UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0332

September Term, 2014

TREVOR SMITH

v.

STATE of MARYLAND

Zarnoch,
Leahy,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: July 7, 2015

Following a jury trial in the Circuit Court for Baltimore County, appellant Trevor Smith was convicted of illegal possession of a firearm.[1] The trial court imposed a sentence of ten years' imprisonment, with the initial five years to be served without parole. Smith appeals, challenging both his convictions and sentence, and presents four issues for our review, which we have recast as follows:

> 1. Whether the admission of certain evidence violated the hearsay rule.
>
> 2. Whether the trial court erred by admitting text messages obtained from cell phones without accompanying expert testimony.
>
> 3. Whether the trial court abused its discretion by permitting the testimony of a turncoat witness.
>
> 4. Whether two convictions for illegal possession of a firearm are illegal.

For the reasons that follow, we affirm Smith's conviction for illegal possession of a firearm by a person previously convicted of a crime of violence. However, because Smith is subject to only a single conviction for illegal possession of a firearm, we vacate Smith's conviction for illegal possession of a regulated firearm by a person previously convicted of a disqualifying crime.

[1]Smith was charged with reckless endangerment, a charge that was dismissed, and illegal possession of a regulated firearm under two sections of the Public Safety Article. Md. Code (2003, 2011 Repl. Vol., 2013 Supp.), §§ 5-133(b) and (c) of the Public Safety Article (Pub. Safety). Count 1 charged a violation of Pub. Safety § 5-133(c), which makes it illegal for a person previously convicted of a crime of violence to possess a firearm. Count 2 of the indictment charged Smith with a violation of Pub. Safety § 5-133(b) - - illegal possession of a regulated firearm by a person previously convicted of a disqualifying crime. The parties stipulated that Smith was disqualified from possessing a firearm.

BACKGROUND

This case has its genesis in a shooting that took place during the early morning hours of March 31, 2013. Pamela Ramseur suffered a gunshot wound to the hand. A friend drove her to St. Agnes Hospital at about 3:00 a.m., and the nature of her injury prompted hospital personnel to call the Baltimore County Police.

Detectives questioned Ramseur about her wound and she provided the first of what would be three different versions of the events of that morning. Initially, Ramseur explained that she had been accosted on the street by an armed robber. When interviewed at police headquarters, she then changed course and told detectives that she had suffered the gunshot wound at her residence when she tried to prevent her friend Smith from harming himself. She was shot during the resulting struggle over the weapon.

At trial, Ramseur came up with a third version of events, and claimed that it was she who produced the handgun, hoping to encourage Smith to leave. The weapon fired, striking Ramseur in the hand causing an accidental self-inflicted wound. Ramseur denied ownership of the handgun, but claimed that she was "holding it" for a friend.

Two detectives investigated the case – Detectives David Johnson and Brian Edwards. The former testified that, following the interview of Ms. Ramseur at the station, the police obtained a search warrant for her house "based on the information that she gave us." Once at her residence, Ramseur demonstrated how the shooting took place. Although there was evidence that a shot had been fired, because there was a bullet hole in her bedspread, the

police were unable to recover either the handgun or the projectile that caused Ramseur's injury.

Given Ramseur's story that Smith had attempted to harm himself, the detectives were concerned about his safety. Their focus evolved, however, when they learned that Smith was prohibited from possessing a handgun. He was soon located and arrested for illegal possession of a handgun.

DISCUSSION

Introduction

Smith raises two issues regarding the admission of documentary evidence. Three documents are at issue. The first is an inventory sheet that reports the seizure of two cellular telephones and the seizure of a handwritten note. Smith next complains of the admission of the note itself. He maintains that the inventory sheet is hearsay, even double hearsay, and claims that the note, signed by a third party and not Smith, is likewise hearsay. He also challenges the trial court's refusal to instruct the jury to clarify that Detective Edwards did not recover any evidence at the time of arrest. He asserts the court erred in admitting a separate record that displays certain text messages that were obtained from the two cell phones by the use of a forensic device named Cellebrite. The text messages, he insists, are hearsay; they were not authenticated. Further, he contends that the detective whose testimony accompanied the introduction and admission of the text messages should have

been qualified as an expert witness when he was asked to describe the employment of the Cellebrite device.

Smith contends that the trial court erred by permitting the testimony of Pamela Ramseur. He states that the prosecution arranged to put Ramseur on the stand solely to impeach her with one of her prior inconsistent statements – specifically the incriminating tale she offered at the police station.

Smith finally avers that he has been convicted twice for a single possession of a handgun. The State agrees.

Standards of Review

"Whether evidence is hearsay is an issue of law reviewed de novo." *Bernadyn v. State*, 390 Md. 1, 8 (2005). We review the trial court's evidentiary rulings for abuse of discretion. *State v. Simms*, 420 Md. 705, 724–25 (2011). A ruling on whether evidence is properly authenticated is likewise review for an abuse of discretion. *See Department of Public Safety & Correctional Services v. Cole*, 342 Md. 12, 26 (1996). We review the trial court's decision on whether to give a jury instruction for abuse of discretion. *Hall v. State*, 437 Md. 534, 539 (2014).

I. Evidentiary Rulings

Inventory Sheet

Smith challenges the trial court's admission of the property inventory sheet. This document, admitted over objection as State's Exhibit 6, recorded the recovery of two cellular

telephones and a handwritten note. The seizure of these items – the cell phones and handwritten note – led to circumstantially incriminating evidence.[2] Smith asserts that the "inventory sheet" is inadmissible hearsay and not subject to any exception. He emphasizes that the State failed to produce either the officer who purportedly recovered the cell phones and note from Smith, or the person who filled in the inventory sheet.

At the outset, the State interposes a preservation argument, claiming that Smith failed to object to the admission of the inventory sheet in a timely manner. Assuming that we find preservation, the State also urges that we should uphold the admission of the inventory. We disagree with the State that Smith failed to preserve this issue and conclude that Smith's challenge to the trial court's ruling on the first inventory sheet is before us. Defense counsel properly objected when the first inventory sheet was introduced and admitted. And we do not agree with the circuit court that the "time to object to hearsay has long passed." We shall address Smith's challenge to the admission of the inventory sheet that reported the seizure of the cell phones and the handwritten note.

[2] The handwritten note is not in the record. The note displayed the name "James Nuke," and, according to Smith, included statements such as "I left never came back"; [sic] "we had argument [sic] about X (no details)"; "I was fighting him"; "told him I didn't want to be with him"; "He went outside"; "Heard front door open"; and "came back with the gun."

The First Inventory Sheet

The issue of whether the inventory sheet should be admitted arose during the testimony of Detective Johnson. At that time, the State introduced the "property inventory sheet" that would be admitted as State's Exhibit 6. The transcript reflects the following:

> [PROSECUTOR:] I'm going to have you first of all take a look at this document in general and tell me if you are familiar with what that document is?
>
> A. Yes.
>
> Q. What type of document is it?
>
> A. It is another property inventory sheet with evidence on it.
>
> * * *
>
> Q. On that particular sheet what information is contained there?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled,
>
> A. This sheet has three pieces of evidence that were submitted to the evidence unit listed on it.
>
> Q. Does it provide who it was taken from?
>
> A. Yes.
>
> Q. And who was it taken from, Detective?
>
> A. Trevor Smith.
>
> Q. And when you are given this property essentially, the items on there, what do you do with it once you get it?

> A. I package it in the envelopes and I seal it with evidence tape and I fill out the information on the envelope and then it goes to the evidence room in the basement of headquarters.
>
> * * *
>
> [PROSECUTOR]: Your Honor, I would move that in as State's 6.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Come up to the bench.

A sidebar ensued, during which defense counsel argued that the document was "hearsay as according to the Court's previous ruling." The court rejected counsel's challenge, and explained that Detective Johnson "has already testified to the fact that it was recovered, that it was documented."

Over further objection, Detective Johnson told the jurors that the inventory sheet showed that two cell phones and the handwritten note had been recovered from Smith at the time of his arrest. He did not recall who gave him the sheet or which officer had seized the evidence. He was not present when Smith was arrested.

Discussion

Pursuant to Maryland Rule 5–801(c), hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 5–802 requires that courts exclude hearsay statements unless "otherwise provided by [the Maryland Rules] or permitted by applicable constitutional provisions or statutes." *Shelton v. State*, 207 Md. App. 363, 375 (2012) (Citation and

footnote omitted). *See Thomas v. State*, 429 Md. 85, 96 (2012) (Citation and internal quotation marks omitted).

Maryland Rule 5-803 sets forth certain exceptions to the application of the hearsay rule, and provides in relevant part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (b) Other Exceptions.
>
> * * *
>
> (6) 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. In this paragraph, "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
>
> * * *
>
> (8) Public Records and Reports.
>
> (A) Except as otherwise provided in this paragraph, a memorandum, report, record, statement, or data compilation made by a public agency setting forth

> (i) the activities of the agency;
>
> (ii) matters observed pursuant to a duty imposed by law, as to which matters there was a duty to report; or
>
> (iii) in civil actions and when offered against the State in criminal actions, factual findings resulting from an investigation made pursuant to authority granted by law.
>
> ***
>
> (C) A record of matters observed by a law enforcement person is not admissible under this paragraph when offered against an accused in a criminal action.

The "common law exception for public records" that is presently codified in Md. Rule 5-803(b)(8) was recognized in *Ellsworth v. Sherne Lingerie, Inc.*, 303 Md. 581 (1985).[3] There, the Court of Appeals said:

> The common law evolved an exception to the hearsay rule for written records and reports of public officials under a duty to make them, made upon firsthand knowledge of the facts. These statements are admissible as evidence of the facts recited in them.
>
> The modern trend has been to admit public records when the information is gathered by a public officer under a statutory duty to investigate and record or certify facts ascertained by other than personal observation.

Ellsworth, 303 Md. at 604 (Citations and internal quotation marks omitted). The Court added:

[3] Md. Rule 5-803(b) is derived from Rule 803 of the Federal Rules of Evidence.

> We agree that the Public Records exception to the hearsay rule appropriately allows the reception of reliable facts, and will be recognized in this state in the form in which it appears at Fed.R.Evid. 803(8).

Id., 303 Md. at 612 (Footnote omitted).

The public records exception is not absolute. The law enforcement exception from the application of the hearsay rule, Md. Rule 5-803(b)(8)(C), prohibits the admission of a "record of matters observed by a law enforcement person[,]" when the record is "offered against an accused in a criminal action." A Senate Judiciary Committee report on the corresponding federal rule noted that "the reason for this exclusion is that observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases." S. Rep. No. 1277, 93d Cong., 2d Sess., *reprinted in* (1974) U.S.C.C.A.N. 7051, 7064.

Notwithstanding the fact that it was prepared by law enforcement, we conclude that the inventory sheet, which records the receipt from Smith of the cell phones and the handwritten note, constitutes an administrative document that fits within the public records exemption set forth in Rule 5-803(b)(8). In our view, the inventory form is of a routine, ministerial and administrative nature that is outside the ambit of the law enforcement exclusion.

There exists extensive authority from other jurisdictions that has sanctioned the admission of law enforcement documents that purport to record routine, ministerial or

administrative matters in connection with a prosecution. The United States Court of Appeals for the Ninth Circuit, in *United States v. Wilmer*, 799 F.2d 495 (9th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987), upheld the admission of a breathalyzer calibration report in the trial of a defendant who was charged with driving while intoxicated. Wilmer argued that the device had been calibrated by a state patrol officer, and thus its calibration report was a matter observed by a law enforcement officer in a criminal case, and that the admission of the report via the testimony of a records custodian should have been excluded as hearsay.

The Ninth Circuit rejected this challenge, reiterating that the "exclusionary provisions of Rule 803(8)(B) [the federal analog to Md. Rule 5-803(b)(8)(C)] were intended to apply to observations made by law enforcement officials at the scene of the crime or the apprehension of the accused and not records of routine matters made in a nonadversarial setting. *Wilmer*, 799 F.2d at 500 (Citation omitted). The calibration report was just such a "ministerial, objective, and nonevaluative" item that was not subject to exclusion. *Id*. at 501.

Calibration reports similar to that involved in *Wilmer* have been regularly admitted. *See Graves v. State*, 761 So. 2d 950, 955 (Miss. Ct. App. 2000); *State v. Ofa*, 828 P.2d 813, 817 (Haw. App. 1992); *State v. Smith*, 675 P.2d 510, 512 (Or. App. 1984). Moreover, other law enforcement documents have likewise been admitted. In *Fowler v. State*, 929 N.E.2d 875 (Ind. App. 2010), for example, the Indiana Court of Appeals concluded that the introduction of a victim's "booking card," which was introduced to verify his identity, was admissible under the public records exception. The intermediate appellate court noted, first,

that "courts have held that the public records exception permits admission of police records created in connection with routine booking procedures." *Fowler*, 829 N.E.2d at 879. Quoting with approval from federal appellate cases, the Indiana court went on to note that the

> rote recitation of biographical information in a booking sheet ordinarily does not implicate the same potential perception biases that a subjective narrative of an investigation or an alleged offense might. [F]ingerprinting and photographing a suspect ... are the types of routine and unambiguous matters to which the public records hearsay exception in [FRE] 803(8)(B) is designed to apply.

Fowler, 929 N.E.2d at 879 (Citations and internal quotation marks omitted) (Internal parentheses omitted). Although the "booking card was created by law enforcement," the "biographical information" set forth therein "was obtained and recorded in the course of a ministerial, nonevaluative booking process[.]" *Id*. The court held that the exhibit was "not subject to the police reports exclusion." *Id*; *see also United States v. Dowdell*, 595 F.3d 50 (1st Cir. 2010).

In *United States v. Grady*, 544 F.2d 598 (2d Cir. 1976), Grady and others appealed their convictions for violations of the federal firearms laws. One issue before the Second Circuit was whether the trial court erred by admitting police records from Northern Ireland. The court held that the records, which demonstrated the location of certain weapons, were admissible:

> For the limited purpose of showing that the specified weapons were found in Northern Ireland on dates subsequent to

> the May, 1970, purchases, however, we think the records were admissible under the public records exception to the hearsay rule, codified in Fed.R.Evid. 803(8)(B). . . . They did not begin to prove the Government's entire case; they were strictly routine records.

United States v. Grady, 544 F.2d 598, 604 (2d Cir. 1976) (Footnotes omitted).

The Fifth Circuit's opinion in *United States v. Quezada*, 754 F.2d 1190 (5th Cir. 1985) is also instructive. Quezada was convicted of illegal reentry after deportation. Two INS forms were crucial to the prosecution – the warrant of deportation and the warning of penalties should the deportee attempt to return. The *Quezada* court upheld their admissibility:

> In the case of documents recording routine, objective observations, made as part of the everyday function of the preparing official or agency, the factors likely to cloud the perception of an official engaged in the more traditional law enforcement functions of observation and investigation of crime are simply not present. Due to the lack of any motivation on the part of the recording official to do other than mechanically register an unambiguous factual matter (here, appellant's departure from the country), such records are, like other public documents, inherently reliable.

Quezada, 754 F.2d at 1194.

The property receipt for the weapon in an unlawful firearm possession case was the disputed evidence in *United States v. Brown*, 9 F.3d 907 (11th Cir. 1993) (per curiam). On appeal from his conviction for possession of a firearm by a convicted felon, Brown asserted that the *property receipt* for the firearm in question was rendered inadmissible by the law enforcement exclusion. The Eleventh Circuit rejected his challenge:

> Although Rule 803(6) cannot be used as a back door to admit evidence excluded by Rule 803(8)(B), we believe that the property receipt in the instant case is not the type of evidence contemplated by the exclusion of Rule 803(8)(B).
>
> * * *
>
> Many courts . . . have drawn a distinction between police records prepared in a routine, non-adversarial setting and those resulting from a more subjective investigation and evaluation of a crime.

United States v. Brown, 9 F.3d at 911 (Footnote omitted); *see also United States v. Weiland,* 420 F.3d 1062, 1074 (9th Cir. 2005) (Fingerprints and photograph were admissible public records of routine, nonadversarial matters).

On the basis of this authority, we conclude that the inventory sheet admitted during the testimony of Detective Johnson is not unlike the routine, administrative, and ministerial records that traditionally have been admitted. An inventory sheet is prepared after the fact, usually in an office, not at the crime scene. It's preparation is a standard practice, involving little or no discretion on the part of the preparer. The trial court did not err by admitting the inventory record that reported the recovery of two cell phones and the handwritten sheet from Smith.[4]

[4] Although not clearly articulated below, Smith now asserts in a footnote in his brief that the inventory report contains multiple levels of hearsay, and that this fact undermines its admissibility. We disagree. Maryland Rule 5-805 covers the issue of multiple levels of hearsay, and provides that "[i]f one or more hearsay statements are contained within another hearsay statement, each must fall within an exception to the hearsay rule in order not to be excluded by that rule." Assuming that the inventory report was drafted by an officer who, (continued...)

Property Record – Cell Phone Download

Smith also challenges the admission of State's Exhibit 15, a document that depicts the downloaded contents of the two cell phones. Smith asserts that the State failed to authenticate these text messages, *i.e.* the State did not establish that the text messages on Exhibit 15 actually came from the cell phones. He also maintains that the text messages that were introduced by the State are hearsay, and further complains that the trial court erred by admitting the report containing the text messages without requiring the State to qualify its witness as an expert to explain to the jury how the messages were collected from the two cell phones.

The State responds that these issues have not been preserved. We disagree.

Just prior to trial, the court entertained Smith's motion *in limine*, in which he initially sought to preclude the admission of the handwritten note and the content of the cell phones that was displayed on a sheet. This information, a number of text messages, had been downloaded by Detective Edwards using a forensic tool – Cellebrite – which is employed to capture the contents of a cellular telephone.

For purposes of the hearing, defense counsel did not object when, at the hearing, the prosecutor said: "I don't think there is any objection as they were taken off of his person."

[4](...continued)
in turn, recorded the observations of the officer who seized the cell phones and handwritten note, we believe both out of court statements would be admissible as public records, and not excluded by Rule 5-803(b)(8)(C). Finally, for reasons stated at pp. 25 *infra*, we believe the content of the items themselves did not contain hearsay.

The prosecutor added that "[t]here is essentially two pages that I point out that has text messages essentially saying we need to get our stories straight."

The trial court asked defense counsel to confirm that he sought "to prevent the State from introducing the content or substance of those text messages, that [the prosecutor] has related amount to two pages?" Counsel agreed, but then noted that the downloaded messages were hearsay: "The second thing is it appeared to me that this information is hearsay, again, hearsay information now."

> [DEFENSE COUNSEL]: There was a chain of custody issue with the last witness, property inventory sheet. The chain of custody issue appears to be the same with this one. That is, we don't know who the phones were recovered from. Whereas the last time I didn't know about the chain of custody issue. This time I do know and it is not identified on that property sheet. He is saying these phones came from Trevor Smith but there is no documentation, at least it is not discernable from the document that he has before him.
>
> THE COURT: Well, how about that, [Mr. Prosecutor]? Although it was testified to without objection by Detective Johnson that the phones and the sheet of paper were recovered and subsequently put on the property sheet, what about this detective? Unless he is the one that actually recovered the phones, he can't say that – he should not be permitted to say that he has firsthand knowledge that they came from the Defendant.

The prosecutor offered to rephrase his question, and asked Detective Edwards whether he was "made aware that phones were recovered in this case[.]"[5] The detective answered in

[5] Defense counsel asked the trial court to instruct the jury to disregard any testimony that the cell phones had been recovered from the defendant. The court denied counsel's (continued...)

the affirmative and the questioning proceeded to testify as to his use of the Cellebrite forensic device:

> [PROSECUTOR:] Detective, are you familiar with a program called [Cellebrite]?
>
> A. Yes, sir, I am
>
> * * *
>
> [Cellebrite] is a device called, it is a universal forensic extraction device. What it does is captures the data from a mobile device, as in this case, the cell phones. It allows you to capture all of the data, that is text messages, incoming calls, out going calls, anything that is physically present on the phone itself, pictures, and it doesn't allow you to alter those images or the messages or anything like that.
>
> * * *
>
> THE COURT: Can you describe for – have you used this program on more than one occasion?
>
> THE WITNESS: I have, yes, sir, Your Honor.
>
> THE COURT: How often, would you say?
>
> THE WITNESS: I have used it quite a bit in the last two years being in violent crimes.

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[5](...continued)
request, suggesting that counsel could make that point on cross-examination. We find no abuse of the trial court's discretion in his refusal to give the requested instruction. Assuming a misstep on the part of the trial court, any mistake on this specific issue is harmless beyond a reasonable doubt. *See Morris v. State*, 418 Md. 194, 221 (2011). The jury saw evidence – the inventory sheet – that the cell phones and handwritten note had been recovered from Smith. Moreover, the trial court reminded counsel that he could cross-examine Detective Edwards on this point.

Q. About how many times have you used it?

A. Probably say at least 50.

THE COURT: And did you receive some sort of training or instruction about how do you use these devices?

THE WITNESS: Yes, I did.

THE COURT: Explain that to the jury.

THE WITNESS: I participated in a week long seminar training class that taught me how to use the [Cellebrite] device.

* * *

THE COURT: And what do you do? Tell us what you learned about how you use this device?

THE WITNESS: This device, we just use it to extract data from cell phones.

THE COURT: Physically how is that done, tell us what you do?

THE WITNESS: You plug the cell phone into the device. You select the make and model and from there, also the carrier, and you select extract, extract data and it extracts it to a USB and you then take that USB and transfer it to a CD. You are able to analyze the data in a report format and even able to see the pictures, text messages, incoming and outgoing messages.

THE COURT: Next question.

[PROSECUTOR:] Did you in fact do that in this particular case?

A. I did, yes, sir.

Q. Did you do it more than one phone?

A. I did it to two phones.

Q. Do you recall what type of phones they were?

A. One was an Apple iPhone and the other was a Kyocera.

Q. And so you did both phones. When that was done, where did that information go? Where did it get downloaded to?

A. It gets downloaded to a USB and we take that information and put it on to a CD for evidence.

Q. And after that you had an opportunity to view all of the evidence on that CD –

A. Yes, sir.

Q. – did you in fact view in this particular case some text messages?

A. I did, yes, sir.

Q. And off of what particular phone?

A. I reviewed all of the text messages from both the iPhone and the Kyocera.

Defense counsel objected to the admission of State's Exhibit 15, which depicted the information – text messages – that had been downloaded from the cell phones. He asserted both that the State needed an expert to accompany the cell phone report, and that the report presented hearsay:

[DEFENSE COUNSEL]: Seems to me that they need an expert to convey this information for which we were not identified that this particular witness wouldn't be an expert. No difference

> between what he has done here and the ballistic analysis or any other analysis. This requires an expert opinion and we had no knowledge that this witness would come in and would be an expert, at the very least, and I re[-]raise my hearsay exemption. We went through an elaborate voir dire actually with the witness to ascertain what his knowledge, training and experience was and typically the same type of voir dire the Court would use for any expert when you are doing ballistics, DNA or what have you.

The trial court inquired of the prosecutor whether he intended to ask for an opinion. After being reassured by the prosecutor that no opinion would be forthcoming from Detective Edwards, then the trial court ruled on the hearsay objection. Again, the court queried the prosecutor, who assured the court that the text messages were not hearsay:

> [PROSECUTOR]: Not for the truth of the matter asserted. Very similar to the same information contained in the piece of paper introduced. It will go to the fact of his intention of setting up a defense.

After considerable discussion at the sidebar, the trial court rejected the defense's argument that the text messages were hearsay. The court declined to entertain counsel's "chain of custody" argument and ruled against Smith on the hearsay issue.

Turning to the question of whether the State should have produced the testimony of an expert to explain the process of downloading the text messages, the trial court also ruled in favor of the State, and allowed defense counsel latitude to conduct cross examination with respect to the document.

Authentication

Smith contests the authentication of the text messages, asserting that the State failed to establish that the text messages actually came from his cell phone. He attacks the State's view that the evidence satisfied the threshold requirement of authentication. We agree with the State.

Maryland Rule 5-901 governs the authentication of evidence and provides that "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." This requirement may be satisfied by the "[t]estimony of a witness with knowledge that the offered evidence is what it is claimed to be." Md. Rule 5-901(b)(1). In the case before us, Detective Edwards testified that he "reviewed all of the text messages from both the iPhone and the Kyocera [cell phone]." He then agreed when asked whether the document, State's Exhibit 15, was "prepared from the download." We believe that the detective's testimony is sufficient from which a reasonable juror may find that the text messages listed on the exhibit came from the cell phones that he connected to the Cellebrite device. The "burden of proof for authentication is slight, and 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." *Dickens v. State*, 175 Md. App. 231, 239 (2007) (Citation and internal quotation marks omitted).

Expert Testimony

Detective Edwards testified as a lay witness. Chapter 700 of Title 5 of the Maryland Rules governs "opinions and expert testimony." Maryland Rule 5-701 addresses the opinion by a lay witness:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

"Testimony elicited from an expert provides useful, relevant information when the trier of fact would not otherwise be able to reach a rational conclusion; such information is not likely to be part of the background knowledge of the judge or jurors themselves." *State v. Payne & Bond*, 440 Md. 680, 698-99 (2014) (Citation and internal quotation marks omitted). Expert testimony is admissible only if it is relevant, and such evidence is relevant if the jury will find the testimony helpful in resolving the issues in the case. *Wilder v. State*, 191 Md. App. 319, 361 (2010).

In the case before us, the State was not required to qualify Detective Edwards as an expert witness to illustrate the steps he took to download the data from the cell phones. His testimony was based on his perception, and was helpful to a clear understanding by the jury. He was not required to parse the text messages, or to engage in a convoluted exegesis on the workings of the Cellebrite device.

In *Payne*, the law enforcement witness, the same Detective Edwards, offered testimony based on "Call Detail Records," which, for purposes of that case, he distilled into just over a single page. The detective determined the "call time, phone number called, whether the call was incoming or outgoing and the cell tower through which the cell phone communicated, based on the complete records he had received from Sprint Nextel." *Payne*, 440 Md. at 686. There was more:

> Detective Edwards proffered, outside of the presence of the jury, the procedure that he used to determine cell tower locations. According to him, the process required matching certain data points associated with a cell phone call to a table available on an unnamed "secure Web site" or on "an Excel spread sheet that comes with the records", to determine the latitude and longitude of the corresponding cell tower. Neither the "Excel spread sheet that comes with the records" nor the "secure Web site" that allegedly maintains cell tower information was admitted into evidence. Satisfied that Detective Edwards need not have been qualified as an expert to testify, as he did to that point, the trial judge permitted the State to further question the Detective about the location of the cell towers that transmitted Payne's and Bond's communications listed in Exhibits 12 and 11B.
>
> Detective Edwards testified thereafter regarding the location of the first cell tower to which Bond's cell phone allegedly connected on the night of the crime, a cell tower located on Menlo Drive, and opined that the cell tower was between one and a half to two miles from the crime scene. The State then offered, as Exhibit 9, a map Detective Edwards created upon which he had printed what he determined to be the location of the Menlo Drive tower as well as the location of the murder.

Payne, 440 Md. at 686-88 (Footnotes omitted). The Court held that the technology was "beyond the ken of an average person" and had to be described by a qualified expert. *Id.* at 708.

In the case before us, Detective Edwards described using the Cellebrite device and then presenting the results, text messages in a form that did not require "some specialized knowledge or skill ... that is not in the possession of the jurors." *Wilder*, 191 Md. App. at 368 (Citation and internal quotation marks omitted). The State was not required to qualify Detective Edwards as an expert, and the trial court did not abuse its discretion by permitting his testimony. Even though he received training on how to operate the device, Detective Edwards was not required to, in turn, educate the jurors on the intricacies of the Cellebrite, but simply describe the routine actions he took to hook the cell phones to the device and then copy their contents to media such as a CD.

Handwritten Note – Text Messages – Hearsay Issue

Smith asserted that the handwritten note and the text messages were hearsay, and the trial court erred by admitting them. This evidence was the subject of the motion *in limine*. Both the contents of the note and the text messages were introduced to demonstrate that Smith, and possibly Ramseur, sought to coach or influence Ramseur's testimony. The short answer to Smith's hearsay complaint is that the content of the handwritten note and the text messages were not hearsay. They were not introduced to prove the matter asserted, but rather

to demonstrate Smith's intent to fabricate a defense. *See Ali v. State*, 314 Md. 295, 304 (1988).

Ramseur Testimony

Smith complains of the trial court's allowance of the testimony of Pamela Ramseur. He contends that the State called her to the stand solely to impeach her and thus circumvent the hearsay rule. We are not persuaded.

Smith insists that the State violated the dictates of the Court of Appeals' decision in *Spence v. State*, 321 Md. 526, 530 (1991), in which the Court ruled that the "State cannot, over objection, have a witness called who it knows will contribute nothing to its case, as a subterfuge to admit, as impeaching evidence, otherwise inadmissible hearsay evidence." Smith's theory on appeal is that the State called Ramseur to place before the jury her second version of events, the recorded statement to police in which she implicated Smith.

In *Spence*, a witness, and alleged accomplice of Spence who had implicated Spence in an interrogation, made it known that he would not testify for the State, and that any testimony he offered would be exculpatory. The State asked the trial court to call the accomplice as a court witness, *see Spence*, 321 Md. at 528 n. 1, who would then be subject to the prosecutor's cross-examination and impeachment. The prosecutor did so, and then called a detective who testified to the conversations he had with the witness, and that witness's implication of Spence.

The Court of Appeals disapproved of this tactic:

> The State concedes, as it must, that Detective Naylor's testimony about Cole's statements regarding Spence's participation did not fall within the hearsay exception and was inadmissible as substantive evidence against Spence. It argues, however, that Cole's extrajudicial statements, though not admissible as substantive evidence, were admissible to impeach Cole. This blatant attempt to circumvent the hearsay rule and parade inadmissible evidence before the jury is not permissible. The State cannot, over objection, have a witness called who it knows will contribute nothing to its case, as a subterfuge to admit, as impeaching evidence, otherwise inadmissible hearsay evidence.

Spence v. State, 321 Md. at 530-31.

Smith's reliance on *Spence* under the circumstances before us is misplaced, and his argument has been overtaken by subsequent case law. *See Nance v. State*, 331 Md. 549 (1993). *See e.g.*, *Stewart v. State*, 104 Md. App. 273 (1995), *aff'd*, 342 Md. 230 (1996). Given the State's intent to employ Ramseur's recorded statement as substantive evidence, that statement was admissible as substantive evidence as a prior inconsistent statement. *See* Md. Rule 5-802.1(a), which provides:

> The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:
>
> (a) A statement that is inconsistent with the declarant's testimony, if the statement was (1) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and was signed by the declarant; or (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement[.]

The trial court did not err by permitting the State to call Ramseur, and to introduce her prior recorded statement as substantive evidence.

II. Multiple Convictions for Illegal Possession of Regulated Firearm.

Smith asserts, and the State agrees, that the trial court erred by entering two convictions for illegal possession of a regulated firearm. We likewise agree, and shall vacate the conviction for illegal possession or a regulated firearm by a person previously convicted of a disqualifying crime. *See Melton v. State*, 379 Md. 471 (2004); *Wimbish v. State*, 201 Md. App. 239, 272, 276 (2011).

CONVICTION FOR ILLEGAL POSSESSION OF A REGULATED FIREARM BY A PERSON PREVIOUSLY CONVICTED OF A DISQUALIFYING CRIME VACATED; JUDGMENT OF CONVICTION FOR ILLEGAL POSSESSION OF A REGULATED FIREARM BY A PERSON PREVIOUSLY CONVICTED OF A CRIME OF VIOLENCE AFFIRMED.

COSTS TO BE EVENLY DIVIDED BETWEEN APPELLANT AND BALTIMORE COUNTY.