

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

v.

JOHN LEROY GORDON,

Defendant.

CRIMINAL ACTION
NO. 18-361-1

PAPPERT, J.

February 28, 2019

MEMORANDUM

Victims or witnesses to a crime may be asked to identify a suspect in different ways. They may be taken to the police station to view a lineup which includes the suspect or asked if they see the suspect's picture in a photo array. This case concerns another identification procedure called a "show-up," in which a single individual fitting the victim or witness's description is presented for identification. For many reasons, show-ups are inherently suggestive. To constitute a denial of due process, however, the show-up must be unnecessarily suggestive and must also create a substantial risk of misidentification.

John Leroy Gordon contends that is what happened here. Police detained Gordon on the shoulder of Interstate 95 as a suspected carjacker and then brought the victim and a witness to view Gordon in that setting. The witness, who initially was unsure if Gordon is the person she saw commit the crime, came to believe it was him after multiple looks. The victim was unable to identify Gordon as her assailant. Gordon now moves to suppress the witness's on-scene identification and preclude her from identifying him in any in-court testimony. He also contends that any purported in-court identification the victim herself may try to make is tainted by the faulty

process through which the witness came to identify him. He goes even further, seeking to prevent “any and all” potential government witnesses from testifying that they can identify him as the carjacker.

After an evidentiary hearing and thoroughly considering all of the evidence and testimony, the Court largely grants the Motion and suppresses the witness’s out-of-court identification and any purported in-court identification of Gordon as the carjacker by both the witness and the victim.

I

At 5:15 p.m. on June 26, 2018, Michelle Beverly and one of her sisters called 911 to report a carjacking in front of 706 Ward Street in Chester, Pennsylvania. (Def. Ex. D01-001–003.) From their vantage point at 712 Ward, they saw the carjacker drive off in a burgundy Toyota Avalon. (*Id.*; Def. Ex. D02-005.) Beverly’s sister, who was not identified in the record, described the carjacker to the police as “black, bald, [and] tall.” (Def. Ex. D01-002.) Beverly reported that the carjacker was carrying a “silver little pistol” and that while “[i]t happened so fast,” she thought he was wearing a white t-shirt and khaki shorts. (*Id.* at D01-003.) Beverly also told the police that her other sister, Rosalind Gray, was already driving the victim, Adora Purnell, to the police station. (*Id.*) Gray, who had also been somewhere in front of 712 Ward, did not call or speak to the 911 operator. *See* (Resp. Opp’n at 2 n.1, ECF No. 16).

Gray and Purnell met Chester Police Officer Billy Kleinfeldt at police headquarters. (Hr’g Tr. 6:16–17, Feb. 15, 2019, ECF No. 22.) At the time of the incident, Kleinfeldt had been a patrolman for the Chester Police Department for about seven months. (*Id.* at 4:24–5:7.) Prior to working for CPD, he served as a patrolman

for the Norwood Police Department in Delaware County for almost a year and a half. (*Id.* at 5:8–17.) While at headquarters, Kleinfeldt asked if Gray and Purnell “were able to identify” a suspect as the carjacker. (*Id.* at 6:24–7:5.) The women were willing to cooperate but asked to remain anonymous. (*Id.* at 7:12–23.) Kleinfeldt then drove Gray and Purnell, who sat in the backseat of his marked police car, to a location between Exits 1 and 2 on I-95 North where John Gordon had been detained by the police.¹ (*Id.* at 8:2–9:1; Mot. Suppress at 2, ECF No. 15; Resp. Opp’n at 3.)

At 6:07 p.m., Kleinfeldt, driving between twenty-five and thirty miles per hour, drove Gray and Purnell past Gordon, who was handcuffed, surrounded by at least five police officers (from both the CPD and Pennsylvania State Police) and standing beside a marked police car on the shoulder of the three-lane highway. (Hr’g Tr. 9:24–10:2, 13:2–14:21, 29:17–31:16, 33:20–22; Gov. Ex. 1A.) Neither Gray nor Purnell was able to identify Gordon and Kleinfeldt radioed to the other officers that the purported identification “was a negative,” (Hr’g Tr. 10:8–13, 28:17–18, 35:6–7; Def. Ex. D13 at 0:10–0:12); both women “were unsure” whether Gordon was the carjacker, (Hr’g Tr. 10:19; Def. Ex. D13 at 0:10–0:12). Kleinfeldt kept driving, headed back towards headquarters with Gray and Purnell. (Hr’g Tr. 10:24–11:6.)

¹ At 5:21 p.m., Jessica Rohde was driving on I-95 South when she called 911 to report that she had “just passed a car that looks like it had run off the road and into the median.” (Def. Ex. D04-002.) She directed the police to a location “a mile north of [] exit 1.” (*Id.*) A minute later, another witness driving north on I-95 called 911 because she saw someone who had “[c]rashed on the south side, jumped out the window, and ran across the highway on the north side.” (Def. Ex. D05-002.) The witness stated that “it looked like he had a gun” and “like he was going to hide in the woods.” (*Id.* at D05-002–003.) Responding to the scene of these witnesses’ descriptions, Chester Police Officer Terrance Broaddus found the burgundy Toyota Avalon which had crashed into the median on I-95 South. (Gov. Ex. 2; Def. Ex. 02-005.) He then saw Gordon walking on I-95 North near Exit 2. See (Mot. Suppress at 2; Resp. Opp’n at 3).

Five minutes later, Chester Police Captain El'lan Morgan called Kleinfeldt from the scene and told him that he “needed to make an additional second loop around to confirm.” (*Id.* at 6:8–15, 11:4–8, 32:8–24.)² Kleinfeldt circled back to where Gordon was being held, still cuffed and surrounded by Chester and Pennsylvania State Police. (*Id.* at 38:8–24, 40:3–21.) Unlike the initial “drive-by,” this time Kleinfeldt pulled in behind the PSP car parked next to where Gordon was standing. (*Id.* at 41:20–24.) After an undetermined time, during which the police turned Gordon sideways to face Gray the way she had seen him on Ward Street, Gray was now able to say that she “believe[d]” Gordon was the carjacker. (*Id.* at 11:11–18, 42:1–3; Gov. Ex 3 at 6:45–7:50.) Purnell remained “unsure” and again could not identify Gordon. (Hr’g Tr. 11:23.) Kleinfeldt then drove Gray and Purnell to headquarters. (*Id.* at 12:5–6.) He did not interview either woman but prepared a report on the incident four days later. (*Id.* at 12:2–3; Gov. Ex. 2; Def. Ex. D02-008).³

² The time between the first and second viewings of Gordon is unclear. On cross-examination, Kleinfeldt testified that five minutes elapsed before Captain Morgan asked him to circle back. *See* (Hr’g Tr. 39:18–40:2). He took “the shoulder” with his “emergency lights on” and returned to the location five minutes after receiving Captain Morgan’s call. (*Id.* at 40:3–41:19.) He admitted that he was driving during “rush hour.” (*Id.* at 43:16.) On redirect, he said that twenty minutes could have elapsed between Captain Morgan’s call and the second show-up procedure. *See* (*id.* at 46:17–18). Nonetheless, Officer Kleinfeldt stated that he did not believe it was “dark when [he] drove by the second time.” (*Id.* at 46:24–47:18.)

Moreover, Kleinfeldt testified that Captain Morgan ordered him to give Gray and Purnell a second look at Gordon, *see* (*id.* at 6:8–15, 32:8–24), but in her recorded police interview Gray said that she asked to see Gordon a second time, *see* (Gov. Ex. 3 at 7:00–7:50).

³ Kleinfeldt’s narrative, a mere ten lines long, is riddled with errors, something the Government concedes. *See* (Hr’g Tr. 16:15–17:24, 112:4–8). He states that he drove Purnell and Michelle Beverly, not Rosalind Gray, to Gordon and that they both “positively identified” Gordon as the carjacker. (Gov. Ex. 2; Def. Ex. D02-008.) He subsequently corrected his report, stating that “only one of the two women identified the suspect” and that, “at the direction of his superior officer, he made two passes of the suspect on Interstate 95.” *See* (Def. Ex. D06).

Detective Jamison Rogers, who has worked in various capacities for CPD throughout the last ten years, interviewed Gray and Purnell after Kleinfeldt brought them back to headquarters. (Hr’g Tr. 51:6–23; 52:6–8; Gov. Ex. 3 at 0:06–0:15.) During her recorded interview, which began at 7:23 p.m., *see* (Hr’g Tr. 53:2–54:21), Gray stated that she was at 712 Ward Street when the carjacking occurred, which is “two doors away” from 706 Ward. (Gov. Ex. 3 at 5:08–5:15.) There are two adjoining houses—708 and 710—between 706 and 712 Ward Street. *See* (Def. Ex. D20). Gray was “standing [outside] towards the door of [her] sister’s house.” (Gov. Ex. 3 at 2:16–2:28.) She saw the carjacker put a silver gun to the victim’s head and heard him say, “Give me the . . .” but could not make out the rest of the words. (*Id.* at 0:56–1:00, 1:17–1:21, 3:27–3:34, 3:41–3:46.) She described the carjacker as a man with a “very dark” complexion wearing a “white t-shirt . . . and black sweats.” (*Id.* at 4:10–4:28.)

When asked to recount the carjacking in more detail, Gray responded that “you gotta remember I was so many distances away.” (*Id.* at 4:58–5:02.)⁴ Gray stated that she could not identify Gordon the first time Kleinfeldt drove her past him “because it was his complexion and his shirt and everything but that’s not the view I got of the guy. I got a side view of the guy.” (*Id.* at 6:35–6:59.) She explained that she never saw the carjacker’s face; rather she had only seen him from the side and that is why she asked Kleinfeldt to drive her back for a second look at Gordon. (*Id.* at 6:24–6:34, 7:00–7:13, 7:50–7:55.) During the second identification, when the officers turned Gordon sideways at her request, she remembered “something about his ear . . . his ears like bulge or

⁴ For his part, Rogers testified that the distance from the carjacking to where Gray was standing was roughly around 400 feet but later stated that it could have been 100 feet. (Hr’g Tr. 56:14–17, 60:16–23.) He conceded, however, that he did not know where Gray was standing when she was making her observations “other than being outside the residence.” (*Id.* at 65:19–22).

something” and based on that she identified Gordon as the carjacker. (*Id.* at 8:00–8:17.) Detective Rogers confirmed that although Gray was able to identify Gordon as the carjacker, Purnell was not. (Hr’g Tr. 52:9–23.)

II

An identification procedure violates due process when it is (1) unnecessarily suggestive and (2) creates a substantial risk of misidentification. *Manson v. Brathwaite*, 432 U.S. 98, 107 (1977). Even where the police employ an unnecessarily suggestive procedure, however, the identification is not automatically excluded. *Perry v. New Hampshire*, 565 U.S. 228, 239 (2012). Instead, courts weigh five factors, established by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 198–99 (1972), to determine whether admitting the identification would amount to a denial of due process. *Perry*, 565 U.S. at 239. When the “identification is reliable despite an unnecessarily suggestive identification procedure,” automatic exclusion “is a Draconian sanction,” one “that may frustrate rather than promote justice.” *Manson*, 432 U.S. 98 at 113. But where the “indicators of [a witness’] ability to make an accurate identification” are “outweighed by the corrupting effect” of a suggestive law enforcement procedure, the identification should be suppressed. *Perry*, 565 U.S. at 239 (quotation omitted).

Unnecessary suggestiveness “contains two component parts: that concerning the suggestiveness of the identification, and that concerning whether there was some good reason for the failure to resort to less suggestive procedures.” *United States v. Stevens*, 935 F.2d 1380, 1389 (3d Cir. 1991) (internal quotations and emphases omitted). The defendant bears the burden of showing that the suggestiveness of the identification

procedure violates due process. *See United States v. Lawrence*, 349 F.3d 109, 115 (3d Cir. 2003).

A

i

A show-up procedure is “inherently suggestive because, by its very nature, it 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) (quoting *Stovall v. Denno*, 388 U.S. 293, 302 (1967), *overruled on other grounds by Griffith v. Ky.*, 479 U.S. 314 (1987)). The defendant in *Brownlee* was suspected of carjacking in the parking lot of a K-Mart. 454 F.3d at 134. The victim and another witness from the parking lot were brought to the defendant, who was “handcuffed, surrounded by police officers, and either seated inside or standing beside a police cruiser . . . at the scene of the accident—a condition that create[d] the impression the police had caught him in the stolen Jeep.” *Id.* at 138. Similarly, both times Gray and Purnell viewed Gordon, he was handcuffed, surrounded by officers, and standing beside a marked police car at a location close to where the police had found the stolen car. (Hr’g Tr. 9:24–10:2, 29:17–31:16, 33:20–22, 38:8–24; Gov. Ex. 1A.)

The Third Circuit in *Brownlee* explained that “other points . . . exacerbate[d] the suggestiveness of the show-up,” making it “unnecessarily suggestive.” 454 F.3d at 138. First, the defendant was the only suspect presented to the witnesses “at any time.” *Id.* Second, the witnesses made identifications while “exposed to the suggestive influence of others.” *Id.* For example, the two witnesses from the parking lot were “not only questioned together but were taken to identify the defendant together.” *Id.*; *see also*

United States v. Shavers, 693 F.3d 363, 382–83 (3d Cir. 2012) (holding that the show-up identifications were unnecessarily suggestive where the identifications took place while the defendants were handcuffed in patrol cars at the scene of the crime, were the only suspects shown to the witnesses and there was a risk that some of the witnesses overheard and were influenced by other witnesses’ identifications). Here, Gordon was the only suspect presented to Gray and Purnell at any time. Gray and Purnell were brought to the scene together, and sat next to each other in the back of Kleinfeldt’s car both times they viewed Gordon.

ii

Show-up identifications may be necessary, however, when there is an “imperative” need for an immediate identification. *Stovall*, 388 U.S. at 302. For instance, exigent circumstances justified a show-up identification in *Stovall* because a key witness was critically injured in the hospital and a show-up identification was “the only feasible procedure.” *Id.*; see *Simmons v. United States*, 390 U.S. 377, 384–85 (1968) (justifying photographic identification where “[a] serious felony had been committed[,] [t]he perpetrators were still at large[,] [and it] was essential for the FBI agents swiftly to determine whether they were on the right track”); *United States v. Sleet*, 54 F.3d 303, 309 (7th Cir. 1995) (holding that immediate show-ups can serve important interests, such as “allow[ing] identification . . . while the witness’ memory is fresh[] and permit[ting] the quick release of innocent persons”); *United States ex rel. Cummings v. Zelker*, 455 F.2d 714, 716 (2d Cir. 1972) (“[P]rompt confrontation [is] desirable because it serve[s] to insure ‘the immediate release of an innocent suspect and at the same time . . . enable[s] the police to resume the search for the fleeing culprit

while the trail is fresh.” (quoting *Bates v. United States*, 405 F.2d 1104, 1106 (D.C. Cir. 1968)).

The Third Circuit in *Brownlee*, albeit in *dicta*, rejected the government’s arguments that a show-up procedure was necessary in that case because “(1) the police wanted to avoid holding a potentially innocent man any longer than necessary, and (2) if the police had apprehended the wrong man, they would be able to resume searching for the right man as soon as possible (to prevent a dangerous suspect from fleeing successfully).” 454 F.3d at 138 n.4. The court felt that “none of the witnesses was in critical condition or otherwise unable to withstand a temporary delay.” *Id.* Moreover, the Third Circuit acknowledged in *Shavers* that “some exigency existed because, due to witness reports that the perpetrators were carrying firearms, it was vital to know immediately whether the correct people had been apprehended.” 693 F.3d at 383. Despite “the urgency at hand,” the court found that the suggestiveness of the show-up procedure could have been “easily minimized if the officers had parked down the street and brought each eyewitness separately to make an identification.” *Id.*; see also *United States v. Funches*, 84 F.3d 249, 254 (7th Cir. 1996) (“[A] strong argument can be made that the show-up was impermissibly suggestive. Exigent circumstances did not exist—there was no danger of losing a key witness and no reason a line-up could not be arranged.”)

The government contends here that the show-up identifications were necessary because the police wanted to confirm “that the defendant was the culprit before taking him into custody.” (Resp. Opp’n at 8.) Detective Rogers explained that using show-up identification procedures is based on department policy:

We would not bring anyone back to the station that could have been involved in an incident criminally unless they were ID'd on the spot. So if that person—if a clear identification was not made, that person would have been free to go and I would have continued my investigation. So being that identification was made by a witness, at that point he was taken into custody and brought back to the station.

(Hr'g Tr. 59:2–9.)

Explaining that show-ups are used so that a potentially innocent person can be released quickly in the absence of a “clear identification” compels the conclusion under the specific facts and circumstances of this case that the need to use the procedure to identify Gordon was less than imperative. During the first drive-by, Gray and Purnell could not identify Gordon at all, much less clearly, as the carjacker. Gray was at best “unsure” and Kleinfeldt reported to his superior and fellow officers that “it [the identification] was a negative.” (*Id.* at 10:8–19, 35:6–7). Purnell, the victim, could not identify Gordon at all. Under Detective Rogers’ justification for CPD’s policy, Gordon should at that point have “have been free to go” and the police could have continued their investigation. *See (id.* at 59:6). In fact, Kleinfeldt had no intention of returning for a second drive-by—until he was ordered by his Captain to do so. *See (id.* at 10:24–11:6, 32:8–10; Gov. Ex. 3 at 7:00–7:13, 7:50–7:55). This of course caused Gordon to be held by the police for a longer period of time, despite the fact that he could not be “ID’d on the spot” by Gray or Purnell the first time.

The government also asserts that because Gordon was “walking on the side of a busy highway[,] safety required that the victim, witness, and suspect spend minimal time standing on the side of the road.” (Resp. Opp’n at 8.) This reasoning cuts against attempts to identify Gordon on the edge of a very heavily travelled three-lane highway during rush hour. There was no need to place in potential danger Gordon, the officers

themselves and rubbernecking drivers inevitably staring at a law enforcement contingent and a man in handcuffs as they drove by. No one was critically injured in the carjacking “or otherwise unable to withstand a delay.” *Brownlee*, 454 F.3d at 138 n.4. Although there was a similar level of urgency here to that in *Shavers* because of witnesses’ reports that the suspect was carrying a gun, *see* (Def. Ex. D01-002–003; D05-002–003), the suggestiveness of the procedures, and the safety of all involved, could have been “easily minimized” if the officers had taken the nearest exit off of I-95 and “brought each eyewitness separately to make an identification.” 693 F.3d at 363. In fact, the next exit was visible from the show-up location. *See* (Def. Ex. D12). The government has not offered a “good reason for the failure to resort to less suggestive procedures,” *Brownlee*, 454 F.3d at 137, and the show-up procedure here was unnecessarily suggestive.

B

An identification’s unnecessary suggestiveness does not, in and of itself, require the identification’s exclusion. *Brownlee*, 454 F.3d at 138–39 (citing *Biggers*, 409 U.S. at 198–99). A “suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability,” *Brathwaite*, 432 U.S. at 106, for reliability is the “linchpin in determining the admissibility of identification testimony,” *id.* at 114. To determine whether an identification was reliable even though a confrontation procedure was suggestive, courts look to the totality of the circumstances and consider five 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 confrontation.

Biggers, 409 U.S. at 199. Applied to the facts of this case, these factors show that Gray's eventual belief that Gordon was the carjacker was not sufficiently reliable and that her on-scene identification must be suppressed.

i

Under *Biggers*' first factor, a reliable identification typically involves the witness seeing the suspect's face clearly, in adequate light, at fairly close range and for a reasonable amount of time. For example, the Supreme Court found in *Biggers* that the rape victim had ample opportunity to view the defendant because she was with him for up to half an hour and at least twice faced him directly and intimately in the moonlight. 409 U.S. at 200–01. In *Brathwaite*, the witness looked directly at the defendant, and standing for two or three minutes within two feet of him in a hallway illuminated by natural light. 432 U.S. at 114. The witnesses in *Stevens* had at least ten minutes to view the perpetrator, who directly faced them several times during the robbery and sexual assault and made no effort to conceal his face. 935 F.2d at 1391. Lastly, the *Brownlee* court held that, although the carjacking "lasted only thirty seconds," the witnesses had a sufficient opportunity to observe the perpetrator at the time of the crime "at a fairly close range, and in broad daylight." 454 F.3d at 140.

The government argues that the carjacking occurred at 5:15 p.m. on June 28 "in broad daylight," (Resp. Opp'n at 10), and that Gray was "close enough to hear [the

carjacker] speak,” (Hr’g Tr. 79:12–15).⁵ Far more importantly, however, Gray never saw the carjacker’s face; she witnessed the crime from several houses away. *See* (Def. Exs. D18, D19 & D20). Unlike the witnesses in *Biggers*, *Brathwaite*, *Stevens* and *Brownlee* who saw the suspect’s face straight on, Gray told the police, multiple times, that she had only ever seen the “side” of the carjacker’s face: “I did not see him face-to-face . . . I only seen him from his right side.” (Gov. Ex. 3 at 7:00–7:13, 7:50–7:55.)

Whereas the witness in *Brathwaite* was within two feet of the defendant, Gray observed the carjacking in front of 706 Ward Street from “so many distances away” at 712 Ward Street. *See* (Gov. Ex. 3 at 5:08–5:15, 4:58–5:02). Although Detective Rogers’ did not personally measure the distance from the carjacking to where Gray said she was standing, he testified that this distance was likely between 100 and 400 feet. (Hr’g Tr. 56:14–17, 60:16–23.) Additionally, Beverly said the carjacking “happened so fast,” limiting the amount of time Gray had to view the suspect, from whatever side angle she may have had. (Def. Ex. D01-003.)

ii

Gray did not pay a substantial degree of attention to the carjacker. The only descriptions she gave of the carjacker—a man with a “very dark” complexion wearing a “white t-shirt . . . and black sweats,” (Gov. Ex. 3 at 4:10–4:28)—were given in her interview with Detectives Rogers *after* she had already seen Gordon twice and identified him as the perpetrator. Although she described the carjacker’s silver gun and allegedly distinct ears, she did not offer a “more than ordinarily thorough”

⁵ Again, Gray stated that she could only hear him say “Give me the . . .” and could not make out the rest of the sentence, which suggests she may not have been as close as the government thinks. (Gov. Ex. 3 at 1:17–1:21, 3:41–3:46.)

description of the carjacker to suggest that she was paying close attention to him. *See Biggers*, 409 U.S. at 200–01 (determining that the witness gave a “more than ordinarily thorough” description of the defendant’s age, height, weight, complexion, skin texture, build and voice); *see also Brathwaite*, 432 U.S. at 115 (finding that the witness, who was a trained undercover state police officer, gave a detailed and accurate description of the defendant with respect to his height, build, color and style of his hair, high cheekbones and clothing); *Stevens*, 935 F.2d at 1391 (noting that the witnesses were military police officers trained in observation who paid close attention throughout the incident as victims of the crimes).

iii

When a witness does not provide a description of the perpetrator prior to her on-the-scene identification, the third *Biggers* factor has no bearing on the case. *See Shavers*, 693 F.3d at 385.⁶ There is no reliable evidence suggesting that Gray provided a prior description. She did not call or speak to the 911 operator. *See* (Resp. Opp’n at 2).⁷ The only descriptions Gray gave of the carjacker were during an interview after she had already identified Gordon.

⁶ In light of *Alleyne v. United States*, 570 U.S. 99 (2013), the judgment in *Shavers* was vacated on other grounds, involving the need for jury findings in relation to sentencing factors, and the case was remanded to the Third Circuit. *See Shavers v. United States*, 570 U.S. 913 (2013). The Court’s analysis of the third *Biggers* factor was unaffected.

⁷ Gordon argues that Gray may in fact have given a prior description of the carjacker, pointing to Kleinfeldt’s report where he stated that “[b]oth Purnell and Beverly described the actor as a black male, short hair, with a small beard, wearing khaki pants and white shirt.” (Hr’g Tr. 85:22 –89:19; Def Ex. D02-008.) Given the unreliability of this report, *see supra* note 3, and the lack of any evidence beyond it to support Gordon’s argument, the Court cannot find that it was Gray who provided this description.

iv

Gray's eventual identification of Gordon as the carjacker was uncertain. She needed to see Gordon twice, and only "believe[d]" he was the carjacker after having him turn sideways. *See* (Hr'g Tr. 11:11–18; Gov. Ex 3 at 6:45–7:50). In assessing the fourth *Biggers* factor, courts have required identifications that are far less equivocal. *See, e.g., Biggers*, 409 U.S. 188 (determining that the witness had "no doubt" that the [the perpetrator] was the person who raped her"); *Braithwaite*, 432 U.S. at 115 (ruling that the witness unequivocally identified the defendant's photograph two days later when he stated, "There is no question whatsoever" and repeated "[t]his positive assurance"); *Brownlee*, 454 F.3d at 138 (holding that the witnesses were "certain" in their identifications).

v

Although the exact time between the carjacking and the second show-up procedure is unclear, Gray likely identified Gordon within, at the very most, two hours of the crime.⁸ This factor supports the reliability of the identification, which Gordon concedes. *See* (Mot. Suppress at 12); *see also Braithwaite*, 432 U.S. at 115–16 ("[The witness'] description was given . . . within minutes of the crime. The photographic identification took place only two days later. We do not have here the passage of weeks or months between the crime and the viewing of the photograph.") In any event, given the Court's conclusion with respect to the remaining factors, this factor is immaterial.

⁸ The carjacking occurred at 5:15 p.m. *See* (Def. Ex. D01-001). Officer Kleinfeldt first drove Gray and Purnell by Gordon at 6:07 p.m. *See* (Hr'g Tr. 33:20–22). The second show-up procedure must have occurred before 7:23 p.m., when Gray was interviewed at headquarters. *See (id. at 53:2 – 54:21).*

See Biggers, 409 U.S. at 201 (finding that even one “seriously negative factor” like a “lapse of seven months between the rape and confrontation” did not alter the ruling).

III

A

Gordon argues that Gray should also be precluded from identifying him in-court because the “taint of her suggestive out-of-court identification cannot be removed.” (Mot. Suppress at 12.) The government contends that a jury is able to determine the weight, if any, to give Gray’s future in-court identification of Gordon. (Resp. Opp’n at 11–12.)

The standard for admitting evidence of a pretrial identification is the same as the standard for permitting an in-court identification in the wake of a pretrial identification. *United States v. Clausen*, 328 F.3d 708, 713 (3d Cir. 2003). “In both cases, the eyewitness testimony will be permitted unless the pretrial procedure was so unnecessarily suggestive as to give rise to such a substantial likelihood of irreparable misidentification that admitting the identification testimony would be a denial of due process.” *Id.* (citing *United States v. Mathis*, 264 F.3d 321, 330 (3d Cir. 2001)); *see also United States v. Diaz*, 444 Fed. App’x 551, 556 (3d Cir. 2011) (“Therefore, because the identification procedure used by the police here did not violate [the defendant’s] due process rights, the District Court did not err in refusing to suppress the on-scene identification of [the defendant] . . . and the identification could not have tainted the in-court identification.”)

Since Gray’s out-of-court identification was unnecessarily suggestive and created a substantial likelihood of misidentification, it taints any in-court identification Gray

would attempt to make; admitting Gray's in-court identification would be a denial of due process. *See United States v. Wade*, 388 U.S. 218, 229 (1967) ("It is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on . . .").

B

Gordon also asserts that "any and all other potential government eyewitnesses" should be precluded from identifying Gordon at trial. (Hr'g Tr. 94:23–24; Mot. Suppress at 12, 15.) The government contends that there is no basis to exclude testimony from anyone "who wasn't touched" by the unnecessarily suggestive show-up. (Hr'g Tr. 105:11–19.) Purnell is the only witness who was "touched" by Gray's out-of-court identification. She accompanied Gray in Kleinfeldt's police car to both show-up procedures and heard Gray ultimately identify Gordon as the perpetrator. More importantly, Purnell herself was unable to positively identify Gordon during the show-ups, or at any point thereafter. *See (id.* at 10:8–13, 11:23, 52:9–23). To the extent Purnell may subsequently attempt to do so, her identification of Gordon would be wholly unreliable and she will not be allowed to testify that she recognizes Gordon as her assailant. *See United States v. Emanuele*, 51 F.3d 1123, 1131 (3d Cir. 1995) (concluding that the testimony of a witness who was unable to identify the defendant at all, coupled with the impermissibly suggestive "viewing of [him] in conditions reeking of criminality [in the courtroom], bolstered by the comments of another witness, render[] the in-court identification unreliable"). The Court has no basis, however, to conclude that anyone other than Gray and Purnell should be precluded from identifying Gordon as the alleged carjacker.

An appropriate Order follows.

BY THE COURT:

/s/ Gerald J. Pappert
GERALD J. PAPPERT, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

v.

JOHN LEROY GORDON,

Defendant.

CRIMINAL ACTION
NO. 18-361-1

ORDER

AND NOW, this 28th day of February, 2019, after considering the Defendant's Motion to Suppress, (ECF No. 15), the Government's Response, (ECF No. 16), and following an evidentiary hearing, (ECF No. 21), it is hereby **ORDERED** that the Motion is **GRANTED**. Specifically, Rosalind Gray's out-of-court identification of the Defendant is suppressed and neither Gray nor Adora Purnell may identify Gordon at trial as the alleged carjacker.

BY THE COURT:

/s/ Gerald J. Pappert
GERALD J. PAPPERT, J.