

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0821

September Term, 2014

MARC MITCHELL

v.

STATE OF MARYLAND

Wright,
Reed,
Alpert, Paul E.
(Retired, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: September 2, 2015

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

Marc Mitchell, appellant, was convicted by a jury sitting in the Circuit Court for Baltimore City of voluntary manslaughter and use of a firearm in the commission of a crime of violence.¹ The court sentenced appellant to consecutive terms of imprisonment of 10 years and 20 years, respectively. Appellant asks the following questions on appeal, which we have reworded:

- I. Did the trial court err in admitting into evidence DVDs from the 7-Eleven surveillance cameras because the State did not authenticate the DVDs?
- II. Did the trial court err in admitting into evidence recordings of three jail calls because the State did not authenticate the recordings?
- III. Did the trial court err in denying appellant's motion for judgment of acquittal because the State failed to prove criminal agency?

For the reasons that follow, we shall affirm the judgments.

FACTS

The State's theory of prosecution was that during the early morning hours of March 4, 2012, appellant shot and killed Terrance Joyner near the 7-Eleven and BP gas station in the 1100 block of Cold Spring Lane in Baltimore. Although several persons were present when the shooting occurred, no one identified the shooter. Evidence that appellant was the shooter came from, among other things, his taped statement to the police a couple of weeks after the shooting and surveillance videos from the two stores. The theory of defense was that appellant did not shoot Joyner, and if he did, he did not intend to kill him. Viewing the

¹ Appellant was acquitted of first- and second-degree murder.

evidence in the light most favorable to the State, the prevailing party, the following was established.

Jamel McDonald testified that around 2:30 a.m. on March 4, 2012, he ran into his friend Blake Harris and several other men he did not know at the BP gas station on Cold Spring Road. He spoke to Harris briefly, then heard gunshots and ran, as did the other men. He testified that he did not see the shooter. The State impeached McDonald's testimony with his taped statement to the police on March 14, ten days after the shooting. In his statement, McDonald said that he and several other men he knew: Harris, Donye Thompson, and Joyner, were outside the BP gas station when Harris left the group and walked over to the 7-Eleven parking lot. At some point, Harris called out to McDonald, who walked over to him. Harris asked McDonald whether a nearby group of men were "beefing" with Joyner. McDonald looked over and saw a man wearing a white T-shirt but did not see his face, so he said, "I don't know." As McDonald began walking back to the BP gas station, he heard gunshots. He ran, and as he did so, he saw over his shoulder the man with the white T-shirt running from the 7-Eleven toward the gas station.

Detective Donald Shores with the Baltimore City Police Department Computer Crimes Division testified that four days after the shooting he retrieved video from the 7-Eleven store's surveillance cameras that was date/time stamped March 4 between 1:30 a.m. and 2:30 a.m. He testified that the date stamp on the video was accurate but the time stamp was about 60 seconds faster than real time. He also retrieved video from the BP gas station

that was recorded during the same time frame. The detective testified that the date stamp on the BP video was also accurate but the time stamp was 46 minutes faster than real time. He downloaded the stores' video onto a "clean" USB drive, which he then recorded onto DVDs back at the police computer lab. He testified that he did not alter the stores' video in any way.

The DVDs, which were admitted into evidence and played for the jury, showed the surrounding area of the two businesses and the street separating the stores. On the 7-Eleven DVDs, appellant and another man, later identified as appellant's friend Jamal Flowers, can be seen entering the 7-Eleven store about 2:30 a.m. Appellant purchased a pizza and then left the store followed by Flowers, who then went back into the store. The BP DVD shows that around the same time a group of three men were walking from the BP parking lot to the street between the stores. A few moments later, the men walk toward the BP parking lot. On the 7-Eleven DVDs, appellant is then seen running behind the cars parked outside the 7-Eleven toward the group of men, holding his arm out straight. Lead Detective Dawnyell Taylor of the Baltimore City Police Department testified as to what the DVDs showed next. The group of men can be seen running away from the gas station, with Thompson turning around as he is running away. Both appellant and Thompson are seen firing guns. Appellant then runs back to the 7-Eleven parking lot and jumps into a car, after which Flowers runs out of the 7-Eleven store and also jumps into the car. The car then leaves the area.

After the shooting, the police and ambulance arrive. Joyner was pronounced dead. During a scan of the area of the shooting, the police recover a .38 cartridge casing in the BP parking lot. Several search warrants were executed to recover the gun that Thompson fired but only .38 bullets were found at his home. A .41 caliber bullet was recovered from the victim's body during a subsequent autopsy. An expert in firearms and toolmark identification testified that she could not compare the casing found at the crime scene to the bullet that killed Joyner because the casing was fired from a semi-automatic while the bullet recovered from Joyner was fired from a revolver.

Appellant was arrested at his grandparents' home about two and a half weeks after the shooting. The house was searched but no handgun or bullets were found. Appellant was transported to the police station where he waived his *Miranda*² rights and gave a taped statement that was admitted into evidence and played for the jury. In his statement, appellant said that during the early morning hours of March 4, 2012, he and his friend, Jamal Flowers, left a party with two men he did not know well. One of the men drove them to a 7-Eleven. Appellant and Flowers went into the 7-Eleven where appellant purchased a pizza. As appellant left the store, appellant saw Harris talking to a group of three men. According to appellant, he heard Harris say, "That's him right there" and then Harris pulled out a gun. In response, appellant pulled out his "big" revolver and fired it several times in an attempt to scare the men away and defend himself. Appellant threw the gun away after the shooting.

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

Appellant told the police that he did not know that Joyner was at the gas station or that he had been shot and killed, until the next day. Appellant said that Joyner was his father's best friend and had raised appellant when appellant's father was in prison. Appellant explained that he was carrying the revolver because in 2010 he was labeled a "snitch" and "everyone in that neighborhood wanted to kill" him. Appellant admitted that he and Joyner had a "falling out" a couple of months before the shooting over the sale of drugs, but said that he, his father, and Joyner had "squashed it" and everybody was "chill[.]" Appellant nevertheless admitted that at the time of the shooting he and Joyner were "beefing" because "everyone" was saying that appellant had stolen items from Joyner's mother's house, which, according to appellant, was untrue.

Detective Taylor testified that, contrary to appellant's statement, there was no evidence that Harris, who was deceased at the time of trial, fired a gun that evening. Detective Taylor further testified that Thompson could not have killed Joyner because, as seen on the DVDs, Joyner was in front of Thompson and not in the line of Thompson's fire.

Three taped telephone calls between appellant and his father, who was in jail, were admitted into evidence. The first recording occurred on February 15th, a couple of weeks before the shooting. In that recording, appellant told his father: "If I see [Joyner], I'm going to blow his fucking face off bitch." Appellant explained to his father:

[Joyner] be coping a whole bunch of duce saying I didn't say that and I aint trying to beef and I told your father that I wasn't trying to beef and I am like I don't know what yo lying for talking about I stole from your peoples I took

your watch and all this other shit and that bull Donye was on there I swear to God I'll put all them fucking bitches in the streets yo.

The other two recordings occurred on March 4, several hours after Joyner was killed. In those calls, appellant and his father discussed Joyner's death and appellant's concern that he would be held responsible for the shooting. They also spoke about the cameras in and around the 7-Eleven store.

Jamal Flowers testified for the defense. He testified that he was good friends with appellant – they had known each other since childhood and saw each other every day. Flowers testified that prior to the shooting, he and appellant left a party with two others, one of whom drove them to a 7-Eleven to purchase something to eat. Flowers testified that while he and appellant were in the store, several men approached the car in which they had arrived. Appellant exited the store, but Flowers stayed inside. Flowers heard shooting. When the shooting stopped, Flowers ran out of the store and jumped into the car. Appellant was already inside. The car then left the area.

DISCUSSION

I.

Appellant argues on appeal that his convictions must be reversed because the trial court erred in admitting the two 7-Eleven DVDs into evidence because they were not

authenticated.³ Appellant raises the same argument on appeal that he raised below – the State failed to prove that the images on the DVDs were of the morning of the shooting. The State responds that the exhibits were properly authenticated, and therefore, the trial court did not abuse its discretion in admitting them. We agree with the State.

Md. Rule 5-901 sets forth the requirements of authentication and provides generally: “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Rule 5-901(a). A videotape is considered a photograph for authentication purposes. *Washington v. State*, 406 Md. 642, 651 (2008)(citation omitted). The Rule lists, by way of illustration and not limitation, three means by which a photograph may be authenticated: (1) direct “[t]estimony of a witness with knowledge that the offered evidence is what it is claimed to be”; (2) the “silent witness theory” where “[c]ircumstantial evidence, such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics, that the offered evidence is what it is claimed to be”; or (3) “[e]vidence describing the process or system used to produce the proffered exhibit or testimony and showing that the process or system produces an accurate result.” *See* Md. Rule 5-901(b)(1), (4), and (9).

³ Appellant does not argue on appeal, nor did he argue below, that the BP gas station DVDs should not have been admitted.

“[T]he burden of proof for authentication is *slight*[.]” *Dickens v. State*, 175 Md. App. 231, 239 (2007)(quotation marks and citation omitted)(emphasis added). “[T]he court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the *jury* ultimately might do so.” *Id.* (quotation marks and citation omitted)(emphasis in original). When a proponent makes a prima facie showing that a proffered document is genuine, the item “comes in, and the ultimate question of authenticity is left to the jury.” *Gerald v. State*, 137 Md. App. 295, 304 (quotation marks and citation omitted), *cert. denied*, 364 Md. 462 (2001). We review a trial court’s decision to admit such evidence for abuse of discretion. *See Gerald*, 137 Md. App. at 305-06. An abuse of discretion occurs “where no reasonable person would take the view adopted by the [trial] court.” *Fontaine v. State*, 134 Md. App. 275, 288 (quotation marks and citations omitted) (brackets in original), *cert. denied*, 362 Md. 188 (2000). “Thus, where a trial court’s ruling is reasonable, even if we believe it might have gone the other way, we will not disturb it on appeal.” *Id.*

Amir Kazmi testified that while working as the night manager at the 7-Eleven on Cold Spring Road on the morning of March 4, 2012, he heard three gunshots. He testified that as a manager for the store he maintained the store’s video surveillance equipment that included eight cameras, both inside and outside the store. He testified that the equipment was working on the night of the shooting. Although he did not know the type of surveillance system the store used, he testified that the cameras were fixed in place and operated automatically; that

he did not and could not manipulate the images on the cameras; that the system stored images for between 15 and 20 days depending on how busy the store was and the number of images it captured; and that the system was reliable. Kazmi testified that shortly after the shooting Baltimore City officers came to the store and downloaded video from the surveillance system. When the State played the DVD onto which the lead detective had downloaded the store's video, Kazmi testified that the footage showed the store and himself inside the store. Nonetheless, he could not say that the footage was from the night of the shooting or if the time/date stamp on the footage was accurate.

Emmanuel Baah testified that while working the night shift at the Cold Spring 7-Eleven store on March 4, 2012, a shooting occurred outside the store. After playing some of the DVD the lead detective had downloaded from the store's video system, Baah testified: "I remember that day, the young man over there instructed me to do the pizza, because he's getting pizza, the one in the white shirt. So I did a pizza." He identified the man on the DVD as appellant.

Appellant cites *Washington v. State*, 406 Md. 642 (2008), in support of his argument that the trial court erred in admitting the 7-Eleven DVDs because they were not properly authenticated. We find that case easily distinguishable. In that case, the Court of Appeals addressed the authentication requirement of a videotape of a shooting outside a bar. The videotape had been heavily compiled and edited – the video was a compilation of eight surveillance cameras recording multiple images at once. The "compilation" technician, who

gathered the various images into a single stream of images, was not called as a witness. The Court reasoned that the foundational requirements for the videotape was more than for a “simple videotape” because the compiled videotape came from eight surveillance cameras, six inside the bar and two outside the bar, and was created by an unknown person, who through some unknown process compiled images from various cameras onto a CD and then into a single stream VHS videotape. *Washington*, 406 Md. at 646, 655.

Here, the 7-Eleven DVDs were authenticated by all three of the ways listed in the Rule. Kazmi testified as to the surveillance system used at the 7-Eleven store and how the information was downloaded by the police. Although Kazmi was unable to offer technical details regarding the inner workings of the surveillance system he was able to describe the setup of the cameras and the general operation of the system. Moreover, Baah corroborated the accuracy of the image when he testified that he recalled selling a pizza to appellant the night of the shooting and identified appellant on the DVD.⁴ We are persuaded that the State presented “some” evidence which would allow a juror to accept the DVDs as authentic.

⁴ Even if we were to believe, which we do not, that the 7-Eleven DVDs were not initially properly authenticated, any error was harmless in light of Detective Shore’s testimony following the trial court’s ruling. Detective Shores testified that four days after the shooting he downloaded video dated March 4, between 1:30 and 2:30 a.m. from the 7-Eleven store. He described the 7-Eleven video surveillance system, which was housed in a locked closet at the store, as an iMAX, whose reliability was “very good.” He testified that he did not alter the downloaded video in any way when he downloaded it onto a clean USB drive that he took back to the police computer lab where he recorded the images on DVDs. The detective testified that the date stamp on the video was accurate but the time stamp was about 60 seconds faster than real time.

Accordingly, the trial court did not abuse its discretion when it admitted the DVDs into evidence and allowed the jury to consider them.

II.

Appellant argues that the trial court erred in admitting into evidence the three recorded telephone jail calls between himself and his father because the State failed to authenticate his and his father's voice.⁵ The State argues that the trial court did not abuse its discretion in allowing Detective Shore, who was familiar with both appellant's and his father's voice, to identify their voices and thereby authenticate the voice recordings. We agree with the State.

The same law governing the authentication of video images discussed above similarly apply to the authentication of voice recordings. Md. Rule 5-901(b)(5) provides “[b]y way of illustration only” that voice identification may be authenticated: “whether heard firsthand or through mechanical or electronic transmission or recording, based upon the witness having heard the voice at any time under circumstances connecting it with the alleged speaker.”

Here, Detective Taylor, the lead investigator of Joyner's shooting death, testified that during her investigation she spoke for an hour and a half each to both appellant and his father and that she recognized the voices on the telephone recording as belonging to appellant and

⁵ Although appellant initially argues that the State failed to authenticate his father's voice on the telephone recordings, appellant concedes this point later in his brief when he states: “assuming that the State properly proved that Mr. Mitchell, Sr.'s inmate number was entered in each of these calls, at best, the State authenticated Mr. Mitchell, Sr.'s voice on the calls.”

his father. This was sufficient authentication. *Cf. Donati v. State*, 215 Md. App. 686, 740-41, *cert. denied*, 438 Md. 143 (2014)(defendant’s telephone calls were properly authenticated by police officers who had each spoken with the defendant for 15 to 20 minutes). Appellant’s argument that it is “simply incredible” that Detective Taylor could identify the voices on the recording after speaking with appellant and his father for an hour and a half is a credibility determination reserved for the trial court. Moreover, the State presented additional evidence to authenticate the calls, specifically, evidence about how the jail calls were made and recorded and evidence regarding the content and circumstances of the conversations. *Cf. Knoedler v. State*, 69 Md. App. 764, 773-74 (1987)(telephone calls may be authenticated by knowledge of caller’s voice and by contents of conversation, circumstances of call, or subsequent behavior of participants reflecting awareness of call). Under the circumstances, the trial court did not abuse its discretion in allowing the jury to consider the calls.

III.

Lastly, appellant argues that the evidence was insufficient to sustain his convictions. He argues that the shooting was a “gun battle” involving multiple people and there was insufficient evidence to prove beyond a reasonable doubt that the bullet that killed the victim came from the gun he fired. We agree with the State that appellant makes this argument by drawing all inferences and conclusions in the light most favorable to him, which is not the correct legal standard. Viewing the evidence under the correct legal standard, we are

persuaded there was more than sufficient evidence for the trial court to deny appellant's motion for judgment of acquittal and allow the jury to consider the charges against appellant.

The standard for appellate review of evidentiary sufficiency “is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)(emphasis in original). “That standard applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone.” *Smith v. State*, 415 Md. 174, 185 (2010)(citation omitted). “Where it is reasonable for a trier of fact to make an inference, we must let them do so, as the question is not whether the [trier of fact] could have made other inferences from the evidence or even refused to draw any inference, but whether the inference [it] did make was supported by the evidence.” *State v. Suddith*, 379 Md. 425, 447 (2004)(quotation marks and citation omitted)(brackets added in *Suddith*). Thus, in assessing the sufficiency of the evidence, “the limited question before an appellate court is not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder.” *Allen v. State*, 158 Md. App. 194, 249 (2004)(citing *Fraidin v. State*, 85 Md. App. 231, 241, *cert. denied*, 322 Md. 614 (1991)), *aff'd*, 387 Md. 389 (2005)(emphasis in *Fraidin*).

It is long settled that “[w]eighing the credibility of witnesses and resolving any conflicts in the evidence are tasks proper for the fact finder.” *State v. Stanley*, 351 Md. 733,

750 (1998)(citing *Binnie v. State*, 321 Md. 572, 580 (1991)). A fact-finder is free to believe part of a witness’s testimony, disbelieve other parts of a witness’s testimony, or to completely discount a witness’s testimony. *Jones v. State*, 343 Md. 448, 460 (1996)(citing *Muir v. State*, 64 Md. App. 648, 654 (1985), *aff’d*, 308 Md. 208 (1986)). Accordingly, contradictions in testimony go to the weight of the testimony and credibility of the evidence, rather than its sufficiency, and we do not weigh the evidence or judge the credibility of the witnesses, as that is the responsibility of the trier of fact. *See Stanley*, 351 Md. at 750.

Appellant was acquitted of murder but convicted of manslaughter, a common law felony defined as “the unlawful and felonious killing of another, without malice aforethought, either expressed or implied[.]” *Selby v. State*, 361 Md. 319, 332 (2000) (quotation marks and citation omitted). Voluntary manslaughter, as distinguished from involuntary manslaughter, requires an intent to kill. *Id.*

Video footage from the stores where the shooting occurred showed that only two men fired weapons during the melee – appellant and Thompson – and that Joyner was not in Thompson’s line of fire. Upon his arrest, appellant told the police that he fired a revolver during the shooting, and the bullet recovered from the victim’s body came from a revolver. A casing for a semi-automatic handgun was found in the area where Thompson fired his gun. Appellant admitted that he had a “beef” with the victim and he told his father shortly before the shooting that he was “going to blow [Joyner’s] fucking face off[.]” Under the

circumstances, a reasonable juror could conclude that appellant fired the shot that killed Joyner, and that he did so intentionally. Accordingly, we shall affirm the judgments.

JUDGMENTS AFFIRMED.

**COSTS TO BE PAID BY
APPELLANT.**