Circuit Court for Baltimore County
Case No. 03-K-16-003421

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 110

September Term, 2017

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GREGORY NEALY, JR.

v.

STATE OF MARYLAND

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Friedman,
Shaw Geter,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Raker, J.

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Filed: March 28, 2018

Gregory Nealy, Jr., was convicted in the Circuit Court for Baltimore County of first-degree assault, use of a firearm in the commission of a crime of violence, and illegal possession of a regulated firearm. He presents the following question for our review:

> "Did the trial court err in admitting unauthenticated documents under Maryland's business records hearsay exception in violation of the Maryland Rules, the U.S. Constitution, and the Maryland Declaration of Rights?"

We shall hold that the trial court erred in authenticating phone records under the business records exception by a certificate that did not meet the requirements of Maryland Rule 5-902(b)(1). Because this error was not harmless, we shall reverse.

## I.

The Grand Jury for Baltimore County indicted appellant with the offenses of attempted second-degree murder, first-degree assault, robbery with a dangerous weapon, use of a firearm in the commission of a crime of violence, and illegal possession of a regulated firearm. The jury acquitted him of attempted murder and robbery, and convicted him on the other charges. The trial court imposed a term of incarceration of twenty years: twenty years for first-degree assault, twenty years concurrent for use of a firearm in the commission of a crime of violence, the first five without parole, and fifteen years concurrent for illegal possession of a regulated firearm, the first five without parole.

The following facts emerged at trial. On May 29, 2016, Ryan Borowiak was shot in his parked car. The police recovered Mr. Borowiak's cell phone, which had contacted

phone number (443) 615-6527 ("the 443 number") before the shooting. No subscriber was associated with the 443 number, and police never found a phone associated with it.

Mr. Borowiak identified appellant as the shooter, and the police arrested appellant while he was in his car with Octavia Gee. Police recovered two cell phones from the car associated to phone numbers (321) 279-0974 and (410) 900-3500 ("the 321 and 410 numbers"). Appellant told Officer Daniel Topper that his phone numbers were (321) 279-0974 and a number starting with (410) 900, but repeatedly denied that the 443 number was his. Appellant also said he was in Ocean City on the weekend of the shooting. Ms. Gee told Officer Topper that the 410 number was appellant's number, but denied that the 443 number belonged to him.

Police requested certified location and usage records for the 443, 321, and 410 numbers from Verizon, Sprint, and T-Mobile, respectively. Verizon sent the 443 number's records with a certificate of authenticity[1] on May 31. Sprint employee Shawna Sallaz e-

[1] Rule 5-902(b)(2) describes a certificate of authenticity as follows:

> "*Form of Certificate*. For purposes of subsection (b)(1) of this Rule, the original or duplicate of the business record shall be certified in substantially the following form:
>
> Certification of Custodian of Records or Other Qualified Individual
>
> I, _____, do hereby certify that:
> (1) I am the Custodian of Records of or am otherwise qualified to administer the records for: _____ (identify the organization that maintains the records), and
> (2) The attached records (footnote continued . . .)

mailed the 321 number's records to the police on June 16 with no certificate. T-Mobile sent the 410 number's records on July 29 to the police, also with no certificate. The records were shared properly with appellant's counsel.

On February 27, 2017, the day appellant's trial began, police contacted Sprint and T-Mobile, requesting certificates for the phone records from the prior summer. Sprint has a policy requiring any certification of records to be signed by the employee who prepared them, but Ms. Sallaz was out of the office when the police called. After discussions with Detectives Topper and Buckingham, Ryan Harger, Ms. Sallaz's supervisor, signed a certificate that authenticated "[t]he attached records" and included a number referenced as a Sprint Case # in Sprint's June 16 email. T-Mobile's Janie Hall also provided a certificate that authenticated "all of the records described below and attached hereto." The T-Mobile certificate includes a tracking ID, which is not displayed in the July 29 records, and the 410 phone number. Both certificates were received on February 27.

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> (a) are true and correct copies of records that were made at or near the time of the occurrence of the matters set forth by, or from the information transmitted by, a person with knowledge of these matters; and
>
> (b) were kept in the course of regularly conducted activity; and
>
> (c) were made and kept by the regularly conducted business activity as a regular practice.
>
> I declare under penalty of perjury that the foregoing is true and correct.
>
> Signature and Title: _____
> Date: _____"

During the trial, the State sought to introduce the three numbers' phone records as part of Detective Topper's investigation, and appellant's counsel responded that the certification, dated the day before, "did not accompany the papers [provided by the State the prior summer], or these are not the papers that the State provided to me, and in either case I would object." The State argued that it had provided the records properly, and failure to provide the certificate was immaterial. The court found that "the business record certificate is, I think, adequate and sufficient to allow [the records] to be admitted," and overruled the objection, admitting all of the phone records.

The next day, the State called Special Agent Matthew Wilde to testify how he used the phone records to discover that the phones associated with all three numbers were near the location of the shooting on May 29, 2016. Appellant's counsel objected that the State had not properly certified the records and thus could not support Agent Wilde's testimony. The court held a hearing outside the presence of the jury in which Detective Topper testified about obtaining the Sprint records.[2] Detective Topper also testified that it was common for records to be returned without certification, and that he and other officers followed standard procedures in requesting and handling both the records and the certificates. He testified also that he did not know Sprint's or T-Mobile's processes for storing, reporting, and securing records.

[2] Detective Buckingham contacted T-Mobile as well as handling part of the Sprint request because Detective Topper was in court for appellant's trial. Detective Buckingham was not available to testify because the State did not anticipate this hearing after the prior day's ruling.

During the hearing, appellant's counsel conceded that he had received the records in July 2016 and a notice around that time indicating that the State intended to offer business records. Nothing in the records themselves indicated a lack of trustworthiness, leading counsel to file no objections based on the notice or the records prior to the trial. The judge quoted Rule 5-902(b)(1), focusing on the requirement to file a written objection within five days of receiving notice. The judge said the lack of a contemporary certificate made no difference because appellant did not file an objection within five days after receiving the phone records, and a contemporary certificate would have resulted in no valid objection. Although the proffered certificates were not directly attached to the records, the judge found the certificates proper, explaining as follows:

> "[I]nitially I was concerned about there not being attached records, but in this day of electronic records and here you had a web-based L site system from Sprint on the one hand and a tracking system from Metro PCS for T-Mobile, the reference to the case number I think it's a reference to the internal number assigned by the carrier which is substantially the same as attaching paper records.
>
> I think since you have a certificate, it's under penalty of perjury, signed by the custodian of records, the records were transmitted to counsel back in July and here we are in March, I think it's acceptable. So I'm gonna allow the certificates. I find the certificates to be proper under the rules."

The court overruled appellant's objection.

The trial court sentenced appellant to a term of incarceration of twenty years: twenty years for first-degree assault, twenty years concurrent for use of a firearm in the commission of a crime of violence, the first five without parole, and fifteen years

concurrent for illegal possession of a regulated firearm, the first five without parole. This timely appeal followed.

II.

Before this Court, appellant argues that the certificates were insufficient procedurally and substantively to certify the phone records under the business records exception. The State provided the certificates at trial, not at least ten days before trial as required by Rule 5-902(b)(1). The certificates themselves were improper because they referenced "attached records" although no records were attached when the telephone companies sent the certificates.

Appellant further argues that admission of the phone records was not harmless. The State used them to impeach appellant's alibi and show that phones with direct ties to appellant were in the area of the shooting. The State emphasized these points in its opening statement and closing argument.

The State argues first that appellant waived his right to appeal the admission of the phone records by not objecting to the State's opening statement that mentioned the records, and even mentioning the records in his own opening statement. The State also argues that the procedural timeliness requirement does not prevent its substantial compliance from satisfying the Rule. It says that appellant was not prejudiced because the prosecutor had sent the phone records, although without certification, to appellant's counsel months before the trial. The actual notice provided by sending the records was sufficient to comply with

the Rule. The Rule does not require a certificate to be attached to the certified records, and these certificates included case numbers along with other identifying information from the phone records. The certificates' identification of the records substantially complied with the Rule.

If admitting the records constituted error, the State contends it was harmless. Because appellant's counsel admitted in his closing argument that appellant lied about his location at the time of the shooting, the phone records did not give the jury any information beyond appellant's testimony.

III.

The certification of business records as an exception to the hearsay rule derives from two related rules of evidence, Maryland Rules 5-803(b)(6) and 5-902(b)(1). We review the trial court's interpretations of the Rules as conclusions of law *de novo*, that is, without deference "to determine if the trial court was legally correct in its rulings on these matters." *Davis v. Slater*, 383 Md. 599, 604 (2004).

Rule 5-803(b)(6) defines the business records exception to hearsay as follows:

> "*Records of Regularly Conducted Business Activity*. A memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses if (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the memorandum, report, record, or data

> compilation. A record of this kind may be excluded if the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness."

Parties seeking to admit business records for this exception may prove satisfaction of these four requirements either "by extrinsic evidence (usually live witness testimony) . . . or by 'self-authentication' pursuant to Rule 5-902[(b)(1)]." *State v. Bryant*, 361 Md. 420, 427 (2000).

Rule 5-902(b)(1) defines the self-authentication certification for business records as follows:

> "*Procedure*. Testimony of authenticity as a condition precedent to admissibility is not required as to the original or a duplicate of a record of regularly conducted business activity, within the scope of Rule 5-803(b)(6) that has been certified pursuant to subsection (b)(2) of this Rule, provided that at least ten days prior to the commencement of the proceeding in which the record will be offered into evidence, (A) the proponent (i) notifies the adverse party of the proponent's intention to authenticate the record under this subsection and (ii) makes a copy of the certificate and record available to the adverse party and (B) the adverse party has not filed within five days after service of the proponent's notice written objection on the ground that the sources of information or the method or circumstances of preparation indicate lack of trustworthiness."

The trial judge accepted the certificates of the phone records under this Rule, citing it during the March 1 hearing in which he found "the certificates to be proper under the

rules."[3] We hold that the court erred in concluding that the State satisfied the requirements of Rule 5-902(b)(1).

The State did not properly authenticate the phone records for the business records exception. Rule 5-902(b)(1) establishes three procedural requirements for certification to self-authenticate business records: (A)(i) at least ten days before the proceeding begins, the records' proponent must notify the adverse party that they plan to use this method; (A)(ii) at least ten days before the proceeding begins, the records' proponent must make available "a copy of the certificate *and* record" to the adverse party; and (B) the adverse party must not file a written objection within five days after receiving that notice. The State did not meet requirement (A)(ii) because it did not have the certificates on the first day of the trial, much less ten days before, and could not have offered them to appellant in a timely manner. Rule 5-902(b)(1) is clear that a party must satisfy all three requirements to use certificates to certify business records—and the State satisfied only two of them by giving notice and appellant not filing a timely written objection. Because the State did not make the certificates available ten days before trial, the certificates were not proper for self-authentication. Because the State did not introduce any other evidence of the records' authenticity, the trial court erred in admitting them.

[3] The State could have attempted to authenticate the records by extrinsic evidence, but never exercised this option.

The improper admission of the phone records was not harmless error. An error cannot be harmless "unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict." *State v. Mazzone*, 336 Md. 379, 400 (1994). The State introduced location evidence for three cell phones from the phone records. Two of those phones were found in appellant's car upon his arrest, but their records were improperly authenticated by the certificates. The other phone, although its records were properly certified and admitted, was never found, and was tied to appellant only by Mr. Borowiak's inconsistent testimony. The State used the location data from all three phones' records to impeach appellant's alibi as well as to put him in the vicinity of the crime. The jury may have been satisfied by evidence from the phone with properly-admitted records, but we cannot find beyond a reasonable doubt that evidence from multiple additional phones claimed by appellant in no way influenced the verdict.

**JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED. CASE REMANDED TO THAT COURT FOR A NEW TRIAL. COSTS TO BE PAID BY BALTIMORE COUNTY.**