UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1913

September Term, 2014

MARK O'NEIL

v.

STATE OF MARYLAND

Meredith,
Berger,
Kenney, James A., III,
(Retired, specially assigned),

JJ.

Opinion by Meredith, J.

Filed: October 26, 2015

Following a jury trial in the Circuit Court for Baltimore City, Mark O'Neil, appellant, was convicted on charges of first-degree assault and the use of a handgun in a crime of violence.[1] The circuit court sentenced appellant to serve twenty years for assault and a consecutive ten years, the first five years to be served without the possibility of parole, for the handgun offense. In his timely filed appeal, appellant raises three questions for our consideration:

1. Did the circuit court err in refusing to ask voir dire questions proposed by the defense?

2. Did the circuit court err in denying defense counsel's *Batson* challenge?[2]

3. Did the circuit court abuse its discretion in admitting social media evidence?

For the reasons set forth below, we shall affirm.

FACTUAL AND PROCEDURAL HISTORY

On June 21, 2012, friends Glancy "G" Edwards and Lee Lumpkins spent the afternoon and evening together at Edwards's home on Leadenhall Street in Baltimore City. Near midnight that night, while they were sitting on Edwards's stoop playing dominoes and

[1]Appellant was acquitted on charges of first-degree murder; attempted robbery; conspiracy to use a dangerous weapon to commit robbery; attempted robbery; and conspiracy to commit robbery.

[2]Referencing *Batson v. Kentucky*, 476 U.S. 79, 89 (1986), wherein the United States Supreme Court held that a party may not use peremptory strikes in a manner that discriminates against potential jurors on the basis of their race.

discussing basketball, they saw their acquaintance Joseph "Binky" Stewart walking quickly down the street toward them from Cross Street. Edwards and Lumpkins asked Binky whether he was okay, and he said: "No." Binky then abruptly turned and ran off down an alley. Edwards and Lumpkins looked up the street toward Cross Street and saw three men approaching.

Appellant, who was wearing a green shirt and had dreadlocks, walked ahead of the other two men. Appellant approached Edwards and Lumpkins. Edwards and Lumpkins could tell that something was not right, but had no time to get away before appellant pulled out a handgun and placed it at Edwards's head. Edwards put his hands up and turned his head away, not making eye contact. Lumpkins took off running down the street. Appellant and the other men gave chase, leaving Edwards on his stoop.

Edwards immediately turned to run into his house. He heard a gunshot behind him. While running up the stairs to call 911, Edwards heard two more gunshots.

Officer Terry Graham of the Baltimore City Police Department was patrolling nearby in his marked police car and heard the first gunshot. As he turned onto Leadenhall Street, he heard two more shots. Officer Graham activated his lights and sirens. He observed three men engaged in an altercation in the middle of the street. Two men — a tall, slender, light-skinned, black male wearing a green t-shirt, and another man wearing a white t-shirt — took off running. The third man, Lumpkins, had been shot. The officer pursued the two assailants

as they ran around the corner to Hamburg Street, but the officer lost sight of them. He returned almost immediately to Leadenhall Street to render aid to Lumpkins who was in pain, but conscious. Officer Graham retrieved a handgun that was left at the scene of the shooting. The handgun was loaded, with a spent cartridge in the chamber that had caused the gun to jam.

Lumpkins was transported by ambulance to Maryland Shock Trauma. He underwent multiple surgeries, but eventually died as a result of complications caused by his gunshot wound. The medical examiner concluded that Lumpkins's death was a homicide.

Appellant was arrested and charged with the first degree murder of Lumpkins, the first degree assault of Edwards, conspiring with others to rob Lumpkins and Edwards with a deadly weapon, attempted armed robbery, and multiple handgun offenses. Edwards identified appellant in a photo array and at his trial as the man who approached him and threatened him with a gun on June 12, 2012. A surveillance video taken at the time of the shooting was admitted into evidence. The video shows the three men tussling in the street, Officer Graham arriving in his patrol car, two of the men running, Officer Graham pursuing them, and then Officer Graham returning to assist Lumpkins. Forensic examination of the handgun, three spent cartridges, and a bullet fragment recovered by the police indicated that the handgun that was recovered by Officer Graham was the weapon that fired the three

cartridges that were recovered from the scene, as well as the bullet fragment that was recovered from Lumpkins's body during his autopsy.

One of appellant's associates, Nathaniel "Q" McKnight, testified that, at the time of the shooting, he and appellant were part of a crew of men who made their living robbing people on the street, mostly drug dealers and pimps. On the night of June 21, 2012, McKnight, appellant, and three other men — nicknamed Champ, Black/Ock, and Phantom — were riding around in a mini-van robbing people. At some point, the van stopped on Cross Street near its intersection with Leadenhall Street. Appellant, Ock, and Phantom got out of the van. McKnight saw appellant, Ock, and Phantom engage in an altercation with another man, heard gunshots, and then saw a police car pull up. McKnight and the driver of the mini-van left the scene and drove around the block to avoid the police.

McKnight testified that, on the night Lumpkins was shot, appellant was carrying a handgun that the crew called "Jamilla." In Facebook communications with McKnight that occurred a little more than one day after the shooting, appellant indicated that he thought Black had grabbed "Jamilla." At appellant's trial, McKnight identified the handgun that was recovered by the Officer Graham from the crime scene on Leadenhall Street as "Jamilla."

The jury found appellant guilty on the counts alleging the first degree assault of Edwards, and the use of a handgun in a crime of violence. The jury returned verdicts of not guilty on the counts alleging the first degree murder of Lumpkins, the attempted armed

robbery of Lumpkins, the conspiracy to rob Lumpkins, and the attempted armed robbery of Edwards. On September 11, 2014, the circuit court sentenced appellant to serve a period of incarceration of twenty years for his assault conviction, and a consecutive period of ten years, the first five years to be served without the possibility of parole, for the handgun conviction. Appellant filed a timely notice of appeal.

DISCUSSION

I. Requested Voir Dire Questions

Prior to appellant's trial, both parties submitted lists of requested voir dire questions. Among the questions proposed by appellant's counsel were: Question #5. "Would any of you refuse to find the defendant not guilty even if you had a reasonable doubt about the defendant's guilt?"; and Question #6. "The defendant has an absolute right to testify or not to testify[.] If the defendant [chooses] not to testify would any member of the panel hold that decision against the defendant?" Before beginning the jury selection process, counsel and the trial judge discussed the voir dire questions the court would ask the members of the venire. In the course of their conversation, defense counsel twice noted that he had requested "the reasonable doubt question," but acknowledged that "judges routinely deny it." The court indicated that it would not ask either the "reasonable doubt" question or the question regarding the defendant's choice to "testify or not testify." Defense counsel objected to the

trial court's decision not to ask the question "about reasonable doubt" and "[t]he other one about election to testify." Defense counsel reiterated his objection at the end of voir dire.

Prior to the parties' closing arguments, the trial court instructed the jury:

> The defendant is presumed to be innocent of the charges and that presumption remains throughout every stage of this trial and is not overcome unless you are convinced beyond a reasonable doubt that the defendant is guilty. The State has the burden of proving the guilt of the defendant beyond a reasonable doubt. This means that the State has the burden of proving beyond a reasonable doubt each and every element of the crime charged.
>
> The elements of a crime are the component parts of the crime about which I will instruct you shortly. The burden remains on the State throughout the trial. The defendant is not required to prove his innocence. However, the State is not required to prove guilt beyond all possible doubt or to a mathematical certainty nor is the State required to negate every conceivable circumstance of innocence.
>
> * * *
>
> The weight of the evidence does not depend upon the number of witnesses for either side. You may decide the testimony of a smaller number of witnesses for one side is more believable than the testimony of a greater number of witnesses for the other side.
>
> The defendant has an absolute constitutional right not to testify. The fact that the defendant did not testify in this case must not be held against him. It must not be considered by you in any way. It must not even be discussed by your or even mentioned by you in your deliberations.

Appellant contends that the trial court committed reversible error by refusing to ask the members of the venire the requested questions, which appellant asserts were "aimed at exposing disqualifying juror bias."

Maryland trial courts are only required to conduct "'limited voir dire[,]'" whereby "the sole purpose of voir dire 'is to ensure a fair and impartial jury by determining the existence of [specific] cause for disqualification[.]'"[3] *Pearson v. State*, 437 Md. 350, 356 (2014) (quoting *Washington v. State*, 425 Md. 306, 312-13 (2012)) (alterations in the original). The Court of Appeals has identified only "two broad areas of inquiry that may reveal cause for a juror's disqualification: (1) examination to determine whether the prospective juror meets the minimum statutory qualifications for jury service, and (2) examination to discover the juror's state of mind as to the matter in hand or any collateral matter reasonably liable to have undue influence over him." *Washington*, 425 Md. at 313 (citing *Davis v. State*, 333 Md. 27, 35–36 (1993)).

This Court reviews a trial court's decision regarding whether to ask a requested voir dire question for abuse of discretion, based on the record as a whole. *Pearson*, 437 Md. at 356 (citing *Washington*, 425 Md. at 314). A trial court does not abuse its discretion by refusing to ask voir dire questions that are not directed at a specific ground for disqualification, that merely fish for information to assist in the exercise of peremptory challenges, that probe the prospective juror's knowledge of the law, that ask a juror to make

[3]Because Maryland employs limited voir dire, appellant's citations to opinions issued by courts in jurisdictions that allow more liberal voir dire are not persuasive. Nor is this Court persuaded by appellant's suggestion that this Court should use this case as a vehicle for adopting a broader right of voir dire, as such a substantive change in Maryland law is more appropriately the province of the Court of Appeals.

a specific commitment, or that address sentencing considerations. *Pearson, supra,* 437 Md. at 357; *State v. Shim*, 418 Md. 37, 44-45 (2011); *Stewart v. State*, 399 Md. 146, 162 (2007).

In *Twining v. State*, 234 Md. 97 (1964), the Court of Appeals considered whether the trial court abused its discretion by refusing to ask prospective jurors whether they would give the defendant the benefits of the presumption of innocence and the burden of proof. *Id*. at 100. The *Twining* Court concluded that the trial court did not abuse its discretion, and stated: "It is generally recognized that it is inappropriate to instruct on law at this stage of the case or to question the jury as to whether or not they would be disposed to follow or apply stated rules of law." *Id*. The Court further noted that the principles highlighted in the requested voir dire questions were "fully and fairly covered in subsequent instructions to the jury." *Id*.

In his brief, appellant acknowledges that his arguments are at odds with the Court of Appeals's holding in *Twining* and its progeny. He nonetheless urges us to hold that his proposed questions fit into the now-required areas of inquiry designed to discern "potential biases or predispositions that prospective jurors may hold, which, if present, would hinder their ability objectively to resolve the matter before them." In addition, he argues that the 1964 holding in *Twining* rested on the premise that jury instructions were merely advisory, which is no longer the law. We are not persuaded that the Court's holding in *Twining* is either inconsistent with more recent precedents or that it applied only when jury instructions were not binding.

In *Marquardt v. State*, 164 Md. App. 95, 144 (2005), this Court began its discussion "by stating that this Court has not, nor could it, retreat from *Twining*. We have consistently held that voir dire need not include matters that will be dealt with in the jury instructions." In *State v. Logan*, 394 Md. 378, 398-99 (2006), the Court of Appeals cited *Twining* for the proposition that "it is 'generally recognized that it is inappropriate . . . to question the jury as to whether or not they would be disposed to follow or apply stated rules of law[.]'" The Court further stated in *Logan*: "[V]oir dire is not the appropriate time to instruct the jury on the law applicable to the case." *Id.* at 400. And in *McFadden v. State*, 197 Md. App. 238, 250 (2011), *disapproved of on other grounds* by *State v. Stringfellow*, 425 Md. 461 (2012), this Court reaffirmed the holdings in *Twining* and *Marquardt*, reiterating that "[i]t has been held inappropriate to question the jury [during voir dire] as to whether or not they would be disposed to follow or apply stated rules of law because they are covered in subsequent instructions to the jury." (Internal quotation marks omitted). The trial court did not abuse its discretion by declining to pose the requested voir dire questions to the venire.

II. *Batson* Challenge

At appellant's trial, during the jury selection process, appellant challenged the State's use of its peremptory challenges, noting that the State used three challenges to strike young black women. The following exchange occurred:

[Defense counsel]: Your Honor, I am going to make a Batson challenge to the last strike. The State has exercised three strikes and all three strikes have been black females.

THE COURT: Has exercised four.

[Defense counsel]: Four, I'm sorry. Of those four three of them have been black females under the age of 25 and while I do understand there's no right to a specific demographic on your jury, I believe these are the three youngest black females to have the opportunity to be on the jury and the State has struck them all.

THE COURT: Okay. All right.

[The prosecutor]: Your Honor, for this particular juror [juror number 528] as soon as I looked over her head was to the side. She was huffing when she got picked. She clearly doesn't want to be here. That is the reason that I struck her. With regards to juror number 532 she was replaced with another black female, Your Honor. That would be number 12 seated in seat 12 and -

THE COURT: The first strike was 434.

[The prosecutor]: Your Honor, her age made me a little nervous. She's 18 years old. I prefer jurors who have a little bit more experience, a little bit more exposure, for that reason I did strike her.

[Defense counsel]: And with all due respect to the State's Attorney, Your Honor, body language in and of itself isn't enough and my client is a young African American male he [*sic*] would like the opportunity to have individuals with that same world view and the State has systematically struck everybody, every female on the jury that would share his world view.

THE COURT: Well, body language is not a suspect class. There have only been four strikes exercised by the State thus far. Three of whose [*sic*] have been black females. One of them was a white male. I don't find sufficient, a sufficient basis yet to grant the motion. So I will deny the motion at this point.

[Defense counsel]: Note my exception.

THE COURT: Noted.

At the end of the jury selection process, when the court asked whether the jury panel was "acceptable," defense counsel stated: "Absent my objections to my *Batson* challenge earlier and the fact that my questions weren't asked." Nothing further was put on the record relative to the *Batson* challenge. Appellant now contends that the trial court "clearly erred when it denied defense counsel's challenges to the State's usage of a peremptory strike against prospective jurors #528 and #532."[4]

The Equal Protection Clause of the United States Constitution forbids a party from using a peremptory challenge to strike a juror solely on account of the juror's race or gender. *See Elliott v. State*, 185 Md. App. 692, 711 (2009) (prohibiting discriminatory use of peremptory challenges based on race (quoting *Batson*, 476 U.S. at 89); *Tyler v. State*, 330 Md. 261, 266 (1993) (prohibiting discriminatory use of peremptory challenges based on gender). The Supreme Court has outlined a three-part analysis to guide a trial court's determination of whether a party has used its peremptory challenges in a discriminatory manner. *Purkett v. Elem*, 514 U.S. 765, 767–68 (1995). First, the moving party must demonstrate by a preponderance of the evidence that the opposing party's peremptory

[4]Appellant does not argue on appeal the court erred with respect to the State's use of a peremptory strike as to potential juror #434.

challenges were exercised in manner indicative of purposeful discrimination and the trial court must find that a *prima facie* case of discrimination against potential jurors exists. *Id*. If the court finds that the moving party has proven a *prima facie* case, the party exercising the peremptory strikes must provide a race- and gender-neutral explanation for each strike. *Id*. Finally, the trial court must decide "whether the opponent of the strike[,]" either by demonstrating that the proffered reasons are pretextual or that the strikes have a discriminatory impact, "has carried his burden of proving purposeful discrimination." *Id*. at 768 (noting that it is at this stage "that the persuasiveness of the justification becomes relevant," and "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination").

"Whether the requisite *prima facie* showing has been made is the trial judge's call, which must be made in light of all of the relevant circumstances." *Meija v. State*, 328 Md. 522, 533 (1992). Among the relevant circumstances that "might give rise to or support or refute such showing include a 'pattern' of strikes against jurors of the cognizable group in the particular venire." *Id.* "The ultimate burden of proof is always on the moving party and it is to persuade the court that there has been intentional racial [or gender] discrimination." *Id.* In reviewing a trial court's determinations regarding whether peremptory challenges were used in a discriminatory manner, we "do not presume to second-guess the call by the 'umpire on the field' either by way of *de novo* fact finding or by way of independent constitutional

judgment." *Bailey v. State*, 84 Md. App. 323, 328 (1990). We review the trial court's findings for clear error. *Whittlesey v. State*, 340 Md. 30, 48 (1995), *cert. denied*, 516 U.S. 1148 (1996). *See also Hernandez v. New York*, 500 U.S. 352, 364 (1991) ("In *Batson* we explained that the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal. . ..").

Preliminarily, we note that there is no information in the record regarding the racial and gender composition of either the pool of potential jurors or the jury as it was finally composed. We are left, therefore, with little basis upon which we might detect any clear error in the circuit court's findings regarding whether there was a pattern of discrimination in the prosecutor's use of peremptory strikes. As this Court has previously opined:

> To extrapolate a pattern of discrimination solely from a statistical analysis of the peremptory challenges would require not only knowledge of the percentage of strikes used against a given group but also knowledge of the percentage that that group represented of the total venire panel – or, more precisely, of the percentage that that group represented of the prospective jurors actually called forward to be accepted or challenged.

Bailey, 84 Md. App. at 331. Our analysis is, therefore, hampered by the paucity of facts we are able to glean from the trial transcript and the inferences that may reasonably be drawn therefrom.

As reflected in the record, defense counsel based his *Batson* challenge on the fact that the State had used three of its peremptory strikes against "black females under the age of 25,"

implying that the prosecutor was employing her peremptory strikes in a manner that discriminated against potential jurors not only on the basis of race and gender but also with respect to age. As the prosecutor pointed out, potential juror #532 — one of the two stricken black female venire members challenged on appeal — was replaced on the jury by another black female venire member. The court could not, therefore, reasonably attribute the prosecutor's use of a peremptory strike to remove juror #532 to either race or gender discrimination.

Defense counsel's complaint regarding the prosecutor's strikes appeared to be motivated primarily by the fact that the prosecutor was striking the youngest members of the venire. As defense counsel pointed out to the court, three of the stricken jurors — #434, #528, and #534 — were all under twenty-five years old. Defense counsel stated: "I believe these are the three youngest females to have the opportunity to be on the jury and the State has struck them all." The court could have reasonably inferred at that point in the selection process that the prosecutor, who clearly stated her preference for "jurors who have a little bit more experience, a little more exposure," could justify her exclusion of all three potential jurors on the permissible basis of age. *See Bridges v. State*, 116 Md. App. 113, 133 (1997) (holding that age is a legitimate basis upon which a party may peremptorily strike a potential juror). The fact that the prosecutor also used a fourth peremptory strike against a white male

venire member, *i.e.,* a potential juror who was neither black nor female, also weighed against the attribution of a racial or gender-based discriminatory motive to the State.

It was the prosecutor's prerogative to determine what amount of life experience was more desirable in the jurors to be seated for this case and to employ the State's limited peremptory challenges accordingly. Considering the limited facts in the record regarding the composition of the panel, we discern no basis upon which we can conclude the circuit court's determination that defense counsel failed to demonstrate a *prima facie* case of discrimination was clearly erroneous.

Citing *Hernandez v. New York*, 500 U.S. 352, 359 (1991), and *Gilchrist v. State*, 340 Md. 606, 628 (1995), appellant asserts that any obligation on the part of defense counsel to establish a *prima facie* case of discrimination based on race or gender was mooted by the prosecutor's voluntary proffer of non-discriminatory explanations for the basis of the State's peremptory strikes. We note, however, that the first step of the *Batson* analysis becomes moot only if two conditions are met: first, that the non-moving party "offer[s] explanations for its peremptory challenges," and second, that "the court rule[s], in part, on the ultimate question of intentional discrimination." *Edmonds v. State*, 372 Md. 314, 332 (2002).

In this case, the State proffered a non-discriminatory basis underlying its use of peremptory strikes to excuse juror #434, youth, and juror #528, negative attitude, but had no opportunity to offer a race- and gender-neutral explanation for striking juror #532. Any

explanation that the prosecutor might have proffered was forestalled by the trial court's interjection that there had been only four strikes "thus far," and the court's determination that appellant had not "yet" established a *prima facie* case of discrimination. Whereas neither of the two *Edmonds* conditions precedent were met, appellant's obligation to establish a *prima facie* case was not moot.

III. Admission of Facebook Messages

During the testimony of appellant's associate Nathaniel "Q" McKnight, the State sought to introduce Facebook messages exchanged between appellant and McKnight in the early morning hours of June 23, 2012, a little more than a day after Lumpkins was shot. The messages were copied from McKnight's account to a compact disk ("CD") which was accompanied by a certificate of authenticity signed by a records custodian from Facebook, Inc. The relevant messages from the day after the shooting were taken from the CD and formatted into a single document that, over defense counsel's objection, was admitted into evidence. The messages, which were exchanged between 1:55 a.m. and 5:19 a.m. on June 23, 2012, were allegedly electronic communications between McKnight and appellant, as follows:

> McKnight: Call me n let me no u safe or urn cummin ta ya moms house. 443-333-7093
>
> McKnight: Dis Q [McKnight testified that Q is his nickname.]

Oneal: a yo I have no phone wya [McKnight explained that "wya" means "where you at?"]

McKnight: On north ave

McKnight: WY@

Oneal: im down bottom. [According to McKnight, "down bottom" means downtown.] wats good tho

McKnight: Downtown

Oneal: yea

McKnight: At the appartmen

Oneal: yea im ducked off [According to McKnight, "ducked off" means "laying low."]

Oneal: y wassup you got a mission for tonite [McKnight testified that "mission" refers to a planned robbery.]

McKnight: Whas da room number n hell ya 10 stacks [McKnight asserted that by "10 stacks," he meant $10,000.]

Oneal: ill meet you out front or in front 7 mart [McKnight testified that 7 mart referred to a store at Saratoga and Eutaw.]

McKnight: Stay put till I get a hack....please tell me u got jamilla [McKnight stated that "jamilla" referred to "the gun."]

McKnight: We in da hack now

McKnight: Meet me out front b der in 5 min

Oneal: ard im on my way down and naw i thought black had it

McKnight: we here cum on

McKnight: I don't no which door so we under the light waiting for u in front rite aid

McKnight testified that, after he sent the message indicating that he was outside, appellant came out of the apartment above the RiteAid to meet him.

Appellant asserts that the trial court abused its discretion by admitting the Facebook messages, which he claims were not properly authenticated. Although appellant challenges the trial court's admission of all three exhibits, 12A, 12B, and 12C, at appellant's trial his authentication argument was directed only to the authentication of Exhibit 12C.[5] Appellant may not raise these arguments as to Exhibits 12A and 12B for the first time on appeal. *See* Md. Rule 8-131(a) (appellate court ordinarily will not decide an issue unless it plainly appears by the record to have been raised in or decided by the trial court); Md. Rule 4-323(a)

[5]In addition to the authentication methods provided in Rule 5-901(b), Rule 5-902 provides that evidence such as certified business records may be self-authenticating, if, at least ten days before the proceeding in which the record will be offered into evidence, the proponent notifies the adverse party and makes a copy of the certificate and record available, and if the adverse party does not file a written objection within five days after service. Md. Rule 5-902(b)(l). State's Exhibits 12A and 12B, the CD of all of the Facebook messages sent by or received by McKnight's Facebook account and the accompanying certificate of authenticity signed by a custodian of records for Facebook, constituted certified business records. Appellant does not assert that he was not properly notified about the Facebook CD and the certificate of authentication, nor that he raised any objection to the authenticity of these exhibits prior to trial. We conclude, therefore, that State's Exhibits 12A and 12B were self authenticating in accordance with Md. Rule 5-902(b)(l).

(objections to the admission of evidence shall be made at the time the evidence is offered or it is waived); *Klauenberg v. State*, 355 Md. 528, 541 (1999) (where specific grounds for an objection to the admission of evidence at trial are stated, the party objecting is deemed to have waived all other grounds).

Maryland Rule 5-901, governing the authentication of evidence, provides in pertinent part: "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). Rule 5-901(b) provides "Illustrations" of various methods parties may use to authenticate evidence, including the presentation of "[t]estimony of a witness with knowledge that the offered evidence is what it is claimed to be[,]" or the proof of "[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." Rule 5-901(b)(1), (4). We review for abuse of discretion a trial court's determination regarding the preliminary question of whether there is sufficient authenticating evidence to admit proffered evidence. *See United States v. Vayner,* 769 F.3d 125, 129 (2d Cir. 2014).

In its recent decision on three consolidated cases published *sub nom. Sublet v. State*, 442 Md. 632 (2015), the Court of Appeals discussed, at some length, methods that may be used to authenticate social media evidence gleaned from websites like Facebook, MySpace,

and Twitter.[6] The *Sublet* Court held that, "in order to authenticate evidence derived from a social networking website, the trial judge must determine that there is proof from which a reasonable juror could find that the evidence is what the proponent claims it to be." *Id*. at 678. The Court explained:

> Under the standard articulated in [*United States v.*] *Vayner*, [769 F.3d 125 (2d Cir. 2014)] the preliminary determination of authentication must be made by the trial judge and "depends upon a context-specific determination whether the proof advanced is sufficient to support a finding that the item in question is what its proponent claims it to be", (*id*.), based upon "sufficient proof… so that a reasonable juror could find in favor of authenticity or identification", (*id*. quoting [*United States v.*] *Pluta*, 176 F.3d [43,] at 49 [(2d Cir. 1999)])[.]

Id. at 666. *Accord* 6A LYNN MCLAIN, MARYLAND EVIDENCE § 901:1, at 848 (3d ed. 2013) ("[A]n item will be properly authenticated if its proponent has offered foundation evidence that the judge finds would be sufficient to support a finding by a reasonable trier of fact that the item is what it is purported to be. . . . In a jury trial, the judge need not be personally satisfied, even by a preponderance of the evidence, that the proffered item is authentic."); *Dickens v. State*, 175 Md. App. 231, 239 (2007) ("the 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"' (quoting *United States v. Safavian*, 435 F. Supp.2d 36, 38 (D.D.C. 2006)) (emphasis omitted); *Gerald v. State*, 137 Md. App. 295, 305, *cert. denied*,

[6]The three cases are: *Sublet v. State*, No. 42, Sept. Term 2014; *Harris v. State*, No. 59, Sept. Term, 2014; and *Monge-Martinez v. State*, No. 60, Sept. Term 2014.

364 Md. 462 (2001) (Noting that, simply because a letter that the State claimed was written by the defendant could have been authored by someone else was not grounds to bar its admission. Because there was sufficient evidence to attribute authorship to the defendant, the trial court did not err by "allowing the jury to weigh that evidence to determine the ultimate question of authenticity.").

In one of the three consolidated cases addressed in *Sublet — Monge-Martinez v. State* — the *Sublet* Court considered the authentication of Facebook messages purportedly sent by the defendant to his victim while she was recovering from the stab wounds that he had inflicted upon her. *Id*. at 676. Monge-Martinez asserted that there was no evidence proving that he authored the Facebook messages, and therefore, they had not been properly authenticated. *Id*. The Court of Appeals held that the trial court did not err by allowing the messages to be admitted, noting the "distinct characteristics of the messages" in the context of the case. *Id*. at 677. *See also* Maryland Rule 5–901(b)(4) (allowing authentication through the admission of circumstantial evidence). The Court noted that "[t]he messages were received shortly after the stabbing at a time when few people were aware of the incident, were written in Spanish (Monge-Martinez's mother tongue)[,] and expressed [the author's] remorse for 'getting carried away by the anger[.]'" *Sublet*, 442 Md. at 677 (footnote omitted). The language and content of the messages was also consistent with other written and oral communications between the victim and the defendant that occurred after

the assault. *Id*. The Court concluded that "[t]he various communications from Monge–Martinez, together with the limited number of people knowledgeable of the incident as well as the use of Spanish in each message was sufficient evidence upon which the trial judge could rely to authenticate the Facebook messages." *Id*. at 677.

Similarly, in the instant case, the distinct characteristics and substantive references in the messages included in State's Exhibit 12C were sufficient to authenticate the evidence because they provided a sufficient basis for the jury to find that they were communications between appellant and McKnight. At appellant's trial, McKnight was a witness with knowledge that the Facebook messages reflected in State's Exhibit 12C were messages that he wrote to and received from appellant. The messages themselves showed circumstantially that "Oneal" was appellant, because "Oneal" knew McKnight by his nickname and responded appropriately to the inquiry about whether he was "safe" by saying that he was good, but laying low at the apartment downtown, which McKnight knew was a reference to an apartment over the Rite Aid. "Oneal" also responded appropriately to McKnight's inquiry about what happened to "Jamilla," by naming another member of the crew who he though had the handgun that had been used in the shooting. "Oneal" also asked whether there was another "mission," consistent with appellant's participation in the robbery crew, and seemingly understood McKnight's response. Finally, when McKnight reached the Rite Aid and sent a Facebook message asking "Oneal" to come down, appellant appeared.

Based on this evidence, a reasonable juror could conclude that the Facebook messages sent to and received from "Oneal" were, in fact, sent to and received from appellant, and not from someone else in cyberspace posing as appellant. Under the circumstances, we are persuaded that the circuit court did not err by concluding that there was sufficient proof from which a reasonable juror could find that the Facebook messages reflected in State's Exhibit 12C were messages exchanged between McKnight and appellant. We conclude, therefore, that State's Exhibit 12C was sufficiently authenticated and the trial court did not abuse its discretion by admitting it into evidence.

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