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Commonwealth v. Munday

Commonwealth of Pennsylvania v. Curtis Wade Munday, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch, Criminal Action
No. 465-2013

HEADNOTES

Criminal Law; Eyewitness Identifications using Facebook; Suggestive Identification Procedures

Witness Identifications using Facebook

1. The validity of an identification made after performing a Facebook search with a suspect's name is a novel issue. Although Facebook is one of the most popular social networking sites, this issue has not previously been presented to the Pennsylvania appellate courts for decision. There has been a surge of case law regarding "e-discovery," but the current legal landscape reveals no such precedent regarding "e-identifications."

Out-of Court Identifications – Suggestiveness

1. To determine whether a police identification procedure is suggestive, Pennsylvania courts apply a totality of the circumstances approach. A police identification procedure raises questions of suggestiveness when it emphasizes or singles-out a suspect. Where an identification challenge is based on a show up or one on one confrontation, there must be the existence of some element of unfairness to make that procedure suggestive.

2. A police officer's actions of providing a witness with the suspect's name, after which that witness conducts a Facebook search and identifies the suspect, is not a suggestive identification procedure where the search was conducted on the witness's own initiative and it generated multiple results.

3. A witness's examination of photos generated by a Facebook search in her own home, is less suggestive than that witness being presented with a lineup of photographs, chosen by the police, at the police station, as that procedure does not give rise to the true concerns underlying suggestive identifications controlled by the police, namely the concern of false identifications based on the circumstances, along with the deterrence of improper police conduct.

Out-of-Court Identifications – Reliability – Five Factor Test

4. Even if a court finds out-of-court identifications to be suggestive, the identifications may be admissible if they possess sufficient indicia of reliability to warrant their admissibility. To determine whether a suggestive identification is nevertheless reliable, Pennsylvania courts consider five factors: [1] The opportunity of the witness to view the criminal at the time of the crime, [2] the witness's degree of attention, [3] the accuracy of his prior description of the criminal, [4] the level of certainty demonstrated at the confrontation, and [5] the time between the crime and the confrontation. In applying the totality of the circumstances test, Pennsylvania courts weigh the factors against the corrupting effect of the suggesting identification itself.

5. Identifications using Facebook is a novel issue to the Pennsylvania appellate courts. In applying this factor test, the key is that the witness did not exclusively rely on the photos generated by a Facebook search with the suspect's name in her identification of that person.

6. In considering the opportunity of the witness to view the criminal during the crime, the court examines the length of time a person had to view the suspect, the proximity to the suspect, the lighting in the area, and anything that would obstruct the witness's view.

7. In considering the witness's degree of attention, the Pennsylvania courts have considered the witness's attentiveness at the time, whether any distractions were present, and the witness's profession. General descriptions, and even failed identifications, do not automatically render a subsequent identification unreliable where the evidence indicates the witness's attention was sufficiently fixed on the suspect.

8. To determine the accuracy of a witness's prior description, the court looks to any differences in the description of the suspect and that person's actual appearance, as well as the decisive nature of the identification. Pennsylvania courts have found identifications reliable even where witnesses are mistaken about certain details in appearance, or where the suspect has changed his appearance.

9. When considering a witness's level of certainty demonstrated at the confrontation, the Pennsylvania courts have focused on a high level of certainty combined with the other reliability factors. A witness who remembers the suspect's face from the crime and not only from a

subsequent Facebook search, and who demonstrates that in court has the level of certainty required under this test.

10. Under the last factor, Pennsylvania courts look to how close in time the identification was to the incident. The focus is whether the face of the culprit was fresh in the mind of the witness, so as to negate the likelihood of misidentification. Where a matter of hours passed between the incident and subsequent identification, and the witness identified the culprit with certainty, there is a low likelihood of misidentification.

11. Upon a report of a carjacking, a suspect's actual arrest in possession of the stolen vehicle is not a factor to be considered under the five factor test, but the Pennsylvania courts have noted that such facts do not undermine any subsequent witness identifications.

In-Court Identifications – Admissibility

12. Even if an out-of-court identification was the product of suggestive police procedures, an in-court identification is admissible where there was an independent basis for the identification. The Commonwealth must establish by clear and convincing evidence that the later identification was not the result of the earlier suggestive event.

13. To determine whether an independent basis existed, Pennsylvania courts apply the same five factor test applied in establishing the reliability of an out-of-court identification.

14. To establish an independent basis where the witness identified a suspect by recognizing his photograph on Facebook, the focus should be on the facts and circumstances underlying the witness's actual encounter with the suspect. There must be evidence that that the identification was made by recognizing a face the witness already had in her mind, and thus she was not relying exclusively on Facebook.

Credibility Issues – Resolved at Trial

15. Notably, any inaccuracies in a witness's description of a suspect, the generality of that description, and other shortcomings pertaining to that identification go more to the weight of the evidence than admissibility, and are therefore credibility issues reserved for the jury to decide.

Appearances

Jenna M. Fliszar, Esq., Counsel for Defendant

David J. Drumheller, Franklin County District Attorney's Office

OMNIBUS OPINION

Before Meyers, J.

On January 5, 2013, Defendant Curtis Wade Munday was arrested in connection with the carjacking of Cheyanne Baylor. A Preliminary Hearing was held on March 5, 2013, after which the case was forwarded to this Court. Formal arraignment was held on March 27, 2013. Munday filed an Omnibus Pre-Trial Motion on May 10, 2013. The Commonwealth filed an Answer on June 3, 2013. This Court held the first part of a suppression hearing on June 11, 2013. Due to the unavailability of the Commonwealth's witness, the second part of the suppression hearing was held on June 21, 2013. Munday filed an Amended Omnibus Pre-Trial Motion and his Brief in Support on July 3, 2013. Munday filed a Motion for Continuance on July 25, 2013. The Commonwealth filed its Brief in Opposition on July 26, 2013. This Court granted a continuance on July 30, 2013, and set the hearing for October 21, 2013. This Court finds that this matter is now ripe for decision.

STATEMENT OF FACTS

On January 5, 2013, at approximately 5:30 p.m., police responded to a report of a carjacking in Waynesboro, Pennsylvania. Transcript of First Suppression Hearing, 06/11/2013, at p. 7. Cheyanne Baylor had been sitting in her car on Third Street waiting at a red light, when a man opened her driver's side door and told her to get out of her car. Id. at 8-10. Baylor stayed seated, and the man pulled her by her coat. Id. at 12. The man got into her car and proceeded to make a left on Potomac Street heading towards Maryland. Id.

Justine Calpado, who was working for Domino's Pizza at the time, saw this incident as it took place. At

approximately 5:30 p.m., Calpado was driving on West Third Street on her way to a delivery. Transcript of Second Suppression Hearing, 06/21/2013, at p. 5. As she approached the intersection driving in the straight lane, she saw a man standing on the sidewalk beside the turning lane, smoking a cigarette. Id. at 7-8. Calpado stated that she saw the man step off the curb, heard Baylor say “no,” and then saw the man “rip [Baylor] out of her vehicle” before getting into her car and driving away towards Maryland. Id. at 11.¹

Baylor later reported the carjacking to the police, and both women gave descriptions of the man. First Suppression Hearing, at 13. Baylor described her assailant as a white male with blonde facial hair reaching from ear to ear, who was holding a cigarette in his hand. Id. at 10-11. Calpado described the man as a white male, with blonde facial hair, between 5’11” and 6’1”, and approximately 180 pounds. Second Suppression Hearing, at 12-13. She stated that the man had been wearing black pants, white shoes, and either a black hooded sweater or a cap. Id. at 9-10.

At the police station, Corporal Wagaman showed Baylor a photograph. First Suppression Hearing, at 13. When asked if the person in the photograph was the person who took her car, Baylor responded in the negative. Id. at 13-14. Baylor testified that the person shown to her was brunette and not blonde like the individual she saw. Id. Corporal Wagaman told her that if he came up with any more pictures for her to look at he would call her back to the station. Id. at 24. Calpado was also called in to look at the photograph. Second Suppression Hearing, at 19. She did not identify the person in the photo as the man who had stolen Baylor’s car. Id. at 20.

At around 2:30 in the morning, Baylor received a phone call from Corporal Wagaman, indicating that the police had apprehended the person with her vehicle in Shenandoah, Virginia. Id. at 14, 21-22. Baylor testified that she asked for the person’s name, and Corporal Wagaman told her his name was Curtis Wade Munday. Id. at 28. Baylor then logged into Facebook and entered “Curtis Wade Munday” in the search bar. Id. at 15. Facebook operates by generating a list of results matching the search terms. Id. In her description of Facebook, Baylor stated that once the results come up, you click on each individual picture to make sure you have found the one that you’re looking for. Id. Baylor testified that, after looking through the profile pictures generated by the search, she found the person she recognized as having stolen her car. Id. at 15, 24. That person was the Defendant. Id. at 15-16, 24. Baylor then called Corporal Wagaman and identified Munday as the person who took her car.

At some point after this identification, Baylor and Calpado had a conversation. Second Suppression Hearing, at 13, 20. Baylor told Calpado that she had identified Curtis Munday as her carjacker, and that she had looked him up on Facebook. Id. at 13. The exact date of this conversation is not clear in the record, but Calpado testified that it was right before the preliminary hearing. Id. at 22. Baylor did not indicate how she received his name, but Calpado testified that she figured the police had told her. Id. at 20. Calpado then decided to look Curtis Munday up on Facebook. After looking through the generated results, she recognized the man she saw steal Baylor’s car, Curtis Munday. Id. at 13-15.

Both Baylor and Calpado identified Defendant Munday as Baylor’s assailant at the preliminary hearing and at the suppression hearings. In his suppression motion, Munday raises two issues: [1] exclusion of the out-of-court identifications and [2] exclusion of the in-court identifications.

DISCUSSION

This case represents the changing nature of eyewitness involvement in police investigations. Social media websites are now mainstream as society has become more digitally equipped. Victims and eyewitnesses to crimes are no longer passive aids to the police. They may now use Facebook and other similar websites to find a photograph of their alleged assailant, without the aid of the law enforcement. This is done by performing a search. A person logs in, enters the name of the individual they are seeking in the search bar, and Facebook generates a list of results. This list usually contains the name, location, and picture of individuals with the name entered, or very similar names. The person then looks through this list of faces for that spark of recognition.

The matter currently before this Court is a novel one – whether an identification made after performing a Facebook search with a suspect’s name is valid. Although Facebook is one of the most popular social networking

¹ Calpado described the incident as follows: “I noticed him step off the curb and I looked back up at the light. I assumed he was just crossing the street. At that point I heard Cheyanne say, no, and I looked over and saw this individual rip Cheyanne out of her vehicle. I saw the car in gear and it proceeded into the intersection where the gentleman ran, jumped into the car, and headed towards Hagerstown, Maryland.” Second Suppression Hearing, at 10.

sites, this issue has not previously been presented to the Pennsylvania appellate courts for decision. There has been a surge of case law regarding “e-discovery,” but the current legal landscape reveals no such precedent regarding “e-identifications.” This Court will examine prior case law dealing with potentially suggestive identifications, before analyzing the suggestive nature of this novel identification procedure as well as its reliability, both in terms of out-of-court identifications and in-court identifications.

I. Out-of-Court Identifications

Munday’s first argument is that both witness’ out-of-court identifications were products of suggestive procedures employed by the police and should be suppressed, unless the Commonwealth can demonstrate their reliability. Defendant’s Brief in Support, 7. This argument consists of two parts: [1] the police used suggestive identification procedures, and [2] those suggestive procedures are not otherwise reliable. The Court will first examine the standards to be applied to each part, before applying those standards to the facts at hand.

A. Suggestiveness

The proper approach courts take in determining whether an identification procedure was suggestive was set forth by the United States Supreme Court in Manson v. Brathwaite, 432 U.S. 98, 110 (1977). Under this approach, suggestive identification evidence is admissible if the identification “possesses certain features of reliability.” 432 U.S. 98, 110 (1977).² The Pennsylvania courts have consistently applied this totality of the circumstances approach. See, e.g., Commonwealth v. Fulmore, 25 A.3d 340, 346 (Pa. Super. 2011) (citing Commonwealth v. Carson, 741 A.2d 686, 697 (Pa. 1999)) (“Whether an out of court identification is to be suppressed as unreliable, and therefore violative of due process, is determined from the totality of the circumstances.”), appeal denied, 34 A.3d 827 (Pa. 2011). While the Pennsylvania courts have examined several types of identification procedures, the precise issue before this Court has never been addressed. It is therefore necessary to examine the various types of identification procedures to provide a helpful backdrop for this novel issue.

A police identification procedure raises questions of suggestiveness when it “emphasizes or singles-out a suspect.” Commonwealth v. Davis, 17 A.3d 390, 394 (Pa. Super. 2011), appeal denied, 29 A.3d 371 (Pa. 2011). The Superior Court has found that where the police show a witness a single photograph of one suspect for the purposes of identification, that identification is suggestive. See, e.g., Commonwealth v. Bradford, 451 A.2d 1035, 1036 (Pa. Super. 1982) (“The display of a single photograph to a witness by the police in this case was a clearly suggestive procedure.”). The act of singling out one person is what makes this type of procedure suggestive. The Superior Court applied the same rationale and found a photo array was suggestive where the police showed the witness three photos, one picturing the defendant, the other two showing a person already known to the witness, who did not resemble the description of the suspect. Commonwealth v. Davis, 17 A.3d 390, 394 (Pa. Super. 2011) (“Under these circumstances, we conclude that the array improperly emphasized Davis and was therefore suggestive.”), appeal denied, 29 A.3d 371 (Pa. 2011).

1. **Police Providing Defendant’s Name to Baylor:**

Munday argues that Baylor’s out of court identification was suggestive because she received his name directly from the police, after which she conducted her Facebook search and identified Munday to the police. Defendant’s Brief in Support, at p. 7, 10. To determine whether the act of providing Baylor with Munday’s name was a suggestive identification procedure, the Court must examine the totality of the circumstances in tandem with the applicable prior precedent.

It is axiomatic that there must be police action in an identification procedure in order for that procedure to be rendered suggestive. Perry v. New Hampshire, 132 S. Ct. 716, 727 (2012) (quoting United States v. Wade, 388 U.S. 218, 228 (1967)) (“[T]he confrontation compelled by the State between the accused and the victim or witnesses,” the Court began, “is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial.”). Two key issues in this case are whether Officer Wagaman’s remarks to Baylor amounted to that type of police action, and if so, whether that police action was suggestive.

There was police action in this case because Baylor received information about Munday from a police officer. Munday correctly notes that this case is distinguishable from Perry in that regard. Defendant’s Brief in Support, 10-11. He states that in Perry, there was “absolutely no element of police suggestive procedures,” whereas here, the

² In Manson, the Supreme Court examined the two approaches that federal appellate courts had taken in determining whether a challenged identification procedure was suggestive: [1] the *per se* approach, which excludes “unnecessarily suggest[ive]” identification evidence “without regard to reliability,” and [2] the totality of the circumstances approach. 432 U.S. 98, 110 (1977). The Supreme Court ruled that the second, more lenient approach, was the proper one and held: “[w]e therefore conclude that reliability is the linchpin in determining the admissibility of identification testimony.” Id. at 114.

police directly told Baylor who they had caught. *Id.* at 11. Additionally, the defendant in *Perry* did not assert any improper police conduct in his identification challenge. *Defendant's Brief in Support*, 8; *Perry*, 132 S. Ct. at 725 (“[Defendant] concedes that . . . law enforcement officials did not arrange the suggestive circumstances surrounding [the witness’s] identification.”).³ Therefore, there was a level of police involvement in this case based on Officer Wagaman’s remarks to Baylor.

Munday argues that Officer Wagaman’s actions constituted a suggestive identification procedure. Munday analogizes this case to prior cases where a witness hears a suspect’s name on the radio. The Pennsylvania appellate courts have addressed similar challenges based on potentially suggestive remarks made by the police prior to an identification. In *Commonwealth v. Moye*, the challenged identification occurred after the police apprehended a burglary suspect and brought him directly to the witnesses. 836 A.2d 973, 975 (Pa. Super. 2003). The officers told one witness that “they had someone for her to identify” and that they found him “running down the street all sweaty and just tired looking.” *Id.* at 978. The Superior Court found that these remarks did not render the witness’ identifications inadmissible, and stated that “[t]he reliability of [the] identification outweighs any possible suggestiveness created by [the officer’s] offhand remarks.” *Id.*⁴

In *Commonwealth v. Morris*, a rape victim, while sitting in a police car, overheard the police relay her description of the suspect over the radio. 466 A.2d 1356, 1359 (Pa. Super. 1983). Based on the transmission, she thought the police had apprehended her attacker. *Id.* The police took the suspect into custody and brought him directly to the victim, after which she identified him as her assailant. *Id.* The Superior Court found the identification was not suggestive, stating that: “The fact that she knew in advance that the police had picked up the man who they believed was the assailant is no more suggestive a factor than in any on-the-scene confrontation.” *Id.* at 1359.

Munday does not cite case law for his analogy to cases involving radio transmissions, but presumably he is drawing on one situation mentioned in *Perry*. There, the Supreme Court described various identifications that involved “some element of suggestion.” *Perry*, 132 S.Ct. at 727-28. One of these situations involves a witness who identifies the suspect after “hearing a radio report implicating the defendant in the crime.” *Id.* Munday states that merely overhearing a radio transmission does not amount to an improper police procedure, but Officer Wagaman’s conduct went beyond that. *Defendant’s Brief in Support*, 10.

Baylor’s out of court identification is comparable to *Moye*, where the police told the witness that the suspect had been caught, after which the witness made an identification with that in mind. Baylor was told over the phone that the police caught someone with her car. *Transcript of Suppression Hearing*, 06/11/2013, at p. 22. Officer Wagaman did not offer the person’s name, but when Baylor asked for it he told her it was Curtis Munday. *Id.* at 22, 27-28. This could be suggestive as it “emphasizes or singles-out a suspect.” *Davis*, 17 A.3d at 394. However, according to Baylor, the Facebook search generated several results. Thus, the fact that Baylor was told that the police apprehended the man who they believed was her assailant “is no more suggestive a factor than in any on-the-scene confrontation.” *Morris*, 466 A.2d at 1359.

Next, Munday argues that Officer Wagaman’s actions can be compared to cases involving a “show up” or “one on one” identifications, where the suspect is brought directly to the witness. *Defendant’s Brief in Support*, at 10-11. Munday asserts that upon conducting the Facebook search, Baylor “viewed only one person and made her identification” to the police. *Id.* at 10.

Where an identification challenge is based on a “show up” or “one on one” confrontation, there must be the existence of “some element of unfairness” to make that procedure suggestive. *Commonwealth v. Moye*, 836 A.2d 973, 976 (Pa. Super. 2003) (quoting *Commonwealth v. Meachum*, 711 A.2d 1029, 1034 (Pa. Super. 1998) (“[a]bsent some special element of unfairness, a prompt ‘one on one’ identification is not so suggestive as to give rise to an irreparable likelihood of misidentification.”)). Notably, the Pennsylvania appellate courts have not found these identification procedures to be presumptively suggestive. See, e.g., *Commonwealth v. Allen*, 429 A.2d 1113, 1120 (Pa. Super. 1981) (identification made upon seeing three robbery suspects handcuffed in back of police car found not unduly suggestive). These identification procedures are permissible “even where an appellant is handcuffed and officers ask a victim to identify him as the perpetrator.” *Commonwealth v. Armstrong*, 74 A.3d 228, 239 (Pa. Super. 2013) (identification not suggestive where robbery victim was taken to apprehended robbery defendant who was in

³ The identification in *Perry* was as follows: the witness had seen an African-American male walking around a parking lot, looking into cars, before breaking into her neighbor’s car. 132 S.Ct. at 721. After calling the police, the arresting officer asked the witness for a more specific description. *Id.* The witness pointed out her window and said the person she had seen was standing next to a police officer in the parking lot. *Id.* at 722. That person was the defendant, who had been told to stand there when approached by the officer. *Id.* at 721. The defendant did not allege any suggestive identification procedures employed by the police, but argued that the trial court should have conducted a hearing to determine the identification’s reliability despite the absence of police action. *Id.* at 722-23.

⁴ See also *Commonwealth v. Sexton*, 400 A.2d 1289 (Pa. 1979) (finding an in court identification admissible, where police gave the victim the defendant’s name prior to court proceeding, because although it was “highly suggestive,” it was not unduly suggestive).

handcuffs, and police asked victim to identify him).

In support of his argument, Munday cites United States v. Brownlee, 454 F.3d 131 (3d Cir. 2006). In Brownlee, the defendant was arrested after crashing a stolen jeep. 454 F.3d at 136. Police handcuffed him, placed him in the backseat of the police car, and presented him to the witnesses. Id. The victim of the carjacking, another witness, and two officers who witnessed the accident identified the defendant. Id. The Third Circuit found that this procedure “create[d] the impression the police had caught him in the stolen Jeep.” Id. at 138. The court found the procedure to be “unnecessarily suggestive,” but held the identifications were admissible because their reliability had been established. Id.⁵

Munday also highlights the existence of less suggestive means that Officer Wagaman could have employed instead of giving his name to Ms. Baylor. Munday asserts that there was no reason to provide Baylor with his name when Corporal Wagaman could have had her come to the station to make her identification. Id. at 11. It is true that Officer Wagaman did not have to divulge, and perhaps should not have divulged, Munday’s name to Baylor, but the law does not require the police to use the least suggestive means in securing an identification. The applicable test is the totality of the circumstances, which may include the existence of less suggestive means, but is not dictated by it.⁶

Based on the totality of the circumstances and the applicable precedent outlined above, this Court finds that Officer Wagaman’s actions of providing Baylor with Defendant Munday’s name was not suggestive.

2. The Facebook Search and Subsequent Identification:

This Court first notes one issue that is implicit in Munday’s argument and the comparisons to both sets of Pennsylvania cases: whether the Facebook search itself is attributable to any suggestive conduct by the police. Officer Wagaman’s remarks are comparable to cases dealing with radio transmissions, in that it is the police who are saying the information. His remarks are comparable to “show up” procedures in that he emphasized one suspect. That is where the similarities end. Unlike the cases dealing with “show up” or “one on one” identification procedures, here there was no actual confrontation put on by the police.

The novel issue presented to this Court may be comparable to other cases where a suspect’s photograph is viewed in similar media. See, e.g., Commonwealth v. Reynard Gregory, NO. 2856-2862., 1990 WL 902411 (Pa. Com. Pl. Feb. 16, 1990) aff’d sub nom. Com. v. Gregory, 593 A.2d 912 (Pa. Super. 1991) (“Where . . . there is a short, occasional exposure to a suspect’s photograph on television or in the newspaper, suppression is inappropriate.”); People v. James, 2012 WL 1436435 (Cal. Ct. App. 2012), *unpublished opinion* (victim received suspect’s name from police, conducted an internet search on her own, and made an identification); State v. Webber, 292 N.W. 2d 5, 11 (Minn. 1980) (witness saw defendant’s photo in newspaper and on television 32 days prior to line-up).

In this case, Officer Wagaman’s involvement ceased after he told Baylor Munday’s name until she called him back to make an identification. Baylor, on her own initiative, conducted the Facebook search. First Suppression Hearing, at 15, 23. Baylor testified that she did not even want to mention her idea for a Facebook search to Officer Wagaman. Id. at 23. Munday concedes that Officer Wagaman did not instruct Baylor to conduct the search. Defendant’s Brief in Support, at 11.⁷ There is nothing in evidence to suggest that Officer Wagaman knew or expected Baylor would conduct such a search. Id. This reasoning also applies to Calpado’s own Facebook search.⁸

In support of his argument to the contrary, Munday makes several assertions. He cites Baylor’s age and the widespread use of Facebook and other social media amongst her peers. He argues that Officer Wagaman should have foreseen that Baylor would conduct the search upon receiving his name. Id. at 11. Defendant does not cite any legal authority for this proposition, but relies on Baylor’s age.⁹ The Pennsylvania courts have not outlined foreseeability as a factor in determining suggestiveness, but instead focus the inquiry on actual conduct by the police. Additionally, Munday seems to argue that because Baylor was familiar with identification procedures in general, she thought she would have to identify her carjacker, and thus she conducted the Facebook search. Id. at 10. Baylor’s testimony

⁵ It should be noted that the Third Circuit has found these “show up” procedures to be “inherently suggestive,” reasoning that “by its very nature, [the procedure] suggests that the police think they have caught the perpetrator of the crime.” United States v. Brownlee, 454 F.3d 131, 138 (3d Cir. 2006) (citing Stovall v. Denno, 388 U.S. 293, 302 (1967)). The Pennsylvania state courts have not reached that conclusion.

⁶ Additionally, Munday notes that there was “no exigency” present that could justify giving his name to Baylor. Id. at 12. While this argument is certainly relevant, it goes to the weight of the identification and its reliability, rather than the suggestive nature of the identification procedure itself. As such, this argument will be addressed in Section I.B. below.

⁷ Defendant asserts that Corporal Wagaman also gave Defendant’s name to Ms. Calpado. Defendant’s Brief in Support, at 11. The Commonwealth asserts that it was Ms. Baylor who gave told Ms. Calpado Defendant’s name just before the preliminary hearing. Commonwealth’s Brief in Opposition, at 4.

⁸ Calpado stated that she received the name Curtis Munday right before the preliminary hearing. Second Suppression Hearing, at 22. She received it from Baylor and not the police. Id. at 21. Calpado looked the name up on Facebook on her own accord. Id. at 13.

⁹ See Defendant’s Brief in Support, at 11-12 (“[I]n this day and age, Facebook and other social media tools are used tirelessly. It is beyond foreseeable and perhaps even expected that a nineteen-year-old girl would use her Facebook account to help her play Law and Order.”).

goes against this argument. Baylor stated that she only decided to conduct the Facebook search because she did not think the police would need her to make an official identification, as they had apprehended Munday in possession of her car. First Suppression Hearing, at 23.

The Facebook search can be further distinguished from the conventional “show up” procedures based on the number of “suspects” presented to the witness. Munday asserts that upon conducting the Facebook search, Baylor “viewed only one person and made her identification” to the police. Id. at 10.¹⁰ Baylor testified that a search of Munday’s name generated more than one result. Id. at 15, 24. In describing Facebook searches in general, Baylor indicated that upon a search for a specific name, multiple names and similar names come up. Id. at 25. Baylor could not remember the exact number, but stated: “I know that more than one person comes up when you put [Curtis Munday] in.” Id. at 24. After looking through the results generated by the search, she recognized Munday’s picture as the person who had carjacked her. Id. at 15, 24.

Finally, this Court notes the distinction between a photographic database created by the police, i.e., a photo lineup, and a database created by individual people. Facebook profiles are created by the individual user, who chooses which photos to display and what information to convey to the outside world. A witness’s examination of photos generated by a Facebook search, in her own home, would seem less suggestive than that witness being presented with a lineup of photographs, chosen by the police, at the police station. Indeed, a Facebook search does not give rise to the true concerns underlying suggestive identifications controlled by the police, namely “the concern of false identifications based on the circumstances, along with the deterrence of improper police conduct.” Manson v. Brathwaite, 432 U.S. 98, 111-12 (1977). Because Baylor typed in the search terms and examined the results alone, “there was no coercive pressure to make an identification arising from the presence of another.” Id. Baylor testified that she looked through all the results generated before recognizing Munday, and thus her identification “was made in circumstances allowing care and reflection.” Id.

Based on the analysis set forth above, this Court finds that the Facebook search conducted by Baylor was not a suggestive identification procedure, nor was the search conducted by Calpado. For the purposes of completeness, this Court will address whether the identifications was reliable.

B. Reliability

Where an out-of-court identification is found to be suggestive, it is not automatically excluded. Although a factor to be considered, “suggestiveness alone does not warrant exclusion.” Commonwealth v. Kubis, 978 A.2d 391, 396 (Pa. Super. 2009) (quoting Commonwealth v. Bruce, 717 A.2d 1033, 1037 (Pa. Super. 1998)). If a court finds out-of-court identifications to be suggestive, the court must next determine “whether the identifications were nevertheless reliable.” Commonwealth v. Davis, 17 A.3d 390, 394 (Pa. Super. 2011).¹¹ The applicable test is “whether the challenged identification has sufficient indicia of reliability to warrant its admission even though the confrontation procedure may have been suggestive.” Commonwealth v. Thompkins, 457 A.2d 925, 928 (Pa. Super. 1983). In determining whether there is “sufficient indicia of reliability,” the court must consider the following factors:

[1] [T]he opportunity of the witness to view the criminal at the time of the crime, [2] the witness’ degree of attention, [3] the accuracy of his prior description of the criminal, [4] the level of certainty demonstrated at the confrontation, and [5] the time between the crime and the confrontation.

Thompkins, 457 A.2d at 928 (quoting Brathwaite, 432 U.S. at 114). The court weighs these factors against “the corrupting effect of the suggesting identification itself.” Id.

1. Opportunity of the witness to view the criminal at the time of the crime:

The Court must first consider the opportunity that both Baylor and Calpado had to view the suspect at the time the crime was committed. Within this inquiry, courts have looked to the length of time a person had to view the suspect, the proximity to the suspect, the lighting in the area, and anything that would obstruct the witness’ view.

Munday cites Commonwealth v. Bradford, 451 A.2d 1035, 1036 (Pa. Super. 1982) as an example.¹² There, a robbery victim “got a good look” at the suspect’s profile for three to four seconds, as it was a clear morning and the victim viewed the suspect at a close range. Defendant’s Brief in Support, at 13. The victim viewed the robber’s “forehead, cheeks, chin and one eye” as he was stealing her purse. Bradford, 451 A.2d at 1036. A second witness

¹⁰ The Court notes that neither the Commonwealth nor the Defense produced a print out or copy of the results generated by the Facebook search.

¹¹ Davis, 17 A.3d at 394 (“Suggestiveness alone will not forbid the use of an identification, if the reliability of a subsequent identification can be sustained.” (quoting Commonwealth v. McGaghey, 507 A.2d 357, 359 (Pa. 1986)); Manson v. Brathwaite, 432 U.S. 98, 114 (1977) (“[R]eliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-Stovall confrontations.”).

¹² The Superior Court applied the totality of the circumstances test to determine whether an in-court identification was admissible despite the suggestive nature of a prior out-of-court identification, but the same factors are applied under both analyses. Commonwealth v. Bradford, 451 A.2d 1035, 1038 (Pa. Super. 1982).

who was running towards the incident viewed the suspect's face "on two separate occasions for a minimum total of from eight to ten seconds." Id. at 1036.¹³

Munday asserts that Baylor and Calpado only saw the carjacker for a matter of seconds. Defendant's Brief in Support, at 13. Baylor testified that she looked directly at Munday's face when he opened her car door and told her to get out. First Suppression Hearing, at 10. She stated that she "never took [her] eyes off his face." Id. Baylor testified that Munday was not wearing anything that obstructed his face in any way. Id. at 29. At the preliminary hearing, Baylor stated that she saw his face, and "if there was a hood over his face [she] wouldn't have been able to see him." Id. at 30. Baylor was unsure of how long she and her carjacker interacted, but she stated that she did not believe it was over a minute. Id. at 19. On cross-examination, Baylor conceded that her description of the carjacker was "pretty vague." Id. at 27.

Calpado testified that as she approached the intersection, she looked at Munday for approximately 20 seconds while he was standing on the corner. Second Suppression Hearing, at 20. She testified that she was approximately five or six feet from him on the sidewalk when she drove past. Id. at 16. She was able to see his face including his jawline and facial hair, which she described as blonde. Id. at 9, 12. She did not notice anything else about his features, nor was she ever face-to-face with him. Id. at 17. She also testified that she could not see his face directly because he was wearing a hood or a cap. Id. at 18. Calpado saw him step off the curb and walk behind her car toward Baylor's car. Id. at 17. She watched him pull Baylor out of her car, and stated that "the man appeared to be the same person that was standing on the corner on the sidewalk." Id. at 11.

Additionally, Munday states that the lighting in the area would not have been sufficient for the witnesses to get a good look at the suspect, due to the location of the crime in relation to the gas station parking lot. Defendant's Brief in Support, at 13. Munday notes that the carjacking occurred in the street, "some yards away" and not directly under the gas station lights. Id. When asked about the lighting conditions, Baylor mentioned the red streetlight, the lights around the intersection, and the well-lit area around Rutter's that was directly to her right. First Suppression Hearing, at 8. The interior light of her car was also on, although Baylor admitted it was not very bright. Id. at 18. Calpado testified that the area was "fairly well lit," due to the traffic lights at the intersection, and the well-lit parking lot of Rutter's gas station. Second Suppression Hearing, at 9. When asked if the light from Rutter's would be cast into the intersection she responded in the affirmative. Id. at 9. She also noted that "the red light even lights up that intersection." Id. In support of his argument, Munday states that the arresting officer said it would be "virtually impossible" that Baylor got a good look at the carjacker due to the area's lighting at that time of night. Defendant's Brief in Support, at 14. Munday does not cite to the record for that assertion as the recording device stopped at that point, but bases it on Defense Counsel's recollection of the preliminary hearing testimony. Id.

This Court finds that Baylor and Calpado had a sufficient opportunity to view the suspect at the time of the crime. Calpado watched him for 20 seconds in a well-lit area. Baylor viewed him "at a close range," at an intersection that was illuminated by the surrounding lighting. Bradford, 451 A.2d at 1037. Munday correctly notes that a reliable identification must be based on more than the opportunity to view a suspect. Defendant's Brief in Support, at 13.¹⁴ However, the Pennsylvania courts have found this factor to be the most important. See Bradford, 451 A.2d at 1037 (The most important factor in the totality test is the opportunity of a witness to view the suspect at the time of the crime." (citing Commonwealth v. Davis, 439 A.2d 195 (Pa. Super. 1981)). Based on the foregoing, this Court finds that both Baylor and Calpado had a sufficient opportunity to view the suspect during the commission of the crime, and therefore this factor tilts in favor of reliability.

2. Witness' degree of attention:

In applying the second factor, Pennsylvania courts have considered the witness's attentiveness at the time, whether any distractions were present, and the witness's profession.

This Court must determine whether each witness "was attentive enough to provide an accurate description" of the suspect. Commonwealth v. Moye, 836 A.2d 973, 977 (Pa. Super. 2003). In Moye, *supra* Section I.A., the Superior Court examined the reliability of two witness' identifications of a burglary suspect. Id. at 976-77. Both witnesses observed the suspect, including his clothing and face, as he walked through the apartment. Id. at 977. Regarding the attentiveness factor, the Court noted that: "[b]oth witnesses were essentially a captive audience

¹³ The police used a single photograph identification procedure, which the Superior Court found suggestive. Bradford, 451 A.2d at 1036. The victim did not identify the appellant as her robber when shown a photograph two days after the robbery, nor at the preliminary hearing nineteen days after. Id. at 1036. The victim eventually identified him at the trial five months later. Id. The second witness identified the appellant when shown a single photograph nine days after the incident, as well as at the preliminary hearing and trial. Id.

¹⁴ Indeed, the Bradford Court applied the totality of the circumstances test and found that despite the suggestive nature of the out-of-court identifications, the subsequent identifications at trial, by the victim and a witness, were admissible. 451 A.2d at 1037-38.

during their respective encounters and, even though it was nighttime, were attentive enough to provide an accurate description of Moye to the police.” *Id.* at 977.

In considering this question of attentiveness, Pennsylvania courts have examined whether a witness was impaired in any way that would affect their attentiveness. *See Commonwealth v. Davis*, 17 A.3d 390, 394 (Pa. Super. 2011). In *Davis*, the appellant challenged his murder conviction, arguing that the witness’ identification should have been suppressed due to its suggestive nature. *Davis*, 17 A.3d at 393. The Superior Court found that the photo array was suggestive, but the identification was reliable. *Id.* at 394-395. The Court considered the reliability factors, and regarding attentiveness stated: “[witness] also testified that on the night of [victim’s] murder, he was not impaired by alcohol or drugs and he was several feet from [appellant] when he saw [appellant] in the lighted dining area of [victim’s] residence.” *Id.*

In applying this factor, Munday first argues that because Baylor stated that she “isn’t very good at describing people,” there is no compelling reason to believe her because “it is impossible for her to recount what she saw that night.” *Defendant’s Brief in Support*, at 14. Munday does not cite any testimony for these statements, but instead questions the legitimacy of her Facebook identification because there is “no basis with which to believe that Baylor identified Munday independent of any police procedure.” *Id.* at 15. That second argument would seem to go towards suggestiveness and not reliability, as addressed above.

Contrary to Munday’s assertion that Baylor cannot recount what she saw, Baylor testified at the preliminary hearing and the first suppression hearing as to what happened that night. Regarding her attentiveness, Baylor testified that she looked directly at the carjacker from the moment when he opened her door. *First Suppression Hearing*, at 10, 18. She stated that she “never once took [her] eyes off his face.” *Id.* Munday notes that this is questionable because Baylor could only provide a general description of her assailant. *Defendant’s Brief in Support*, at 15. He asserts that someone so focused on a person’s face should be able to recall more than “only the most generic characteristics” of that person. *Id.*

Although Baylor’s identification was more general than specific, it is not unreliable. Baylor testified that her assailant as a white male with blonde facial hair reaching from ear to ear, and who was holding a cigarette in his hand. *First Suppression Hearing*, at 10-11. Baylor could describe his facial hair, but could not remember what he was wearing. *Id.* 11, 18. Nor could she recall details about the shape of his face, the color of his eyes, or his build, but she testified that he was taller than she was. *Id.* at 19-20. However, Baylor indicated numerous times that she remembers her assailant’s face due to her intent focus on it. *See, e.g., Transcript of Audio of Preliminary Hearing*, 03/05/2013, at 29 (“And I remember his face from when he pulled me out of my vehicle.”); *Id.* (“I saw his face, if there was a hood over his face I wouldn’t have been able to see him. I saw his face.”); *First Suppression Hearing*, at 10 (“When he opened the door I looked directly at him . . .”); *Id.* (“I never once took my eyes off his face.”).

In terms of impairment, Baylor agreed that she was very stressed out during the incident. *Id.* at 21. Baylor also testified that, at the time of the carjacking, she was on the phone with her boyfriend. *Id.* at 9. She did not see the person approach her car, but first saw him when he opened her driver’s side door. *Id.* Munday argues that this was likely due to “the distracting nature inherent when a nineteen-year-old talks to her boyfriend on the phone.” *Defendant’s Brief in Support*, at 15. This Court notes that it could also be due to Baylor keeping her eyes on the road in front of her as she was waiting for the stop light to turn green. Despite any distractions, Baylor’s testimony indicates that she was attentive throughout the entire incident.

Furthermore, Pennsylvania courts have found that general descriptions, and even failed identifications, do not automatically render a subsequent identification unreliable. This is because “[w]henver the victim of a crime has an opportunity to observe the criminal, the impression of the face of an assailant is etched upon the prey by the terror of the occasion.” *Commonwealth v. Bradford*, 451 A.2d 1035, 1037 (Pa. Super. 1982). This Court finds that Baylor was attentive enough to provide an accurate description.

Additionally, Munday notes that Pennsylvania courts have considered a witness’s profession in determining attentiveness, specifically whether that profession has given the witness any special skills that would render them especially attentive. Munday cites *Manson v. Brathwaite*, where the witness was an undercover police officer and thus trained to pay “scrupulous attention to detail.” 432 U.S. 98, 115 (1977). In *Manson*, the undercover police officer purchased heroin from the appellant, after which he provided a description to the police. *Id.* at 100-01. Another police officer left a photograph of appellant on the undercover officer’s desk, and two days later the officer looked at the photograph and made a positive identification. *Id.* at 101.¹⁵ Regarding the attentiveness factor, the United

15 The United States Supreme Court found that this identification procedure did have a “corrupting effect,” but the reliability factors weighed against any such suggestiveness. *Id.* at 116 (“Although identifications arising from single-photograph displays may be viewed in general with suspicion . . . we find in the instant case little pressure on the witness to acquiesce in the suggestion that such a display entails.”) (citation omitted).

States Supreme Court noted:

[The witness] was not a casual or passing observer . . . but instead was a “trained police officer on duty and specialized and dangerous duty. . . . [and] as a specially trained, assigned, and experienced officer, he could be expected to pay scrupulous attention to detail, for he knew that subsequently he would have to find and arrest his vendor. In addition, he knew that his claimed observations would be subject later to close scrutiny and examination at any trial.

Id. at 115. See also Commonwealth v. Bradford, 451 A.2d 1035, 1037 (Pa. Super. 1982) (“[T]he victim was an artist by profession, so that the victim here would be by training and reflex, if not by instinct, devoted to detail.”)

Calpado testified that she saw the carjacker approach Baylor’s car. Second Suppression Hearing, at 11. In terms of attentiveness, Calpado testified that she had been particularly aware at the time of the incident. Id. at 7. She attributed this awareness to her job as a delivery driver and the need to avoid any type of accident. Id. Additionally, she stated that the man she saw on the corner had been standing in an “odd position on the street,” which is what caught her attention. Id. at 7. Regarding any distractions, Calpado noted that as she was driving she had been smoking a cigarette with the window down. Id. at 11. She was able to hear Baylor say “no” after Munday approached her car. Id. at 11.

Calpado testified that as she approached the intersection she “saw his jawline and facial hair,” and noticed what he was wearing. Id. at 9. Munday notes that Calpado never came face-to-face with the carjacker, and thus focused more on what he was wearing, a black winter coat and black pants. Defendant’s Brief in Support, at 15.¹⁶ Munday urges this Court to consider the time of year of the incident, arguing that “[a] man wearing a black winter coat and black pants in Pennsylvania in January is hardly distinct.” Id. While this Court is aware that the cold bite of January invites most people to sport winter clothing, the testimony of both witnesses indicates that only one person was standing at that intersection, and only one person opened Baylor’s car door before relieving her of her vehicle. Whether other people in Pennsylvania had been wearing winter clothing at the time of the carjacking is irrelevant.

Based on the foregoing analysis, this Court finds that both Baylor and Calpado had a sufficient degree of attention focused on Baylor’s assailant. Thus, this factor tilts in favor of reliability.

3. Accuracy of the prior description of the criminal:

Under the third factor, the court looks to the descriptions provided by the witnesses, and any differences to the suspect’s actual appearance.

In support of his argument that the identifications are unreliable, Munday cites Commonwealth v. Davis, 17 A.3d 390 (Pa. Super. 2011). There, the witness described the murder suspect as follows: “about 20 years old, black male, dark skin, braids, beige khaki shirt and pants and beige timberland boots, about 5’5” [with] a medium build and no facial hair.” Davis, 17 A.3d at 394. Munday notes the detail of that description, and points to the fact that the witness identified the same suspect three years after the incident. Id. at 395. The Superior Court in Davis focused on the decisive nature of that identification, despite the fact that the suspect had changed his physical appearance at that time. Id. (“Finally, when [witness] identified [suspect] for police three years after the murder, he did so quickly and decisively, although [suspect] by then had a beard and no braids.”). Notably, the Superior Court did not find that the change in the suspect appearance weighed against the witness’ reliability.

In this case, Baylor stated that her carjacker had facial hair from ear-to-ear. Munday asserts that he has never worn facial hair in that style, nor do his Facebook photos show any facial hair in that style. Defendant’s Brief in Support, at 16. At the preliminary hearing, when Calpado was asked if she recognized anyone in the courtroom that she saw that night, she stated: “Yes . . . I do recognize Mr. Munday, although he shaved.” Preliminary Hearing, at 35. The Pennsylvania Courts have found identifications reliable even where witnesses are mistaken as to certain details.¹⁷ Moreover, the Pennsylvania Courts have recognized the ability to change one’s appearance. Davis, 17 A.3d at 394. Baylor and Calpado decisively identified Munday, and despite any inaccuracies in their descriptions or changes in Munday’s appearance, this Court finds the witness’ prior descriptions to be sufficiently accurate.

Munday also notes the general nature of the witness’ descriptions regarding the suspect’s clothing. Munday argues that both descriptions merely “describe a man who lives in a cold environment during the winter.” Defendant’s Brief in Support, at 16. The Pennsylvania courts have found witness descriptions to be reliable despite

¹⁶ More specifically, Calpado testified that the suspect had been wearing black pants, white shoes, and either a black hooded sweater or a cap. Id. at 9-10. Second Suppression Hearing, at 12-13.

¹⁷ For example, in United States v. Brownlee, 454 F.3d 131, 140 (3d Cir. 2006), See *infra*, p. 13 for a discussion of the Brownlee and factors that weaken reliability of witness identifications.

their generalities. See, e.g., Commonwealth v. Moye, 836 A.2d 973, 976 (Pa. Super. 2003) (“Those descriptions may have been general, but both women recalled that the intruder was dark-skinned, wore light-colored pants, and was shirtless.”); United States v. Brownlee, 454 F.3d 131, 140 (3d Cir. 2006) (“[The witness’] prior descriptions, though general, were fairly accurate.”). This Court finds that, despite their general nature, the descriptions provided by Baylor and Calpado weigh in favor of reliability.

4. Level of certainty demonstrated at the confrontation:

Munday argues that a witness must be “absolutely sure” that the person identified is the person who committed the crime. Defendant’s Brief in Support, at 17. The Pennsylvania courts have not interpreted this factor as requiring 100 percent certainty, but instead have focused on a high level of certainty combined with the other reliability factors.

Munday also argues that Baylor has never answered a critical question: whether the person she identified in court was the same person she saw commit the crime. Defendant’s Brief in Support, at 17.¹⁸ In support of this argument, Munday cites a question from the preliminary hearing, where the Commonwealth asked Baylor: “Is that the same person you saw on Facebook, the same person you see sitting here today in the orange?” Putting this question in context, it appears the critical question Munday cites was in fact answered:

DISTRICT ATTORNEY: Cheyanne, how do you, how do you know that the person who took your car, who pulled you out of the car and took your car was the same person that’s seated here today?

BAYLOR: Because when he pulled me out – when he opened my door I made eye contact with him, of course I remember his face. You know around two in the morning the next morning I got a phone call stating that he was caught with my car and again have given me a name. So I on my own time I went and searched him on Facebook and I called my police station and I said that I am absolutely positive that is the guy who pulled me out of my car and stole my car and I wanted to let them know that I was sure of that.

DISTRICT ATTORNEY: Okay, and is that same person that you saw on Facebook the same person that’s here today in the orange?

BAYLOR: Yes, sir.

Preliminary Hearing, at 12.

The record is ripe with numerous times that Baylor identified Munday as the person who committed the crime, and did so with great certainty. At the first suppression hearing, Baylor was asked: “Based on your recollection of that night, not Facebook, is the person who did that to you that night present in the courtroom today?” First Suppression Hearing, at 16. Baylor responded in the affirmative and proceeded to identify Curtis Munday. Id. Baylor testified that when she found Munday’s Facebook page, she thought that “he was the person I saw took my car from me and pulled me out of my car.” Id. at 15-16. She further stated that: “Even if I didn’t do the Facebook, I could have identified by picture without Facebook as well. I’m positive about that.” Id. at 16. On cross-examination, she was asked: “But you ID’d him based on the Facebook profile and picture?” Id. at 26. Baylor responded: “No. I looked to see if that was the guy that I remember doing it and I mean if Facebook wasn’t involved I still would have been able to identify him.” Id. at 26-27. This Court finds that Baylor was highly certain in her identification of Munday.

Munday also argues that Baylor “relies exclusively on her Facebook search as if to respond to a claim that has not been raised by either party: Whether the Facebook profile she used to identify Curtis Munday was actually his profile.” Defendant’s Brief in Support, at 17. Munday is presumably referring to Baylor’s comments about him working at Golden Corral. He notes that Baylor’s certainty in her identification comes from seeing Golden Corral in the employment history of the Facebook page she found, where Munday admitted to working. Id. Munday argues that this testimony is a waste of this Court’s time and could “infect the neutrality of jurors” at his trial. Id. What Munday does not indicate is that this discussion was on cross-examination, in response to a question about whether the Facebook profile Baylor found indicated that the person’s location was Waynesboro. First Suppression Hearing, at 26.

Although Munday does not make an argument regarding Calpado’s level of certainty, this Court finds that this factor is satisfied. At the suppression hearing, Calpado was asked: “Setting aside what you saw on Facebook, thinking only of what you recall from that night, the description you gave to the police . . . do you recognize anyone in the courtroom you saw the night of January 5th, 2013?” Calpado answered that she did, and proceeded to identify

¹⁸ It should be noted that it is Baylor’s out-of-court identification that is at issue, and her in court identification is addressed next.

Munday. Second Suppression Hearing, at 12-13. Calpado made a similar identification at the preliminary hearing, where she identified Munday as someone she recognized from the night of January 5th. Preliminary Hearing, at 9.

Based on the analysis set forth above, this Court finds that both Baylor and Calpado demonstrated a high level of certainty when they identified Munday as Baylor's carjacker. Therefore, this factor weighs in favor of reliability.

5. Time between the crime and the confrontation:

Under this factor, Pennsylvania courts look to see how close in time the identification was to the incident. Manson v. Brathwaite, 432 U.S. 98, 115-16 (1977) (photo identification took place two days after crime); Simmons v. United States, 390 U.S. 377, 385 (1968) (witnesses shown photographs "only a day later, while their memories were still fresh"); Commonwealth v. Moye, 836 A.2d 973, 977 (Pa. Super. 2003) (witnesses identified culprit at show-up procedure "within minutes of the crime"). The key is whether the face of the culprit was fresh in the mind of the witness, so as to negate the likelihood of misidentification.

Munday argues that based on Corporal Wagaman's act of providing Baylor with Munday's name, "assessing the amount of time that passed between the incident and the identification is unnecessary." Munday avers that it is his Facebook picture that is fresh in Baylor's mind, and that there is no way to be sure that Baylor would have picked Munday from a line-up absent her Facebook search. As recounted above, Baylor stated numerous times that she would have recognized Munday absent the Facebook search. Additionally, this argument would seem to go to the weight of the evidence offered and the credibility of Baylor's testimony at trial, which are issues for the jury to resolve.

This Court finds that examining the fifth factor is indeed necessary under current case law. Baylor's car was stolen at approximately 5:30 p.m. on January 5, 2013. Id. at p. 7. Baylor was unsure of how long she and her carjacker interacted, but she did not believe it was over a minute. Id. at 19. Baylor and Calpado reported the carjacking to the police, and later that evening Baylor went to the police station to look at a photograph. Id. at 21. She did not identify the person in the photograph as her carjacker. Id. At approximately 2:30 a.m., Baylor received the call from Corporal Wagaman, indicating that her assailant had been caught. Id. at 14, 21-22. She got off the phone and conducted a Facebook search with the name Curtis Munday. Id. at 15. She looked through the results generated before recognizing Munday's picture as the person who stole her car. Id. at 15, 24. Approximately nine hours had passed between the initial confrontation with Munday to when she viewed his picture on Facebook.

Calpado observed the carjacking from her car, after which Baylor got in to her car and they called the police. Second Suppression Hearing, at 12. After giving her statement to the police, Calpado was also called to the police station to look at a photograph. Id. at 19. Calpado did not identify the person in the photo as the carjacker. Id. at 20. After Baylor found Munday on Facebook, Baylor told Calpado that she had looked him up. Id. Calpado decided to look Curtis Munday up on Facebook, and after looking through the results, she recognized the man she saw steal Baylor's car, Curtis Munday. Id. at 13-15. The exact timeframe is not clear from the record. Calpado testified that she received the name Curtis Munday very close to the preliminary hearing on March 5, 2012. Id. at 22. Thus, approximately two months passed between the carjacking and the time when Calpado received Munday's name, and looked him up on Facebook.

This Court finds, based on Baylor's testimony and the evidence presented, that the incident was still fresh in Baylor's mind when she made her identification of Curtis Munday. Regarding Calpado's identification, although the exact timeframe is not clear in the record, Calpado demonstrated that the incident was still fresh in her mind. Considering the other reliability factors, i.e., the level of certainty demonstrated by both witnesses, this Court finds a low likelihood of misidentification based on the circumstances.

C. Reliability Weighed Against the Corrupting Effect of the Identification:

In applying the totality of the circumstances test, Pennsylvania courts weigh the factors against "the corrupting effect of the suggesting identification itself." Thompkins, 457 A.2d at 928. In this case, Munday draws an analogy to United States v. Brownlee, 454 F.3d 131 (3d Cir. 2006), and argues that like in Brownlee, it was "inevitable that Baylor would identify Munday" due to the suggestive police procedures. Defendant's Brief in Support, at 11. See *supra*, Section I.A.1.

In Brownlee, the Third Circuit found that, despite the "unnecessarily suggestive" nature of the police one-

on-one show up identification procedure, the identifications were nevertheless admissible. Brownlee, 454 F.3d at 140. The Third Circuit even outlined specific aspects that “weaken[ed] the reliability” of the identifications. Id. at 139-140. For example, the carjacking victim admitted that the incident lasted 30 seconds, most of which she spent “focused on the weapon (which, incidentally, she misidentified).” Id. at 140. The victim also told the 911 dispatcher that “her assailant was wearing shorts (whereas Brownlee wore blue jeans).” Id. One witness stated that “she initially believed the carjacker was a young kid (while Brownlee was 30 at the time the crime was committed).” Two other witnesses did not get a good look at the suspect’s face as he was running away from them. Id. Further, “none of the witnesses could describe the suspect’s facial features or provide the police with more than a relatively general description of him.” Id.

Despite these weaknesses and inaccuracies, the Third Circuit found that “the totality of the circumstances establish[ed] that the identifications were reliable.” Id. at 140. In applying the reliability factors, the Third Circuit stated:

The evidence provided at the suppression hearing indicates that (1) the witnesses’ opportunity to observe the perpetrator at the time of the crime was sufficient, at fairly close range, and in broad daylight; (2) their degree of attention was substantial; (3) their prior descriptions, while rather general, were fairly accurate; (4) their degree of certainty was absolute; and (5) relatively little time passed between the crime and confrontations (approximately 25 minutes).

Id. at 140. The Third Circuit also stated that “[t]he generality of the witnesses’ descriptions of the suspect, the relatively short period of time they saw him, and the other shortcomings pertaining to their identifications, go more to the weight of the evidence than the reliability of their identifications, and thus were issues for the jury.” Id. Many of the issues that Munday raises go to the weight of the evidence rather than the reliability of the actual identifications.

Regarding the “corrupting effect” of Baylor’s identification, Munday challenges Baylor’s claim that she would have identified Munday even without the Facebook search. Munday cites part of Baylor’s preliminary hearing testimony as support, where she testified as follows:

I was told that the person who did it, which was him, was the one who was caught red handed with my car, so yes of course I’m going to identify him as the one. And I remember his face from when he pulled me out of my vehicle.

Preliminary Hearing, at p. 29. Munday’s brief does not include the last sentence, but relies on the first portion of that testimony for his argument that Corporal Wagaman’s information prompted Baylor’s identification. Defendant’s Brief in Support, at 11.

Assuming the identification procedure was suggestive, this Court finds that the totality of the circumstances establishes that the identifications were reliable. Baylor saw Munday face-to-face, which was illuminated by her car’s interior light, the traffic lights, and the lights in the adjacent parking lot. Calpado saw part of his face including his jawline and facial hair as he was standing on the sidewalk, and described the area as fairly well-lit. Both witness’ displayed a sufficient degree of attention during the incident. Baylor never took her eyes off Munday’s face, and Calpado watched from her car. The witness’ prior descriptions were “while rather general, were fairly accurate.” The time between the confrontation and identification for Baylor was approximately nine hours, and the time for Calpado is unclear. The specific shortcomings Munday points to “go more to the weight of the evidence than the reliability of their identifications, and thus were issues for the jury.” Brownlee, 454 F.3d at 140.

Munday also argues that “no exigency” existed that could justify Corporal Wagaman giving his name to Baylor. Defendant’s Brief in Support, at 12.¹⁹ According to Munday, he was “arrested while in possession of stolen property and under the influence of alcohol, therefore, an identification was not necessary to arrest him because the police were not arresting the wrong person.” Id. (internal quotations omitted). This argument draws on a key concern underlying the protections against suggestive identification procedures, i.e., preventing false identifications that lead to arrests of innocent persons. See, Manson v. Brathwaite, 432 U.S. 98, 111-12 (1977) (“The driving force of prohibitions against suggestive identification procedures is the concern of false identifications based on the circumstances, along with the deterrence of improper police conduct.”). Where this concern is not present, courts are less likely to find a suggestive identification procedure was warranted.

Munday seems to say that because he was caught with Baylor’s vehicle, the police “were not arrested the wrong person.” Defendant’s Brief in Support, at 12. Thus, the police were arresting the right person. In Manson, the Supreme Court specifically noted the impact that this could have on the reliability of the challenged identification:

¹⁹ Munday made this argument in the first part of his brief. This Court addresses it here because this argument goes more to the weight of the evidence and reliability rather than suggestiveness.

Although it plays no part in our analysis, all this assurance as to the reliability of the identification is hardly undermined by the facts that respondent was arrested in the very apartment where the sale had taken place, and that he acknowledged his frequent visits to that apartment.

Manson, 432 U.S. at 116. The Court did not hold that the actual arrest was a factor to be considered under the test set forth above. However, it does seem to give a little weight to a subsequent identification. Thus, the reliability of both witness' identifications is certainly not undermined by the fact that Munday was arrested while in possession of Baylor's stolen vehicle.

For the reasons set forth above, this Court finds that the out-of-court identifications of both Baylor and Calpado are sufficiently reliable, and are therefore admissible. For the purposes of completion, this Court will also examine the in-court identifications.

II. In-Court Identifications

Even if an out-of-court identification was the product of suggestive police procedures, an in-court identification is admissible where there was an "independent basis" for the identification. The Commonwealth must establish "by clear and convincing evidence that the later identification was not the result of the earlier suggestive event." Commonwealth v. Fisher, 769 A.2d 1116, 1127 (Pa. 2001). There must be "sufficient guarantees that the identification resulted from the victim's memory of the actual attack by the assailant, rather than the victim's memory of seeing the accused" through the suggestive identification procedure. Commonwealth v. W. P., 448 A.2d 97, 99 (Pa. Super. 1982). Pennsylvania courts apply a totality of the circumstances test to determine whether there was an independent basis. To determine whether an independent basis existed, the court must consider the following factors:

[1] the opportunity of the witness to view the criminal at the time of the crime; [2] the witness' degree of attention; [3] the accuracy of the witness' prior description of the criminal; [4] the level of certainty demonstrated by the witness at the confrontation; and [5] the length of time between the crime and the confrontation.

Fisher, 769 A.2d at 1127; See, e.g., Commonwealth v. Davis, 17 A.3d 390, 394 (Pa. Super. 2011); Commonwealth v. Wade, 33 A.3d 108, 114-15 (Pa. Super. 2011), appeal denied, 51 A.3d 839 (Pa. 2012).

Defendant challenges the in court identifications of Baylor and Calpado. Under this inquiry, the Pennsylvania courts apply the same test used to determine whether out-of-court identifications are reliable despite their suggestive nature. See *supra*, Section I.B. Thus, for each of the five factors, this Opinion incorporates the corresponding facts and discussion set forth in the reliability analysis above.

Additionally, Pennsylvania case law provides some instructive application of the specific facts to the in-court identification context. For example, in Commonwealth v. Wade, 33 A.3d 108, 110 (Pa. Super. 2011), the victim encountered a person sitting in his car at 11:20 p.m. with the driver's side lock punched out. The person refused to leave the car and, after threatening the victim, proceeded to drive away in his car. Id. After being pursued by the police, the carjacker eventually crashed the vehicle and was taken to the hospital. Id. at 11-12. The victim was taken to the hospital to identify the carjacker, where he made a positive identification of the appellant. Id. at 112. The appellant was later positively identified at trial. Id. On appeal, the Superior Court applied the totality of the circumstances test to determine whether the in-court identification was admissible:

Assuming *arguendo* that the out-of-court identification was improper because police informed the victim that they arrested his assailant, we hold that the trial court properly admitted the in-court identification and Appellant is not entitled to relief. Approximately two hours after Appellant took the victim's car, police captured Appellant in the same vehicle that he stole. The victim observed Appellant from a close distance under not only street and house lights, but with the interior lights of his vehicle illuminating Appellant's face. The court also credited the victim's testimony that he was particularly observant at the time of the incident since Appellant threatened his dog, him, and his friend. Finally, the witness provided an accurate description. Viewing all of the evidence together, we agree that an independent basis from the out-of-court identification existed so as to allow the victim to identify Appellant in court.

Wade, 33 A.3d at 114-15.

That same reasoning can be applied to the case currently before this Court. The reliability factors discussed in the out-of-court identification analysis also apply to both witness' in-court identifications. Baylor and Calpado

had a sufficient opportunity to observe Munday during the commission of the crime. Calpado testified that she was particularly observant during the incident, and Baylor testified that she never took her eyes from Munday's face. This Court also finds that the witnesses provided accurate descriptions of the suspect. Both Baylor and Calpado identified Munday with a great degree of certainty. Finally, the Court finds that the length of time between both witness' observations and identifications was not so long as to weigh against reliability. Viewing all of the evidence together and considering the factors set forth above, there was an independent basis for both Baylor's and Calpado's in-court identifications, and thus the identifications are admissible.

CONCLUSION

For the reasons set forth above, this Court finds that both witness' identifications were not unduly suggestive, and displayed sufficient indicia of reliability to warrant their admissibility. Munday's arguments to the contrary are without merit. Baylor looked Munday up on Facebook on her own accord. Calpado also performed the Facebook search on her own. Thus, the witness' out-of-court identifications were not the product of suggestive police procedures. The out-of-court identifications displayed sufficient reliability as required by the controlling legal framework. Additionally, both witnesses consistently testified to their ability to recognize Munday's face without the Facebook search. Thus, their in-court identifications are reliable as they each have an independent basis.

Therefore, based on the foregoing analysis of relevant case law and the facts and circumstances as established through testimony, this Court finds that the identifications of Munday are admissible. This case has addressed a new type of identification procedure, one only possible in the digital age. The general theme of Facebook is that it "helps you connect and share with the people in your life."²⁰ In this instance, Facebook helped Baylor and Calpado connect with someone very important in both their lives – the alleged assailant.

For the foregoing reasons, this Court finds that the identifications are admissible, and therefore Defendant Munday's Omnibus Motion is DENIED.

ORDER OF COURT

AND NOW THIS 18th day of November, 2013, the Court having read and considered Defendant's Omnibus Pre-Trial Motion and the Commonwealth's response;

IT IS HEREBY ORDERED that Defendant's Motion is **DENIED**. The Court's Opinion is attached.

Pursuant to the requirements of Pa.R.Crim.P. 114 (B)(1), (2) and (C)(1), (2), the Clerk shall promptly serve this Order or court notice on each party's attorney, or the party if unrepresented; and shall promptly make docket entries containing the date of receipt in the Clerk's office of the Order or court notice; the date appearing on the Order or court notice; and the date and manner of service of the Order or court notice.

²⁰ FACEBOOK, <https://www.facebook.com/> (last visited Nov. 15, 2013).