UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0475

September Term, 2014

BRIAN CUFFIE MAYHEW

v.

STATE of MARYLAND

Wright,
Reed,
Alpert, Paul E.
(Retired, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: August 19, 2015

A jury in the Circuit Court for Prince George's County convicted Brian Mayhew, appellant, on two counts of first and second degree murder, use of a handgun in the commission of a crime of violence, and related offenses. Appellant appeals as of right and challenges two evidentiary decisions by the trial court. He first contests the trial court's allowance of the expert testimony of the State's fingerprint expert, and then asserts that the trial court erred in admitting recorded telephone conversations without authentication.[1]

For the reasons that follow, we shall affirm.

FACTS

Because appellant does not challenge the sufficiency of the State's evidence, a full recitation of the evidence is unnecessary to address the issues before us. *See Hill v. State*, 418 Md. 62, 66 (2011); *Westray v. State*, 217 Md. App. 429, 434 n.2, *cert. granted on other grounds*, 440 Md. 225 (2014); *Washington v. State*, 180 Md. App. 458, 461-62 n.2 (2008) ("recitation of trial evidence unnecessary to address issue on appeal") (citation omitted); *Whitney v. State*, 158 Md. App. 519, 524 (2004); *Pearlstein v. State*, 76 Md. App. 507, 520 (1988) (unnecessary to recapitulate all evidence presented at trial).

[1] In his opening brief, Appellant phrases the two questions as follows:

> 1. Did the trial court abuse its discretion by failing to exclude the expert testimony of a fingerprint examiner whose summary of the grounds for her opinion was not disclosed before trial and who did not have a proper factual basis for her opinion at trial?
>
> 2. Did the trial court err by admitting recorded telephone conversations without proper authentication?

This case involves the murders of Anthony McKelvin and Sean Ellis on May 30, 2011. The two men were shot while seated in a Lexus automobile at London Woods. Appellant, along with a second individual, was implicated in the murders.[2]

The key testimony for the State came from Nicoh Mayhew's testimony before the grand jury.[3] Nicoh was appellant's uncle, Kenan Myers was a "cousin through marriage," and Nicoh had also known McKelvin and Ellis. Because Nicoh was murdered before trial, his testimony was introduced instead, and read to the jury by Detective Tariq Hall.[4] On the afternoon of the shootings, Nicoh saw the four men at Booker Terrace playground in Seat Pleasant. Appellant and Myers arrived at Booker Terrace on foot; Ellis and McKelvin drove there in Ellis's Lexus.

Nicoh was solicited to be involved in the events of this case when Myers called him to ask whether Nicoh could obtain some bleach and gasoline. Nicoh was not particularly concerned about getting these materials right away, and so he visited with his girlfriend's family and "went about his business." Later, Myers called Nicoh again, and

[2] A Prince George's County grand jury returned an indictment charging Appellant with two counts each of common law murder, use of a handgun in the commission of a crime of violence, conspiracy to commit murder, robbery with a dangerous weapon, conspiracy to commit robbery with a deadly weapon, kidnapping, conspiracy to commit kidnapping, false imprisonment, conspiracy to commit false imprisonment, and one count each of attempted first and second degree malicious burning of property. The State also charged Kenan Myers. Myers was tried separately and acquitted.

[3] We shall refer to Nicoh Mayhew by his first name to avoid confusion.

[4] *See Alexis v. State*, 209 Md. App. 630, 672 (2013)*, aff'd on other grounds*, 437 Md. 457 (2014).

asked whether he had obtained the bleach and gasoline. Myers urged Nicoh to get these items and meet him at London Woods, which Nicoh described as a "back little road."

Nicoh bought the bleach at a convenience store, five dollars worth of gasoline at a nearby filling station, and proceeded towards the rendezvous point with Myers. He was unsure how to find the London Woods location but saw the silver Lexus as that car was backing up "into like a cut." Nicoh was driving forward when he heard four or five gunshots.

After hearing the gunfire, Nicoh pulled up, jumped out of his car, and demanded to know what was "going on." The others cautioned him to "be quiet." Myers and appellant hurried to remove items from the Lexus and place them in Nicoh's automobile. Myers and appellant then poured the bleach and gasoline in and on the Lexus.

Nicoh approached the Lexus and saw that Ellis and McKelvin were "out;" that they had been killed. Appellant and Myers asked Nicoh whether he had any matches. After Nicoh replied that he did not, the three men then drove to Nicoh's cousin's house on J Street. Appellant and Myers stored the boxes of items that had been taken from the Lexus in the back yard. In the meantime, Nicoh refused their request to return them to the Lexus to set the car aflame.

Myers and appellant left for the site of the shooting and returned after about twenty minutes. In the meantime, Nicoh went inside his cousin's house and called his brother, Gillie Mayhew. When Myers and appellant returned, they said that the police had already

arrived at the scene by the time they reached the Lexus. The two men told Gillie Mayhew, who had arrived at the house in the interim, that Ellis and McKelvin were "done." Myers and appellant counted money that had been in a grocery bag. After this, the two parted and left. Before leaving, they asked Nicoh whether he was "all right," and the latter complained that they were "all wrong to even bring [him] in on this."[5]

Nicoh saw Myers and appellant over the next two days and assured them that he was "good," because he did not want them to suspect that he was concerned about the events of that night; that he was "telling." In truth, Nicoh was afraid and was bothered by what had happened. He was also concerned that he would be implicated in the shootings because he had purchased the gasoline and bleach. Early the following morning, at about 1 a.m., Nicoh went to see his girlfriend, Shawntia Sams. She testified that Nicoh "was bothered." Concerned about the shootings and the fact that family members had brought him into these events, Nicoh decided to go to the police.

The State presented testimony that suggested that appellant and Myers sought to intimidate Nicoh. On November 27, 2012, Nicoh visited his brother, Joseph Crockett, at the Detention Center in Upper Marlboro. According to a corrections officer, Mr. Fowler, it was during this jail visit that appellant and Myers also appeared in the inmate portion of the visitor room and, for a brief period, joined Crockett during Nicoh's visit. Sams

[5] Although he disapproved of their actions, Nicoh was conflicted and clearly fearful. Nicoh explained: "I just seen my best friend, like their friend too. Two of their friends like they just killed them."

testified that, after this jail visit, Nicoh appeared to be "paranoid." Cynthia Mayhew, the mother of Joseph Crockett, Nicoh Mayhew, and Gillie Mayhew, recalled that Nicoh had intended to testify against appellant and Myers, but that he "seemed like he got scared" after November 27, 2012.

Nicoh's fears were justified. Mrs. Mayhew saw him every day in December, 2012. He would regularly show up between 8:30 and 9:30 a.m. at her house on Seat Pleasant Drive. Nicoh kept to this routine on December 19, 2012, when he was murdered outside her front door.

Gillie Mayhew testified that Nicoh Mayhew was his brother and that appellant was his nephew. Gillie was also acquainted with Sean Ellis. Gillie was a reluctant witness whose story changed from his version of events as stated before the grand jury and to police, and his testimony at trial.[6] He denied getting a call from Nicoh on the night of the shootings, and stated that he did not see Nicoh, Myers, or appellant at the J Street address.

Because Gillie sought to distance himself from his grand jury testimony, the State introduced his prior statement to officers and the grand jury testimony. In his testimony before the grand jury, Gillie acknowledged that Nicoh called him on May 30, 2011, that he went to the J Street house, and that, once there, he saw Nicoh, appellant, and Myers. Gillie had told the grand jury that appellant said "they done," referring to "Sean and

[6] To set the tone of his testimony, Gillie refused to point out appellant in the courtroom. He also insisted that he could not remember anything he had said to detectives.

Tony." He confirmed that those two were the men who had been shot and killed. In the earlier statement, Gillie said Myers talked about pouring gas over a car, and Gillie also said he saw appellant and Myers counting money from a grocery bag.

On cross-examination, Gillie claimed that his earlier statements and grand jury testimony were not true. Gillie explained that he spoke with Nicoh at the station, because they were in adjoining interrogation rooms, and that Nicoh told him to give the statements to police. Gillie insisted that he had lied in earlier statements and testimony in order to protect his brother. Instead, he met with Nicoh "around Seat Pleasant." He insisted that appellant was not responsible for the shootings.

Officer Chad Miller responded to the scene of the shooting and observed the Lexus. He recalled that the Lexus appeared to have been doused with gasoline or bleach. As he drew closer to the car, Officer Miller saw two people, later identified as McKelvin and Ellis, sitting in the front and rear passenger seats. They had been shot.

Jerel Wright is an evidence technician with the Prince George's County Evidence Unit. He examined the Lexus and recovered three shell casings from the rear driver's side, a bullet from the rear passenger side, and a bullet fragment from the car's front passenger door. Wright also found a bottle of Clorox in the driver's seat and a gasoline container in the car's trunk.

Detective Felipe Ordono was the lead investigator on this case. When he arrived at the scene of the shooting on the evening of May 30, 2011, he saw two bodies in the

Lexus as well as a bleach bottle from 7-Eleven. Detective Ordono would later view surveillance videos that showed Nicoh, on the night of the shootings, purchasing a bottle of bleach from a local 7-Eleven at 10:44 p.m. and five dollars worth of gasoline from a local filling station at 10:35 p.m.

After viewing the videos, Detective Ordono sent officers to locate Nicoh and bring him in for questioning. He interviewed Nicoh on June 1, 2001, and recorded a statement. Nicoh testified before the grand jury the following day. Detective Ordono obtained arrest warrants for appellant and Myers based on information obtained from the interview and Nicoh's grand jury testimony.

Detective Ordono testified on cross-examination that he had been aware that Nicoh had been charged with drug offenses, and that he had dealt drugs along with Ellis. Nicoh also told the detective that Myers and Ellis had been "beefing" about some money that had been taken from Myers. He also acknowledged that Nicoh had told him numerous versions of events during the interview.

Officer Darin Bush located Nicoh at 5708 J Street on June 1, 2011. Officer Bush also served an arrest warrant on appellant and Myers on June 7, 2011, following a car chase. Appellant was at the wheel of a Chevrolet Impala, with Myers in the passenger seat, when he attempted to flee. Officer Bush recalled that the Impala stopped after colliding with two unmarked police vehicles. When Officer Bush arrested appellant and Myers, he saw a handgun on the front passenger seat.

On June 2, 2011, police executed a search warrant at 5708 J Street in Fairmount Heights. Pursuant to this warrant, Evidence Technician Brian Grempler recovered a large number of items from the house, including one rifle and eight handguns with their magazines, ammunition, five pounds of marijuana, and a plastic bag containing two watches. All items were concealed throughout the house. Grempler was also able to lift a latent fingerprint from the magazine found in a .45 pistol.

Firearms examiner Joseph Young, qualified as an expert in firearm and tool mark identification, determined that the firearms that had been seized were operable. Young further testified that one of the handguns – a Smith and Wesson .45 caliber handgun – was associated with three cartridge casings, one bullet, and two bullet fragments that police had recovered at the scene had been fired from one of these guns. A nine-millimeter Beretta handgun fired another bullet fragment that was also recovered. Young said the gun had a magazine with a ten-cartridge capacity that had seven cartridges remaining.

Fingerprint Examiner Virgie Davis, with over 42 years in fingerprint examination, was qualified without objection as an expert in the field of fingerprints and fingerprint examination. She compared a latent fingerprint lifted from a magazine of a handgun recovered in this case to appellant's known inked fingerprints. Davis testified, over defense objection, that an identification was made:

I compared the latent lift of exhibit 111 with the ink fingerprint card bearing the last name Mayhew, Brian Cuffie, which is Exhibit 118, and identification was made.

* * *

[PROSECUTOR:] Now, ma'am, what factors did you base your conclusion that that print belonged to Brian Mayhew on?

A. Comparing the latent lift with the known print, I compared the latent with the known print and basing my -- the examination, comparing the information within both impressions, and the characteristics in both impression holds the same position, with no dissimilarities about them.

Q. And just so we're clear, which particular finger of Brian Mayhew did you identify the latent that was left on that gun magazine to?

A. Finger number 6, which is the left thumb.

Davis was vigorously cross-examined, and we shall set forth relevant portions of her cross-examination testimony below. Davis's testimony was accompanied by her report, which was admitted into evidence and which concluded: "A latent print lifted from '45 mp 3BG2 .45 Caliber magazine" life #2 of 6 (jacket2) has been identified with the known prints of Mayhew, Brian Cuffie (printed 7-19-12)."

The State introduced certified copies of ten recorded telephone calls that originated from the Prince George's County Detention Center. These copies were admitted over objection through the testimony of Lieutenant Dundas Orr of the Prince George's County Department of Corrections. Lt. Orr manages the inmate telephone system and is the custodian of the inmate phone records. Sometime prior to trial, the State notified the defense that it intended to use certified business records of inmate calls.

Lt. Orr elaborated on the system and its use by inmates. Each inmate was assigned a unique Telephone ID number ("TID") which he would use to make telephone calls. Each of the jail's housing units accommodated about 96 inmates and each unit had a bank of 8 to 10 telephones.

Lt. Orr emphasized that the calls are recorded in the regular course of detention center business and cannot be accessed without permission. Each call is recorded, along with the date, time, housing unit, inmate name, and TID number. He emphasized that, while the server is maintained by Global Telelink, a private business, the server is housed at the detention center. The recordings of the calls are made and kept at the detention center as a regular practice.

Lt. Orr elaborated on the procedures he followed to download the calls to a zip file and produce an index of the calls. He acknowledged that the detention center would be unable to monitor whether an inmate was using another inmate's TID to make a call. In this case, the compact disc ("CD") that was admitted into evidence contained recordings of calls that were made through the TID of a Tommy Moore and were made between October 3 and December 19, 2012. Moore, appellant, Myers, and Crockett were housed in the same housing unit.

Sean Ellis's mother, Charlene McKelvin, testified that she lived in District Heights, Maryland, with Ellis and her daughter, Makea Boyd, and that Ellis kept some of his money with her. On the evening of May 30, 2011, Ellis called Mrs. Boyd, who, as a

result, ran upstairs and came back with a grocery bag filled with money. Mrs. Boyd handed the bag to McKelvin, who placed it outside at the front door. McKelvin kept the door slightly ajar, peered out, and saw her silver Lexus parked outside. She recalled that her nephew, Anthony ("Tony") McKelvin, got out of the front passenger seat and walk up to the door. As Tony retrieved the money, he "mumbled" "we're being robbed," and returned slowly to the car. Mrs. McKelvin recalled that after Tony picked up the money, the Lexus made a U turn, and drove by her house. She could see four heads inside; she identified one of the four as her son, Sean, who was in the back passenger seat.

We shall recite additional facts as necessary.

DISCUSSION

I. Opinion of Fingerprint Expert

Appellant complains of the trial court's denial of his motion *in limine*, which sought to bar the expert testimony of Virgie Davis, the State's fingerprint examiner. As noted above, Davis, analyzed the latent fingerprint that had been lifted from a handgun magazine with appellant's known fingerprints and identified a match. She provided the jurors with general background information about fingerprints, the equipment she used, and the ACE-V protocol that she followed.[7]

[7] This Court, quoting from a decision by the Massachusetts Supreme Judicial Court, described the "ACE-V" protocol as follows:

> In the analysis stage of ACE–V, the examiner looks at three levels of
>
> (continued...)

Appellant mounts two lines of attack. He first complains that the State ignored its discovery obligations, in violation of Md. Rule 4-263(d)(8)(A) by not disclosing the

[7](...continued)
detail ("level one") on the latent print. Level one detail involves the general ridge flow of a fingerprint, that is, the pattern of loops, arches, and whorls visible to the naked eye. The examiner compares this information to the exemplar print in an attempt to exclude a print that has very clear dissimilarities. At this stage, the examiner also looks for focal points – or points of interest – on the latent print that could help prove or disprove a match. Such focal points are often at the boundaries between different ridges in the print. The examiner will then collect level two and level three detail information about the focal points he has observed. Level two details include ridge characteristics (or Galton Points) like islands, dots, and forks, formed as the ridges begin, end, join or bifurcate. Level three details involve microscopic ridge attributes such as the width of a ridge, the shape of its edge, or the presence of a sweat pore near a particular ridge.

In the comparison stage, the examiner compares the level one, two, and three details of the focal points found on the latent print with the full print, paying attention to each characteristic's location, type, direction, and relationship to one another. The comparison step is a somewhat objective process, as the examiner simply adds up and records the quantity and quality of similarities he sees between the prints. In the evaluation stage, by contrast, the examiner relies on his subjective judgment to determine whether the quality and quantity of those similarities are sufficient to make an identification, an exclusion, or neither.

* * *

Assuming a positive identification is made by the first examiner, the verification step of the process involves a second examiner, who knows that a preliminary match has been made and who knows the identity of the suspect, repeating the first three steps of the process.

Markham v. State, 189 Md. App. 140, 160-61 (2009) (quoting *Commonwealth v. Patterson*, 840 N.E.2d 12, 16 (Mass. 2005)).

"summary of the grounds" of Davis's opinion. Appellant next maintains that the trial court "should have excluded" Davis's opinion because she failed to provide an adequate basis for her opinion, as required by Md. Rule 5-702. We are not persuaded.

a. Discovery

We review *de novo* whether a discovery violation occurred. *Thomas v. State*, 168 Md. App. 682, 693 (2006) (citing *Cole v. State*, 378 Md. 42, 56 (2003)), *aff'd on other grounds*, 397 Md. 557 (2007). The trial court's remedy for an alleged violation of the discovery rules is reviewed for an abuse of discretion. *Raynor v. State*, 201 Md. App. 209, 227 (2011), *aff'd on other grounds*, 440 Md. 71 (2014), *cert. denied*, 135 S.Ct. 1509 (2015).

Maryland Rule 4-263 governs discovery in the circuit court and relevantly provides the State's disclosure obligation that pertains to the case before us:

> **Md. Rule 4-263. Discovery in circuit court.**
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> * * *
>
> (c) **Obligations of the Parties.** (1) Due Diligence. The State's Attorney and defense shall exercise due diligence to identify all of the material and information that must be disclosed under this Rule.
>
> (2) Scope of Obligations. The obligations of the State's Attorney and the defense extend to material and information that must be disclosed under this Rule and that are in the possession or control of the attorney, members of the attorney's staff, or any other person who either reports regularly to the attorney's office or has reported to the attorney's office in regard to the particular case.

> (d) **Disclosure by the State's Attorney.** Without the necessity of a request, the State's Attorney shall provide to the defense:
>
> * * *
>
> (8) Reports or statements of experts. As to each expert consulted by the State's Attorney in connection with the action:
>
> (A) the expert's name and address, the subject matter of the consultation, the substance of the expert's findings and opinions, and a summary of the grounds for each opinion;
>
> (B) the opportunity to inspect and copy all written reports or statements made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison; and
>
> (C) the substance of any oral report and conclusions by the expert[.]
>
> The Court of Appeals has often:
>
> stated that the scope of pretrial disclosure requirements under Maryland Rule 4-263 must be defined in light of the underlying policies of the Rule. Inherent benefits of discovery include providing adequate information to both parties to facilitate informed pleas, ensuring thorough and effective cross-examination, and expediting the trial process by diminishing the need for continuances to deal with unfamiliar information presented at trial. Specific to the mandatory disclosure provisions of Rule 4-263(a), the major objectives are to assist defendants in preparing their defense and to protect them from unfair surprise.

Williams v. State, 364 Md. 160, 172 (2001) (citations omitted). *Accord, e.g., Thomas v. State*, 397 Md. 557, 567 (2007); *Cole v. State*, 378 Md. 42, 58 (2003); *Brunson v. State*, 9 Md. App. 1, 6 (1970). With respect to the discovery of an expert opinion, it is implicit in "the substance of the rule that its purpose is to afford the defendant a fair opportunity to discover the 'reports and statements' of experts consulted by the State, including the

results, *inter alia*, of any 'scientific test' of assistance to the defendant in preparing his defense." *Patrick v. State*, 329 Md. 24, 31 (1992).

The core concerns have been addressed in this case. In this instance, prior to jury selection, appellant's counsel moved *in limine* to exclude the testimony of the State's fingerprint examiner, Davis. Although counsel did not suggest that the prosecution was holding anything back, counsel was concerned about the substance of the discovery thus far provided:

> [DEFENSE COUNSEL:] What they have provided thus far is merely reports that indicate we looked at the fingerprints and there's a fingerprint on a handgun or the clip of a handgun . . . that matches my client. There is absolutely no information that I can see in the files that I've been provided, no basis for why those two fingerprints match.
>
> As a result, when I was trying to come up with how I was going to deal with this witness, I don't know how she came to her conclusion, which is why I've asked the State to provide me with some basis for how she came to that conclusion.
>
> I think it's required under Maryland Rule 4-263(b)(8)(A) [sic]. It's required by the Maryland Rules of Evidence 5-202 [sic] and 5-703. Nothing in their notice of expert or the files that they have provided indicate what the basis for her opinion is or any reason.
>
> I know the Court has had the opportunity and I've had the opportunity in the past to be provided with records which show, well, this is why they match, because of this ridge, this loop. You know, there's oftentimes a number of points that match. There's some basis upon which the expert has their opinion.
>
> Here, I've been provided nothing at all. There's nothing for me to really rebut. I suppose the only thing the expert is going to do is get up on the stand and say they match. I think the Rules require much more than that.

> For that reason, we're asking you not to permit Vergie [sic] Davis to testify as an expert witness in this case.

The prosecutor responded that there was nothing else forthcoming from Davis:

> I contacted Ms. Davis about that information and was told, as of Tuesday, that that information, they don't have documents that contain that sort of information. When I asked her specifically if the Court were to require what is the basis for her expert opinion that these fingerprints match, she would say it was based on her examination of the recovered print and Mr. Mayhew's known print.

The prosecutor added that striking the witness would not comport with the intent of the discovery rule. He further suggested that "if there is an issue regarding the incomplete nature of an expert's opinion, then a motion to compel would have been the appropriate course of action prior to the morning of trial." Defense counsel replied:

> I would ask the State, if the State has the summary of the grounds for her opinion that they match, if he can give me a proffer of what the summary of the grounds is, maybe this will be a moot point as well. I just don't know what the summary of the grounds are.
>
> I think it's required both under the discovery rules, but it's also required under Maryland Rule 5-702 and 703. If there is not a basis or a summary of the grounds for her opinions, then I don't think she is entitled to testify as to the opinion. I don't think she's entitled to testify as an expert witness.

The State replied:

> [PROSECUTOR]: Your Honor, just so the record is clear, I do not have any additional material regarding that which [defense counsel] has requested.
>
> [T]he summary of the grounds for [Davis's] opinion is, as I indicated, she examined Mr. Mayhew's print, she examined that, compared it to the latent print lifted from the magazine of that weapon, and she found

> that they were a match. I don't have any further information I can give [defense counsel].
>
> As I indicated, if he wants something separate, I'm happy to arrange a conversation with Ms. Davis if he would like to conduct some sort of . . . questioning of her, prior to her taking the witness stand, to satisfy the issue. But I do not believe that in light of these circumstances, that excluding her as a witness would be appropriate, Your Honor.

After viewing the material that had been submitted, indeed the "original of everything," the trial court denied the defense motion *in limine*:

> The Court denies the motion *in limine* with regards to the testimony of Vergie [sic] Davis without prejudice. We'll provide the defense whatever time it needs to have an opportunity to have further effort towards finding out whether or not Ms. Davis is going to say anything other than there was a match and describing what she looks at in terms of comparing the prints.

The trial court did not err in rejecting appellant's challenge to the State's discovery and, thus, in denying appellant's motion *in limine* to preclude Davis's testimony. The State adequately complied with the defense request for discovery with respect to Davis's

opinion by providing the "summary of the grounds."[8] Md. Rule 4-263 does not require the reasons for an expert's opinion.

b. Evidentiary challenge

The second prong of appellant's challenge to the admission of Ms. Davis's testimony is that the trial court abused its discretion by refusing to strike her opinion testimony. Appellant asserts that Davis's testimony lacked an adequate factual basis.

[8] Even if the trial court had ruled that the State failed to fulfill its discovery obligations, the trial court could very well have rejected the remedy offered by the defense.

Md. Rule 4-263(n) authorizes the court to impose sanctions as a remedy for a discovery violation, and provides:

> **Md. Rule 4-263. Discovery in circuit court.**
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> * * *
>
> (n) **Sanctions.** If at any time during the proceedings the court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances. The failure of a party to comply with a discovery obligation in this Rule does not automatically disqualify a witness from testifying. If a motion is filed to disqualify the witness's testimony, disqualification is within the discretion of the court.

Md. Rule 4-263(n) sets forth the range of sanctions. The Rule "'does not require the court to take any action; it merely authorizes the court to act.'" *Raynor*, 201 Md. App. at 227 (quoting *Thomas v. State*, 397 Md. at 570).

The trial court's ruling on whether to admit an expert opinion is reviewed for an abuse of discretion. *See Bomas v. State*, 412 Md. 392, 419 (2010).

Maryland Rule 5-702 governs the admission of expert opinion testimony, and reads:

> **Md. Rule 5-702. Testimony by experts.**
>
> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

Asserting that Davis's opinion does not meet the third element set forth in Md. Rule 5-702, appellant equates her testimony with the expert testimony found lacking in *Giant Food, Inc. v. Booker*, 152 Md. App. 166, 182 (2003). Appellant's reliance on *Booker* is misplaced. *Booker* was a workers' compensation case in which the claimant alleged that her work-related exposure to Freon gas caused a later development of adult on-set asthma. The claimant in *Booker* presented the testimony of a physician who opined that his asthma was related to his occupational exposure:

> As we have noted, appellants concede that Booker has adult on-set asthma. The current dispute is whether Booker's exposure to Freon on December 15, 1998, "caused" his asthma. At trial, Dr. Redjaee testified (via a videotaped deposition) that the exposure caused the asthma. His opinion was offered in response to Booker's counsel, who asked Dr. Redjaee if he had "an opinion based on a reasonable degree of medical probability as to whether his current pulmonary symptoms are related to the

> event at Giant Food, which occurred on December 15, 1998?" To that question, Dr. Redjaee responded, "Yes, based on my evaluation of him and the history and physical, I have a good degree of probability that this was related to that incident that happened to him." The crux of appellants [sic] argument is that Dr. Redjaee did not provide an adequate factual basis, nor did he rely on reliable principles and methods, to support his opinion. In other words, appellants posit that simply because an expert says "because I think so," or "because I say so," does not necessarily mean that a court must accept the opinion.

Giant Food, Inc., 152 Md. App. at 178 (footnote omitted).

We concluded that the claimant's doctor, while qualified as an expert in pulmonary medicine, did not offer an opinion as to the etiology of Booker's asthma that rose "above the level of mere speculation and conjecture." *Id*. at 185. The doctor's opinion lacked an "adequate factual basis, as well as an unsupportable methodology for his conclusion[.]" *Id*. We emphasized that the doctor's "testimony regarding the cause-and-effect relationship does not rise above the level of mere speculation or conjecture." *Id*. The conclusion to be drawn from the doctor's testimony was that "he had little factual information about the accidental release of Freon" at the claimant's workplace on the date in question. *Id*. at 187. The claimant essentially cast his claim on the "equivalent of a *res ipsa loquitur* theory." *Id.* The doctor "was not clear about what happened, not clear about what chemicals were involved," and derived his conclusion from the fact that the claimant had gone to the emergency room following the "exposure to what they call a chemical irritant." *Id*. at 188.

Unlike *Booker*, Davis's opinion was based on a factual basis that is adequate to overcome a challenge to the admissibility of her conclusions. Although her opinion, as presented in her testimony, was sparse, that lack of detail goes to the weight of her opinion, a point that is subject to cross-examination. *Cf. People v. Ford*, 606 N.E.2d 690, 694 (Ill. App. 1992) (fingerprint opinion sufficient evidence where expert testified that prints matched). The factual underlay from which she formed her opinion was in the record in the form of the fingerprint lift cards and appellant's fingerprints.

Further, there was a sufficient basis in the record for an effective cross-examination of her conclusions. Maryland Rule 5-705 provides that the opponent of an expert may probe that witness regarding the factual basis, *vel non*, for his or her opinions:

> **Md. Rule 5-705. Disclosure of facts or data underlying expert opinion.**
>
> Unless the court requires otherwise, the expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Defense counsel was able to question Davis point by point about her testimony. The record reflects the following:

> [DEFENSE COUNSEL:] Now, when you're looking at and comparing a fingerprint, what are you looking at? I think you testified there were three things you look at, correct?
>
> A. When comparing a latent print to a known print, we're looking at the information in both impressions, and that information are the points of identity.

Q. Okay. But there are three things I think you mentioned, and I want to get them right, because I've been getting nomenclature wrong all day. You said, I believe, a dot was one of them, correct?

A. Yes, that's one of the characteristics.

Q. The characteristics you look at to see whether two prints match. There's bifurcation, correct?

A. Yes.

Q. And that's where there is a forking, correct?

A. Where two ridges come together and fork out.

Q. And then there are dots, correct?

A. That's correct.

Q. Okay. And then I think the other one was ending ridges; is that correct?

A. Yes, where the ridge comes up and flows out and is immediately stopped.

Q. And how many bifurcations did you see in Mr. Mayhew's fingerprints?

A. A total of 13 points of identity were made.

Q. Okay. How many bifurcations?

A. We don't count the different points of -- well, we count the points in the latent prints and known prints. But as to type, it all falls under the characteristics.

Q. Okay. And I don't want to -- do you know how many bifurcations were in his fingerprints?

A. No. I can only tell you the number of points of identity that I could –

Q. And you said 13. But you don't know, of that 13, if seven were bifurcations, right?

A. No, because it all falls under the characteristics. And all of them are —- whether it's bifurcation or a dot or a ridge, they all are characteristics.

Q. But when you're looking, you must have made – did you make a report noting how many bifurcations you saw?

A. No, I did not because, as I said, it all falls under characteristics, and the characteristic could be a bifurcation, could be a dot or ending ridge.

Q. Okay. But if those are the three characteristics that you use, you can't tell us what characteristics in this instance you used to claim there was a comparison.

[PROSECUTOR]: Objection, Your Honor. Asked and answered.

THE COURT: Overruled.

BY [DEFENSE COUNSEL]:

Q. I mean, are they ending ridges? Are they dots? Are they bifurcations?

A. I see some bifurcations.

Q. How many?

A. I did not count how many -- I did not count the different characteristics.

Q. Okay.

A. But I did count how many points of identity.

To reiterate, in this case, Davis's opinion was based on sufficient facts, appellant's fingerprint card and the handgun magazine, and the fingerprint analysis was conducted according to the ACE-V methodology. With respect to the reliability of the methodology

employed, this Court has joined other jurisdictions in ruling that the ACE-V methodology is a reliable protocol for the analysis of fingerprint evidence. *Markham v. State*, 189 Md. App. 140, 160-62 (2009). *See generally, United States v. Rose*, 672 F. Supp. 2d 723, 724-25 (D. Md. 2009) (collecting cases). Given that Davis examined and compared print lift cards with appellant's prints with the print on the magazine pursuant to this protocol, and those items were admitted into the record, Davis had an adequate factual basis to render an opinion. *See In re Richard M.*, 932 N.Y.S.2d 165, 166-67 (N.Y. App. Div. 2011).[9] *Cf. United States v. Jackson*, 451 F.2d 259, 261 (5th Cir. 1971) (court rejects challenge to fingerprint expert's testimony although comparison based on print card not in evidence); *State v. Davis*, 381 N.E.2d 641, 646 (Ohio 1978) (rejecting challenge to introduction of evidence concerning age of fingerprint; held that question goes to weight of evidence).

[9] *In re Richard M.*, cited by the State, in turn cites to an opinion in *People v. Jones*, 539 N.E.2d 96, 97 (N.Y. 1989), where the New York Court of Appeals emphasized that "[a]s a general rule, in order for an expert's opinion to qualify as evidence supplying a necessary element of proof on a sufficiency review, it must rest on facts in evidence or on those personally known and testified to by the expert." This view is consistent with Maryland jurisprudence. In *Dickinson-Tidewater, Inc. v. Supervisor of Assessments of Anne Arundel County*, 273 Md. 245, 253 (1974), the Court stated:

> Unquestionably, the facts upon which the opinion of an expert witness is predicated must be stated; this is so because the opinion of an expert must rest upon facts legally sufficient to form a basis for his conclusion. If the facts relied upon for the expert opinion are not revealed, it becomes impossible to ascertain whether the conclusion drawn from them possesses sufficient probative force; or is not mere conjecture or speculation. [Citations omitted].

Davis's conclusions were supported by an adequate factual basis, and the trial court did not abuse its discretion by admitting her opinion.

II. Authentication of Jailhouse Calls

Appellant challenges the trial court's admission of a CD that contained telephone calls that were made from appellant to Asha Smyth on the jail account of one Tommy Wells. The calls had been admitted to show appellant's involvement in the shooting death of Nicoh.[10] Appellant insists that the CD was not properly authenticated. Objecting to the admission of the calls at trial, appellant asserted that "the information that Lieutenant Orr has testified to is not information that is owned and maintained by Prince George's County," but was rather property owned by Global Telelink. The trial court overruled his objection.

Appellant reiterates this objection on appeal, insisting that the calls/CD were not authenticated. We are not persuaded.

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 reviewed for an abuse of discretion. *See Dep't of Pub. Safety & Corr. Servs. v. Cole*, 342 Md. 12, 26 (1996). "A trial court abuses its discretion only when no reasonable person would take the view adopted by the [trial] court, or when the

[10] This issue was first addressed during a pre-trial motions hearing. The trial court overruled appellant's objections at the hearing, and subsequently at trial.

court acts without reference to any guiding rules or principles." *Baker v. State*, ___ Md. App. ___, ___, No. 1397, Sept. Term 2014, slip op. at 9 (July 6, 2015) (citations and internal quotation marks omitted).

"Authentication is an aspect of relevancy." *United States v. Safavian*, 435 F.Supp. 2d 36, 38 (D.D.C. 2006) (citing Advisory Committee Notes, Fed.R.Evid. 901(a)). An "inquiry into authenticity concerns the genuineness of an item of evidence, not its admissibility." *Orr v. Bank of America*, 285 F.3d 764, 776 (9th Cir. 2002) (citation omitted). The admission of evidence that is not properly authenticated by its proponent constitutes error. *See generally, Washington v. State*, 406 Md. 642 (2008). We have pointed out that "if a *prima facie* showing [of relevance] is made, the writing or statement comes in, and the ultimate question of authenticity is left to the jury." *Gerald v. State*, 137 Md. App. 295, 304 (2001) (citation omitted). 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) (quoting *Safavian*, 435 F. Supp. at 38).

Maryland Rule 5-901 governs the authentication of evidence and provides, in pertinent part:[11]

[11] The Court of Appeals "adopted Maryland Rule 5-901, as well as the rest of the Maryland Rules of Evidence, in 1993, to codify our common law of evidence, which was (continued...)

Md. Rule 5-901. Requirement of authentication or identification.

(a) **General provision**. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Rule:

(1) *Testimony of witness with knowledge.* Testimony of a witness with knowledge that the offered evidence is what it is claimed to be.

* * *

(4) *Circumstantial evidence*. Circumstantial evidence, such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics, that the offered evidence is what it is claimed to be.

(5) *Voice identification*. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, based upon the witness having heard the voice at any time under circumstances connecting it with the alleged speaker.

(6) *Telephone conversation*. A telephone conversation, by evidence that a telephone call was made to the number assigned at the time to a particular person or business, if

(A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or

[11](...continued)
based upon Federal Rule of Evidence 901. [Maryland Courts] take into account common law principles on the same subject matter when interpreting the rules of evidence set forth in Title 5." *Sublet v. State*, 442 Md. 632, 656-58 (2015) (footnotes, citations, internal quotation marks and brackets omitted).

> (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

The State asserts that the authenticity of the records of the calls was established by a number of alternate means as set forth in Md. Rule 5-901(b) and also pursuant to the self-authentication provisions set forth in Md. Rule 5-902(b)(1).[12] We first address the State's argument that the recorded calls were self-authenticating. The State represents that it notified appellant long before trial that it intended to introduce certified business records of certified calls from the detention center. According to the State, the defense did not object within the five-day time period set forth in Md. Rule 5-902(b)(1). This would be sufficient to "self-authenticate" the recorded calls.

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[12] Md. Rule 5-902 addresses self-authentication, and relevantly provides:

> **Md. Rule 5-902. Self-authentication.**
>
> * * *
>
> (b) **Certified records of regularly conducted business activity.** (1) *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.

Aside from the self-authentication, there is direct evidence of appellant's voice. Asha Smyth testified for the State after pleading guilty on the charge of conspiracy to intimidate a witness – Nicoh.

Smyth was well-acquainted with appellant's voice. She had become close to appellant after meeting him in April or May, 2011 when he was in jail, and she said that their relationship became increasingly more "intimate." Smyth would visit appellant in jail, and they spoke on the phone about five times a week. During this period, no one else called Smyth from the detention center.

Smyth knew appellant was calling her, first, because the jail had "two distinctive numbers," so she identified the phone number on her phone, and also, when she answered a call, a detention center "monitor" explained the provenance of the call. An automated message, with the inmate-caller's voice, would then identify the caller for the call to go through. When appellant called Smyth, the automated name she heard at the outset of the call was not his; also, the name changed over time.

To save on long-distance tolls, Smyth registered a "Google Voice" phone number to receive appellant's calls. In "late fall, around November," and at appellant's behest, she also established a "Google Voice" number for his friend "Stanley." Eventually, Smyth was also asked to set up three-way calls for appellant, some family members, and two men named Stanley and Cannon. She connected three-way calls for appellant, approximately twice a week for about eight months, and she would overhear the voices of

the participants when she connected the calls. During her testimony, the State introduced, and played for the jury, the recordings of the disputed ten phone conversations. Smyth identified the voices of the participants in these calls, including herself, other individuals, and appellant.

Smyth's identification of appellant as one of the callers during the recorded conversations is more than sufficient to authenticate the calls, and appellant's participation in them, based on her "having heard [his] voice at any time under circumstances connecting it with [appellant]." Md. Rule 5-901(b)(5).[13] *See Donati v. State*, 215 Md. App. 686, 740-41, *cert. denied*, 438 Md. 143 (2014). Smyth's testimony chronicles her close relationship with appellant and their frequent contact.

Given the low threshold for authentication, Smyth's testimony qualifies under Md. Rule 5-901(b)(5) as sufficient circumstantial evidence to allow a jury to make the determination that appellant's voice was recorded during the conversations at issue. Accordingly, the trial court did not abuse its discretion in allowing the CD recordings of the calls from the detention center into evidence as they were properly authenticated.

The Court of Appeals's decision in Washington, *supra.*, 406 Md. 642, offers no support for appellant's challenge to the admission of the CD recordings. At issue there was whether surveillance videotapes and associated still photographs were properly

[13] Appellant does not, and can not, contest the reliability of Smyth's identification of his voice on the disputed calls. *See Donati v. State*, 215 Md. App. 686, 740-41 (addressing reliability factors), *cert. denied*, 438 Md. 143 (2014).

authenticated. *Id.* At 644. In this prosecution for an assault and a shooting in a bar, the State introduced the recording from eight surveillance cameras. *Id.* at 646. When the police asked the bar's owner to see the surveillance tapes, the owner enlisted the aid of a private technician, who came out and "printed" a CD with the surveillance videos. *Id.* The CD was, in turn, copied to a VHA tape. *Id.*

The problem for the prosecution in *Washington*, a difficulty not present in the case before us, was that it had not authenticated either the video recordings or their derivative still photographs. We recite the Court of Appeals's explanation of these deficiencies at length:

> In the instant case, the State offered the videotape and still photographs as probative evidence in themselves, and not as illustrative evidence to support the testimony of an eye-witness. The evidence was offered by the State to demonstrate that petitioner was present at Jerry's Bar on the night of the crime. Here, the foundational requirement is more than that required for a simple videotape. The videotape recording, made from eight surveillance cameras, was created by some unknown person, who through some unknown process, compiled images from the various cameras to a CD, and then to a videotape. There was no testimony as to the process used, the manner of operation of the cameras, the reliability or authenticity of the images, or the chain of custody of the pictures. The State did not lay an adequate foundation to enable the court to find that the videotape and photographs reliably depicted the events leading up to the shooting and its aftermath. Without suggesting that manipulation or distortion occurred in this case, we reiterate that it is the proponent's burden to establish that the videotape and photographs represent what they purport to portray. The State did not do so here.
>
> Mr. Kim, the owner of the bar, testified that he did not know how to transfer the data from the surveillance system to portable discs. He hired a technician to transfer the footage from the eight cameras onto one disc in a single viewable format. Mr. Kim did not testify as to the subsequent editing

> process and testified only that the surveillance cameras operated "almost hands-free" and recorded constantly. Detective Vila's testimony also failed to authenticate the video. He testified that he saw the footage only after it had been edited by the technician. We hold that the trial court erred in admitting the videotape and still photographs without first requiring an adequate foundation to support a finding that the matter in question is what the State claimed it to be.

Id. at 655-56.

The deficiencies in *Washington*, as outlined above, are absent in the case at hand. In this case, Lt. Orr described how the system worked and that it was he who created the CD recordings of the telephone calls. His testimony accompanied the admission of the ten recordings, and Smyth, who was well acquainted with appellant, identified his voice in the conversations.

CONCLUSION

The fingerprint expert offered an opinion with an adequate factual basis. The trial court did not abuse its discretion in refusing to bar its admission, leaving it up to the jury to determine whether her opinion was persuasive. The CD recordings of the telephone conversations from the detention center were properly authenticated. The trial court neither erred nor abused its discretion in allowing their admission in conjunction with the testimony of Lt. Orr.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. APPELLANT TO PAY COSTS.