UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0707

September Term, 2015

BRITTANY POWERS

v.

STATE OF MARYLAND

Kehoe,
Nazarian,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: July 11, 2016

Appellant Brittany Powers appeals from her convictions in the Circuit Court for Baltimore City of first-degree murder, attempted first-degree murder, use of a handgun in the commission of a crime of violence, possession of a regulated firearm by a disqualified person, and wearing or carrying a handgun. She raises the following questions for our consideration:

> "1. Did the trial court commit plain error in permitting the State to question Appellant concerning the credibility of the critical State's witness?
>
> 2. Did the trial court err in admitting evidence of 'jail calls' made to Appellant?"

We shall hold that the trial court did not commit plain error in allowing the State's questioning and that the court did not err in admitting the jail calls.

I.

Appellant was indicted by the Grand Jury for Baltimore City with one count of first-degree murder, one count of attempted first-degree murder, one count of assault in the first-degree, two counts of use of a firearm in the commission of a crime of violence, two counts of wearing or carrying a handgun, and one count of possession of a regulated firearm by a disqualified person. The jury convicted appellant of first-degree murder, attempted first-degree murder, use of a handgun in the commission of a crime of violence, possession of a regulated firearm by a disqualified person, and wearing or carrying a handgun. The court imposed a sentence of incarceration for life, with all but 50 years suspended, for first-

degree murder, with the remaining charges resolved by imposition of lesser concurrent sentences or by merger, plus five years of probation. The following facts were adduced at trial.

On October 22, 2013, Gwendolyn Johnson saw appellant on the street, and asked when appellant would pay her $70.00. Ms. Johnson's fiancee, ChaDonna Chase, who was also present, testified that appellant responded, "[y]ou'll get it when I give it to you," and began to fight with Ms. Johnson. Other people present separated appellant and Ms. Johnson three times. The fighting ended and the two went their separate ways.

About 45 minutes later, Ms. Chase and Ms. Johnson again encountered appellant in front of 819 Abbott Court, where they lived. Again, the subject of the $70.00 debt arose. Appellant then said "I'll kill both of you bitches," produced a handgun from her sweatshirt, and fired one shot that struck Ms. Johnson in the lower back. Appellant fired a second shot that missed Ms. Chase. Appellant then ran off. Ms. Chase called 911 and tried to resuscitate Ms. Johnson, to no avail. She died. According to an assistant Medical Examiner, the bullet entered Ms. Johnson's left hip and traveled upward, striking a number of vital organs, including her heart and right lung.

Ms. Chase identified appellant in a photo array, writing on the photo: "[t]his is Brittany Powers, a/k/a Chops, who shot and killed my girlfriend, Gwendolyn Johnson, and she also shot at me but missed." Kenya Watkins witnessed the shooting and testified that she

heard one of the people arguing say "I will do you right now," and then " . . . one woman pulled out a gun and shot another woman."

Appellant testified in her own defense. While she admitted to fighting with Ms. Johnson, she denied having been present when Ms. Johnson was shot. Appellant testified that she was Ms. Johnson's friend and that the two had "drug business" together. Appellant also knew Ms. Chase. Appellant related that Ms. Johnson approached her while she was on the phone with her girlfriend Deanndra, who was incarcerated at the Jessup Correctional Institution at the time. Ms. Johnson asked appellant about money, to which appellant responded "[y]ou'll get it when you get it." Appellant alleged that it was Ms. Johnson who "swung on me," initiating the first of the three sequential altercations, and caused her to drop her phone. Appellant denied having subsequently gone to retrieve a gun from a relative's house and then seeking out Ms. Johnson. She denied shooting Ms. Johnson. During cross-examination, the prosecutor questioned appellant as follows, which prompted no objections:

> "[PROSECUTOR]: You didn't understand why people would pick out you as the person who shot Gwendolyn Johnson?
>
> [APPELLANT]: Honestly, sir, I did not.
>
> [PROSECUTOR]: Yet you heard the statement of Ms. Chase as she sat in the same place that you sit and she answered all the questions that I posed to her and, more importantly, she answered all the questions the defense attorney posed to her, and you saw her pick you out; isn't that right?
>
> [APPELLANT]: Yes, sir, I did.

> [PROSECUTOR]: So Ms. Chase is intentionally deceiving everybody when she points you out?
>
> [APPELLANT]: Yes, sir.
>
> [PROSECUTOR]: She's concocting this version of having known you and having you come up with a gun, pull it out your hoody, point it at Gwendolyn Johnson, fire it, and firing it again, trying to hit Ms. Chase, that is all made up?
>
> [APPELLANT]: As far as I know—I mean, no, sir. As far as shooting, pulling the gun and everything else in that manner, yes, sir, it's lie.
>
> [PROSECUTOR]: All made up?
>
> [APPELLANT]: Yes, sir."

One of the subjects of this appeal are recordings of three jail calls that the State entered into evidence. The recordings capture appellant speaking with her girlfriend Deanndra at various times during and immediately after the events relevant to this case. Appellant moved *in limine* to exclude the calls on the grounds that the State could not sufficiently authenticate that the voice on the call was appellant's, and because the calls were more prejudicial than probative. The court denied the motion and ruled that "[i]f the call itself is authenticated, properly established as call from A to B, then it will be played." James Shields from the Maryland Department of Corrections testified on direct examination by the prosecutor that he had custodial responsibility over the jail calls, that recordings of jail calls are kept in the normal course of business, about how inmates make calls using a state

identification number and a PIN, and as to how the recordings were created in response to the subpoena in the case *sub judice*. Further, Mr. Shields identified the recipient telephone number of the jail calls as a number that was later identified as belonging to appellant. The State then moved to introduce the phone call recordings. Appellant's counsel renewed his objection on the same bases as in his motion *in limine*. The State proffered that it would introduce evidence sufficient to prove that the recordings were of appellant's voice, stating as follows:

> "Your Honor, I think the State has met its burden of authentication. Once this is moved in, additionally, the jury can place the weight that they determine they need to on the voice. I could actually have Ms. Powers read from a transcript which I have to allow the jury to make an assessment of whose voice it is they're hearing. I don't believe that we need to do that, because during Ms. Powers' interview with the Baltimore City Police Department she acknowledges and admits the phone number that was just read in by Mr. Shields is in fact the phone number that these calls were made to, and I'd proffer that to the Court as well."

The court admitted the phone call recordings.

The State played the recordings for the jury. The first call recorded the initial altercation, the second included appellant admitting to her girlfriend that she had been fighting, and the third call recorded appellant's statements that she had "fucked up" and needed to get rid of her phone, and that Deanndra should "watch the news" to learn more about what she had done.

During direct examination, appellant verified that she received the three recorded jail calls from Deanndra, explaining as follows:

> "[APPELLANT'S COUNSEL]: Now, I'm going to direct your attention back to October 22nd. Did you see Ms. Johnson that day?
>
> [APPELLANT]: Yes, sir.
>
> [APPELLANT'S COUNSEL]: When did you see Ms. Johnson?
>
> [APPELLANT]: Earlier that day.
>
> [APPELLANT'S COUNSEL]: What happened?
>
> [APPELLANT]: I was approached by her.
>
> [APPELLANT'S COUNSEL]: When you say you were approached, what do you mean?
>
> [APPELLANT]: She came to me, standing in my face.
>
> [APPELLANT'S COUNSEL]: And were you doing anything at that time?
>
> [APPELLANT]: On the phone, yes, sir.
>
> [APPELLANT'S COUNSEL]: Who were you on the phone with?
>
> [APPELLANT]: Deanndra.
>
> [APPELLANT'S COUNSEL]: Now, who is Deanndra?
>
> [APPELLANT]: My girlfriend.
>
> * * *

[APPELLANT'S COUNSEL]: Where was she calling from?

[APPELLANT]: Jessup.

[APPELLANT'S COUNSEL]: And as you were talking to Deanndra, what did [Ms. Johnson] do?

[APPELLANT]: Approached me and asked me about her money.

[APPELLANT'S COUNSEL]: All right. And what did you tell her?

[APPELLANT]: She'll get it when she get it.

* * *

[APPELLANT'S COUNSEL]: All right. Now, you heard the State put in evidence about phone calls from Deanndra yesterday, correct?

[APPELLANT]: Yes, sir.

[APPELLANT'S COUNSEL]: Did you get—after the fight, did you get another [second] phone call from Deanndra?

[APPELLANT]: Yes, sir, I did.

* * *

[APPELLANT'S COUNSEL]: Now, the State also played another phone call from Deanndra?

[APPELLANT]: Yes, sir.

[APPELLANT'S COUNSEL]: Did you hear that yesterday?

> [APPELLANT]: Yes, sir.
>
> [APPELLANT'S COUNSEL]: Do you remember when that phone call happened?
>
> [APPELLANT]: Which one? There was three.
>
> [APPELLANT'S COUNSEL]: The third phone call.
>
> [APPELLANT]: Later that day.
>
> [APPELLANT'S COUNSEL]: Now, do you remember what you said on that third phone call?
>
> [APPELLANT]: Yes, sir, I do.
>
> [APPELLANT'S COUNSEL]: What did you say, if you remember?
>
> [APPELLANT]: Basically, I said I screwed up and I had to get rid of my phone."

Appellant testified that in the third call she was not referring to having shot Ms. Johnson. Appellant explained that when she said she had "screwed up" and needed to get rid of her phone, it was because she had severely beaten a "junkie" who had stolen cocaine from her, striking him four or five times with a wooden two-by-four after which he had not gotten up.

As noted above, the jury convicted appellant of first-degree murder, attempted first-degree murder, use of handgun in the commission of a crime of violence, possession of a regulated firearm by a disqualified person, and wearing or carrying a handgun. Following sentencing, this timely appeal followed.

II.

Appellant argues before this Court that the trial court erred in permitting the State to question appellant about whether she heard Ms. Chase's testimony and whether appellant believed that Ms. Chase was lying in her testimony about appellant. Conceding that the issue was not preserved because there was no objection to the questioning, appellant urges us to conduct a plain error review because the presentation of evidence was sufficiently prejudicial. Appellant offers that this case was decided largely on whether the jury found her or Ms. Chase more credible. Appellant argues that her defense was severely prejudiced when the State was allowed to ask her a series of forceful "is she lying" questions on cross-examination. She argues that although her counsel did not object to the questioning at trial, the testimony was sufficiently prejudicial that this Court should exercise its discretion to recognize plain error and reverse.

Appellant also argues that the trial court erred in admitting evidence of the three telephone calls appellant received from her girlfriend who was in jail at the time. She argues that, on the balance, the unfair prejudice that the phone calls inflicted outweighed substantially the probative value. Appellant maintains that the phone calls were unfairly prejudicial because they informed the jury repeatedly that appellant's girlfriend is incarcerated, because the conversations indicated the callers' familiarity with "gang culture,"

and because the calls included gratuitous profanity. Appellant also argues that large portions of the recordings have no probative value and are irrelevant to the crimes charged.

Further, appellant argues that the three phone calls were not properly authenticated before the court admitted them into evidence and allowed them to be played to the jury. She argues that before the phone call recordings were admitted, the State put on evidence that authenticated the calls as having been placed by an inmate at the penitentiary, and that the penitentiary maintained such call recordings in the ordinary course of business, but that the State offered no further evidence to show that the second voice on the call was appellant's. Appellant argues that this error was prejudicial.

The State argues that this Court should refuse to review the prosecutor's questions for plain error. The State notes that appellant concedes that her counsel did not object to the State's questions during trial. The State argues that there was no clear or obvious error by the trial court that affected the outcome of the trial, and any error was immaterial, thus appellant failed to meet the basic requirements for the extraordinary remedy of plain-error review.

With regard to the jail calls, the State argues that the court did not abuse its discretion by admitting the calls as each had significant probative value that outweighed any prejudice to appellant. The State argues that the calls corroborated the testimony of Ms. Chase, the State's key witness, and included significant consciousness-of-guilt evidence. The State

argues that appellant is raising a question on appeal of whether the court should have redacted irrelevant portions of the calls, but that appellant did not preserve this argument for review because appellant only requested that the trial court exclude the calls entirely, not redact any part thereof. Further, the State argues that the calls were properly authenticated after the calls were admitted, including in testimony by appellant herself where she admitted to having received the calls. The State offers that Rule 5-104(b) ("When the relevance of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding by the trier of fact that the condition has been fulfilled."), permits the court to admit the calls subject to additional evidence entered later that appellant was one of the speakers.

III.

Appellant raises an issue, claiming that the State asked one witness to comment upon the credibility of another witness, that might very well merit our consideration were it not for the conceded fatal flaw that appellant's counsel did not object to the questions at trial. Without a contemporaneous objection below, the issue is not preserved for our review. Md. Rule 4-323(a). Appellant asks that we overlook the preservation requirement and exercise our discretion to note the error as plain error.

Our review of an unpreserved evidentiary issue is discretionary. *Williams v. State*, 34 Md. App. 206, 212 (1976). "Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court . . . ." Md. Rule 8-131(a). It is a touchstone of our trial and appellate system that "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." Md. Rule 4-323(a). We *may*, at our discretion, review an unpreserved claim when it is "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *State v. Hutchinson*, 287 Md. 198, 203 (1980); *see also Hammersla v. State*, 184 Md. App. 295, 306, *cert. denied*, 409 Md. 49 (2009) (plain error is error that vitally affects a defendant's right to a fair and impartial trial). Such is not the case here.

Appellant falls into a rhetorical trap visited often by parties seeking plain error review—contending that an error resulted in prejudice severe enough that would merit relief had the issue been preserved, then proceeding to argue the merits of the unpreserved contention as if the issue had been preserved. *See Molter v. State*, 201 Md. App. 155, 179 (2011). Even if an error may have been prejudicial to an appellant, this does not guarantee that it will be noticed. *Morris v. State*, 153 Md. App. 480, 512 (2003). The trap for an appellant is believing "an argument good enough to prevail should prevail whether preserved

or not. Nothing could be further from the truth." *Molter*, 201 Md. App. at 179-80. To reward such an approach would invalidate the purpose of the preservation requirement:

> "The preservation rule contemplates error. It assumes that an error has probably occurred. Its concern is that the error was not brought to the trial judge's attention so that he could have had the opportunity to correct it."

Austin v. State, 90 Md. App. 254, 261 (1992). Had appellant objected to the questioning at trial, the trial judge would have had a remedy ready, and this issue could have been resolved in an appropriate fashion by striking the testimony or with a remedial instruction to the jury. We do not find this to be a compelling, extraordinary, or exceptional issue, or one that raises a question fundamental to a fair trial.

Assuming, *arguendo*, that the issue had been preserved, we would still find that it was not reversible error. To be sure, it is improper for one witness to comment on the credibility of another witness. *Bohnert v. State*, 312 Md. 266, 277 (1988) (it is error for court to permit statement, belief, or opinion of one witness that another witness is telling the truth or lying). Nonetheless, considering the assumed error in the context of all the evidence in the case, we would find that the error was harmless beyond a reasonable doubt and hence, not plain error.

IV.

Appellant raises two arguments regarding three jail calls that were admitted into evidence. We consider below whether the trial court should have excluded the calls because

the probative value was substantially outweighed by the danger of unfair prejudice. Md. Rule 5-403. We next consider whether the jail calls were authenticated sufficiently during the trial, namely that appellant was identified as a speaker on the phone call. We review the trial court's evidentiary rulings for abuse of discretion. *State v. Simms*, 420 Md. 705, 724-25 (2011).

A.

A question as to whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice is left to the sound discretion of the trial judge and will be reversed only upon a clear showing of abuse of discretion. *Malik v. State*, 152 Md. App. 305, 324 (2003). We give significant deference to the determinations of the trial court that probative evidentiary value outweighs any danger of prejudice. *CSX Transp., Inc. v. Pitts*, 203 Md. App. 343, 373 (2012), *aff'd*, 430 Md. 431 (2013). Evidence is probative "if it tends to prove the proposition for which it is offered." *Consol. Waste Indus., Inc. v. Standard Equip. Co.*, 421 Md. 210, 220 (2011) (quoting *Johnson v. State*, 332 Md. 456, 474 (1993)). Evidence is unfairly prejudicial when it "might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is being charged." *Burris v. State*, 435 Md. 370, 392 (2013) (quoting *Odum v. State*, 412 Md. 593,

615 (2010)). The question is one of balance, thus the more probative the evidence, the greater the unfair prejudice that must be shown to justify exclusion. *See id.*

The court did not abuse its discretion in admitting the jail calls over appellant's objection based on unfair prejudice. Appellant is correct that some prejudice may flow from the fact that the calls admitted into evidence are jail calls, from the gang oriented content or from the profane language. The relevant inquiry, however, is whether the prejudice is unfair to a level that *substantially outweighs* the probative value of the evidence. *See Odum*, 412 Md. at 615. The trial judge was correct in finding that the probative value was not outweighed by any prejudicial effect. The first call included content that corroborated Ms. Chase's account of the conversation appellant had with Ms. Johnson during their first encounter. The second call corroborates Ms. Chase's testimony regarding the confrontation between appellant and Ms. Johnson, including that appellant had just been fighting. The third call includes evidence that could be interpreted by the jury as appellant's consciousness-of-guilt. The probative value of each of the calls is substantial, and is not outweighed by the risk of unfair prejudice.

B.

We next consider appellant's argument that the jail calls were not authenticated properly before the court admitted the recordings into evidence and the State played them for

the jury. Authentication of evidence is governed by Maryland Rule 5-901(a), which states the following:

> "(a) General Provision. 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."

This provision establishes that authentication is a condition precedent to admissibility; the condition is satisfied by evidence showing that the matter in question is what its proponent claims, and the showing must be sufficient to support a finding. The trial judge must find "that there is proof from which a reasonable juror could find that the evidence is what the proponent claims it to be." *Sublet v. State*, 442 Md. 632, 638 (2015). The burden of proof for authentication is slight. *Dickens v. State*, 175 Md. App. 231, 239 (2007).

For purposes of authenticating evidence, Rule 5-901 offers illustrations of the means by which a proponent of evidence can establish authenticity. Rule 5-901(b) includes a non-exhaustive and not-limiting set of examples of showing authentication under the Rule. The most relevant illustrations are as follows:

> "(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Rule:
>
> * * *
>
> (5) *Voice Identification*. Identification of a voice, 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.
>
> (6) *Telephone Conversation*. A telephone conversation, by evidence that a telephone call was made to the number assigned at the time to a particular person or business, if
>
> > (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or
> >
> > (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone."

Md. Rule 5-901(b). The illustrations indicate that the voice of the speaker may be identified by extrinsic evidence, but the voice must be identified. *Knoedler v. State*, 69 Md. App. 764, 773-74 (1987) (proponent may authenticate telephone calls by knowledge of caller's voice and by contents of conversation, circumstances of call, or subsequent behavior of participants reflecting awareness of call). Where the identity of the speaker is in question, authentication may be achieved by testimony of a witness who recognizes the voice on the recording as belonging to a person they otherwise heard speak. *Donati v. State*, 215 Md. App. 686, 740-41, *cert. denied*, 438 Md. 143 (2014) (defendant's telephone calls authenticated properly by police officers who had each spoken with the defendant for 15 to 20 minutes). The content of the recording itself may corroborate the identity of the speaker. *Basoff v. State*, 208 Md. 643, 649 (1956).

When there is a dispute about the truth of a fact in order for evidence to be relevant, such as the fact of authenticity, it is a question of conditional relevancy. *Kosmas v. State*, 316 Md. 587, 600-01 (1989). A court may admit evidence conditionally, *i.e.* evidence that is not yet authenticated, subject to a proffer as to how the evidence will be authenticated. Rule 5-104(b) permits a court to admit evidence subject to the condition that the proffering party will enter evidence to satisfy the relevancy requirement:

> "(b) Relevance Conditioned on Fact. When the relevance of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding by the trier of fact that the condition has been fulfilled."

We consider that authentication is "essentially a question of conditional relevancy." *Sublet*, 442 Md. 632, 668 n.40 (quoting *Lorraine v. Markel Am. Insurance Co.*, 241 F.R.D. 534, 539-40 (D.Md. 2007)). If the objecting party believes that the condition was left unfulfilled, that the condition of fact has not been proven, that party should move to strike the evidence:

> "(a) . . . When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court may admit the evidence subject to the introduction of additional evidence sufficient to support a finding of the fulfillment of the condition. The objection is waived unless, at some time before final argument in a jury trial or before the entry of judgment in a court trial, the objecting party moves to strike the evidence on the ground that the condition was not fulfilled."

Md. Rule 4-323. The trial court has several remedies in its arsenal. The court may merely strike the evidence, accompanied by a curative instruction, or in the extreme case, and upon request, grant a mistrial.

The admission of evidence that is not authenticated properly by its proponent constitutes error. *See Washington v. State*, 406 Md. 642 (2008). We review a ruling on whether evidence is authenticated properly for an abuse of discretion. *See Dep't of Pub. Safety & Corr. Servs. v. Cole*, 342 Md. 12, 26 (1996). 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 (2000).

During the bench conference immediately preceding the court's ruling admitting the recordings, the State proffered that it could prove by various means that the voice on the recording was appellant's. Such a proffer is a sufficient basis on which a court may admit evidence conditionally. The State was then liable for producing such evidence to satisfy the condition and otherwise risked that the evidence would be struck or the court would grant a mistrial. If appellant was not satisfied at the end of all the evidence that the State had fulfilled its authentication or relevancy burdens, it was her duty to object. Such an objection was not called for in this case because the State's evidence authenticated the recordings. The State established that the recordings were what the State claimed them to be, including

appellant's testimony verifying that she received the three calls and affirming the content of the calls.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.