Circuit Court for Baltimore City
Case No. 121138003

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 0914

September Term, 2023

DONTE BROWN

v.

STATE OF MARYLAND

Graeff,
Arthur,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: March 10, 2025

After a trial in the Circuit Court for Baltimore City, a jury convicted appellant Donte Brown of first-degree murder and three handgun offenses. The court sentenced Brown to life in prison plus an additional 35 years.

Brown appealed his convictions. He argues that the circuit court erred by admitting three pieces of video surveillance footage that the State had not properly authenticated. The State argues that it laid a proper foundation for admission of the evidence.

We agree that the court committed reversible error when it admitted two of the three videos without adequate authentication. Consequently, we must reverse Brown's convictions and remand the case to the Circuit Court for Baltimore City for a new trial.

FACTUAL AND PROCEDURAL HISTORY

A. The Shooting and the Investigation

On March 5, 2021, at about 6:35 p.m., a Baltimore City police officer heard a loud bang and saw people running in the 400 block of West Saratoga Street. She rushed down the street, where she found a man, later identified as Tavon Hutton, lying on the ground after being shot multiple times. Hutton died from his injuries.

Police officers began to search for the person who shot Hutton. Homicide Detective David Moynihan responded to the scene of the shooting and observed two cameras outside a tobacco and grocery store on West Saratoga Street. He arranged to "recover and view the video" that the cameras captured around the time of the shooting. Sergeant Steven Henson assisted Detective Moynihan in recovering the videos.

The video footage from the tobacco and grocery store captured the shooting. In the footage, the shooter appears to argue with Hutton, who is sitting in a wheelchair. After briefly walking away from Hutton, the shooter approaches Hutton, who puts his hands up. The shooter pulls a gun from his right vest pocket and shoots Hutton. The shooter and another man then run west on Saratoga Street, roughly one minute before a police officer arrives on the scene. Detective Moynihan noted that, in the video, the shooter was "wearing a mask," making him "next to impossible" to identify. Detective Moynihan, however, did observe that the shooter was "dressed in all black with a black vest . . . with a white little emblem." The shooter had "a set of keys hanging from his waistband," and he was wearing "red Nike Air Jordan tennis shoes."

Roughly two minutes before the shooting, the tobacco and grocery store footage shows the shooter and another man walking onto Saratoga Street from Jasper Street, an alleyway west of the site of the shooting. As a result, Detective Moynihan and Sergeant Henson "began tracking . . . west and then north into the alley, looking for video."

The detective and the sergeant obtained footage from a Marathon gas station on Paca and Mulberry Streets, one block north of the tobacco and grocery store. According to Detective Moynihan, the footage from the Marathon station shows two men entering the Jasper Street alleyway adjacent to the Marathon station roughly three minutes before the shooting. The two men approach the Marathon station from Mulberry Street. This observation led Detective Moynihan and Sergeant Henson to request video footage from

an Exxon gas station at Greene and Mulberry Streets, one block west of the Marathon station.[1]

The footage from the Exxon station shows two people exiting a silver Maserati with what appeared to Detective Moynihan to be temporary Virginia tag. One of the men was the shooter. The men walk east, in the direction of the Marathon gas station.

Detective Moynihan asked Detective Kyle Johnson to retrieve video footage from cameras at the University of Maryland Hospital, a few blocks south of the Exxon station. The footage from those cameras shows a silver Maserati traveling south on Greene Street and then west on Fayette Street roughly two or three minutes after the shooting.

After viewing all the videos, Detective Moynihan sent out a flyer advising all police units "to be on the lookout for [a] silver Maserati."

An officer contacted Detective Moynihan shortly after he disseminated the flyer. The officer informed Detective Moynihan that on March 2, 2021, three days before the shooting, the officer had "stopped a silver Maserati . . . somewhere on Charles Street." The officer gave Detective Moynihan the car's temporary tag number. Detective Moynihan determined that only one silver Maserati was registered in Maryland with a

[1] Detective Moynihan noted that the footage from the Marathon station, which shows two men walking toward the scene of the shooting, is actually timestamped 6:36 p.m., four minutes later than when Detective Moynihan said the men would have been walking toward the scene (and about a minute after the shooting itself). Detective Moynihan testified that Sergeant Henson "did all the time and the math things" and "determined [the camera] to be approximately four minutes fast." Sergeant Henson testified, however, that the Marathon video was one day and five minutes fast. The question of the precise time and date of the Marathon video is discussed in greater detail below.

temporary Virginia tag. Detective Moynihan contacted the Department of Motor Vehicles in Virginia and received the name of the Maserati's registered owner.

On March 10, 2021, Detective Moynihan went to the registered owner's listed address on Oak Haven Circle in Windsor Mill, Maryland. He found the Maserati parked in the driveway, and he instructed a Regional Auto Theft (RAT) unit officer to surveil the address.

While members of the RAT unit were surveilling the Maserati, they observed someone drive the Maserati to a car wash. The driver got out of the Maserati and into a black Honda, which exited the car wash. The RAT unit towed the empty Maserati.

While the Maserati was at the car wash, the officers observed an older woman leave the home where the Maserati had been parked. Detective Moynihan suspected the woman was the mother of the Maserati's registered owner, so he found her work address and spoke with her there. The woman confirmed that the Maserati's registered owner was her daughter. Detective Moynihan then showed the woman pictures of the Maserati at the car wash. The woman identified the person exiting the Maserati in the car wash bay as "Donte." Although she was not positive, she believed his last name was "Brown." The woman knew "Donte" as her daughter's boyfriend.

Police officers executed a search and seizure warrant of the Maserati on March 15, 2021. Brown's fingerprints were found in the car.

Officers also executed a "Berla warrant"[2] to extract navigation data from the car's GPS system. The navigation data showed that, on the morning of the shooting, the Maserati left Oak Haven Circle in Windsor Mill. The Maserati was at the intersection of West Mulberry and North Greene Streets at around 6:30 p.m. on the same day. The Maserati returned to Windsor Mill at 7:51 p.m.

Officers retrieved video footage from cameras outside of the Oak Haven Circle apartment complex. The footage showed a man wearing "red shoes" and a "black vest" walking away from the apartment complex at around 8:25 a.m. on March 5, 2021. He was wearing a keychain "similar" to the keychain observed on the person who fired the gun in the tobacco and grocery store video. The complex's video shows the man entering the silver Maserati and driving out of the parking lot.

The police issued an arrest warrant for Brown on March 17, 2021. Officers arrested him on April 29, 2021.

B. The Trial

The State charged Brown with first-degree murder, use of a firearm in the commission of a crime of violence, and four counts related to the possession of a firearm. Brown elected a jury trial, which began on January 24, 2023.

[2] Berla manufactures a product that enables the police to "access the infotainment system of many newer vehicles." Adam M. Gershowitz, *The Tesla Meets the Fourth Amendment*, 48 BYU L. REV. 1135, 1139 (2023). The device "enables the police to discover" a car's "navigation data." *Id.* "Berla products are not generally available to the public, and sales access is restricted to law enforcement, the military, civil and regulatory agencies, and select private investigation service providers." *Jones v. Ford Motor Co.*, 85 F.4th 570, 573 (9th Cir. 2023).

At trial, the State called Sergeant Steven Henson. Sergeant Henson testified that Detective Moynihan asked him to retrieve video footage from the tobacco and grocery store from March 5, 2021.

Sergeant Henson explained his usual process for retrieving video from third parties. First, he "introduce[s] [him]self to either the manager or the owner" and "ask[s] them [to] pull video from the DVR system." He then "get[s] onto the DVR system" and "select[s] the cameras that [his supervising officer] request[s.]" Next, he selects "the timeframe[] and . . . the date" and "download[s] [the footage]" onto his own flash drive. He then downloads the footage to his laptop, "just to make sure that it's playing from [the] beginning to the end." Finally, he puts the footage onto evidence.com, "which is the database used to store digital evidence."

Sergeant Henson testified that, at the tobacco and grocery store, he confirmed that the time on the DVR was accurate and took pictures of the DVR system. The court admitted the pictures into evidence.

Moments later, when the State offered the videos from the tobacco and grocery store cameras into evidence, Brown objected on the ground that the State had not laid "the proper foundation" for admitting the evidence. Specifically, Brown argued that Sergeant Henson had not spoken about "[t]he working condition of the [DVR] equipment." The State responded that it had "met the elements" for admission by having "a witness identify the footage." The trial court overruled Brown's objection, admitted the evidence, and allowed the State to publish it to the jury.

Sergeant Henson then testified about his recovery of video footage from the Marathon gas station. Although Detective Moynihan would later testify that the Marathon video was "approximately four minutes fast," Sergeant Henson testified that the Marathon station's DVR was "one day and five minutes fast."[3] Sergeant Henson took a picture of the monitor of the DVR system, and the court admitted that picture into evidence.

The State offered the Marathon footage into evidence, and Brown objected. He observed that, according to the witness, the date on the video was March 6, 2021, which "would be after this homicide." He argued that Sergeant Henson had not explained at all "how he came to [the] conclusion" that the DVR was running a day and five minutes fast. He insisted that Sergeant Henson needed to "explain the time difference" for the footage to be admissible.

In response to the objections, the State asked Sergeant Henson to explain the time difference. He testified that he looked at the Marathon footage at 9:19 a.m. on March 5, 2021—which would have been nine hours *before* the shooting occurred.

The State attempted to satisfy the court's concerns about the authenticity of the video by offering Sergeant Henson as an "expert in the field of video retrieval and preservation." The Court recognized Sergeant Henson as an expert and admitted the Marathon footage into evidence.

[3] Detective Moynihan deferred to Sergeant Henson for an explanation of how they determined that the camera was "approximately four minutes fast." Rather than explain the four-minute discrepancy, Sergeant Henson increased it by many orders of magnitude.

On cross-examination, Brown asked Sergeant Henson whether he remembered the name of the person to whom he spoke at the Marathon station. Sergeant Henson testified that he could not recall the person's name, gender, or ethnicity. He reiterated that he went to the Marathon station on March 5, 2021: "I was there on the 5th," he said. He reiterated that "the timestamp" on the video "was a day and five minutes faster than the day [he] was there."

Brown asked Sergeant Henson if he remembered the type of DVR system that the Marathon station used; Sergeant Henson replied that the system "was generic," meaning that "it didn't have a name on it."

A bit later, Sergeant Henson testified that the timestamp of the video said March 5, 2021, but that the DVR monitor showed a different date—March 6, 2021. When asked to explain the "inconsistency," Sergeant Henson said that "[w]hoever set up the DVR" did not put the accurate time on the system. Sergeant Henson did not testify that the Marathon worker told him that the system's time was inaccurate—rather, he testified that he knew this to be so because of his training and experience. Brown asked whether the "owner of the video system changed the dates or times purposely or not[.]" Sergeant Henson replied that he had "no idea[.]" He insisted, however, that, "when the video is recording, it's recording whatever time of day that is, real time."

The State called Detective Kyle Johnson, who retrieved the video footage from the University of Maryland. Over Brown's objection, the court accepted Detective Johnson as an expert in the field of the retrieval, preservation, and recovery of video.

Detective Johnson testified that his general process for retrieving video footage from third parties is similar to Sergeant Henson's. He takes a picture of the DVR system, puts his flash drive into the system, extracts the video from the correct timeframe, downloads the video onto his flash drive, and then puts the footage on evidence.com. Detective Johnson testified, however, that the University of Maryland employees do not allow him to engage in his usual process. Instead, "they do it for you." In this case, a university employee "gave [him] the videos" from a "PC-based" system, and he "review[ed] that video footage." The employee put the footage onto Detective Johnson's flash drive. The State offered the University of Maryland footage into evidence, and Brown objected.

Brown argued that, once again, the State had not laid a proper foundation for the admission of the video footage. According to Brown, for the footage to be admissible, "the person who should have [testified was] the technician from the University of Maryland." The court told the State that it was "important to ask" whether Detective Johnson "was present when [the university technician] downloaded" the footage. A bit later, the court told the State to establish that the detective watched the video before it was downloaded. In the midst of this discussion, Detective Johnson testified, without elaboration, that the University's "timeframes are accurate."

The State proceeded to question Detective Johnson about his familiarity with the downloading process. He testified that the university used a "Pelco" DVR system, which he described as an IP, or "internet protocol," camera system—a "high-end" system used

by "commercial businesses." The video, he testified, is stored on the University's mainframe computer and is accessible on the internet. He explained that the University has several cameras on its campus and that the system allows the user to select the video footage from a specific camera at a specific date and time.

The State offered the footage into evidence again, and Brown renewed his objection, arguing that Detective Johnson's testimony was imbued with too much "ambiguity." The court overruled the objection and admitted the footage into evidence.

On cross-examination, Detective Johnson testified that he, in fact, did not conduct the video search himself, but instead "told [the technician] where to look[.]" Additionally, Detective Johnson testified that the university did not allow him to take pictures of the DVR system. Detective Johnson said that he was able to confirm the accuracy of the video by "look[ing] at the system and see[ing] where it says the timestamp[.]"

The jurors began deliberating on the morning of January 31, 2023. They were able to watch the video footage from the tobacco and grocery store cameras, the Marathon and Exxon station cameras, and the University of Maryland cameras.

On the afternoon of January 31, 2023, the jury found Brown guilty of first-degree murder, use of a firearm in the commission of a crime of violence, possession of a regulated firearm after having been convicted of a disqualifying offense, and wearing, carrying, or transporting a handgun. The court sentenced Brown to an aggregate term of life in prison plus an additional 35 years of incarceration. Brown noted a timely appeal.

QUESTIONS PRESENTED

Brown presents one question for our review: Did the lower court err in admitting video evidence without proper authentication of that evidence? He challenges the admission of the video from the tobacco and grocery store, the video from the Marathon station, and the video from the University of Maryland. He does not challenge the admission of the video from the Exxon station.

For the reasons that follow, we conclude that the court erred in admitting the videos from the tobacco and grocery store and from the Marathon station. Consequently, we shall reverse Brown's convictions and remand the case for a new trial.

STANDARD OF REVIEW

"An appellate court reviews for abuse of discretion a trial court's determination as to whether an exhibit was properly authenticated." *Mooney v. State*, 487 Md. 701, 717 (2024) (citing *State v. Sample*, 468 Md. 560, 588 (2020)) (further citation omitted).

DISCUSSION

Maryland Rule 5-901(a) establishes that authentication is "a condition precedent to admissibility[,]" which is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Authentication "'is not an[] artificial [principle] of evidence, but an inherent logical necessity[.]'" *Sublet v. State*, 442 Md. 632, 656 (2015) (quoting 7 J. Wigmore, Evidence § 2129 (Chadbourn Rev. 1978)) (emphasis omitted).

The authentication of photographs, motion pictures, and video footage presents special challenges. "Photographic manipulation, alterations and fabrications are nothing new, nor are such changes unique to digital imaging, although it might be easier in this digital age." *Washington v. State*, 406 Md. 642, 651 (2008). "'[M]ovies and tapes are easily manipulated, through such means as editing and changes of speed, to produce a misleading effect.'" *Id.* (quoting 5 Lynn McLain, *Maryland Evidence* § 403.6, at 592 (2001)). "Courts therefore require authentication of photographs, movies, or videotapes as a preliminary fact determination, requiring the presentation of evidence sufficient to show that the evidence sought to be admitted is genuine." *Id*. at 651-52.

Video footage "is admissible in evidence and is subject to the same general rules of admissibility as a photograph." *Washington v. State*, 406 Md. at 651; *accord Jackson v. State*, 460 Md. 107, 116 (2018); *Reddick v. State*, 263 Md. App. 562, 579 (2024).

Maryland courts have identified several methods for authenticating video footage. Video can be authenticated under the "'pictorial testimony'" method, whereby "'a witness testifies from first-hand knowledge that the [video] fairly and accurately represents the scene or object it purports to depict as it existed at the relevant time.'" *Mooney v. State*, 487 Md. at 705-06 (quoting *Dep't of Pub. Safety & Corr. Servs. v. Cole*, 342 Md. 12, 20-21 (1996)). Video can also be authenticated under "the silent witness method[,]" which "allows for authentication by the presentation of evidence describing a process or system that produces an accurate result." *Washington v. State*, 406 Md. at 652; *accord Reddick v. State*, 263 Md. App. at 579-80. Some video recordings may be

authenticated "as part of an official record made and kept in the ordinary course of" a business activity. *Dep't of Pub. Safety & Corr. Servs. v. Cole*, 342 Md. at 27-28. Most recently, the Supreme Court of Maryland has held that video can be authenticated through a combination of the testimony of a witness with first-hand knowledge of some of the events depicted therein and circumstantial evidence suggesting that the video is what it is claimed to be. *Mooney v. State*, 487 Md. at 730.[4]

"'[T]he bar for authentication of evidence is not particularly high.'" *Id.* at 717 (quoting *Sublet v. State*, 442 Md. at 666). Still, for video to be admissible, "there must be sufficient evidence for a reasonable juror to find by a preponderance of the evidence that the video is authentic." *Id*. at 728; *accord Reddick v. State*, 263 Md. App. at 579. A "'[c]ourt 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.'" *Jackson v. State*, 460 Md. at 116 (quoting *United States v. Safavian*, 435 F.Supp.2d 36, 38 (D.D.C. 2006)) (emphasis in original).

The methods of authentication enunciated in this opinion are not necessarily the only ways to authenticate video evidence in Maryland. "Video footage can be authenticated in different ways[,]" as long as "the proponent of the video . . .

[4] *Mooney* was decided after this case was submitted on brief. Consequently, we requested supplemental briefing to address "the impact, if any, of the Supreme Court's decision" in that case on this appeal. Brown argued that *Mooney* was inapplicable because in his case the State did not attempt to elicit "circumstantial evidence that the recordings accurately and reliably depicted the relevant events." The State agreed with Brown that *Mooney* was inapplicable.

demonstrate[s] that the evidence is sufficient for a reasonable juror to find by a preponderance of the evidence that the video is what it is claimed to be." *Mooney v. State*, 487 Md. at 730.

In Brown's case, the State did not attempt to authenticate the videos through the pictorial testimony method or the circumstantial evidence method, as the State's witnesses had no personal knowledge—of any kind—of the crucial events that occurred in the videos.[5] Nor did the State attempt to show that the videos were admissible as the business records of the tobacco and grocery store, the gas stations, or the University of Maryland. Instead, the State sought to admit all of the video footage by way of the silent witness method.

A. The Silent Witness Method

As stated above, the silent witness method "allows for authentication by the presentation of evidence describing a process or system that produces an accurate result." *Washington v. State*, 406 Md. at 652.

The silent witness method "rests on the notion that photographic and video evidence is often more reliable than [the testimony of] a human witness and can 'be probative in itself.'" *Reddick v. State*, 263 Md. App. at 580 (quoting *Dep't of Pub. Safety & Corr. Servs. v. Cole*, 342 Md. at 22). "The 'silent witness' theory of admissibility authenticates a photograph as a 'mute' or 'silent' independent photographic witness

[5] The police officer who responded to the scene of the shooting had personal knowledge of the events depicted in the tobacco and grocery store video once she reached the scene, about a minute after the shooting.

because the photograph speaks with its own probative effect." *Dep't of Pub. Safety & Corr. Servs. v. Cole*, 342 Md. at 21. "'Given an adequate foundation assuring the accuracy of the process producing it,'" a photograph may "'be received as a so-called silent witness or as a witness which speaks for itself.'" *Id.* at 21-22 (quoting 3 WIGMORE ON EVIDENCE § 790, at 219-20 (Chadbourn rev. 1970)) (further quotation marks omitted).

Under the silent witness method, a photograph—and, by analogy, a video recording—may be admissible as probative evidence in itself "rather than merely as illustrative evidence to support a witness's testimony, so long as sufficient foundational evidence is presented to show the circumstances under which it was taken and the reliability of the reproduction process." *Washington v. State*, 406 Md. at 652; *accord Mooney v. State*, 487 Md. at 706; *Jackson v. State*, 460 Md. at 116-17; *Dep't of Pub. Safety & Corr. Servs. v. Cole*, 342 Md. at 21. The requisite "foundation can be laid where, for instance, a witness testifies about 'the type of equipment or camera used, its general reliability, the quality of the recorded product, the process by which it was focused, or the general reliability of the entire system.'" *Mooney v. State*, 487 Md. at 706 (quoting *Jackson v. State*, 460 Md. at 117); *accord Washington v. State*, 406 Md. at 653.

"[T]he silent witness theory does not require personal knowledge of the content of video evidence or direct participation in its creation, but rather knowledge of the process by which it was created sufficient to establish its reliability." *Reddick v. State*, 263 Md. App. at 582. As this Court recently explained:

> [C]ourts have relied on the accuracy of the witness's knowledge of the system of collecting, storing, and downloading the videos, the reliability of

> that system, and whether the video is likely to have been altered. When a witness provides testimony addressing these concerns, our courts have found video evidence properly authenticated.

Id.

There are no "rigid prerequisites" for authentication under the silent witness theory. *Mooney v. State*, 487 Md. at 721. Instead, "'[t]he facts and circumstances surrounding the making of the photographic evidence and its intended use at trial will vary greatly from case to case, and the trial judge must be given some discretion in determining what is an adequate foundation.'" *Id.* (quoting *Dep't of Pub. Safety & Corr. Servs. v. Cole*, 342 Md. at 26).

Maryland courts have identified several situations where the State laid an adequate foundation to allow video to "speak[] with its own probative effect." *Washington v. State*, 406 Md. at 652 (internal quotation marks omitted).

In *Jackson v. State*, 460 Md. at 114-15, the State sought to admit surveillance footage of a Bank of America ATM. The State called the bank's protective services manager to authenticate the footage. *Id.* at 117. The manager testified that, once a detective requested the footage from the bank, the manager "located the date, time[,] and cameras for the [bank's] branch relative to the incident[.]" *Id.* At that point, the manager was not even permitted to copy the file to a thumb drive or a DVD. Instead, Bank of America required him "to submit a specific request" for the video to a different Bank of America team in North Carolina. *Id.* That team downloaded the video and sent it directly to the detective. *Id.* The Court ruled that the State, through the protective

services manager, established "the process of reproduction, the reliability of that process, and whether the reproduction was a fair and accurate representation of what the witness had viewed when he submitted a request for the video footage to [the team in] North Carolina." *Id.* at 119.

In *Reddick v. State*, 263 Md. App. at 582, this Court held that the State had properly authenticated video footage from a Walmart store through the testimony of the store's asset protection manager, who had "extensive knowledge of the video surveillance system, how it operated, and how video footage was collected, stored, and downloaded." The asset protection manager "was able to describe the process by which the downloaded copy was created and verify that only a person within his asset protection group had [the ability] to do so." *Id.* at 582-83. In addition, the manager "testified that the videos could not be manipulated or altered when downloaded and assured the court that the system of time[-] and date[-]stamping was reliable." *Id*. at 583. We found it immaterial that the manager "did not personally download the footage or view the video in its original [form]." *Id.* at 582.

Of course, not every piece of surveillance footage offered into evidence is delivered to the police from the secure hands of a national bank or a chain store. In *Reyes v. State*, 257 Md. App. 596 (2023), the State offered into evidence footage of a shooting captured on a private homeowner's security camera. The State called the homeowner to testify as to the general reliability of the camera. *Id.* at 631. The homeowner explained that he captured the footage on a "Wi-Fi-enabled home security camera" that he installed

himself. *Id.* He testified that he would invariably receive an alert on his phone when the camera began recording and that he did receive such an alert on the night of the shooting. *Id.* This Court held that the homeowner's testimony "provided an 'adequate foundation assuring the accuracy of the process producing [the footage]'" and ruled that the trial court was correct to admit it. *Id.* (quoting *Washington v. State*, 406 Md. at 653).

Similarly, in *Prince v. State*, 255 Md. App. 640 (2022), the trial court admitted surveillance footage of a shooting that occurred at a place of business. At trial, the State called the owner of the business, who testified, at first, only that he gave the police the surveillance footage. At that point, the State offered the footage into evidence, and the trial court "instructed the State to lay more foundation for the footage before it could be admitted into evidence." *Id.* at 649. The store owner then testified that he was one of the "caretaker[s]" of the surveillance system and that he used the cameras "on a daily basis." *Id.* The trial court was once again unconvinced that the State laid a sufficient foundation for admission of the surveillance footage. *Id.* The store owner added that the surveillance cameras were connected to a DVR and were "constantly running[]," that he needed to go into his office or turn on his cell phone to access the footage, that he watched the surveillance footage in question before giving it to the police, and that the exhibit the State showed him was the exact same video that he watched before the police downloaded it. *Id.* at 650-51. This time, the court admitted the evidence. *Id.* at 651.

On appeal, this Court held that the trial court did not abuse its discretion in admitting the video footage into evidence. *Id.* at 654. We reasoned that the store

owner's testimony provided a sufficient foundation to admit the video footage at issue because the owner was one of the "caretaker[s]" of the surveillance system (*id.* at 653)—someone who "knew the process by which the police could obtain the video" and "was knowledgeable about the process of obtaining the surveillance footage[.]" *Id*. at 653-54. The store owner's testimony was sufficient to establish that the footage "did not undergo any editing before being viewed by the police and used during trial[.]" *Id.* at 654.[6]

In *Washington v. State*, 406 Md. at 655, by contrast, the Court held that the State *had not* laid a proper foundation for the admission of surveillance footage of an assault at a bar. In that case, the State offered footage from eight cameras that had been compiled onto one disc. *Id.* The State planned to use the footage to show that the defendant was in the bar on the night he was alleged to have assaulted someone. *Id.*

The State called the bar's owner to testify as to the reliability of the camera footage, but the Court found his testimony deficient. *Id.* The owner "testified that he did not know how to transfer the data from the surveillance system to portable discs." *Id.* Instead, "[h]e hired a technician to transfer the footage from the eight cameras onto one disc in a single viewable format." *Id.* The owner provided no testimony "as to the

[6] In *Covel v. State*, 258 Md. App. 308, 323-24, *cert. denied*, 486 Md. 157 (2023), this Court affirmed the admission of a police surveillance video from a Citiwatch camera in Baltimore City. Although we relied on the silent witness method, the decision could be read to anticipate the circumstantial evidence method of authentication. The witness who authenticated the video was a Citiwatch employee who "addressed the general reliability of system." *Id.* at 323. In addition, the witness, who was able to watch live footage of events as they occurred, testified that "he viewed the events directly after the shooting" and that "the recording accurately displayed what he had viewed." *Id.* at 323-24.

process used, the manner of operation of the cameras, the reliability or authenticity of the images, or the chain of custody of the pictures." *Id.* All the State was able to elicit from the owner, the Court found, was that a recording "was created by some unknown person, who through some unknown process, compiled images from the various cameras to a CD, and then to a videotape." *Id.*

The State tried to authenticate the video through the detective who recovered the footage, as well. *Id.* The Court found that the detective also "failed to authenticate the video" because "he saw the footage only after it had been edited by the technician." *Id.* Because neither the bar owner nor the detective could provide "an adequate foundation to support a finding that the matter in question [was] what the State claimed it to be[,]" the trial court erred in admitting the compilation. *Id.* at 655-56.

B. Brown's Case

The State contends that, by calling Sergeant Henson and Detective Johnson to the stand to testify about how they obtained copies of the surveillance videos, it "satisfied the low bar for authenticating evidence[.]" We disagree with respect to the video from the tobacco and grocery store and the video from the Marathon station.[7]

1. The Tobacco and Grocery Store Footage

The footage from the tobacco and grocery store depicts the shooting. The shooter was wearing a mask, making him difficult to identify, but was also wearing a "black vest

[7] As previously stated, Brown does not challenge the admission of the video from the Exxon station.

. . . with a white . . . emblem" and "red Nike Air Jordan tennis shoes." The tobacco and grocery store footage does not show the silver Maserati, but the footage led officers to the Marathon gas station footage, which in turn led them to the Exxon station footage which shows the shooter and a companion exiting the Maserati. From the Berla search, the officers determined that the Maserati was at the Oak Haven Circle apartment complex on the morning of the shooting and that it returned to the complex a little more than an hour after the shooting. The officers retrieved video footage of the complex parking lot from the morning of the shooting and saw a man with red shoes and a black vest walking away from the complex.

In short, the tobacco and grocery store footage not only shows the killing, but it led officers to crucial identifying information that matched the shooter's car and clothing on the day of the shooting to Brown's car and clothing on the day of the shooting.

Sergeant Henson testified that, at the tobacco and grocery store, the manager or owner showed him "where the DVR system [was] located," and that he "select[ed] the cameras[,] . . . the timeframe[], and . . . the date" that Detective Moynihan requested. Once he had the footage he needed, he "download[ed] it onto [his] flash drive." Sergeant Henson also took pictures of the store's DVR system with the date and time listed.

The State contends that Sergeant Henson "did precisely as required by *Jackson* and *Washington*" through his testimony. The State specifically argues that it did enough to authenticate the video through Sergeant Henson's testimony "about the technique he used to download the video." The State is incorrect.

Sergeant Henson did not discuss any of the factors to which Maryland courts have looked in evaluating whether a party had satisfactorily authenticated video footage. For example, he did not discuss "the type of equipment or camera used, [the system's] general reliability, the quality of the recorded product, the process by which it was focused, or the general reliability of the entire system." *Washington v. State*, 406 Md. at 653. On the basis of his testimony, he appears to have no "knowledge of the process by which [the video] was created" (*Reddick v. State*, 263 Md. App. at 582) and thus no knowledge "sufficient to establish its reliability." *Id.* He evidenced no "knowledge of . . . whether the video is likely to have been altered." *Id.* His testimony was wholly inadequate to authenticate the video footage from the tobacco and grocery store.

The State did offer evidence in the form of pictures of the DVR system, which the trial court admitted without objection. But those pictures, which are not part of the record on appeal, do not authenticate the video footage. Sergeant Henson did not testify, for example, that he was familiar with the type of equipment used to capture the footage and could explain why it was reliable, or that he could be sure based on his training or experience that the type of equipment used would reliably capture the events depicted on the video.

The requirements for video authentication, while slight,[8] exist, in part, "to prevent the admission of tampered evidence." *Mooney v. State*, 487 Md. at 740 (Gould, J. dissenting). Sergeant Henson's testimony suffices to establish that the video footage at

[8] *See, e.g.*, *Jackson v. State*, 460 Md. at 116.

issue was unaltered from the time when he downloaded it at the tobacco and grocery store to the time the State offered the video into evidence. The silent witness method, however, demands more than that showing. For the footage to be admissible, the State, through Sergeant Henson, was required to put on some evidence that the process by which the video was *captured* was reliable. Sergeant Henson offered no testimony on that subject.

The State argues that it was "not required" to adduce evidence concerning the reliability or accuracy of the video-recording system at the tobacco and grocery store. The State's assertion is completely inconsistent with the cases explaining the silent witness method, which repeatedly stress the need for some evidence establishing the reliability of the mechanism for making the recording. *Jackson v. State*, 460 Md. at 116-17; *Washington v. State*, 406 Md. at 652; *Reddick v. State*, 263 Md. App. at 579-80; *Reyes v. State*, 257 Md. App. at 630-31; *see also Prince v. State*, 255 Md. App. at 652.

Quoting *Prince v. State*, 255 Md. App. at 654, the State also argues that the store video was a "'simple videotape' that 'did not undergo any editing before being viewed by the police and used during trial.'" Perhaps the video was not edited. Perhaps there was no time to edit the video between the time of the shooting and the time when Detective Moynihan made a copy of it. We simply do not know, because the State made no effort to prove that the video had not been or could not have been edited. But even if the State had come forward with such proof, a more fundamental problem would still remain: the

State made no effort to adduce any evidence about the reliability of the device that recorded the video in the first place.

To reiterate: to authenticate the video under the silent witness method, the State was required to adduce at least some evidence of the reliability of the system—evidence sufficient for a reasonable juror to find by a preponderance of the evidence that the video was what the State claimed it to be. *Mooney v. State*, 487 Md. at 708. Here, however, the State adduced no such evidence. As Brown states in his opening brief, "all that was shown was that [Sergeant] Henson retrieved video from a system of unknown, and unproven, reliability." The court, therefore, abused its discretion in admitting the video footage from the tobacco and grocery store.

2. The Marathon Gas Station Footage

Sergeant Henson's testimony about the Marathon gas station footage did not establish the authenticity of that video, either. The Marathon footage showed the shooter and his accomplice walking toward the tobacco and grocery store from the Jasper Street alleyway. Perhaps more important, though, the footage showed the two men arriving at the Marathon station on West Mulberry Street. This information led officers to check the video system at the Exxon gas station one block west of the Marathon station. The Exxon footage was the first piece of evidence that tied the assailant to the silver Maserati and the silver Maserati to the shooting.

The first difficulty with the Marathon video is in identifying precisely when the events depicted in it actually occurred. According to the timestamp on the video, it

shows the shooter and his accomplice walking in the direction of the tobacco and grocery store at 6:36 p.m. on March 5, 2021. But, according to the testimony of the police officer who heard the shot and responded to the scene, and according to the timestamp on the video from the tobacco and grocery store, the shooting occurred a minute earlier, at 6:35 p.m. on March 5, 2021. It makes no sense for the shooter and his accomplice to be walking *toward* the store a minute *after* the shooting occurred.

Detective Moynihan asserted that the timestamp on the Marathon video was wrong, that the clock on the recording device at the Marathon station was four minutes fast, and that the events depicted in the Marathon video actually occurred at about 6:32 p.m. on March 5, 2021, three minutes before the shooting. The detective's testimony would explain why the video shows the shooter and his accomplice walking toward, rather than away from, the tobacco and grocery store. The detective, however, could not explain how he knew that the timestamp on the Marathon video was four minutes fast. Instead, he deferred to Sergeant Henson.

Sergeant Henson's testimony did not clarify matters. He did not explain why the timestamp on the Marathon video read 6:36 p.m. on March 5, 2021, if the events that it depicts actually occurred four minutes earlier. Instead, he testified that the Marathon station's DVR was not four minutes fast, as Detective Moynihan said, but "one day and five minutes fast." Worse yet, Sergeant Henson insisted that he looked at the Marathon footage at 9:19 a.m. on March 5, 2021—nine hours *before* the shooting occurred. He repeated that patently fallacious assertion on no fewer than three occasions.

We could speculate about why the State's witnesses were unable to articulate a coherent narrative about when the events depicted in the Marathon video actually occurred, but we should not have to do so. Before the court could admit the Marathon video into evidence, the State was required to come up with some admissible evidence from which a reasonable juror could find that the video depicted events at the Marathon station at about 6:32 p.m. on March 5, 2021. *Mooney v. State*, 487 Md. at 728. Although that burden "'is not particularly high'" (*id*. at 717 (quoting *Sublet v. State*, 442 Md. at 666)), the State failed to meet it.[9]

But even if we were to overlook the confusion about when the events in the Marathon video actually occurred, we would still conclude that the court abused its discretion in admitting the video. As with the video from the tobacco and grocery store, Sergeant Henson did not testify about "the type of equipment or camera used, [the system's] general reliability, the quality of the recorded product, the process by which [the video] was focused, or the general reliability of the entire system." *Washington v. State*, 406 Md. at 653. And as with the video from the tobacco and grocery store,

[9] The State argues that its witnesses' abject failure to explain why the timestamp on the Marathon video was incorrect and when the events depicted in the video actually occurred was simply a matter for cross-examination. The State is incorrect. Detective Moynihan alone testified that the video was four minutes fast, but he had no factual basis for his assertion—he testified that he had relied entirely on computations by Sergeant Henson, who testified that the video was one day and five minutes fast. Because the State did not prove that the video was what the State said it was, the court should not have admitted it into evidence. Cross-examination is not a means of countering the erroneous admission of evidence that has not been adequately authenticated.

Sergeant Henson did not disclose that he had any "knowledge of the process by which [the video] was created" (*Reddick v. State*, 263 Md. App. at 582) and thus any knowledge "sufficient to establish its reliability." *Id.* Sergeant Henson testified only that the system was "generic." That testimony alone could not provide "sufficient evidence for a reasonable juror to find by a preponderance of the evidence that the video [was] what it [was] claimed to be." *Mooney v. State*, 487 Md. at 708. As Brown argues, once again, "all that was shown was that [Sergeant] Henson retrieved video from a system of unknown, and unproven, reliability."[10]

3. The University of Maryland Footage

The University of Maryland footage stands on a different footing. Although the State's questions were not designed to elicit information about the reliability of the University's system, Detective Johnson's answers still gave the jury an adequate basis to conclude that the University's video probably was what the State claimed it to be.

Detective Johnson testified that the University has a "high-end system," of the type used by sophisticated businesses, such as institutions of higher learning. He was familiar with the brand—a Pelco. He testified that, once the video is recorded, it is stored on the University's mainframe computer and is accessible, to authorized University employees, via the internet. The system allows an authorized user to select a video from multiple cameras at designated dates and times, and Detective Johnson confirmed that the

[10] The State does not argue that the admission of the tobacco and grocery video and the Marathon video amounted to harmless error. Consequently, we do not consider any such argument.

timing of the system was accurate. Most notably, the University employs security that is designed to protect the integrity of the data stored in the system: no outsiders—not even police officers—are allowed to download information from the system. Instead, only University employees may perform that task. The University's concern about the integrity of its system is evidently so intense that it would not even permit Detective Johnson to take a photograph of it.

The State could certainly have done more than it did to authenticate the University's video: it could, for example, have called a University employee to explain how the system worked and how it creates and stores a reliable video record, as the State did with the ATM camera footage in *Jackson* and the Walmart security footage in *Reddick*. In the circumstances of this case, however, we are satisfied that the State did enough to persuade a reasonable juror that the University video more likely than not depicted what happened on Greene Street in Baltimore at about 6:40 p.m. on March 5, 2021. The video was recorded and stored in a sophisticated, computer-based system; the timing of the system was accurate; and we know that the University employs strict security measures to control access to the system and thus to prevent the manipulation or alteration of the images stored in it. The circuit court did not err in admitting the University video.[11]

[11] In addition to arguing that the State did not adequately authenticate the University video, Brown argues that the admission of the video violated his Sixth Amendment right to confront the witnesses against him. He argues, specifically, that the Sixth Amendment obligated the State to call a representative of the University to lay the foundation for the admission of the video. Because Brown did not make this specific

CONCLUSION

We hold that the circuit court erred in admitting the video footage from the tobacco and grocery store and from the Marathon station, because the State adduced no evidence whatsoever about the reliability of the systems that recorded and stored those videos. We remand the case for a new trial.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. CASE REMANDED TO THAT COURT FOR A NEW TRIAL. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.

constitutional argument at trial, he has failed to preserve it for appeal. Md. Rule 8-131(a). *See Collins v. State*, 164 Md. App. 582, 602 (2005). We express no opinion about the merits of that argument should Brown reassert it on remand.