prior to viewing the photo array. That claim, however, is not supported by the record, as Officer Washington testified that he did not find appellant's license until after he was shown the array. Beyond that, appellant presents no argument as to how the array was suggestive. Accordingly, the suppression court did not err in denying appellant's motion to suppress.

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